

OFFICE OF ADMINISTRATIVE LAW

300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826

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Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: January 28, 2011

To: Arvie Carroll

From: Chapter Two Compliance Unit

Subject: **2011 OAL DETERMINATION NO. 4(S)**
(CTU2010-1203-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation California Code of Regulations, title 15, section 3040(e)

On December 3, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether California Code of Regulations, title 15, section 3040(e) constitutes an underground regulation. Section 3040 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 11342.600,¹ which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250:

The following definitions shall apply to the regulations contained in this chapter:

(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.

The section you challenge as an underground regulation, California Code of Regulations, title 15, section 3040(e), was duly adopted as a regulatory amendment pursuant to the APA and filed with the Secretary of State. Section 3040(e) was originally filed with the Secretary of State on

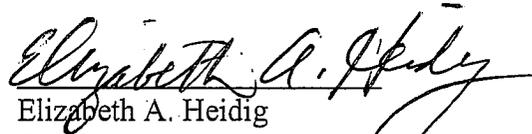
¹ "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

February 13, 2001 and was effective on March 15, 2001. The text of section 3040(e) has had some minor, substantive amendments, but has remained the same as it currently exists in the California Code of Regulations since the amendment was filed with the Secretary of State on June 9, 2006, effective July 9, 2006. It has not been amended since July 9, 2006.

Because the rule you challenge in your petition is a properly adopted regulation, we find that it is not an underground regulation.²

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


DEBRA M. CORNEZ
Assistant Chief Counsel/Acting Director


Elizabeth A. Heidig
Staff Counsel

Copy: Matthew Cate
Tim Lockwood

² 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.)

Exhibit A

§ 3033

does not meet an inmate's special physical/health needs, the chief medical officer may authorize a special issue to that inmate based upon a medical necessity as defined in section 3350(b)(1). Upon staff verification, a state-issued item, which is lost or damaged through no fault of the inmate, shall be replaced without charge to the inmate.

(b) An inmate shall not alter personally owned clothing in any manner that would change its characteristics or style from that originally approved by the institution head.

NOTE: Authority cited: section 5058, Penal Code. Reference: section 5054, Penal Code.

HISTORY:

1. Renumbering and amendment of former subsection 3032(a) to 3030(b), and former 3032(b) to 3030(c), and renumbering and amendment of former section 3033 to 3032 filed 7-9-92; operative 8-10-92 (Register 92, No. 28).
2. Amendment of subsection (a) filed 2-17-95 as an emergency; operative 3-1-95 (Register 95, No. 9). This regulatory action was deemed an emergency pursuant to section 5058(e) of the Penal Code and remains in effect for 160 days. A Certificate of Compliance must be transmitted to OAL by 8-8-95 or emergency language will be repealed by operation of law on the following day.
3. Amendment of subsection (a) refiled 8-7-95 as an emergency; operative 8-7-95 (Register 95, No. 32). This regulatory action was deemed an emergency pursuant to section 5058(e) of the Penal Code and remains in effect for 160 days. A Certificate of Compliance must be transmitted to OAL by 1-16-96 or emergency language will be repealed by operation of law on the following day.
4. Reinstatement of section as it existed prior to emergency amendment filed 2-17-95 by operation of Government Code section 11346.1(f) (Register 96, No. 8).
5. Amendment of subsection (a) filed 2-21-96 as an emergency; operative 2-21-96 (Register 96, No. 8). A Certificate of Compliance must be transmitted to OAL by 6-20-96 or emergency language will be repealed by operation of law on the following day.
6. Certificate of Compliance as to 2-21-96 order including amendment of subsection (a) transmitted to OAL 6-18-96 and filed 7-9-96 (Register 96, No. 28).

3033. Alteration.

NOTE: Authority cited: section 5058, Penal Code. Reference: section 5054, Penal Code.

