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Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: August 23, 2011
To: Veni Fonoti
From: Chapter Two Compliance Unit
Subject: **2011 OAL DETERMINATION NO. 16(S)**
(CTU2011-0714-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Operational Procedure
#216, titled "Gymnasium Procedure"

On July 14, 2011, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether Operational Procedure (OP) #216, titled "Gymnasium Procedure" constitutes an underground regulation. OP #216 establishes a plan to house and program inmates in the Gymnasium Dormitory Housing Units at Kern Valley State Prison. OP #216, dated June 24, 2011, was issued by the warden of Kern Valley State Prison 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. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

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.

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.

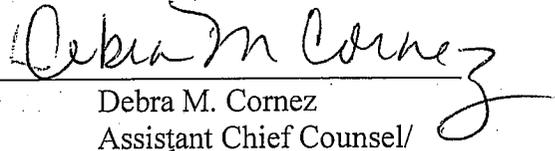
The Donovan policy is not a rule of general application. It applies solely to Donovan and, under Penal Code section 5058, subdivision (c)(1), is not subject to APA requirements.

Similarly, the rule challenged by your petition was issued by the warden of Kern Valley State Prison and applies solely to the inmates of Kern Valley State Prison. 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.³

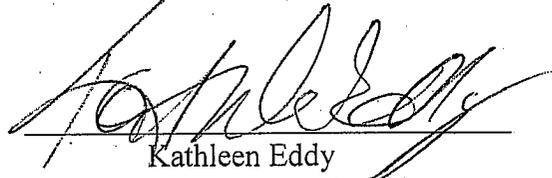
³ The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

- (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

EXHIBIT
'C'-1

DEPARTMENT OF CORRECTIONS AND REHABILITATION
KERN VALLEY STATE PRISON
Operational Procedure #216
Gymnasium Procedure

I. PLAN NUMBER AND TITLE:

Operational Procedure Number: 216

Operational Procedure Title: Gymnasium Procedure

II. PURPOSE AND OBJECTIVE:

The purpose of this Operational Procedure (OP) is to establish a plan to safely house and program inmates in Gymnasium (Gym) Dormitory Housing Units located within Facilities A, B, C, and D of Kern Valley State Prison (KVSP).

III. REFERENCES:

- A. California Code of Regulations, Title 15, Sections 3272, 3274, 3375, 3375.1, 3377.1 and 3377.2
- B. Kern Valley State Prison Inmate Orientation Handbook.

IV. APPROVAL AND REVIEW:

- A. This procedure requires the approval of the Warden.
- B. This procedure will be reviewed annually in June by the Associate Warden Complex I and Associate Warden Complex II.

REVISED: June 2010
NEXT REVISION: June 2011

V. RESPONSIBILITY:

- A. The respective Facility Captains shall be responsible for the implementation as well as administrative oversight of Gym Dormitory Housing Units. The Facility Captains, Program Lieutenants, Facility Sergeants, and Dormitory Officers have the responsibility for the safe and orderly operation of the Gym Dormitory Housing Units as well as ensuring compliance with this OP.

- B. A copy of this OP shall be maintained in the OP Manual in the Warden's Office. The Administrative Assistant to the Warden is responsible for placing the approved OP on KVSP Forms for staff access.

- C. It is the responsibility of all staff to familiarize themselves and comply with this OP.

VI. METHODS:

A. Arrival/Reception of Inmates:

1. The processing and housing of all Level I, II, III inmates arriving at KVSP will be coordinated by the Receiving and Release (R&R) Sergeant and the Program Sergeant from the respective yards where the inmates will be housed.
2. Only inmates who are endorsed by a Classification Services Representative (CSR) or Classification and Parole Representative (C&PR), for Level I, II, or III Dorm housing will be housed in a Gym commensurate with their classification level.
3. Medical staff will be notified immediately to report to R&R to conduct a medical screening and evaluation of inmates requiring medical attention or who may be prescribed any medication.
4. Inmate property, except health care appliances, shall be stored in R&R in accordance with OP #204, R&R Procedure, pending distribution by R&R staff.
5. R&R shall supply intake inmates with a bed roll containing two sheets, one pillow case, one blanket (two during inclement/cold weather), and two towels.
6. Legal material in an inmate's property will be delivered on a priority basis if there is a verifiable court deadline within 30 days. These inmates will be placed on Preferred Legal User Library status and will have physical access to the library facilities at times to be scheduled by the Facility and the library.
7. Level IV inmates shall not be housed in Gym Dorm, unless they are overridden to a Level III by the CSR. At no time will close custody inmates be housed within a KVSP Gym.
8. Upon intake from R&R, inmates will be escorted single file to the designated Yard Gym door, where the Facility Yard Sergeant will positively identify each inmate according to name, California Department of

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Corrections and Rehabilitation (CDCR) number, and photo identification (ID).

