

OFFICE OF ADMINISTRATIVE LAW

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SUSAN LAPSLEY
Director

ENDORSED FILED
IN THE OFFICE OF

2010 JAN 20



Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: January 20, 2010

To: Robert Gibson

From: Chapter Two Compliance Unit

Subject: **2010 OAL DETERMINATION NO.2 (S)**
(CTU2009-1130-03)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation sections of the California Code of Regulations, rules adopted by individual prisons, sections of the Department Operations Manual, an Administrative Bulletin issued by the Department of Corrections and Rehabilitation and other rules dealing with personal property

On November 30, 2009, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a number of specified rules constitute underground regulations. The challenged rules are:

- California Code of Regulations, title 15, section 3174, prohibition on "over night" visits.
- California Code of Regulations, title 15, section 3006, mail restrictions.
- California Code of Regulations, title 15, section 3220.4, prohibition on R rated movies.
- A rule contained in a Memorandum issued by the Warden at California State Prison, Corcoran, on February 14, 2002, prohibiting the possession of "Stuff" and "Maxim" magazines. A copy is attached as Exhibit A.
- A rule issued by Salinas Valley State Prison in Operational Procedure #2, revised August 2005, concerning inmate mail. A copy is attached as Exhibit B.
- Administrative Bulletin 02/04 restricting possession of materials showing full frontal nudity. A copy is attached as Exhibit C.
- Department Operations Manual (DOM) sections 54030.18.2, 54030.18.4, 54030.18.6, 54030.18.7, 54030.19.2, 54030.19.4, 54030.19.5 and 54030.19.7.1. These sections deal with specified allowable personal property.
- A complete ban on specified food items, such as dry fruit, cane sugar, candy with sugar, honey, etc.
- A complete ban on personal property, such as televisions with speakers and audio capabilities, ceramic hot pots, nylon tote bags, DVD players, etc.
- A complete ban on specified clothing items, such as blue jeans, Levis and Wrangler jackets, brown Dickie winter coats, fishing hats, sweat pants with drawstrings, etc.
- A ban on wearing personal clothing in the prison visiting room.

- Restricting the items a vendor may sell to inmates.

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 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.

CALIFORNIA CODE OF REGULATIONS

You challenge California Code of Regulations, title 15, sections 3174, 3006, and 3220.4 as underground regulations. These sections were duly adopted as regulations pursuant to the APA and filed with the Secretary of State in compliance with the APA:

- Section 3174 was filed with the Secretary of State on February 18, 2003 and has not been amended.
- Section 3006 was filed with the Secretary of State on March 2, 1983 and has been amended numerous times since then. The most recent amendment was filed with the Secretary of State on August 4, 2008.
- Section 3220.4 was filed with the Secretary of State on June 29, 1993. Amendments were filed with the Secretary of State on June 28, 1996, December 19, 1996, and May 23, 1997.

These challenged rules are not, therefore, underground regulations.

DOM SECTIONS

The California Department of Corrections and Rehabilitation (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. The DOM sections you challenge, sections 54030.18.2, 54030.18.4, 54030.18.6, 54030.18.7, 54030.19.2, 54030.19.4, 54030.19.5 and 54030.19.7.1, deal with various types of personal property. These sections of the DOM are among those that are included in the APPS.

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

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

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.

The APPS (revised February 1, 2008) was incorporated by reference and is therefore 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 that incorporated the APPS was filed with the Secretary of State on June 4, 2008, in accordance with the APA.

These challenged rules are not, therefore, underground regulations.

LOCAL RULES

You challenge two rules issued by individual state prisons:

- A rule contained in a Memorandum issued by the Warden at California State Prison, Corcoran, on February 14, 2002, prohibiting the possession of "Stuff" and "Maxim" magazines.
- A rule issued by Salinas Valley State Prison in Operational Procedure #2, revised August 2005, concerning inmate mail.

