

**OFFICE OF ADMINISTRATIVE LAW**

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**SUSAN LAPSLEY**  
Director

ENDORSED FILED  
IN THE OFFICE OF

2009 MAY 26 AM 8:09



*Debra Bowen*  
DEBRA BOWEN  
SECRETARY OF STATE

Date: May 26, 2009  
To: William Bonner  
From: Chapter Two Compliance Unit  
Subject: **2009 OAL DETERMINATION NO. 13(S)**  
**(CTU2009-0417-01)**  
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;  
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation a memorandum concerning the daily schedule for security Level III inmates and staff at California State Prison, Solano

On April 17, 2009, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a memorandum titled "Level III Operations Program Schedule" (Memorandum) constitutes an underground regulation. The Memorandum was issued by two facility captains at California State Prison, Solano, and approved by Associate Warden V. Singh at California State Prison, Solano, on December 28, 2007. The Memorandum sets forth the daily schedule for security Level III inmates and staff at California State Prison, Solano. The Memorandum is attached hereto as Exhibit A.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600<sup>1</sup> that should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).<sup>2</sup> Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

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<sup>1</sup> "Regulation" means 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.

<sup>2</sup> Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

"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.

Generally, a rule which meets the definition of a “regulation” in Government Code section 11342.600 is required to be adopted pursuant to the APA. In some cases, however, the Legislature has chosen to establish exemptions from the requirements of the APA. Penal Code section 5058, subdivision (c), establishes exemptions expressly for the California Department of Corrections and Rehabilitation:

(c) The following are deemed not to be “regulations” as defined in Section 11342.600 of the Government Code:

(1) Rules issued by the director applying solely to a particular prison or other correctional facility....

This exemption is called the “local rule” exemption. It applies only when a rule is established for a single correctional institution.

In *In re Garcia* (67 Cal.App.4<sup>th</sup> 841, 845), the court discussed the nature of a “local rule” adopted by the warden for the Richard J. Donovan Correctional Facility (Donovan) which dealt with correspondence between inmates at Donovan:

The Donovan inter-institutional correspondence policy applies solely to correspondence entering or leaving Donovan. It applies to Donovan inmates in all instances.

...

The Donovan policy is not a rule of general application. It applies solely to Donovan and, under Penal Code section 5058, subdivision (c)(1), is not subject to APA requirements.

Similarly, the rule challenged by your petition applies solely to the inmates of California State Prison, Solano. It was issued by two facility captains and approved by an associate warden at California State Prison, Solano. Inmates housed at other institutions are controlled by those other institution’s criteria for the daily schedule for security Level III inmates and staff. The rule you challenged was issued by the California State Prison, Solano, and applies only to inmates at California State Prison, Solano. Therefore, the rule is a “local rule” and is exempt from compliance with the APA pursuant to Penal Code section 5058(c)(1).<sup>3</sup>

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<sup>3</sup> The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

(f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be issued to conclude that a challenged rule is an underground regulation.

(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:

(A) The challenged rule has been superseded.

(B) The challenged rule is contained in a California statute.

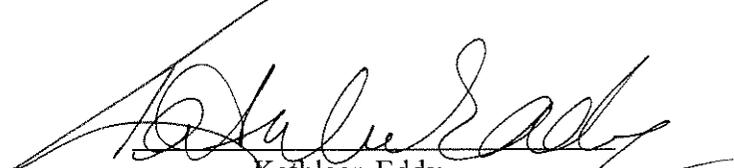
(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

(D) The challenged rule has expired by its own terms.

**(E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule.** (Emphasis added.)

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.

  
\_\_\_\_\_  
SUSAN LAPSLEY  
Director

  
\_\_\_\_\_  
Kathleen Eddy  
Senior Counsel

Copy: Matthew Cate  
John McClure

# EXHIBIT A

State of California

Department of Corrections and Rehabilitation

# Memorandum

*Lt. Blackwell*

Date: December 28, 2007

To: ALL CONCERNED

From: California State Prison - Solano Vacaville, California 95696-4000

Subject: LEVEL III OPERATIONS PROGRAM SCHEDULE

The following Level III program schedule is effective at 0530 hours on Monday, January 7, 2008.

### WAKE UP

First Watch Control Booth Officers, working general population housing units (1, 2,3,4,5, 6, 7, 8, 11, 12 and H-dorm) shall conduct wake-up announcements at 0530, 0545, and 0600 hours.

### MEAL RELEASE

The following Level III inmates, identified as (Early Workers) and Kosher inmates, shall be released for the morning meal. PLA, VOC C-Side and Complex B Education assigned inmates.

