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STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

2009 OAL DETERMINATION NO. 27
(OAL FILE NO. CTU2009-0529-01)


DEBRA BOWEN
SECRETARY OF STATE

REQUESTED BY: JOHN ROGERS

**CONCERNING: California Department of Corrections and Rehabilitation
Memorandum Titled "Violent Felonies and Minimum Custody
Eligibility"**

**DETERMINATION ISSUED PURSUANT TO GOVERNMENT
CODE SECTION 11340.5.**

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of "regulation" as defined in Government Code section 11342.600¹ and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250.² OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

CHALLENGED RULE

The rule challenged as an underground regulation is found in a memorandum titled "Violent Felonies and Minimum Custody Eligibility," dated January 6, 2006 (Memorandum). The Memorandum is addressed to associate directors of the Division of Adult Institutions, wardens, classification and parole representatives, correctional counselors III at reception centers and classification staff representatives. The Memorandum states that it is intended to be used in the training of correctional counselor staff, and it contains summaries, clarifications and changes from current rules enforced by the California Department of Corrections and Rehabilitation (CDCR) in the classification of inmates. The specific rule summarized in the Memorandum and challenged as an underground regulation is in the bullet heading that states:

¹ Unless otherwise specified, all references are to the Government Code.

² As defined by title 1, section 250(a), an

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

“Rules Violation Reports” would now allow inmates found guilty of Division A-1 or A-2 offenses, equivalent to a PC Section 667.5(c) offense, in a disciplinary hearing to have a case-by-case review for violence without having a court conviction.³

The Memorandum was signed by D.L. Runnels, Acting Deputy Director of the Division of Adult Institutions of CDCR. A copy of the Memorandum is attached to this determination as Exhibit A.

DETERMINATION

OAL determines that the challenged rule in the Memorandum meets the definition of “regulation” that should have been adopted pursuant to the APA.

FACTUAL BACKGROUND

On May 29, 2009, John Rogers (Petitioner) submitted a petition to OAL challenging the rule noted above in the Memorandum as an underground regulation. As described in the Memorandum, the purpose of the Memorandum is “...to assist staff in determining when to apply the Violent (“VIO”) Felony Administration Determinant when classifying inmates.”

OAL accepted the petition for consideration on July 27, 2009. Comments from the public were solicited until September 14, 2009. No comments were received. CDCR declined to submit a response to the petition. On October 13, 2009, Petitioner submitted a letter to CDCR titled “Re: Rebuttal; Petition of an underground CDCR regulation specifically ‘Memorandum—Violent Felonies and Minimum Custody Eligibility.’”

When an inmate enters into the prison system, the inmate is given a classification score based on factors such as length of sentence, stability, education, employment, and behavior during a prior incarceration. The classification score determines the type of facility in which the inmate will be housed. The score may change over time based on the inmate’s behavior and other specific case factors. The change in the inmate’s classification score may result in the transfer of the inmate to a different institution.⁴

CDCR has adopted regulations governing the classification process. California Code of Regulations, title 15 sections 3375 through 3379 establish the process for classifying inmates and the various factors and numerical weights used to determine an inmate’s classification

³ California Code of Regulations, title 15, section 3312 discusses a “Rules Violation Report.” The report is a disciplinary method used “[w]hen misconduct is believed to be a violation of law or is not minor in nature...” Division A-1 and A-2 offenses are listed in California Code of Regulations, title 15, section 3323 and include offenses such as murder, battery causing serious injury, arson involving damage to a structure or causing serious bodily injury, etc.

Penal Code section 667.5(c) defines “violent felony” for purposes of the enhancement of prison terms. It includes offenses such as murder, mayhem, rape, robbery, kidnapping and arson.

⁴ This description of the classification process is found on CDCR’s website:
http://www.cdcr.ca.gov/Victim_Services/sentencing.html [Last viewed November 19, 2009.]

score.⁵ The classification score is then used to determine the appropriate housing placement of the inmate based upon the level of security of the institution.

