

P.O. Box 942883
Sacramento, CA 94283-0001



May 19, 2015

2ND NOTICE OF CHANGE TO TEXT AS ORIGINALLY PROPOSED

Canine Searches

You are receiving this Notice because you provided comments or expressed an interest in receiving Notices of Change to the California Department of Corrections and Rehabilitation (CDCR) amendments to the California Code of Regulations concerning Canine Searches.

Changes to the original text concerning Canine Searches are provided in its original single underline and ~~striketrough~~ format. Changes that were provided in the 1st Notice of Change to Text are indicated by **bold double underline** for added text and ~~**bold double striketrough**~~ for deleted text.

The changes provided in this 2nd Notice of Change to Text are indicated by **bold dotted underline** for additional added text and with ~~**bold dotted striketrough**~~ for additional deleted text.

As determined by the CDCR, the attached text contains the following changes:

Non-substantive changes are made to subsections 3173.2(c)(3)(B) and 3173.2(c)(3)(I) to remove the word “Rev.” from CDC Form 887-B (Rev. 01/03) because this was a new form adopted in 2003 and is not revised in these regulations.

Non-substantive changes are made to subsections 3173.2(c)(3)(C) and 3410.2(d)(3) to add the words “the institution’s Investigative Services Unit” to define the acronym, and subsections 3173.2(c)(6)(A) and 3410.2(d)(6) to remove the words “Investigative Services Unit” and use only the acronym.

Subsection 3410.2(d)(4) is amended to specify that in the event of a positive canine alert, attorneys or legal organizations have the opportunity to have a non-contact visit the same day, if available, or reschedule an appointment. These options were not available in the 1st 15-Day Renotice and are in response to public comments.

The 15-day comment period on these changes shall close on June 5, 2015. Submit any comments to Timothy M. Lockwood, Chief, Regulation and Policy Management Branch, Department of Corrections and Rehabilitation, P. O. Box 942883, Sacramento, CA, 94283-0001, fax to (916) 324-6075, or by e-mail at rpb@cdr.ca.gov before the close of the public comment period. Comments must be received no later than 5:00 p.m. on June 5, 2015.

Only those comments relating directly to the enclosed post-hearing changes that are indicated by **bold dotted underline** and ~~**bold double striketrough**~~ will be considered.

Original signed by:

TIMOTHY M. LOCKWOOD, Chief
Regulation and Policy Management Branch
Division of Administrative Services
Department of Corrections and Rehabilitation

Attachment

TEXT OF PROPOSED REGULATIONS

In the following, all new language is indicated by underline and deleted text is indicated by ~~strikethrough~~.

Chapter 1. Rules and Regulations of Adult Operations and Programs

Article 1. Behavior

3000. Definitions

Section 3000 is amended to alphabetically merge the definitions below with those that exist in the regulations:

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Canine means a dog that is trained specifically to assist CDCR personnel. Departmental canines are primarily responsible for searching for illegal drugs, tobacco, and cell phones. The department's most commonly used breeds are Labrador Retrievers, German Shepherds, and Belgian Malinois; however, Beagles and German Short Hair Pointers may also be used. Departmental canines are designated as Peace Officers and the intentional injury of a departmental canine will be prosecuted as described in Penal Code section 600.

Canine Handler means a departmental Peace Officer trained in the handling, care, instruction, and use of a departmental canine, including recognition of the canine's alert to the odor of items the canine is trained to detect.

Air Scan Search means when a departmental canine is instructed to "scan" or sniff the air in an attempt to detect the odor of drugs, tobacco, or cell phones on a person or within specific articles of property. The canine handler will allow the dog to move freely past individuals and objects. Should the canine detect the odor of any drugs, tobacco, or cell phones the canine will display a positive canine alert.

Positive Canine Alert means a change in behavior that departmental canines are trained to perform when they detect the odor of marijuana, heroin, cocaine, methamphetamine, tobacco, and cell phones. This change in behavior alerts the handler the canine has detected the odor of drugs, tobacco, or cell phones. Passive canines are trained to perform signals including but not limited to sitting and/or staring at the detected contraband. Active canines are trained to perform signals including but not limited to scratching and/or staring at the detected contraband.