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 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 rules challenged by your petition apply solely to the inmates of the California State Prison,

Corcoran and Salinas Valley State Prison:

- The Memorandum concerning possession of “Stuff” and “Maxim” was issued by the Warden of California State Prison, Corcoran. Inmates housed at other institutions are governed by those other institution’s criteria for possession of these magazines. The rule you challenged was issued by California State Prison, Corcoran, and applies only to inmates at California State Prison, Corcoran.
- Operational Procedure #2 concerning restrictions on inmate mail was issued by Salinas Valley State Prison. Inmates housed at other institutions are governed by those other institution’s criteria for inmate mail. The rule you challenged was issued by Salinas Valley State Prison, and applies only to inmates at Salinas Valley State Prison.

Therefore, these rules are “local rules” and are exempt from compliance with the APA pursuant to Penal Code section 5058(c)(1). They are not underground regulations.

RESTATEMENT OF LAW

Administrative Bulletin 02/04 prohibits inmates from possessing or receiving material that shows full frontal nudity of either gender. This prohibition is in compliance with California Code of Regulations, title 15, section 3006(c)(17) which prohibits “Sexually explicit images that depict frontal nudity...”

As noted above, the definition of “regulation” in Government Code section 11342.600 includes “every rule, regulation, order, or standard of general application ... adopted by any state agency to *implement, interpret, or make specific* the law enforced or administered by it, or to govern its procedure.” (Emphasis added.)

California Code of Regulations, title 15, section 3006(c)(17) prohibits images of frontal nudity. Administrative Bulletin 02/04 restates section 3006 without further implementing, interpreting or making specific section 3006. The prohibition on material containing frontal nudity, therefore, does not meet the definition of “regulation” in Government Code section 11342.600. Administrative Bulletin 02/04 is not an underground regulation.

UNABLE TO DETERMINE

The remainder of the rules challenged in your petition do not contain a reference to the source of the rule, nor were copies of the rules included with your petition. We cannot, therefore, determine whether these rules meet the definition of “regulation” in Government Code section 11342.600, and therefore, cannot determine whether these rules are underground regulations.

CONCLUSION

For the reasons discussed above, we find that the rules discussed above in the sections titled “California Code of Regulations,” “DOM Sections,” “Local Rules” and “Restatement of Law” are not underground regulations.⁵ We are unable to determine whether the remaining rules challenged in your petition are underground regulations.

⁵ The rules 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:

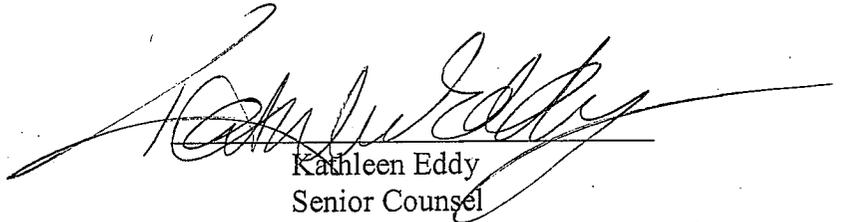
(f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b)

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
Timothy Lockwood
John McClure

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.*

Exhibit A

MEMORANDUM



Warden's Office
Extension 5000



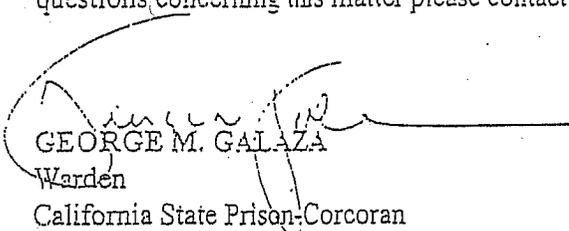
Date: February 14, 2002

To: ALL STAFF AND INMATES

Subject: MAGAZINES NOT PERMITTED IN THE INSTITUTION

This memorandum is to advise you that effective immediately all "Stuff" and "Maxim" magazines are not allowed at Corcoran State Prison. This decision is based on the fact that over the past several months, numerous issues of these magazines have included articles that contained information which raised specific security concerns.

Your cooperation in this matter is expected and appreciated. If you should have any questions concerning this matter please contact the Mailroom.


