

OFFICE OF ADMINISTRATIVE LAW

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SUSAN LAPSLEY
 Director

Date: July 27, 2010
 To: Jaime Zepeda
 From: Chapter Two Compliance Unit
 Subject: **2010 OAL DETERMINATION NO.16(S)**
(CTU2010-0514-02)
 (Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
 Cal. Code Regs., tit. 1, sec. 270(f))

Handwritten signature: Susan Lapsley
 S. LAPSLEY, DIRECTOR

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 IN THE OFFICE OF

Petition challenging as an underground regulation Department Operations Manual sections 54030.10.6.1, 54030.17.1, 54030.18.7.1, 54030.19.7.1 and 54030.20.7.1

On May 14, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether Department Operations Manual (DOM) sections 54030.10.6.1, 54030.17.1, 54030.18.7.1, 54030.19.7.1 and 54030.20.7.1, issued by the California Department of Corrections and Rehabilitation (CDCR), constitute an underground regulation. These DOM sections deal with various types of personal property that may be possessed by inmates and are 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 11342.600,¹ which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).²

CDCR adopted California Code of Regulations, title 15, section 3190, to govern the type and amount of personal property an inmate may possess. Section 3190 incorporates by reference the Authorized Personal Property Schedule (APPS) (revised February 1, 2008). The APPS lists the allowable personal property items an inmate may possess in each of the five mission-based regions³ of the Division of Adult Institutions.⁴ The APPS is printed in Article 43 of the DOM.

¹ "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.

² 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.

³ The five mission-based regions are:

- Reception Centers,
- Levels I, II, III, and Male Conservation Camps,

The DOM sections you challenge, sections 54030.10.6.1, 54030.17.1, 54030.18.7.1, 54030.19.7.1 and 54030.20.7.1, are in Article 43 and deal with various types of personal property. These sections of the DOM are among those that are included in the APPS.

Pursuant to California Code of Regulations, title 1, section 20(a), “incorporation by reference” is defined to mean:

...the method whereby a regulation printed in the California Code of Regulations makes provisions of another document part of that regulation by reference to the other document.

Section 3190 incorporates by reference the APPS (revised February 1, 2008); therefore the APPS is part of California Code of Regulations, title 15, section 3190. Section 3190 was duly adopted as a regulation pursuant to the APA and filed with the Secretary of State on March 6, 1985, and was subsequently amended several times. The amendment of section 3190 that first incorporated by reference the APPS was filed with the Secretary of State on June 4, 2008, in accordance with the APA.

For this reason, we find that the rule challenged by your petition is not an underground regulation.⁵

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- California Out Of State Facilities and Community Correctional Facilities,
 - Levels III and IV, High Security and Transitional Housing, and
 - Female Offenders Programs.

⁴The Division of Adult Institutions is the division within CDCR responsible for the administration of California prisons.

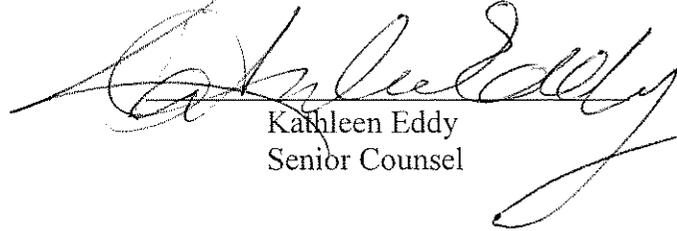
⁵The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

- (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
Tim Lockwood

Exhibit A

54030.10.6.1 Additional Appliance/Musical Instrument Requirements

Appliances may be AC plug-in or may use an AC/DC adapter. Battery operated non-entertainment appliances shall not be counted against the two appliance limit. Inmates may purchase and use rechargeable batteries with a recharger unit. Recharger units and AC/DC adapters are considered appliance accessories and shall not be counted as a separate appliance. Inmates shall not possess or use a remote control device. Entertainment appliances with internal mechanisms for recording, downloading, or transmitting shall not be allowed. All appliances, including entertainment appliances, shall be portable models. Entertainment appliances with antennas shall be built in. Entertainment appliances shall have earphones or earplugs that shall be worn on the head or in the ear when the appliance is in use within the housing units.

All appliances shall have the inmate's name and number engraved on the back and be sealed by staff. Staff shall make the necessary entries on the inmate's CDC Form 160-H before releasing the property to the inmate. Any inmate who breaks or tampers with the seal may be subject to disciplinary action and confiscation of the item. Inmates that are found guilty of breaking or tampering with the seals of any personal appliance may have the appliance confiscated and disposed of in accordance with Section 54030.12.2.

Inmates ordering new or replacement appliances shall be required to purchase clear-case appliances. Non-clear case appliances shall be eliminated through attrition. Musical instruments and case combined dimensions shall not exceed 46" x 24" x 12".

54030.17.1

GRANTED EXEMPTION REQUESTS

California Institution for Men

No Exemptions

Deuel Vocational Institution

No Exemptions

North Kern State Prison

No Exemptions

Richard J. Donovan Correctional Facility

No Exemptions

San Quentin State Prison

No Exemptions

Wasco State Prison

No Exemptions

**NOTE: Institutions listed in this matrix are administered by the mission-based region for Reception Centers. Individual facilities with Security Levels outside the scope of this region are subject to property requirements of the mission-based matrix most closely associated with the facility Security Level, unless an exemption has been granted.
“YES” = NO LIMIT ON PRODUCTS. HOWEVER, TOTAL MUST REMAIN WITHIN SIX CUBIC FEET**