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NOTE: Authority cited: Sections 2717.3, 3000.03, 5058, 5058.3 and 1170.05, Penal Code; Section 10115.3(b), Public Contract Code; and Sections 4525(a), 4526 and 14837, Government Code. Reference: Sections 186.22, 243, 314, 530, 532, 646.9, 653m, 832.5, 1170.05, 1203.8, 1389, 2080, 2081.5, 2600, 2601, 2700, 2717.1, 2717.6, 2932.5, 3003.5(a), 3020, 3450, 3550, 4570, 4576, 5009, 5050, 5054, 5068, 7000 et seq. and 11191, Penal Code; Sections 1132.4 and 1132.8, Labor Code; Sections 10106, 10108, 10108.5, 10115, 10115.1, 10115.2, 10115.3 and 10127, Public Contract Code; and Section 999, Military and Veterans Code; Section 391, Code of Civil Procedure; Section 297.5, Family Code; Sections 8550, 8567, 12838 and 12838.7, Government Code; Governor's Prison Overcrowding State of Emergency Proclamation dated October 4, 2006; *In re Bittaker*, 55 Cal.App. 4th 1004, 64 Cal. Rptr. 2d 679; Section 11007, Health and Safety Code; and *Madrid v. Cate* (U.S.D.C. N.D. Cal. C90-3094 TEH).

Subchapter 2. Inmate Resources

Article 7. Visiting

3173.2. Searches and Inspections.

Subsections 3173.2(a) through 3173(b) are unchanged.

Subsection 3173.2(c) is unchanged and shown for reference:

(c) Visitors shall be required to submit to contraband and/or metal detection device(s) and/or electronic drug detectors including, but not limited to, ION scanners and other available contraband and/or metal detecting device(s) technology, and a thorough search of all personal items, including inspection of a wheelchair, implant, prosthesis or assistive devices; prior to being allowed to visit with an inmate. Visitors shall be subject to search by passive canines as follows:

New subsections 3173.2(c)(1) through 3173.2(c)(6)(d) are adopted to read:

(1) Any person coming onto the grounds of any department facility is subject to search by a department canine as part of the department's drug interdiction program.

(2) Direct Search of Visitors using Passive Alert Canines.

Prior to beginning the search of visitors using passive alert canines, the Search Operations Commander or designee shall be responsible for determining if the search will be of all visitors entering or exiting an area, or only those selected on a random basis. The random selection method shall be documented on the Canine ~~Search~~ **Air Scan Results** Log prior to the commencement of the searches. The random pattern shall not be altered unless approved by the Search Operations Commander.

(A) The canine handler shall make a courteous Visitor Search Announcement informing the visitor(s) that he/she is conducting passive air scan searches of visitors using passive alert canines and that the purpose of the scan is to detect illegal drugs.

(B) The canine handler shall request consent to conduct a passive air scan search of any visitor prior to conducting the passive air scan search. The visitor shall be informed that he/she does have the right to refuse the search. Any visitor who refuses to be searched in this manner shall be denied contact visiting but may be authorized for a non-contact visit if available on that same day.

(C) The visitor shall be directed to not interact with the canine in any way.

(D) While inadvertent contact is a possibility, the handler shall not instruct the canine to contact the visitor.

(E) If the visitor seems excessively nervous, the handler shall attempt to reassure the visitor that the procedure is safe.

(3) Results of a Canine Search.

(A) If the canine does not give a positive canine alert during an air scan **search** of a visitor, the visitor shall be permitted to resume his/her visitor processing.

(B) If the canine does alert during an air scan search of the visitor, the visitor shall be required to submit to an unclothed body search as a condition of **contact** visiting. Refusal to submit to the search shall result in the denial of contact visiting for that day and approval for non-contact visiting only, if available. All requests for unclothed body searches, the reason for the request, and specific facts on which the search is based shall be documented on CDCR Form 888 (Rev. ~~01/03~~ **04/15**), Notice of Request for Search, which is incorporated by reference. This form shall include the subject's name, date, and signature of person authorizing the search. Should the visitor refuse to be searched or in instances where drugs or contraband are discovered, a CDC Form 887-B (~~Rev.~~ 01/03), Notice of Visitor Warning/ Termination/ Suspicion/ Denial/ Revocation, which is incorporated by reference, shall be completed. This form shall specify the reason for the denial of visiting and time frames for which the denial/suspension are in effect.

(C) A visitor found in possession of drugs and/or cell phones shall be referred to **the institution's Investigative Services Unit (ISU)** for possible arrest and shall be suspended from visiting at any CDCR facility pursuant to section 3176.3, except that the suspension shall be for three years on the first occasion and shall be a permanent exclusion on any subsequent occasions.

(D) Any confiscated controlled substance or other contraband shall be handled as evidence.

(E) Whenever a canine handler finds contraband, the find shall be reported to the on duty supervisor. The supervisor shall determine what action shall be taken.