An inmate may be housed in a facility with a security level which is not consistent with the classification score if an inmate meets one of the administrative or irregular placement conditions, known as administrative determinants, as described in California Code of Regulations, title 15, section 3375.2. Section 3375.2 includes a series of three-letter codes that are used to indicate the administrative determinants that may be imposed by CDCR officials to override the placement of an inmate according to the classification score. The “VIO” designation referred to in the challenged rule is the Violent Felonies Administrative Determinant. It is used when an inmate:

...has a current or prior conviction for a violent felony, or a sustained juvenile adjudication including, but not limited to, those listed under Penal Code section 667.5(c), which, as determined by the [Classification Staff Representative], requires placement in a facility with a higher security level than that indicated by his/her placement score.⁶

....

UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), provides that:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency has issued, utilized, enforced, or attempted to enforce a rule that meets the definition of “regulation” as defined in section 11342.600 and should have been adopted pursuant to the APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled

⁵ For example, California Code of Regulations, title 15, section 3375.5 requires that if an inmate had no serious disciplinary action in the last 12 months of incarceration, four points are entered into Box 50 of the classification score sheet and subtracted from the score. For each serious disciplinary action in the last 12 months, four points are entered into Boxes 51-52 of the classification score sheet and added to the score.

⁶ California Code of Regulation, title 15, section 3375.2(b)(25).

to “due deference” in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

ANALYSIS

OAL's authority to issue a determination extends only to the limited question of whether the challenged rule is a “regulation” subject to the APA. This analysis will determine (1) whether the challenged rule is a “regulation” within the meaning of section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in section 11342.600 as:

...every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).⁷

As stated in *Tidewater*, the first element used to identify a “regulation” is whether the rule applies generally. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations.

The challenged rule is found in the Memorandum that was sent to various CDCR staff from the Acting Director of the Division of Adult Institutions of CDCR. The stated purpose of the Memorandum is to “assist staff in determining when to apply the Violent (“VIO”) Felony Administrative Determinant when classifying inmates. Please ensure a copy of this memorandum is provided to all Correctional Counselor (CC) staff.”

The challenged rule in the Memorandum requires that CDCR staff who participate in the classification process implement the Violent Felony Administrative Determinant by including the administrative determinant for specified offenses with which the inmate was found guilty in a disciplinary proceeding without a court conviction. The challenged rule, therefore, applies directly to the classification staff of CDCR.

In addition, use of the Violent Felony Administrative Determinant is required to be applied to the classification score of every inmate who meets the criteria established in the

⁷ Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

Memorandum. The placement of the inmate may possibly change if the Violent Felony Administrative Determinant is applied to the classification score causing the inmate to be transferred to a prison with a higher level of security. The challenged rule in the Memorandum applies to inmates, then, as well as CDCR staff. Both of these groups are clearly defined classes of persons.

The rule, therefore, applies generally, and the first element of *Tidewater* is met.

The second element used to identify a “regulation” as stated in *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency’s procedure. On July 1, 2005, the Department of Corrections was reorganized into the Department of Corrections and Rehabilitation.⁸ Penal Code section 5054 provides that:

Commencing July 1, 2005, the supervision, management and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the Secretary of the Department of Corrections and Rehabilitation.

Penal Code section 5058, subdivision (a), states:

The director may prescribe and amend rules and regulations for the administration of the prisons and for the administration of the parole of persons sentenced under Section 1170 except those persons who meet the criteria set forth in Section 2962. The rules and regulations shall be promulgated and filed pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except as otherwise provided in this section and Sections 5058.1 to 5058.3, inclusive. All rules and regulations shall, to the extent practical, be stated in language that is easily understood by the general public.