General Population (GP) will feed after all "Early Workers" have been received the morning meal. Modified program feeding (if applicable) will follow. Building Officers shall use the daily Unlock Report to monitor, identify, and differentiate between those inmates designated as early release and GP inmates.

### MEAL RELEASE PROCESS

AM and PM feeding will be accomplished in the following manner: Officers from adjacent housing units will assist in the feeding of each housing unit. Example: Building Officers from housing units 4,5, and 6 will respond to housing units 1, 2, and 3 and will assist the regularly assigned housing unit staff in the release of the inmates to the dining facility. This procedure will be repeated as the Building Officers from housing units 1, 2 and 3 will respond to housing unit 4, 5, and 6 and assist in the release of inmates to feeding.

This procedure will also occur on Facility II as the Building Officers from housing units 11, and 12 will respond to housing units 7 and 8 and assist in the meal release.

Program Sergeants will randomly tour the housing units during the feeding and provide supervision during the release and return of inmates in various housing units. Program Sergeants will ensure the staff is conducting the release in a safe manner, following sound correctional practices, and ensuring a constant flow on inmates to the dining hall is achieved. Program Sergeants shall monitor inmate movement and provide additional security for inmates returning to housing units.

Staff will ensure: inmates report to dining rooms for meals in single file line, inmates are properly attired, inmates present a current identification card (photo depicts inmates appearance). If the inmate's appearance has changed the inmate will be educated to Receiving and Release (R&R) where he will be charged \$5.00 for a new identification card.

 ORIGINAL

LEVEL III OPERATIONS PROGRAM SCHEDULE  
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MEDICATION RELEASE

Inmates who are authorized to receive medication shall be released with their housing units. They shall get their medication while enroute to their meal. Inmates will not be allowed to return to the medication line from their housing unit to retrieve medication after the meal.

HOUSING UNIT RELEASE

Assigned inmates, not on their regular day off, upon being released for the morning meal, will report directly to the dining complex for feeding and medication (if applicable) and shall report to their work/education assignment.

Inmate Workers will not have access to their assigned housing units once released for the meal, unless their class or work has been canceled.

Inmates who are not assigned, or on their regular day off (RDO), will receive their meal, medication (if applicable) and report directly to their assigned housing unit and cell for inmate accountability.

YARD/DAYROOM PROGRAM

Staff shall utilize the daily Unlock Report to identify inmates prior to yard release. Inmates who refused to go to work or failed to go to work are not allowed on the exercise yard, or in the dayroom during their regular assigned work hours, and will remain in their cell.

Level III Yard Program:

Yard hours:

- AM morning yard, (0830 hours to 1145 hours), (depending on completion of inmate accountability and feeding).
- At 1015 hours there will be an In-line only, from yard to the cell.
- At 1210 hours, Inmates assigned to Education B will be released to return to their assignment.
- PM afternoon yard, (1215 hours to 1600 hours), per yard schedule.
- At 1415 hours, there will be an In-line only, from yard to the cell.
- At 1515, 1530 and 1545 hours, Inmates returning from their work assignments will be afforded one-way access into the building for showering. A shower list will be formulated and used to ensure all inmate workers attain a shower. If showers are not completed then showers will continue throughout the dayroom program.
- PM evening yard, (at approximately 1900 hours to 2100 hours), will begin at the completion of the evening feeding and close at 2100 hours. Evening Yard is for A1A assigned workers only, per attached schedule.
- At 2000 hours there will be an In-line only, from yard to the cell.

Level III Dayroom Program: On odd or even days each tier will have access to the dayroom area per the Level III program schedule.

*Any inmate participating in dayroom program who needs to use the restroom will be afforded a one-way into their respective cell; where they will remain until the next scheduled unlock.*

Unlock Procedure for Yard Outline: Yard Outline's shall be conducted in the following manner. Example: At 0830 hours, Both floor officers from the adjacent building will proceed to their sister building, 1 for 2, 3 for 4, 5 for 6, 7 for 8, 11 for 12 etc.. and assist in the Yard Outline. The assistance will be provided in the following manner, staff from the sister Building will post themselves in front of the building to conduct random clothed body searches of inmates leaving the building.

## TO BE POSTED IN ALL HOUSING UNITS

**Level III Program Schedule:** The GP housing unit unlocks (inline and outline) portion of the schedule is not flexible and shall be followed.

