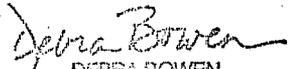


STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

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2011 OAL DETERMINATION NO. 11
(OAL FILE NO. CTU2010-1007-01)


DEBRA BOWEN
SECRETARY OF STATE

REQUESTED BY: CARLOS RIOS

CONCERNING: GENERAL EDUCATION DEVELOPMENT (GED)
REQUIREMENT ISSUED BY THE CALIFORNIA PRISON
INDUSTRY AUTHORITY (CALPIA)

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

The specific alleged underground regulation challenged by Carlos Rios (petitioner) concerns the General Educational Development (GED) Requirement of the California Prison Industry Authority (CALPIA) and is contained within the attached Exhibit A, at the bottom of page 3. It is stated as follows:

CALPIA inmate employees assigned after 10/26/07, who failed to meet this mandatory educational requirement [GED or equivalent], will be indefinitely

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.

ineligible to receive pay increases beyond the "D" level, or .40 cents an hour, until this requirement is met regardless of longevity.³

DETERMINATION

OAL determines that the CALPIA GED Requirement meets the definition of "regulation" that should have been adopted pursuant to the APA, and therefore, is an underground regulation.

FACTUAL BACKGROUND

On October 7, 2010, the OAL received a petition from Mr. Rios alleging that CALPIA has issued, used, enforced, or attempted to enforce an underground regulation as stated in the CALPIA Operational DOM SUPPLEMENTAL "GED Inmate Employee Policy & Procedure, CALPIA 003" dated October 2008 (Exhibit A). The specific provision being challenged, the CALPIA GED Requirement, states that employee inmates assigned after 10/26/07, who do not obtain their GED or its equivalent, are indefinitely ineligible to receive pay increases beyond the "D" level or .40 cents per hour until the requirement is met regardless of longevity. 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:

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 (Gov. Code, sec. 11340(b)). An OAL determination 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].

³ The challenged rule will hereafter be referred to as: "CALPIA GED Requirement."

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.

The CALPIA GED Requirement applies to all inmates of California prisons who are employed by CALPIA. Inmates employed by 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 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,

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

except as otherwise provided in this code. This compensation shall be credited to the account of the inmate. . . .

The CALPIA GED Requirement mandated by CalPIA is a requirement that directly affects the compensation of the inmate employees. The CALPIA GED Requirement implements, interprets or makes specific Penal Code section 2811, the law enforced or administered by the agency. The second element of *Tidewater* is thereby met.

The CALPIA GED Requirement 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 Government Code 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 CALPIA GED Requirement, nor did OAL find such an exemption.

AGENCY RESPONSE

On March 28, 2011, CALPIA was notified of OAL's acceptance of the petition and of the opportunity to respond to the allegations of the petition. OAL received no response.

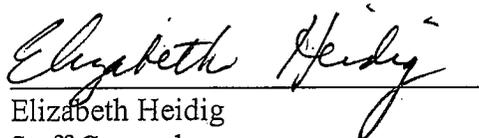
CONCLUSION

In accordance with the above analysis, OAL determines that the CALPIA GED Requirement meets the definition of "regulation" that should have been adopted pursuant to the APA, and therefore, is an underground regulation.

Date: June 21, 2011



Debra M. Cornez
Assistant Chief Counsel/Acting Director



Elizabeth Heidig
Staff Counsel

Copy: Charles, Patillo, General Manager, CALPIA
Anne Cunningham, CALPIA

Exhibit A



**OPERATIONAL PROCEDURE
DOM SUPPLEMENTAL**

**GED Inmate Employee
Policy & Procedure**

**Initial: October 2008
CALPIA 003**

PURPOSE

The purpose of this operational procedure is to complement existing California Department of Corrections and Rehabilitation (CDCR) institutional policy regarding the employment of inmates in California Prison Industry Authority (CALPIA) work/training programs.

OBJECTIVE

This procedure will provide a consistent standard and specific methodology to ensure clear interpretation and consistent application by CDCR and CALPIA staff. This policy and procedure shall be exclusively utilized to govern the employment of inmates assigned to CALPIA work/training programs.