Penal Code section 5068 states:

The Director of Corrections shall cause each person who is newly committed to a state prison to be examined and studied. This includes the investigation of all pertinent circumstances of the person's life such as the existence of any strong community and family ties, the

⁸ Penal Code section 5055:

Commencing July 1, 2005, all powers and duties previously granted to and imposed upon the Department of Corrections shall be exercised by the Secretary of the Department of Corrections and Rehabilitation, except where those powers and duties are expressly vested by law in the Board of Parole Hearings. Whenever a power is granted to the secretary or a duty is imposed upon the secretary, the power may be exercised or the duty performed by a subordinate officer to the secretary or by a person authorized pursuant to law by the secretary.

maintenance of which may aid in the person's rehabilitation, and the antecedents of the violation of law because of which he or she has been committed to prison. Any person may be reexamined to determine whether existing orders and dispositions should be modified or continued in force. Upon the basis of the examination and study, the Director of Corrections shall classify prisoners; and when reasonable, the director shall assign a prisoner to the institution of the appropriate security level and gender population nearest the prisoner's home, unless other classification factors make such a placement unreasonable.

These Penal Code sections give CDCR broad powers to adopt regulations dealing with the care, custody, treatment, training, discipline and employment of inmates, including the placement of inmates in an institution of an appropriate security level. The challenged rule in the Memorandum requires that the Violent Felonies Administrative Determinant be used in specified circumstances when classifying an inmate. The use of the Violent Felonies Administrative Determinant could change the inmate's classification score, resulting in placement of the inmate in an institution with a higher level of security. The use of the Violent Felonies Administrative Determinant is part of the classification process required by Penal Code section 5068. The challenged rule in the Memorandum, therefore, interprets, implements and makes specific Penal Code sections 5058 and 5068.

California Code of Regulations, title 15, section 3375.2, quoted above, permits the use of the Violent Felonies Administrative Determinant only if the inmate "...has a current or prior conviction for a violent felony, or a sustained juvenile adjudication..." The challenged rule attempts to amend CDCR's own existing regulation by adding the ability to apply the Violent Felonies Administrative Determinant to an inmate's classification score "...without having a court conviction." The challenged rule in the Memorandum, therefore, further interprets, implements and makes specific California Code of Regulations, title 15, section 3375.2.

The final issue to examine is whether the challenged rule falls within an express statutory exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to section 11346, the procedural requirements established in the APA "shall not be superseded or modified by any subsequent legislation *except to the extent that the legislation shall do so expressly.*" (Emphasis added.)

CDCR has not identified an express statutory exemption from the APA that would apply to the challenged rule in the Memorandum, nor did OAL find such an exemption.

OAL determines, therefore, that the challenged rule meets the definition of "regulation," there is no applicable statutory exemption from the APA, and the Memorandum should have been adopted pursuant to the APA.

PUBLIC COMMENTS

OAL did not receive any public comments.

AGENCY RESPONSE

CDCR declined to respond to the petition.

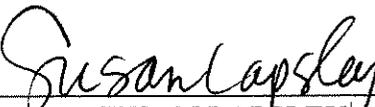
PETITIONER'S REBUTTAL

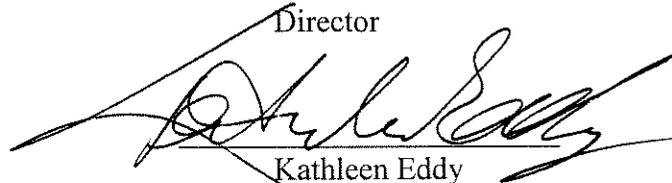
On October 13, 2009, Petitioner submitted a letter to CDCR titled "Re: Rebuttal; Petition of an underground CDCR regulation specifically 'Memorandum—Violent Felonies and Minimum Custody Eligibility.'" The letter did not contain any new information or arguments relevant to the issue of whether the challenged rule is an underground regulation.

CONCLUSION

In accordance with the above analysis, OAL determines that the challenged rule in the Memorandum meets the definition of "regulation" that should have been adopted pursuant to the APA.