9. The Gym inmates will be given a brief verbal orientation by the Gym Housing Officer informing them of the rules, regulations, and behavioral expectations while they are housed in the Gym Dorm. Disability Placement Program inmates shall be advised of the Americans with Disabilities Act (ADA) accessible facilities (showers, toilets, sinks, etc.) and accommodations such as Inmate Assistance Givers, ADA exercise equipment, Telephone Device for the Deaf (TDD) machine, page magnifiers, the Armstrong Remedial Plan, related local procedures, and Title 15 in audio format and enlarged print.
10. Gym staff will supply the intake inmates with a fish kit containing one toothbrush, one packet of toothpowder, one bar of soap, and one roll of toilet paper and an Orientation Handbook.

B. Classification:

All new arrival Level I, II, III inmates who have been endorsed by CSR for Level I, II, III placement will be housed in a respective Gym Dorm on orientation status.

1. The facility Gym Correctional Counselors will be responsible for classification of Gym orientation inmates.
2. Initial classification of Gym orientation inmates shall be by Unit Classification Committee (UCC) or Institutional Classification Committee (ICC).

3. Inmates assigned to Level III Gyms shall be permitted to attend all Education and Vocational assignment(s) consistent with their custody designation and gate pass clearance; such assignment may include participating in the same class as a Level IV inmate.

C. Housing Criteria

The following criteria are established for housing inmates in KVSP Gym Housing Units.

1. No Close Custody Inmates.

2. Unless an override of the inmates classification level is approved by the CSR, the inmate's Classification Score must be consistent with the Designated Custody Level for the respective Gym: Facility A, Levels I or II; Facility B, Levels II or III; Facility C, Levels II or III (SNY); and Facility D, Levels II or III.
3. No extensive history of in-dorm violence towards inmates or assaults on staff.
4. No SHU term(s) in the last 12 months except as approved by ICC.
5. No Enhanced Outpatient Program (EOP) inmates except as assigned by the CSR or C&PR.
6. Correctional Clinical Case Management System (CCCMS) inmates can be housed in the Gym.

D. Disability Placement Program

Inmates who are identified as participants to the Disability Placement Program (DPP) and are fulltime wheelchair users as verified and documented on a CDCR 1845, may be housed in a Gym and will be assigned to specific bunks. The following facility Gym bunks are currently designated for permanent, full-time wheelchair users (DPW):

1. Facility A: 104W, 105W, 112W, 113W.
2. Facility B: 105W, 106W, 115W, 116W, 125W, 126W, 135W, 136W.
3. Facility C: 105W, 106W, 115W, 116W.
4. Facility D: 101W, 102W, and 103W, 105W, 129W, 136W, 137W, 144W.

VII. OPERATIONS:

A. General:

1. Facility Yard Observation Officers will be notified to clear the track in order to escort Level I, II, or III inmates to and/or from the patio area when Level IV inmates are on the yard. When Gym inmates are on the yard Facility Yard Observation Officers will be notified to clear the track in order to escort

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Level IV inmates to and/or from the patio area.

2. At no time shall a Level IV inmate be allowed access to the Facility Gym.

B. Housing:

1. Each inmate will be required to sign a Trust Account Withdrawal Order, Form CDCR-193, in order to be issued a lock. In the event the lock is lost or damaged due to negligence, the CDCR-193 will be forwarded to the Trust Office for processing.
2. Each inmate will be assigned one pillow and one mattress. Both items will remain on the assigned bunk.

C. Clothing:

1. A full complement of state-issued clothing will be issued to each inmate as soon as possible upon the inmate's arrival.
2. All clothing and laundry exchange will be conducted on second watch consistent with the Facility Laundry Room schedule. Staff shall maintain a list of all outgoing laundry bags and their contents to ensure all bags and clothing/bedding items are accounted for and returned. Disability Placement Program inmates shall be advised of the procedure for exchanging soiled linen and clothing.
3. Each inmate will be provided two nylon mesh laundry bags with the bunk numbers labeled on the outside. One laundry bag will be strictly for blue clothing and one for white clothing.

D. Institutional Counts:

1. There are a total of seven formal institutional counts in a 24-hour period.
2. Excluding counts on First Watch, an announcement for count will be made via the Public Address System within the Gym. A 15 and a five minute warning shall be given.
3. The 1630 hour count is a mandatory standing count. In dormitories equipped

with triple tier bed/bunks, the inmates assigned to the top tier bunk shall be seated on the top bunk, and the inmates assigned to the bottom and middle bunks shall be standing next to their bunks facing towards the main entrance of the Gym next to their lockers until the count is completed by the Officer. After count has been completed the inmates shall return back to their assigned bunks until the institutional count has been cleared. DPW inmates or inmates with a medical chrono will not be required to stand, but shall remain seated in their wheelchair next to their assigned bunk.

4. There will be no inmate movement during count and each inmate will remain on his assigned bed until staff announces the count has cleared.
5. One officer will perform the count. The other officer will observe and cover the officer counting. This is to ensure staff safety and to ensure inmates do not change bunks during count.