RESPONSIBILITY

The Warden at each CDCR facility will have ultimate responsibility for ensuring initial implementation and subsequent compliance with this operational procedure. The Chief Deputy Warden and/or Associate Warden Operations, and CALPIA Administrator/Lead Manager will regularly audit this procedure to ensure its integrity and full compliance.

DEFINITIONS:

Penal Code (PC) Section 2811 specifies that prisoners engaged in productive work while assigned to the Prison Industry Authority (PIA), may receive compensation as determined by the Prison Industry Board (PIB). Such compensation shall be based on quantity and quality of work performed and shall be required for its performance, but in no event shall such compensation exceed one-half the minimum wage provided in section 1182 of the Labor Code, except as otherwise provided in the Penal Code.

PROCEDURE

This procedure describes the process by which CALPIA handles inmate assignments, pay changes and dismissal from CALPIA work programs. The Administrator/Lead Manager shall:

- Monitor programs to ensure that pay positions have been properly classified and allocated.
- Review and appropriately approve/disapprove all recommendations for

pay changes.

- Review and appropriately approve/disapprove all recommendations for dismissal.
- This policy and procedure shall be the final arbitrator regarding disputes or interpretations of this plan.

CALPIA will develop job descriptions, based on the United States Department of Labor's Dictionary of Occupational Titles (DOT) for each inmate work position. Each job description will establish the minimum acceptable standards of participation and performance.

The inmate shall sign and be given a copy of the job description, indicating acceptance of the conditions of employment.

**INMATE
ASSIGNMENT**

This Policy and Procedure establishes guidelines for uniform interpretation, application, and administration of the CALPIA inmate pay plan: hiring and assignments, pay rate changes and dismissal.

Prison Industry Authority will fill and evaluate inmate job positions based on factors including but not limited to:

- Skill. Demonstrating expertise of technical skills and knowledge.
- Ethnic Balance. Assignments shall be balanced in the same ratio as Institution's ratio.
- Behavior. Relationship with Others. Demonstrates ability to deal with authority figures, job supervisors, and other inmates.
- Attitude, Adaptability. Demonstrating willingness to learn, take directions, and orders.
- Work Habits. Punctuality, dependability, care of equipment, and safety practices.
- Formal Education/Training. Preparation for work and the ability to read, write, and speak effectively.
- The ability to perform the essential functions of the program, with or without reasonable accommodations.

The facility Prison Industries Administrators/Lead Manager shall determine the inmate quota for each cost center within their responsibility and adjust it as necessary by the procedures listed.

An inmate quota is defined as the current need for inmate workers in a specific cost center to maintain adequate production levels in order to support the volume of sales orders and service contracts. Changes in existing inmate quotas shall be submitted annually via the CALPIA fiscal year budget process. The following procedures shall be followed when establishing new or revising existing PIA inmate quotas:

- For changes of existing quota of 25 percent or more, the CALPIA Administrator/Lead Manager will submit an inmate employment plan to

the PIA Enterprise Branch Manager for approval. The plan shall include the quota of inmate workers required per shift, the Dictionary of Occupational Titles (DOT) job description for each pay position, and the justification for revising an existing quota. The inmate quota for each enterprise is to be jointly approved by (1) the Warden/ Chief Deputy Warden and (2) the PIA Assistant General Manager of Operations.

- For changes of existing quota of less than 25 percent, the CALPIA Administrator/Lead Manager will submit an informational copy of the change justifying the revision in the inmate quota to the appropriate Enterprise Branch Manager. The inmate quota for each enterprise is to be jointly approved by (1) the Warden/ Chief Deputy Warden and (2) the Administrator/Lead Manager.

The following criteria will be utilized when inmate quotas are reduced, causing a lay off situation of inmate workers. If possible, reduction and lay offs shall be accomplished through attrition.