(F) In instances when a positive canine alert is given, ~~but no drugs or contraband are discovered,~~ or in ~~instances where~~ if drug paraphernalia is discovered on the person of a visitor, the visitor shall be required to submit to an unclothed body search as a condition of contact visiting.

(G) A visitor's refusal to submit to a required unclothed body search shall result in the denial of contact visiting for that day and approval for non-contact visiting only, if available, for the next two consecutive visits unless that visitor submits to an unclothed body search.

(H) Any visitor who refuses to submit to an unclothed body search after a positive canine alert and/or positive Electronic Drug Detection Equipment (EDDE) alert three times within a twelve-month period may be suspended from visiting at all CDCR facilities pursuant to section 3176.3, except that any such suspension shall not exceed one year.

(I) All requests for unclothed body searches, the reason for the request, and specific facts on which the search is based shall be documented on CDCR Form 888 (Rev. ~~01/03~~ **04/15**), Notice of Request for Search, which is incorporated by reference. This form shall include the subject's name, date, and signature of person authorizing the search. Should the visitor refuse to be searched or in instances where ~~drugs or contraband~~ are discovered, a CDC Form 887-B (~~Rev.~~ 01/03), Notice of Visitor Warning/ Termination/ Suspicion/ Denial/ Revocation, which is incorporated by reference, shall be completed. This form shall specify the reason for the denial of visiting and time frames for which the denial/suspension are in effect.

(4) Positive Canine Alert due to prescribed medications.

(A) When conducting scans of inmate visitors, there may be occasions when legitimate circumstances exist that may result in a positive canine alert. The cause of this alert may be the visitor's use of prescribed medications that contain narcotics and other drugs for which the canine has been trained to alert.

(B) Should the visitor claim that a positive canine alert is due to one or more prescribed medications, that person must provide current documentation in the form of a doctor's, **licensed physician's assistant's or certified nurse practitioner's** verification or a valid prescription for the medication that is suspected to have caused the positive alert before they will be permitted a contact visit.

(C) If the visitor has provided valid documentation and the prescribed medication is found to be the source of the positive scan, the Visiting Lieutenant may authorize a regular visit.

(D) If documentation is not readily available, a non-contact visit may be authorized, if available.

(5) Outside Law Enforcement Agencies.

Local police officers or other law enforcement officers shall not be involved in the search of visitors.

(6) Arrests/Citations/District Attorney Referral.

(A) Visitors who are searched and found in possession of drugs or contraband are subject to arrest. If an arrest is initiated, those arrested, along with the drugs or contraband discovered shall be turned over to the institution's ~~Investigative Services Unit (ISU).~~

(B) Once the pre-booking process has been completed by CDCR staff, the arrestee(s) shall be transported without delay by CDCR personnel or by the local police/sheriff's department to a designated detention facility. Arrestee(s) shall not be held at the pre-booking area beyond a reasonable amount of time necessary to complete the process.

(C) If any visitor is found in possession of drugs or contraband, the ISU Lieutenant/Search Commander shall make any decision to arrest, issue a citation, or refer the matter to the District Attorney's office for prosecution.

(D) In all cases where a visitor is arrested and/or issued a citation for committing a criminal act while on institution grounds, a copy of CDCR 837-A (Rev. 07/05), Crime/Incident Report, Part A - Cover Sheet, which is incorporated by reference, arrest reports, and staff reports documenting the arrest will be forwarded to the local District Attorney's office in accordance with existing departmental regulations in sections 3176.2 and 3316(a).

Subsections 3173.2(d) through 3173.2(i)(2) are unchanged.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 4573, 4573.5, 4576, ~~and~~ 5054 and 6402, Penal Code.

Subchapter 4. General Institution Regulations

Article 2. Security

3287. Cell, Property, and Body Inspections.

Subsections 3287 (a) through 3287 (b)(5) are unchanged.

Subsection 3287(c) is unchanged and shown for reference.

(c) Inspections of inmate cell or living areas, property, work areas, and body shall be conducted on an unannounced, random basis as directed by the institution head. Such inspections shall be conducted no more frequently than necessary to control contraband, recover missing or stolen property, or maintain proper security of the institution.

New Subsections 3287(c)(1) through 3287(c)(3)(b) are adopted to read:

(1) Inmates shall be subject to passive air scan searches by a passive alert canine.

(2) Direct Searches of inmates: The canine handler shall make an announcement informing the inmate(s) that he/she is conducting passive air scan searches using a passive alert canine and that the purpose of the scan is to detect illegal drugs. The inmate does not have the right to refuse the search. An inmate who refuses to be searched may be subject to disciplinary action and subject to additional search and urine testing for the presence of drugs.

