HENRY MCMASTER
ATTORNEY GENERAL

August 5, 2008

George L. Schroeder, Director
Legislative Audit Council
1331 Elmwood Avenue, Suite 315
Columbia, South Carolina 29201

Dear Mr. Schroeder:

We received your letter requesting an opinion of this Office concerning the South Carolina Department of Corrections' ("SCDC's") "practice of denying inmates access to food as punishment for rule violations." In particular, you ask the following questions:

> 1) Is the agency practice of denying inmates access to the cafeteria as punishment for rule violations legal under South Carolina law?
>
> 2) If so, should SCDC establish a formal written policy outlining procedures for implementing this practice?

In addition, you provided us with additional background information.

> According to SCDC officials, when an inmate fails to comply with the grooming policy, SCDC handles the matter informally by preventing the inmate from going to the cafeteria for meals. The inmates are restricted to their cells and not allowed to the cafeteria until compliance with the policy. However, medical staff monitors inmates with medical issues and administers the appropriate medication and food intake. SCDC also cites a 2005 ruling, Freeman v. Berge, in support of their position that they do not use food as punishment and never withhold it as punishment.

Law/Analysis

Attached to your letter, you included copies of various SCDC policies, including those on inmate grooming and discipline. In our review of these provisions, we did not find a specific written

policy concerning SCDC's practice of denying inmates food if they do not comply with its grooming policies. However, you also included a memorandum from Robert E. Ward, Division Director of SCDC, to prison wardens dated March 1, 2007 stating as follows:

> If an inmate does not comply with the required grooming policy the following will be implemented:
>
> Medical will be notified to determine if the inmate has been prescribed medication that requires food intake within a specified time. The medical staff will determine if the inmate can be refused a meal or served an alternative meal.

Based on this memorandum and your letter, we presume SCDC has adopted the above as its policy.

Chapter 1 of title 24 of the South Carolina Code (2007 & Supp. 2007) governs SCDC. Section 24-1-90 f the South Carolina Code (2007) is among the provisions contained in this chapter, and provides as follows: "The director shall have authority to make and promulgate rules and regulations necessary for the proper performance of the department's functions." Furthermore, section 24-1-140 of the South Carolina Code (2007) provides:

> The director shall have power to prescribe reasonable rules and regulations governing the humane treatment, training, and discipline of prisoners, and to make provision for the separation and classification of prisoners according to sex, color, age, health, corrigibility, and character of offense upon which the conviction of the prisoner was secured.

In addition, section 24-1-130 of the South Carolina Code (2007) states:

> The director shall be vested with the exclusive management and control of the prison system, and all properties belonging thereto, subject to the limitations of Sections 24-1-20 to 24-1-230 and 24-1-260 and shall be responsible for the management of the affairs of the prison system and for the proper care, treatment, <u>feeding</u>, clothing, and management of the prisoners confined therein. The director shall manage and control the prison system.

(emphasis added).

According to these provisions, the Director has the authority to promulgate rules and regulations concerning such things as inmate grooming and discipline. In addition, the Director is charged with the duty caring for prisoners in SCDC's custody, which includes feeding such

prisoners. Based on this authority, we recognize that SCDC and its director have wide latitude in formulating prison policy. While this Office will not address or interfere with SCDC's policy decisions, we may opine as to whether these policies run afoul of State law. In that respect, we find no State law prohibiting the Director or SCDC from adopting a policy denying prisoners who are not in compliance with SCDC's grooming policies access to the cafeteria. However, such a policy may raise constitutional concerns. Specifically, by denying food, one may argue that SCDC's policy violates the Eighth Amendment to the United States Constitution.

The Eight Amendment protects individuals from "cruel and unusual punishments." Courts read this provision to apply to the treatment prisoners receive in prison and the conditions under which they are held. See Helling v. McKinney, 509 U.S. 25, 31 (1993). The United States Supreme Court in Farmer v. Brennan, 511 U.S. 825, 832 (1994) states the Eight Amendment "imposes duties on [prison] officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'" (quoting Hudson v. Palmer, 468 U.S. 517, 526-27(1984)). Accordingly, the Eighth Amendment requires that prison officials provide adequate food to inmates.

In the materials you provided with your request, you included a copy of the Freeman v. Berge, 441 F.3d 543, which you explain SCDC cited in support of their ability to deny inmates food if they do not comply with the grooming policy. In that case, an inmate alleged a violation of his Eighth Amendment rights when he was denied a meal for refusing to wear pants. Id. The prison enacted a rule that "requires that the prisoner stand in the middle of this cell, with the lights on, when the meal is delivered and that he be wearing trousers or gym shorts. If the inmate does not comply with the rule, the meal is not served to him." Id. at 544. The Court determined "there is a difference between using food deprivation as punishment and establishing a reasonable condition to the receipt of food." Id. at 545. The Court found the condition that the inmate wear pants reasonable based on the fact that many women work as security officers at the facility and the fact that the rule enhances security. Id. Furthermore, the Court determined there was no reason Freeman could not comply with the rule. Accordingly, it determined "deprivation by itself would not in the circumstances of this case rise to the level of cruel and unusual punishment." Id.