- Skill. Demonstrating expertise of technical skills and knowledge of a dedicated job or process in a PIA assignment.
- Ethnic Balance. Assignments shall be balanced in the same ratio as Institution's ratio.
- Behavior. Relationship with Others. Demonstrates ability to deal with authority figures, job supervisors, and other inmates.
- Attitude, Adaptability. Demonstrating willingness to learn, take directions, and orders.
- Work Habits. Punctuality, dependability, care of equipment, and safety practices.
- Formal Education/Training

**CALPIA PAY RATE
AND SKILL LEVEL
CHANGES**

Pay rate Changes to a higher and/or lower level shall be based upon a combination of factors including but not limited to the following:

- **GED REQUIREMENTS**

- A. All inmates assigned to CALPIA should possess a High School Diploma, GED or a 9.0 Grade Point Level. Additionally, assigned inmates will have to complete their GED or High School diploma within two years of initial CALPIA assignment (Implemented by PIB action on 10/26/07). Workers hired prior to 10/26/2007 that do not have a High School Diploma or GED will be allowed 24 months to obtain either one. However, during this period of time, these workers *will not* be allowed to promote to a *higher pay skill level* but may move up within their current pay grades. CALPIA inmate employees assigned after 10/26/07, who failed to meet this mandatory educational requirement, will be indefinitely ineligible to receive pay increases beyond the "D" level, or .40 cents an hour, until this requirement is met regardless of longevity.

B. Assigned CALPIA inmate employees will be paid their current rate of pay while attending up to two hours of GED preparation classes during the normal scheduled work day. However, the GED classroom must be located within the CALPIA program area in order for the inmate to be eligible for compensation.

- The written recommendation of the supervisor showing cause for reduction of the inmate's pay. The following document(s) and justification reflecting below standard performance, misbehavior or "A" days is required in support of this written recommendation.
- Documentation of the inmate's accumulated work history as reflected in, Worker Supervisor's Report, CDCR Form 101's.
- General Chrono, CDCR Form, 128-B, Custodial Counseling Chrono, Form 128-A and/or Rules Violations Report, CDC 115.
- Inmate Work Supervisor's Log, CDCR Form 1697 which reflect absent without leave "A" day.
- Pay increases shall not be automatic or based on the inmate's longevity in an assignment. Raises and or reductions of an inmate's pay shall be based on factors including but not limited to:
 - A. The GED criterion set forth above.
 - B. The work supervisor's recommendation.
 - C. The inmate's work/training performance reports and disciplinary reports.
- CALPIA Inmate Employees that are successful in completion and award of their GED shall receive a \$0.05 per hour incentive pay increase.

CALPIA EMPLOYMENT DISMISSAL

When the cause for dismissal is misbehavior, including willful refusal or failure to work as directed, a Worker Supervisor's Report, CDC Form 101 shall be prepared and submitted to the factory superintendent for review and approval.

The following document(s) and justification reflecting below standard performance, misbehavior or "A" days is required in support of this written recommendation.

- Documentation of the inmate's 30-day work history
- General Chrono, CDC Form, 128-B, Custodial Counseling Chrono, Form 128-A and Rules Violations Report, CDC 115.
- Inmate Work Supervisor's Log, CDC Form 1697 which reflect absent with out leave "A" day.

The CALPIA Administrator/Lead Manager will review for proper justification and approve the applicable above written documentation. If

denied all documentation will be returned to factory Superintendent. Upon approval CALPIA Administration will generate CDC 128B-1 Classification Hearing Request/Notice, and submit to Facility Classification Committee for removal of inmate from CALPIA work program. The CALPIA Administrator/Lead Manager or designated Superintendent will be required to attend the Facility Classification Committee hearing. The CALPIA representative will assist the Committee by providing any additional information and/or testimony that may be required to remove the inmate from his/her CALPIA assignment.

The inmate shall be placed on "S" time, with the approval of the PIA Administrator/Lead Manager, pending the outcome of the disciplinary process. A finding of guilty to the charge may be accepted as authority for dismissal and/or reduction of the inmate's pay rate to the lowest PIA pay number, notwithstanding any other penalty imposed at the disciplinary hearing.

The General Chrono, CDC Form, 128-B requesting that the inmate be placed on "S" time should as an example contain the following verbiage; "Due to the seriousness of the rules violation and the security risk posed to CALPIA and the institution and because of the inability to maintain constant supervision of this inmate on the job site during an entire work shift, inmate (inmate name) is deemed a security risk to CALPIA and the institution and shall remain on "S" time pending the adjudication of the CDC Form 115, Rules Violation Report". (Attach the CDC-115 to this CDC128-B).