(A) While inadvertent contact is a possibility, the handler shall not instruct the canine to contact the inmate.

(B) If the inmate seems excessively nervous, the handler shall attempt to reassure the inmate that the procedure is safe.

(3) Results of a Canine Search. If the canine gives a positive canine alert during a passive air scan search of the inmate, the inmate shall submit to an unclothed body search and urinalysis testing.

(A) Any confiscated controlled substance shall be handled as evidence.

(B) Whenever a Canine handler finds contraband, the find shall be reported to the on duty supervisor. The supervisor shall determine what action shall be taken.

Subsection 3287 (d) is unchanged.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 5054 and 6402, Penal Code; and *Jordan v. Gardner*, 986 F.2d 1521.

Subchapter 5. Personnel

Article 2. Employees

Section 3410.1 is amended to read:

3410.1 Searches of Employees, Contractors, and Volunteers for Contraband and Illegal Drugs.

(a) All persons who are employed by the department, employees of other government agencies, contract employees, contractors and their employees, ~~and~~ volunteers, and attorneys or legal organizations as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia who come onto institutional grounds are subject to a search of their person, private property, and vehicles for contraband and illegal drugs before entering, or while inside, any department facility or department grounds via the use of contraband and/or metal detection equipment and/or electronic drug detectors including, but not limited to, ION scanners and other available contraband and/or metal detecting device(s) technology, and passive alert canines may be used for this purpose.

(b) By entering or attempting to enter a department facility or department grounds, employees, employees of other government agencies, contract employees, contractors and their employees, ~~and~~ volunteers, ~~and~~ attorneys or legal organizations as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia consent to being searched for contraband and illegal drugs.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 4573, 4573.5, 4574, 4576, ~~and~~ 5054 ~~and~~ 6402, Penal Code.

New Section 3410.2 and title are adopted and new subsections 3410.2(a) through 3410.2(b)(6) are adopted to read:

New subsection 3410.2 Passive Alert Canine Searches of Employees, Contractors, and Volunteers.

(a) An employee, employees of other government agencies, contract employees, contractors and their employees, ~~and~~ volunteers, ~~and~~ attorneys or legal organizations as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia coming onto the grounds of any department facility is subject to search by a department canine as part of the department's drug interdiction program. Passive alert canines shall be used to combat the introduction of illegal drugs and contraband being smuggled into CDCR facilities.

(b) Direct searches of employees, employees of other government agencies, contract employees, contractors and their employees, ~~and~~ volunteers, ~~and~~ attorneys or legal organizations as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia by Canine Units.

Prior to beginning a search of employees, employees of other government agencies, contract employees, contractors and their employees, ~~and~~ volunteers, ~~and~~ attorneys or legal organizations as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia using passive alert canines, the Search Operations Commander or designee shall be responsible for determining if the search will be of all employees entering or exiting an area, or only those selected on a random basis (e.g., every 3rd or 5th). The random selection method shall be documented on the Canine ~~Search~~ **Air Scan Results** Log prior to the commencement of the searches. The random pattern shall not be altered unless approved by the Search Operations Commander.

(1) The canine handler shall inform employees, employees of other government agencies, contract employees, contractors and their employees, ~~and~~ volunteers, ~~and~~ attorneys or legal organizations as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia that he/she is conducting passive air scan searches of individuals using passive alert canines and that the purpose of the scan is to detect illegal drugs.

(2) The canine handler shall inform each employee, employees of other government agencies, contract employees, contractors and their employees, ~~and~~ volunteers, ~~and~~ attorneys or legal organizations as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia that the passive canines have been trained to detect the presence of contraband by smell and to alert their handlers to that detection by sitting down or staring.

(3) Employees, employees of other government agencies, contract employees, contractors and their employees, ~~and~~ volunteers, ~~and~~ attorneys or legal organizations as identified in section 3141(c)(9)

authorized to practice law in California, another state, or the District of Columbia shall be directed to not interact with the canine in any way.

(4) While inadvertent contact is a possibility, the handler shall not instruct the canine to contact the individual being scanned.

(5) If the subject of the air scan search seems excessively nervous, the handler shall attempt to reassure the person that the procedure is safe, but the person shall not be permitted to pass into the institution without being scanned.