HISTORY:

1. Editorial correction of printing error (Register 92, No. 5).
2. Renumbering of former section 3033 to 3032 filed 7-9-92; operative 8-10-92 (Register 92, No. 28).

Article 3. Work and Education

3040. Participation.

(a) Every able-bodied person committed to the custody of the Secretary of the Department of Corrections and Rehabilitation is obligated to work as assigned by department staff and by personnel of other agencies to whom the inmate's custody and supervision may be delegated. Assignment may be to a full day of work, education, or other program activity, or to a combination of work and education or other program activity.

(b) Inmates assigned to a physical fitness program as part of a work incentive program shall be held to the same obligations/participation requirements governing other vocational, educational, or work assignments.

(c) Except as provided in sections 3040.2(d) and 3040(e), a classification committee shall assign each inmate to an appropriate work, education, vocation, therapeutic or other institution program, taking into account the:

- (1) Inmate's expressed desires and needs.
- (2) Inmate's eligibility for and availability of the desired work or program activity.
- (3) Institution's security and operational needs.

(4) Safekeeping of the inmate.

(5) Safety of persons and the general public.

(d) Despite an inmate's assignment to a program mutually agreed upon in a classification committee hearing, or pending such a hearing, or pending assignment to a designated program, or during any period when the designated program is temporarily suspended, or in the absence of the inmate's agreement to participate in any program activity, any able-bodied inmate may be assigned to perform any work deemed necessary to maintain and operate the institution and its services in a clean, safe and efficient manner. Operational needs may always override a program assignment.

(e) Inmates assigned to clerical duties and office work positions, requiring an extensive amount of staff/inmate interaction, such as clerks and teachers' aides, shall be rotated at regular intervals to other positions within the institution even though that may result in lower pay, or no pay at all, to the inmate being rotated out of the position. The institution head shall determine the rotation schedule based upon security needs of the institution. Assignments to such positions shall not exceed a two-year period. Routine rotation shall not affect the inmates' work/training group designation, although it may divest the inmate of a paid position.

(f) Any staff request for removal of an inmate from a program shall be submitted to the inmate's correctional counselor on a CDC General Chrono Form. The counselor shall refer the request to a classification committee for consideration and action. If a request is for cause, defined as behavior that would result in loss of participation credit pursuant to section 3043.2(a), the inmate may be temporarily relieved of the position and denied pay (if a paid position), pending classification committee action.

(g) Work assignments, in lieu of enrollment and participation in education, vocational, therapeutic or other institution program assignments, may be made with or without the inmate's consent by a classification committee, a staff member designated as an inmate assignment officer, or by any staff member responsible for the supervision of an unassigned inmate.

(h) Inmates who have a history of computer fraud or abuse, including documented institutional disciplinary action involving computer fraud or abuse, shall not be placed in any vocational or work assignment that provides access to a computer.

(i) A job description shall be developed for each inmate work/training position, establishing the minimum standards of acceptable participation and performance and the possible consequences of failure or refusal to meet the standards. The inmate shall sign a copy of the job description, indicating acceptance of the conditions of employment, and shall receive a copy.

(j) The allocation of paid inmate work/training assignments on an institution-specific basis shall be made by the institution's inmate pay committee. Each institution shall administer an inmate pay program consistent with the budget allotted for such assignments. As directed and in accordance with section 3380, Department and institutional inmate pay committees shall administer inmate rate and wage matters subject to these regulations.

(k) An inmate's assignment to a paid position is a privilege dependent on available funding, job performance, seniority and conduct. These factors shall be criteria considered in determining an inmate's eligibility for pay earning status and rate of pay.

(l) The following inmate assignments shall not be considered paid work/training assignments.

(1) Inmate advisory council members (except the chairperson and secretary).

(2) Vocational student assignments (however, exceptions may be made where the inmate is enrolled in a bona fide apprenticeship program or performs work that provides a benefit to the institution and/or public).

(3) Academic student assignments.

(4) Substance abuse or therapeutic program assignments.