Any inmate unassigned from CALPIA for disciplinary cause will be ineligible for reassignment to another CALPIA enterprise. An inmate can be reassigned only with the approval of the PIA Administrator/Lead Manager after six months of disciplinary free behavior and a positive CDC Form 101, Work Supervisors Report, from a work assignment other than CALPIA.

Inmates removed from their CALPIA assignment for reasons beyond their control, for example; out-to-court or found not guilty of charges after an investigation, may return to a previous CALPIA assignment, at the same or closest level of pay to their former position, if available.

Inmates assigned to clerical positions shall be rotated at regular intervals to other non-clerical positions within CALPIA or the Institution. Assignments to such clerical positions shall not exceed a two-year period.

**PIA ASSIGNMENTS
FOR TRANSFERRED
INMATES**

Former PIA inmates transferring from other facilities may be placed in the skill level which is appropriate for the position desired. If the inmate stays in the same trade area and demonstrates the necessary skills for appointment during the probationary ninety (90) days at D1 rate. Eligible

inmates may be placed at an equal level to the work assignment previously held at the sending facility, when a position becomes available, but such placement is not guaranteed. This placement remains subject to other criteria as set forth in Department Operational Manual (DOM) subsection 51121.7.

LEAD POSITION HIRING CRITERIA

Each PIA enterprise is authorized to have one leadperson for each industrial staff within the operation. The Prison Industries Administrator/Manager at the facility shall approve the leadperson. Functions of leadperson positions shall be related to the duties of the industrial staff justifying the leadperson. Clerical positions may be assigned leadperson pay.

Under the direction of the industrial staff, the leadperson shall be expected to do much of the on-the-job training of newly assigned inmates. They shall assist in communicating to new inmate workers the staff's expectations of their work. Inmate leadpersons shall not function as assistant forepersons or supervisors and shall not be assigned control over other inmates. Their role is limited to that of training and communication.

The following criteria will be used when hiring leadpersons for all CALPIA factories:

- Post job vacancy, indicating the area(s) of responsibility, description of duties and required skills and abilities. The posting will also indicate the experience and/or education necessary to apply for the position. The position will be posted for a one-week period; the closing date will be clearly stated.
- At the closing date all applications will be reviewed, only those that meet the hiring requirements will be selected for interview. Work files and/or C-files shall be reviewed by the interviewing staff panel.
- During the subsequent interviews, a staff panel will rate applicant's replies to a number of set questions. The questions will reflect the applicant's ability to carry out the Lead position duties, and the ability to work with others.

The most qualified applicant will be selected for the position. All Lead positions will include a probation period of six (6) months.

GENERAL WORK EXPECTATIONS

All inmates assigned to CALPIA work programs are to adhere to the following general work expectations. The Prison Industries Superintendent I and II are responsible for supplemental (specific) work expectations related to industry type. CALPIA work expectations for assigned inmates are as follows:

- Be punctual and reliable, report on time, every time.

- Be prepared to work when you arrive at work.
- Know your job description and responsibilities. Gather the tools, equipment and materials you need to complete the job responsibilities. If you don't have all that you need to complete these job requirements, ask your supervisor.
- Follow all instructions you are given by your supervisor.
- All work places have rules and regulations, know what they are and follow them.
- Work at a steady pace that you can maintain throughout the shift.
- Work safely; use of personal protective equipment, as required in designated areas, is mandatory. If you are not trained to use a tool or a piece of equipment, do not operate it. If you see or think that something presents a danger, inform your supervisor immediately.
- Take only breaks that are scheduled.
- Do not participate in any non-work activity i.e. hobby work, horseplay, gambling, etc.
- Be respectful and courteous to everyone.

**LEGAL AUTHORITY
AND ASSOCIATED
DOCUMENTS**

PC § 2811. LC § 1182 & U.S. Department of Labor DOT.
California Department of Corrections Operations Manual
California Code of Regulations Title 15
California Labor Code Section 1182
California Labor Code Section 3370
PIB Policy Decision 10/26/07

ATTACHMENTS

CALPIA Inmate Orientation Packet
CALPIA Worker Job Bulletin
CALPIA Inmate Job Description