GEORGE M. GALAZA

Warden

California State Prison-Corcoran

Exhibit B

California Department of Corrections Salinas Valley State Prison OPERATIONAL PROCEDURE # 2	TITLE: Inmate Mail Process
	DEVELOPED: March 1996
	REVISED: August 2005

The inmate may decline to consent to examination of the enclosure by any staff member. In such cases, the enclosure will be placed in a separate envelope, sealed in the presence of the inmate, annotated with the inmate's name and number, and a statement that the envelope contains unexamined enclosures removed from confidential correspondence, dated received, and the name and address of the sender. The envelope will be placed with the inmate's unissued property. The inmate will be allowed access to the material for review and examination, under supervision, in a manner that will prevent the material from being read by staff or other inmates.

Any person who examines the content of confidential mail must keep the content of the examined material in strict confidence and make no reference to it in any documentation which may be entered in the inmate's Central file.

**DISAPPROVAL OF
INMATE MAIL**

- ~~Staff~~ personnel will not knowingly permit an inmate to send or receive correspondence which, ~~in their judgment~~, contains or concerns any of the following:
 - No posters allowed
 - No laminated bookmarks/photos or any laminated item
 - No stickers or address labels
 - No telephone cards
 - ~~No plastic greeting/religious cards(credit card-type)~~
- No pen, pencils, or markers of any type
- Any matter of a character tending to incite murder, arson, riot, or any form of violence or physical harm to any person, or any ethnic, gender, racial, religious, or other group.
- Blackmail or extortion.
- Contraband, or sending or receiving contraband.
- Plans to escape or assist in an escape.
- ~~Plans to disrupt the order, or breach the security or any facility.~~
- Plans for activities which violate the law, these regulations, or local procedures.
- Coded messages

Exhibit C

JUL 23 02 TUE 07:20 AM

FAX NO.

P. 02

07/15/02 MON 17:15 FAX 9163244520

DEPUTY DIR. OFFICE

CORCORAN

002

 <p style="text-align: center;">Department of Corrections ADMINISTRATIVE BULLETIN</p> <p>Subject: BAN OF MATERIALS DISPLAYING FRONTAL NUDITY</p>	Number: 02/04
	Date Issued: July 10, 2002
	Cancelled Effective:

The purpose of this Administrative Bulletin (AB) is to announce a clarification of policy regarding allowable materials that inmates may possess or receive via mail. This policy clarification is supported by and in compliance with California Code of Regulations Title 15, Sections 3001, 3006(e), 3190, 3191, and the Mauro v. Arpaio case in which the Ninth Circuit Court of Appeals upheld correctional policy prohibiting prisoners from possessing sexually explicit materials, defined as photographs, drawings, magazines, and pictorials showing frontal nudity.

The Ninth Circuit concluded that the policy was rationally related to the jail's legitimate penological objectives of maintaining security, rehabilitating inmates, reducing sexual harassment of female officers, and avoiding a hostile work environment.

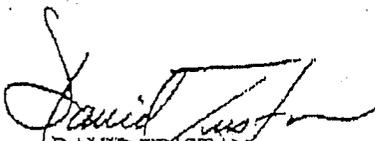
Policy

Effective 60 days from the date of this bulletin, inmates will be prohibited from possessing or receiving materials that show frontal nudity of either gender as described herein. Prohibited materials include personal photographs, drawings, magazines, and/or pictorials. Frontal nudity includes either the exposed female breast(s) and/or the genitalia of either gender.

Following the 60-day period, any personal photographs, drawings, magazines, and/or pictorials displaying frontal nudity as described that are received by the institution, in the possession of an inmate or found during routine cell searches, will be treated as contraband. Contraband items will be handled by either disposing of the item or mailing at the expense of the inmate.

This policy along with the Ninth Circuit's decision only restricts materials that show frontal nudity as described. Staff should be advised the above stated ban does not include departmentally approved educational/medical/program materials, sexually explicit letters, articles, and photographs of clothed person(s), and that inmates will still be allowed to receive these sexually explicit communications.

Please inform all concerned persons of this AB, which shall remain in effect until incorporated into Department Operations Manual Chapter 5, Article 41, MAIL. Direct any inquiries regarding this bulletin to Tim Rougeux, Chief, Institution Services Unit, at 916-324-8354.


 DAVID TRISTAN
 Chief Deputy Director
 Field Operations