

OFFICE OF ADMINISTRATIVE LAW

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

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Jenna Bowen
EUREKA BOWEN
SECRETARY OF STATE

Date: August 11, 2011
To: Dwayne Harvest
From: Chapter Two Compliance Unit
Subject: **2011 OAL DETERMINATION NO. 14(S)**
(CTU2011-0701-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Memorandum Titled
"Process Change of Inmate Mail Collection and Medical 7362"

On July 1, 2011, we received your petition to the Office of Administrative Law (OAL) asking for a determination as to whether a memorandum titled "Process Change of Inmate Mail Collections and Medical 7362" (memorandum) constitutes an underground regulation. The memorandum changes the way Inmate Outgoing Mail is processed in the Level II and III housing units at California State Prison, Solano. The memorandum was issued on May 20, 2011, by the warden at the California State Prison, Solano, and 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).² Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment.

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 the California

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.

Department of Corrections and Rehabilitation (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 memorandum challenged by your petition was issued by the warden of California State Prison, Solano, and applies solely to the inmates of California State Prison, Solano. Therefore, the memorandum is a "local rule" and is exempt from compliance with the APA pursuant to Penal Code section 5058(c)(1). It is not an underground regulation.³

³ 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.

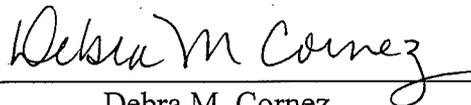
(B) The challenged rule is contained in a California statute.

(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

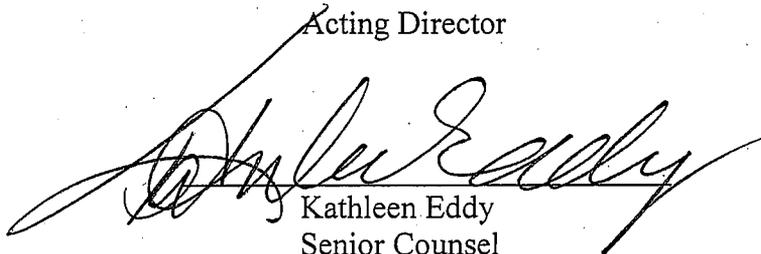
(D) The challenged rule has expired by its own terms.

(E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule. [Emphasis added.]

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



Kathleen Eddy
Senior Counsel

Copy: Matthew Cate
Tim Lockwood

Exhibit A

Memorandum

EXHIBIT

Date : May 20, 2011

To : ALL CONCERNED

Subject: PROCESS CHANGE OF INMATE MAIL COLLECTION AND MEDICAL 7362

The California State Prison-Solano (SOL) will be changing the way Inmate Outgoing Mail is processed in the Level II and III housing units. The purpose of these changes is to eliminate the primary method being used by inmates for submitting inmate authored anonymous notes due to the impact they are having on Institution/Facility programming. Additionally, the CDCR Form 7362, Request for Medical Services Drop Boxes on each Facility will be relocated. Beginning Monday, May 23, 2011, Third Watch, the Housing Unit Officers shall comply with the process outlined below.

Level III. Facilities I and II

At 2100 hours an announcement will be made over the building public address system that the outgoing mail is being collected. The housing unit officer shall conduct a visual security check of each cell then collect any outgoing mail provided by the inmate housed in the cell. Each piece of outgoing mail shall include the inmate's return address (inmate's Name, CDC number, and housing). This shall include but not be limited to all Inter-Facility outgoing mail (i.e., U Save' Em Envelopes) and Request for Interviews forms. The officer shall positively identify that the return address matches the inmate providing the mail via the inmate's state issued identification card. Upon completion of collecting the mail, the officer shall ensure each piece of mail is placed in the building mail bag. At no time will inmates have access to or be authorized to place outgoing mail directly in the building mail bag.

Level II. Facility III and IV

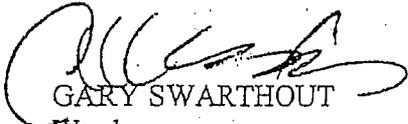
At 2000 hours, an announcement will be made over the building public address system that the outgoing mail will be collected in the housing unit. (Mail line is open at this time, all outgoing legal mail or personal mail must be turned into the officer station during the next 60 minutes). Mail will not be accepted after the 60 minutes have lapsed, subsequent mail will only be accepted during the following day's mail call. Each piece of outgoing mail shall include the inmate's return address (inmate's Name, CDC number, and housing). This shall include but not be limited to, all Inter-Facility outgoing mail (i.e., U Save' Em Envelopes) and Request for Interview forms. The officer shall positively identify that the return address matches the inmate providing the mail via the inmate's state issued identification card prior to the inmate leaving the area. When collecting the mail, the officer shall ensure each piece is placed in the building mail bag. At no time will inmates have access to or be authorized to place outgoing mail directly in the building mail bag.

Request for Medical Services Box

The Medical Services Box currently located by the Facility Medication Line Window will be relocated adjacent to the Facility Center Complex Entrance. This relocation will enable staff to monitor and supervise the integrity of this process. Inmates wishing to fill out a CDCR

Form 7362, Request for Medical Service shall place their request in this box. The contents of this box shall be collected daily by designated medical staff.

Inmates continue to have the ability to report issues of concern to staff or via the various confidential hotlines (telephone numbers posted in the housing units).



GARY SWARTHOUT
Warden
California State Prison-Solano

EXHIBIT