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STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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2009 OAL DETERMINATION NO. 11
(OAL FILE NO. CTU2008-1014-01)


DEBRA BOWEN
SECRETARY OF STATE

REQUESTED BY: BRADLEY VAN DYKE

**CONCERNING: JOB ASSIGNMENT PRACTICES FOR INMATES EMPLOYED
BY THE CALIFORNIA PRISON INDUSTRY AUTHORITY**

**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 in the petition is California Prison Industry Authority's (CALPIA) job assignment practice of hiring Level II inmates in Level III CALPIA work areas.

DETERMINATION

OAL determines that the challenged rule meets the definition of "regulation" in Government Code section 11342.600, and should have been adopted pursuant to the APA.

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.

FACTUAL BACKGROUND

In February 2008, an inmate³ at California State Prison, Solano (CSP, Solano) submitted an appeal to prison management and CALPIA claiming that CSP, Solano was “illegally” placing Level II inmates into Level III CALPIA work areas.⁴

On April 11, 2008, T. Moore, P.I. Administrator at CSP, Solano, responded to the appeal stating:

This decision by me was based purely on business practices and what is best for PIA as an organization to run as a business, to be competitive, satisfy customers and ultimately make a profit. ... Since PIA began employing Level II inmates approximately three (3) years ago, the Level III work areas have greater operating stability.

...

The actual plan was to reach an optimum goal of approximately 50% of the workforce from Level II so operations can function during modified program. As of February 2008 that goal has been attained. PIA continues to hire Level III inmates if they meet specific criteria and as positions become available.

...

Solano is not the only institution to mix custody levels in their areas. At least four other institutions use the same practice. It makes good sense from a programming and business standpoint.

The appeal was denied and on October 14, 2008, Bradley Van Dyke (Petitioner) submitted a petition to OAL challenging the job assignment practice of hiring Level II inmates in Level III CALPIA work areas as an underground regulation.

CALPIA did not submit a response to the petition.

³ The inmate who submitted the appeal is not the Petitioner.

⁴ CDCR facilities are divided into different security levels depending on the amount of security necessary to ensure the safety of inmates and the public. Inmates are assigned to a security level based upon the inmate's classification score. A facility may include one or more security levels:

Level I: Open dormitories, without a secure perimeter.

Level II: Open dormitories, with secure perimeter fences and armed coverage.

Level III: Individual cells, fenced perimeters and armed coverage.

Level IV: Cells, fenced or walled perimeters, electronic security, more staff and armed officers both inside and outside the facility.

SHU: Security Housing Unit. The most secure area within a level IV prison designed to provide maximum coverage.

RC: Reception Center. Provides short term housing to process, classify, and evaluate incoming inmates.

Cond: Condemned. Holds inmates with death sentences.

http://www.cdcr.ca.gov/Career_Opportunities/POR/docs/CDCR_map_new.pdf (Viewed April 7, 2009)

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 issues, utilizes, enforces, or attempts to enforce a rule that meets the definition of a "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 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)).⁵

The first element of 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. In this case, the hiring practices of CALPIA, including determining which security level of inmates will be employed in the various jobs and work spaces, apply to inmates of California prisons who are seeking employment with CALPIA. This is a clearly defined class of persons. The first element of *Tidewater* is, therefore, met.

The second *Tidewater* element is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure. CALPIA was created in 1982 as a semiautonomous state agency⁶ to operate California's prison industries in a manner similar to private industry. Penal Code section 2801 establishes the purposes of CALPIA as:

(a) To develop and operate industrial, agricultural, and service enterprises employing prisoners in institutions under the jurisdiction of the [CDCR], which enterprises may be located either within those institutions or elsewhere, all as may be determined by the authority.

(b) To create and maintain working conditions within the enterprises as much like those which prevail in private industry as possible, to assure prisoners employed therein the opportunity to work productively, to earn funds, and to acquire or improve effective work habits and occupational skills.

(c) To operate a work program for prisoners which will ultimately be self-supporting by generating sufficient funds from the sale of products and services to pay all the expenses of the program, and one which will provide goods and services which are or will be used by the [CDCR], thereby reducing the cost of its operation.

The job assignment practices established by CALPIA, including the determination of which security level of inmates will be employed in the various jobs and work spaces, are part of the "working conditions within [CALPIA's] enterprises." The job assignment rule stated in the response to the inmate's appeal is part of CALPIA's statutory mandate to create and operate the various enterprises employing inmates. It, therefore, implements, interprets or makes specific Penal Code section 2801. The second element of *Tidewater* is, therefore, met.

⁵ Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

⁶ An example of the semiautonomous nature of CALPIA is that Penal Code section 2800 establishes CALPIA within CDCR; however, Penal Code section 2809 permits CALPIA to recruit and employ civilian staff, establish recruiting, testing, hiring, promotion, disciplinary, and dismissal procedures and practices for both civilian and inmate staff which meet the unique personnel needs of CALPIA. The general manager is the appointing authority for all personnel of CALPIA.

CALPIA's job assignment practice of hiring Level II inmates in Level III CALPIA work areas, therefore, meets the definition of "regulation" in Government Code section 11342.600.

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.)

CALPIA did not identify an express statutory exemption from the APA, nor was OAL able to identify an express statutory exemption.

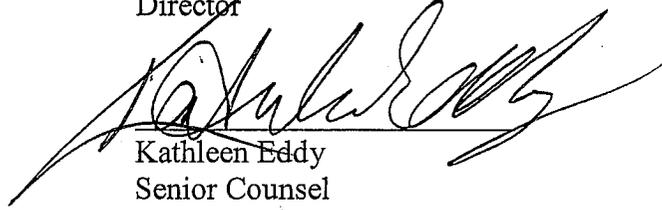
CONCLUSION

In accordance with the above analysis, OAL determines that the challenged rule meets the definition of "regulation" in Government Code section 11342.600, does not fall within an express statutory exemption from the APA, and should have been adopted pursuant to the APA.

Date: May 12, 2009



SUSAN LAPSLEY
Director



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