November 23, 2009


SUSAN LAPSLEY
Director


Kathleen Eddy
Senior Counsel

Cc: Matthew Cate
Timothy Lockwood
John McClure

Exhibit A

Memorandum

PELICAN BAY STATE PRISON
 SECURITY HOUSING UNIT
 UNIT C-6

Date : January 6, 2006

To : Associate Directors – Division of Adult Institutions
 Wardens
 Classification and Parole Representatives
 Correctional Counselor IIIs-Reception Centers
 Classification Staff Representatives

Subject: **VIOLENT FELONIES AND MINIMUM CUSTODY ELIGIBILITY**

The purpose of this memorandum is to assist staff in determining when to apply the Violent ("VIO") Felony Administrative Determinant when classifying inmates. Please ensure a copy of this memorandum is provided to all Correctional Counselor (CC) staff.

It is the expectation that all Classification and Parole Representatives (C&PR) shall provide training on the contents of this memorandum to the CC staff. Due to the fact the minimum custody eligibility memorandums are more detailed causing them to be lengthy, in the future a brief memorandum will release an insert on a specific minimum custody criteria; i.e., Holds, Warrants, and Detainers Criteria and Minimum Custody Eligibility. The insert can be placed in a binder creating a Minimum Custody Screening Handbook.

The following bullets identify headings in the attached memorandum and the clarification of, or changes from, current policy:

- The Department, with the assistance of the Office of the Attorney General, defined "Intent versus Neglect" to assist in the evaluation for violence.
 - Penal Code (PC) Section 192(a), *Voluntary Manslaughter*, is now an automatic "VIO" exclusion.
 - Helps to ensure public safety.
 - Helps reduce classification committee workload.
 - Provides consistency for application of the "VIO" determinant.
 - The number of inmates affected is minute.
 - "Case-by-Case Review" provides, per departmental policy, the PC Sections that require a case-by-case review for violence.
 - PC Section 667.5 (c) was amended on March 8, 2000. For the purpose of determining whether a case-by-case review for violence should be completed, if an inmate has ever been convicted of one of the listed offenses, a case-by-case review for violence shall be completed.
 - "Rules Violation Reports" would now allow inmates found guilty of Division A-1 or A-2 offenses, equivalent to a PC Section 667.5(c) offense, in a disciplinary hearing to have a case-by-case review for violence without having a court conviction.
 - 2. ▪ "The 6 Elements of a "VIO" Case-By-Case Review" provides classification committees a guideline of what to evaluate when completing a case-by-case review for violence.
-
- "Reception Center" and "General Population" provide instructions to classification staff on completing an automatic exclusion or case-by-case review for the "VIO" administrative determinant. This brings the violence review into compliance with the Inmate Classification Score System regulations and policies.
 - "Terrorist Threats" and "Stalking" clarifies current policies concerning the review for violence.

Inmate Copy

Associate Directors – Division of Adult Institutions
Wardens
Classification and Parole Representatives
Correctional Counselor IIIs-Reception Centers
Classification Staff Representatives
Page 2

PELICAN
SECURITY
UNIT C-6
REVISION
CLASSIFICATION UNIT

- "Stalking" incorporates current policies for the case-by-case review for violence.
- "Scenarios" provides staff with hypothetical situations to assist in determining how to review for the "VIO" administrative determinant.

Inmates, during their regular classification committees, such as Initial, Annual, or Transfer Reviews, shall have their violence history reviewed to ensure proper application of the following criteria. No special classification committee reviews will be conducted solely for this purpose.

If you have any questions, please contact your C&PR or RC CC-III. If the C&PR or CC-III has any questions, please contact Ricky Lazaro, Facility Captain, CSU, at (916) 323-4224, or via e-mail at Ricky.Lazaro@cdcr.ca.gov, or Rodger Meier, CC-II, CSU, at (916) 327-1109, or via e-mail at Rodger.Meier@cdcr.ca.gov.

Original Signed By

D. L. RUNNELS
Deputy Director (A)
Division of Adult Institutions

Attachments

cc: John Dovey
Sandra Duveneck
Kathleen Keeshen
Ombudsman's Office
Mary Phillip
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Karen Wong
Rick Rimmer
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