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SUSAN LAPSLEY
 Director



Date: June 23, 2010

To: John Steffen

From: Chapter Two Compliance Unit

Subject: **2010 OAL DETERMINATION NO. 12(S)**
(CTU2010-0504-01)
 (Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
 Cal. Code Regs., tit. 1, sec. 270(f))

Debra Bowen
 DEBRA BOWEN
 SECRETARY OF STATE

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Petition challenging as an underground regulation an
 Addendum to DOM¹ Supplement #019 (Inmate Visiting Procedure)

On April 30, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a rule regarding inmate visiting procedures constitutes an underground regulation. The rule is in the Addendum to DOM Supplement #019, effective January 2010. This Addendum to DOM Supplement #019 was issued by the warden at the California Correctional Training Facility and 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 11342.600,² which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).³ 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.

¹ The DOM is the Department Operations Manual published by the California Department of Corrections and Rehabilitation.

² "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.

³ 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 (CDCR):

(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.4th 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 the Correctional Training Facility. It was issued by Randy Grounds, Warden of the Correctional Training Facility. Inmates housed at other institutions are governed by those other institutions' criteria for visiting procedures. The rule you challenged was issued by the Correctional Training Facility, and applies only to inmates at the Correctional Training Facility. Therefore, the rule is a "local rule" and is exempt from compliance with the APA pursuant to Penal Code section 5058(c)(1). It is not an underground regulation.⁴

⁴ 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.

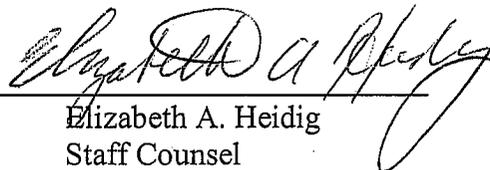
(D) The challenged rule has expired by its own terms.

(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



Elizabeth A. Heidig
Staff Counsel

Copy: Matthew Cate
John McClure

Exhibit A



ADDENDUM TO DOM SUPPLEMENT # 019
INMATE VISITING PROCEDURE

DOM Chapter 5 Article 42

Effective January 1, 2010, North Facility Visiting Program will implement the following schedule change: Visitation will be offered on a weekly rotational schedule by Yard. A Yard will begin the rotation cycle followed by B Yard.

Also Effective January 1, 2010, visitors without a scheduled appointment will not be processed until after 11AM.

The following schedule change will be implemented on January 1, 2010, for scheduling appointments by phone: Visitors may schedule appointments in person at the conclusion of their visit at the Central Entrance Building during regular visiting hours.

OR

Visitors may schedule appointments over the telephone, (831) 678-3951 x4012 during the following times:

Monday NORTH and SOUTH FACILITY ONLY (visitors can begin scheduling for the weekend two (2) weeks ahead. 10AM – 1PM)

Friday CENTRAL FACILITY ONLY (visitors can begin scheduling for the weekend two (2) weeks ahead. 10AM-1PM)

Tuesday, Wednesday, Thursday All Facilities
6PM-8PM

Telephone appointment requests can only be made by speaking with a staff member. Requests left via voicemail will not be processed.

OR

Visitors may request scheduled appointments via e-mail at ctfvisiting@cdcr.ca.gov once the request is processed staff will e-mail the visitor a confirmation. The request must include the names of the visitors, inmates name, CDC number, and housing, date and time of the requested visit. If the requested time is not available the requestor will be scheduled for the next available time slot.


RANDY GROUNDS
Warden (A)


Date