(c) Passive air scan searches by Canines. All positive air scan results shall be documented on the Canine ~~Positive~~ Air Scan Results Log. A passive air scan search may be conducted under one or both of the following conditions:

(1) A passive air scan search may be conducted in open areas where groups of employees, employees of other government agencies, contract employees, contractors and their employees, ~~or~~ volunteers, or attorneys or legal organizations as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia are walking and/or congregated, e.g., main entrances, administration buildings, in service training areas, sallyports, hallways, housing units, visiting rooms, or yards, etc.

(2) A passive air scan search of any employee, employees of other government agencies, contract employees, contractors and their employees, ~~or~~ volunteers, or attorneys or legal organizations as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia may also be initiated based upon reasonable suspicion.

(d) Positive Canine Alert.

(1) If the canine alerts during the air scan search of an employee, employees of other government agencies, contract employees, contractors and their employees, ~~or~~ volunteers, or attorneys or legal organizations as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia, supervisory staff shall be notified immediately. The employee, employees of other government agencies, contract employees, contractors and their employees, ~~or~~ volunteers, or attorneys or legal organizations as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia will be subject to a patdown search by same gender supervisory staff in a private setting. Any item being brought into the facility by that employee, employees of other government agencies, contract employees, contractors and their employees, ~~or~~ volunteers, or attorneys or legal organizations as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia will be subject to a thorough search. If no contraband is discovered, the individual shall be allowed to enter the institution.

(2) The Office of Internal Affairs (OIA) Regional Special Agent in Charge or OIA Administrator Officer of the Day shall be contacted for consideration of an exigent investigation prior to the search of any departmental employee, employees of other government agencies, contract employee, contractor and their employee, ~~or~~ volunteer, or attorney or legal organization as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia when there is a reasonable suspicion that the employee, employees of other government agencies, contract employee, contractor and/or their employee, ~~and~~ volunteer, ~~and~~ attorney or legal organization as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia is or will be in possession of illegal drugs or contraband and when the employee, employees of

other government agencies, contract employee, contractor and their employee, ~~or~~ volunteer, or attorney or legal organization as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia is individually selected. This shall not apply to random, gate or area searches. In the event there are exigent circumstances where the need to act is immediate, OIA shall be notified as soon as possible thereafter.

(3) An employee, employees of other government agencies, contract employee, contractor and their employees, ~~or~~ volunteers, or attorneys or legal organizations as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia found in possession of drugs and/or cell phones shall be referred to the institution's Investigative Services Unit (ISU) for possible arrest.

(4) Employees of other government agencies, contract employees, contractors and their employees, ~~and~~ and volunteers can refuse to submit to the search; however, refusal shall result in the denial of entry and may lead to exclusion from all CDCR institutions. ~~and a~~Attorneys or legal organizations as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia can refuse to submit to the search; however, refusal shall result in the denial of entry and permanent exclusion from CDCR institutions. however, refusal shall result in the denial of a contact visit, but a non-contact visit may be authorized if available on the same day. Alternatively, the appointment shall be rescheduled for another day. Departmental employees do not have the right to refuse the search.

(5) Outside Law Enforcement Agencies shall not be involved in the search process.

(6) Arrests/Citations/District Attorney Referral. Persons who are searched and found in possession of drugs or contraband are subject to arrest. If an arrest is initiated, those arrested, along with the drugs or contraband discovered shall be turned over to the institution's ~~Investigative Services Unit (ISU).~~

(A) Once the pre-booking process has been completed by CDCR staff, the arrestee(s) shall be transported by CDCR personnel or by the local police/sheriff's department to a designated detention facility. Arrestee(s) shall not be held at the pre-booking area beyond a reasonable amount of time necessary to complete the process.

(B) If any employee, employee of other government agencies, contract employee, contractor and/or their employee, ~~or~~ volunteer, or attorney or legal organization as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia is found in possession of drugs or contraband, the ISU Lieutenant/Search Commander shall make any decision to arrest, issue a citation, or refer the matter to the District Attorney's office for prosecution.

(C) In all cases where an employee, employee of other government agencies, contract employee, contractor and/or their employee, ~~or~~ volunteer, or attorney or legal organization as identified in section 3141(c)(9) authorized to practice law in California, another state, or the District of Columbia is arrested and/or issued a citation for committing a criminal act while on institution grounds, a copy of CDCR 837-A (Rev. 07/05), Crime/Incident Report, Part A-Cover Sheet, which is incorporated by reference, arrest reports, and staff reports documenting the arrest shall be forwarded to the local District Attorney's office in accordance with existing departmental regulations in sections 3176.2 and 3316(a).

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 4573, 4573.5, 4574, 4576, ~~and~~ 5054 ~~and~~ 6402, Penal Code.