

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

ENDORSED FILED
IN THE OFFICE OF

2010 APR 29 PM 1:30

2010 OAL DETERMINATION NO. 7
(OAL FILE NO. CTU2009-1109-01)

Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

REQUESTED BY: DAVID THAYNE SMITH

CONCERNING: Pay Schedules for California Prison Industry Authority
(CalPIA) Inmates

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

Department Operations Manual (DOM)³ section 51121.5, titled "PIA Inmate Pay Schedules," enforced by the California Prison Industry Authority (CalPIA) (attached as Exhibit "A" hereto).

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.

³ The DOM is published by the California Department of Corrections and Rehabilitation and contains provisions that are enforced by CalPIA.

DETERMINATION

OAL determines that CalPIA's Inmate Pay Schedules (herein referred to as DOM section 51121.5) meet the definition of "regulation" that should have been adopted pursuant to the APA.

FACTUAL BACKGROUND

On November 9, 2009, David Thayne Smith submitted a petition to OAL requesting a determination as to whether the challenged rule (DOM section 51121.5), is an underground regulation. DOM section 51121.5 provides for the assignment of inmate positions to certain job categories and an hourly pay step schedule, as well as the maximum percentage of the inmate work force allowed in each skill level. CalPIA did not respond to the Petition and no comments were received by OAL from the public.

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 has issued, utilized, enforced, or attempted to enforce a rule that meets the definition of "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)).⁴

As stated in *Tidewater*, the first element used to identify 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.

DOM section 51121.5 applies to all inmates of California prisons who are employed by the CalPIA. Inmates employed by the CalPIA is a clearly defined class. Therefore, the first element of *Tidewater* is met.

The second element used to identify a “regulation” as stated in *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency’s procedure.

California Penal Code section 2811 states:

Commencing July 1, 2005, the general manager [of the CalPIA] shall adopt and maintain a compensation schedule for inmate employees. That compensation schedule shall be based on quantity and quality of work performed and shall be required for its performance, but in no event shall that compensation exceed one-half the minimum wage provided in Section 1182 of the Labor Code, except as otherwise provided in this code. This compensation shall be credited to the account of the inmate.

Inmate compensation shall be paid from the Prison Industries Revolving Fund.

DOM section 51121.5 establishes hourly wage rates and steps for inmate workers, as well as the maximum percentage of the inmate work force in each skill level. As such, it establishes a compensation schedule for inmate employees as required by Penal Code section 2811. DOM section 51121.5 is used by CalPIA as the “compensation schedule for inmate employees.”

⁴ Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

CalPIA is therefore implementing, interpreting or making specific Penal Code section 2811. Therefore, the second element of *Tidewater* is met.

The challenged rule, 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 has not identified an express statutory exemption from the APA that would apply to the Inmate Pay Schedules, nor did OAL find such an exemption.

AGENCY RESPONSE

On December 18, 2009, CalPIA was notified that OAL accepted this petition for consideration and of the opportunity to respond by February 16, 2010. No response was received from CalPIA.

CONCLUSION

In accordance with the above analysis, OAL determines that DOM section 51121.5 meets the definition of "regulation" and should have been adopted pursuant to the APA.

Date:

4/29/10


SUSAN LAPSLEY
Director

cc: Charles Patillo, General Manager
Prison Industry Authority

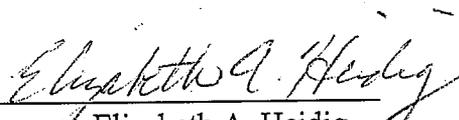

Elizabeth A. Heidig
Staff Counsel

Exhibit A

51121.5 PIA Inmate Pay Schedules

Hourly wage rates shall be approved by the PIB and published by the PIA.

All PIA inmate positions are to be assigned to one of the following levels:

Hourly Pay Schedule

Title	Step I	Step II	Step III
Leadperson (AA)	\$.75	\$.85	\$.95
Special Skills (A)	.65	.70	.75
Technician (B)	.55	.60	.65
Semi-Skill (C)	.45	.50	.55
Laborer (D)	.30	.35	.40

For each enterprise, the percentage of the inmate work force in each skill level shall not exceed the following:

Leadperson (AA)/Special Skills (A) 25 percent

Technician (B) 25 percent

Semi-Skill (C) 25 percent

Laborer (D) 25 percent