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2011 AUG 18 PM 1:14



Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: August 18, 2011
To: Robert Cavalier
From: Chapter Two Compliance Unit
Subject: **2011 OAL DETERMINATION NO. 15(S)**
(CTU2011-0711-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation language in Operational
Procedure #623

On July 11, 2011, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether one paragraph of Operational Procedure (OP) #623 constitutes an underground regulation. The language you challenge is designated as paragraph 623.6.4 and is on page 7 of the 15-page OP #623. Paragraph 623.6.4 deals with access to the main exercise yard. OP #623 was issued by California State Prison, Los Angeles County and page 7, the only page you submitted, is attached hereto as Exhibit A.¹

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,² which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).³ 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.

¹OAL is printing the copy of page 7 of OP #623 as you submitted it, including your annotations. We make no determination on the accuracy or relevance of your annotations.

²"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.

³Such 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.

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 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 rule challenged by your petition was issued by California State Prison, Los Angeles County and applies solely to the inmates of California State Prison, Los Angeles County. Therefore, the rule 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.⁴

⁴ 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.

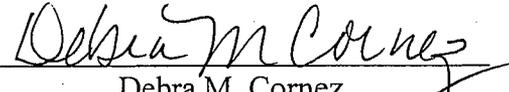
(B) The challenged rule is contained in a California statute.

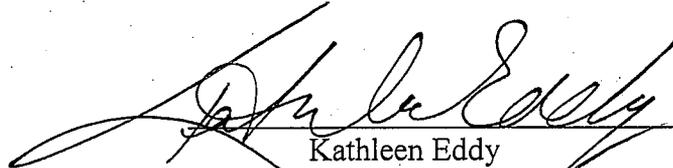
(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

(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



California
 Department of Corrections
 California State Prison
 Los Angeles County
 Operational Procedure
 #623

TITLE: Facility "C" Sensitive Needs Level IV General
 Population
 DAILY ACTIVITY SCHEDULE
 DEVELOPED: May 2009
 REVISED: October 2009

in groups no larger than two (2).

Inmates will not be allowed to congregate in groups larger than five (5) either on the roadway or on the yard. No more than ten (10) inmates will be allowed to congregate at each recreational table. Staff should be constantly alert to abnormal groupings, their locations and be prepared to take appropriate action. The only exception would be during authorized recreational sports activities.

*NO qualified immunity to outdoor exercise
 claim cert denied. 514 US 1065, 115 S Ct 1695
 131 LEd 2d 559 (1995)*

3.6.2
 1/A RECREATION
 YARD ACTIVITIES

A1/A unassigned, and assigned inmates during scheduled off work hours, will receive yard in accordance with the building rotation schedule on Facility "C".

3.6.3
 2/B RECREATION
 YARD ACTIVITIES

A2/B inmates will receive yard in accordance with the facility schedule, Monday through Friday only.

3.6.4
 C RECREATION
 YARD ACTIVITIES

Access to the main exercise yard will be limited to walking to meals, ducats, library (PLU only), medical, and religious services.

3.7
 DAYROOM
 ACTIVITIES

** NO SECURITY CONCERNS NOTED*
 Dayroom activities will be in accordance with the tier rotation schedule on all facilities. Specific restrictions for dayroom access will be based on the inmate's Work Group/Privilege Group or as the result of a disciplinary hearing.

3.7.1
 1/A DAYROOM
 ACTIVITIES

A1/A unassigned, and assigned inmates during scheduled off work hours, will receive dayroom daily, in accordance with their tier rotation schedule. AM dayroom release for A1/A will take place after the building yard release. PM dayroom release for A1/A will take place at 1900 hours.

3.7.2
 2/B DAYROOM
 ACTIVITIES

A2/B inmates will receive dayroom in accordance with their tier rotation schedule. Monday through Friday only. A2/B inmates are restricted to their cells on weekends, holidays, and during evening hours except for certain activities such as meals, medical, religious services, ducats, and visits.