- 0600 hours Morning Meal and Medication Release
- 0745 hours Staff meeting
- 0830 hours Yard Opens, Dayroom opens following.
- 1015 hours Inline only
- 1130 hours Dayroom recall
- 1145 hours Inline, Yard Closed, dayroom closed.
- 1210 hours Education unlock
- 1215 hours Yard opens, outline, Close A inmates released when count clears.
- 1415 hours Inline only
- 1515 hours Worker Inline
- 1530 hours Worker Inline
- 1545 hours Worker Inline
- 1550 hours Dayroom closed with exception of worker showers.
- 1600 hours Inline/Yard Closed workers showers continue
- 1615 hours Staff meeting
- 1700 hours Mandatory Standing Count
- 1715 hours Upon Clearing of Count, Meal Release
- 1900 hours Yard Program upon completion of evening meal.
- 2000 hours Inline only.
- 2050 hours dayroom closed.
- 2100 hours Inline/End of Program.
- 2130 hours Count.

V. Singh  
Answer Key  
1/2/08

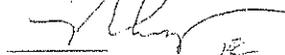
**Facility II Yard Schedule**  
(subject to change without notice)

- AM yard: 0830 - 1145 hours Afternoon yard: 1215 - 1600 hours Evening Yard: 1900 - 2100
- On odd numbered days, 1<sup>st</sup> Tier has AM yard, 2<sup>nd</sup> Tier has dayroom. For the afternoon yard the tiers will switch. Buildings 11, depending on Ad-Seg overflow status and H-Dorm will have access to both yards.
- On even numbered days, 2<sup>nd</sup> Tier has AM yard, 1<sup>st</sup> Tier has dayroom. For the afternoon yard the tiers will switch. Buildings 11, depending on Ad-Seg overflow status and H-Dorm will have access to both yards.
- A1A tier assignments for the evening program will be the same as whatever the morning assignments were.
- Yard unlock will occur first. Once all authorized inmates are released to the yard, secure the sallyport doors and conduct a dayroom unlock for authorized inmates per this schedule. Dayroom recall will occur just prior to yard recall at 1130 hours, 1545 hours and 2050 hours.
- Inmates do not have a choice of dayroom or yard. If an inmate does not want to program with assigned tier then he will remain in his cell.
- Monday-Sunday: Yard closes for count 1145-1215.
- Weekend, Holiday yard: A1/A(assigned and unassigned) Red Card Inmates ONLY! With assigned tier. One tier yard, one tier dayroom.
- A2B inmates will program with their assigned tier Monday through Friday, no evening program, and no program on weekends. A2B inmates will be allowed to shower just prior to a confirmed visit.

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
		<b>1 NO A2B'S</b> Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier yard Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier dayroom	<b>2</b> Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier yard Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier dayroom	<b>3</b> Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier yard Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier dayroom	<b>4</b> Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier yard Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier dayroom	<b>5 NO A2B'S</b> Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier yard Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier dayroom
<b>6 NO A2B'S</b> Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier yard Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier dayroom	<b>7</b> Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier yard Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier dayroom	<b>8</b> Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier yard Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier dayroom	<b>9</b> Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier yard Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier dayroom	<b>10</b> Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier yard Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier dayroom	<b>11</b> Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier yard Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier dayroom	<b>12 NO A2B'S</b> Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier yard Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier dayroom
<b>13. NO A2B'S</b> Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier yard Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier dayroom	<b>14</b> Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier yard Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier dayroom	<b>15</b> Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier yard Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier dayroom	<b>16</b> Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier yard Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier dayroom	<b>17</b> Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier yard Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier dayroom	<b>18</b> Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier yard Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier dayroom	<b>19 NO A2B'S</b> Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier yard Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier dayroom
<b>20 NO A2B'S</b> Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier yard Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier dayroom	<b>21 NO A2B'S</b> Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier yard Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier dayroom	<b>22</b> Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier yard Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier dayroom	<b>23</b> Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier yard Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier dayroom	<b>24</b> Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier yard Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier dayroom	<b>25</b> Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier yard Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier dayroom	<b>26 NO A2B'S</b> Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier yard Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier dayroom
<b>27 NO A2B'S</b> Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier yard Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier dayroom	<b>28</b> Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier yard Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier dayroom	<b>29</b> Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier yard Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier dayroom	<b>30</b> Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier yard Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier dayroom	<b>31</b> Bldgs. 7,8,11,12, HD AM 1 <sup>st</sup> tier yard Bldgs. 7,8,11,12, HD AM 2 <sup>nd</sup> tier dayroom		

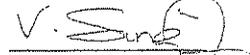
MORNING UNLOCK SCHEDULE

0745 – 0815 Staff Meeting  
0830 – Yard Opens  
1015 – In-line  
1145 – Yard Recall

  
J. NUEHRING

AFTERNOON UNLOCK SCHEDULE

1215 – Yard Opens      1600 – Yard Recall  
1415 – In-Line      1615 – 1645 Staff Meeting  
1515 – Workers In-Line  
1530 – Workers In-Line

  
V. SINGH

EVENING YARD

1900 – Yard Opens  
2000 – In-Line  
2100 – Yard Recall