We also note numerous other cases in which courts examined similar situations. Recently, in Garrison v. Washington State Deptartment of Corrections, No. C05-5837, 2008 WL 534291 (W.D. Wash. 2008), an inmate sued citing a violation of his Eighth Amendment rights when the facility in which he was being held denied him food because he refused to clean his cell. The Court noted the defense's arguments that the condition of his cell created a potential biohazard and that delivery of the meals created a "safety and security risk." Id. The Court set forth the following test to determine whether a the Eight Amendment has been violated based on conditions of confinement: "[A] plaintiff must show two things: (1) that the deprivation was 'sufficiently serious' to form the basis for an Eighth Amendment violation, and (2) that the prison official(s) acted 'with a sufficiently culpable state of mind.'" Id. at 8 (quoting Wilson v. Seiter, 501 U.S. 294, 298(1991)). The Court

determined: "As to the first prong, it is well settled that prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety. However, there may be circumstances where the withholding of food will not rise to a constitutional violation." The Court cited to Freeman, noting the difference between using food deprivation for punishment and "'establishing a reasonable condition to the receipt of food.'" Id. (quoting Freeman, 441 F.3d at 545). Finding undisputed evidence that the inmate's actions were of his own doing and that he had numerous opportunities to clean his cell, the Court concluded summary judgment on the inmate's Eight Amendment claim was appropriate. Id. See also, Talib v. Gilley, 138 F.3d 211 (5th Cir. 1998)(finding no Eighth Amendment violation when an inmate failed to assume a certain position when served a meal in his cell); Mellender v. Dane County, No. 06-C-266-C, 2006 WL 1982636 (W.D. Wis. 2006) (finding the withholding of medication from an inmate based on this refusal to wear a shirt does not violate the Eighth Amendment).

While we do not comment as to the propriety of this practice by SCDC, based on the authority cited above, courts appear to recognize instances in which food may be withheld from inmates without violating their Eighth Amendment rights. These cases rest on the fact that denial of meals is based on failing to satisfy a reasonable condition required for the receipt of meals and is not an act of punishment. Thus, if the denial of meals by SCDC is based on the fact that compliance with SCDC's grooming policies is a reasonable condition to the receipt of meals and compliance with the grooming policy is within the control of the inmates, a court may uphold this policy.

However, we emphasize that the condition must be reasonable in order to pass judicial scrutiny. In reviewing the cases above, the courts in each case determined that the inmate's conduct interfered with delivery of the food in a safe and healthful manner. In this instance, the grooming policy itself proclaims that the policy serves to "promote safety, security, and sanitation within the SCDC and to facilitate the identification of inmates, the SCDC will establish and strictly enforce standards of personal grooming for all inmates." In addition, in an email sent by Jon Ozmit, the Director of SCDC, discussing this policy, he states:

> We are also required to provide safe, secure prisons for the public, staff, and inmates. For these reasons we must set reasonable health and safety requirements such as appropriate attire, identification, grooming and quiet orderly behavior in all circumstances. These rules are necessary and rationally related to our primary mission.

Based upon purpose provided for the grooming policy and Mr. Ozmit's comments, we gather that by enforcing the grooming policy, SCDC seeks to promote health and safety. Certainly, the promotion of health and safety are the aim for many SCDC policies. However, whether or not a policy is a reasonable condition for the receipt of food is a separate issue. We can imagine that issues like safety and sanitation are particularly of concern when inmates are in the cafeteria because a large number of inmates are gathered in one place posing a concern for guards. In addition, by

requiring good hygiene, SCDC is decreasing the likelihood of food contamination. However, these theories are purely speculation and thus, we cannot opine with certainty on SCDC's rationale in requiring the grooming policies be satisfied before an inmate may receive a meal. In addition, because a determination of reasonableness requires analysis of SCDC's rationale, this determination is factual in nature. On many occasions, we stated that only a court may make determinations of facts. See Op. S.C. Atty. Gen., January 17, 2008. Thus, only a court, not this Office, may determine with finality whether compliance with SCDC's groom policy is a reasonable condition to receiving a meal.

In addition to inquiring about the legality of this policy, you also ask whether it must be established as a "formal written policy outlining procedures for implementing this practice." As noted above, the SCDC Director has the authority to make rules and regulations. See S.C. Code Ann. 24-1-90. However, we did not find a provision requiring such rules and regulations be written. But, in our opinion, we find it advisable for SCDC to incorporate such a rule into its policies. As indicated above, there appears to be a fine line between whether food is withheld for punishment or whether it is simply withheld due to a failure to satisfy conditions required to receive meals. Thus, we find it prudent to provide specific written guidelines in order to avoid misuse of this policy and risk a possible constitutional violation.

Conclusion

In our research, we did not discover any South Carolina law specifically prohibiting SCDC from denying inmates access to the cafeteria. However, such a practice causes concern with regard a facility's duty to provide inmates with adequate food under the Eighth Amendment. Nonetheless, according to the case law cited above, if inmates are not denied food as punishment, but as a result of failing to satisfy a reasonable condition to the receipt of food, such actions do not appear to violate the Eighth Amendment. Because the determination of whether a condition is reasonable requires a factual analysis, only a court may determine whether compliance with SCDC's grooming policy is a reasonable condition to an inmate's receipt of a meal. Furthermore, we must clarify that this opinion only speaks to the legality of such a practice and not to our view of the policy behind such a practice.

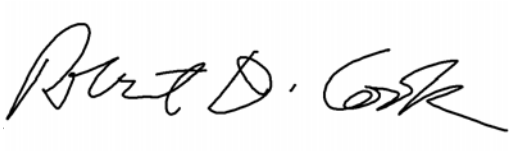
As to whether SCDC must establish a written policy implementing this practice, we are not aware of such a requirement. However, we believe a written policy is advisable under these circumstances.

Very truly yours,

Henry McMaster
Attorney General

Assistant Attorney General

REVIEWED AND APPROVED BY:



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