E. Meals:

1. Inmates housed in the Gyms will be released to the Dining Rooms for their breakfast and evening meals. A sack lunch will be distributed to all Gym inmates as they leave the Dining Hall upon their completion of the morning meal.
2. On Facilities A, B, C, and D, Facility Gym Officer Floor #1 will stand by the Gym door and release the Gym inmates to the dining hall. Wheelchair users will be released to the dining halls first. If an inmate elects not to eat, he is not required to leave the Gym during feeding.
3. The inmates will walk to the dining hall in a single file line with their hands behind their backs and display their State Identification Cards as they enter the dining hall.
4. At the completion of meals and when released by staff inmates will clean off their table, dispose of all trash, place their trays in the scullery and proceed directly back to the Gym in a single file line with their hands behind their back.

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5. During the release and returning to the Gym all inmates are subject to random searches by staff.

F. Yard Program:

1. The Gym inmates will be allowed access to the main yard, during scheduled times. At no time will Level IV and Gym inmates be allowed to program on the same yard at the same time.
2. Designated yard times will be scheduled and coordinated with current institutional policies and procedures.
3. Gym inmates shall have access to yard daily during the following approximate times: 1145 hours to 1300 hours, and 1830 hours to 2030 hours. Yard will be conducted on a rotational basis; on odd day's yard will take place on the lower yard and on the even days it will take place on the upper yard.

G. Canteen:

The Gym inmates will follow the existing canteen procedures in accordance with institutional procedures and departmental regulations based upon work/privilege group (refer to OP # 616, Canteen).

H. Emergencies/Alarm Activation

During an emergency or the activation of an alarm within the Gym, all inmates in the bed areas will remain on their bunks and keep the aisle ways clear. Inmates in the dayroom areas shall assume a prone position on the floor. Inmates in the showers shall turn the water off and remain standing in the shower area. Inmates in all other areas of the Gym, with the exception of the restroom area, shall assume a prone position on the floor. Inmate wheelchair users and inmates with medical documentation stating they cannot lie in a prone position shall be allowed to sit and remain stationary until the alarm is cleared and normal program resumes.

I. Allowable Inmate Property

1. Battery operated personal televisions or radios will be operated with headphones only. Any inmate found not using a

headphone will have his television or radio confiscated, mailed out at his expense, and will be subject to disciplinary action.

2. Each inmate is allowed to keep up to six cubic feet of personal property, excluding approved health care appliances. All personal property is to be stored and locked in the inmate's assigned locker when not in use. Lockers will not be left unlocked at any time.
3. Guitars are allowed as personal property and shall only be played outside the Gym or during chapel services.
4. Inmates will be allowed to possess property consistent with allowable inmate property for KVSP with the exception of heating devices such as Hot Pots.

J. Living Area:

Each Gym inmate is responsible for the daily cleanliness of the area surrounding his bunk.

1. All beds must be made up when not in use and prior to the inmates going to the morning meal.
2. Floors are to be swept and mopped, including under the bunks.
3. Living areas are to be neat and clean at all times.
4. Inmates will be allowed to hang one towel to dry on the crossbar at the foot of the bunk. At no time will an inmate be allowed to hang any other items from their bunks.
5. Inmates will be allowed to keep one pair of shoes on the floor under the bottom bunk.
6. Cardboard boxes are not allowed to be used for storage or any other purpose in the Gyms.
7. Inmates are not allowed to consume food or beverages in the bed areas.
8. Trash containers are to be emptied daily, littering will not be tolerated.
9. Clothing or other items shall not be hung from any object or fixtures in the Gym.

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Safety grab bars for disabled inmates shall not be used to hang or wring out laundry.

10. There is to be no game playing or loitering in the bunk area from 2100 hours to 0730 hours. Any inmate found loitering between these hours shall be subject to progressive disciplinary action.

11. Noise levels will be kept to a minimum in the living area at all times.

12. No curtains are allowed at any time.

13. No photos of any kind will be attached anywhere to the outside of the lockers.

14. Locker tops shall remain clear of items at all times.

15. Beds and/or lockers will not be moved and/or modified.

16. Bathroom/Shower area shall remain clean at times. Inmates are not to use their feet to operate the flush button on the toilet.

17. Wheelchair users will be allowed to keep the wheelchairs next to their beds in the upright folded position.

K. Dayroom Activities

1. Dayroom Program shall commence daily, seven days a week, at approximately 0900 hours and will continue until the announcement of the 1630 Count. Dayroom Program will resume upon the completion of the evening meal and conclude at approximately 2230 hours on Sunday through Thursday. Dayroom Program shall conclude at approximately 0030 hours on Fridays, Saturdays and any night before a state holiday. Inmates will be allowed to shower daily until 2100 hours.

2. Television viewing selections shall be done by vote with a daily schedule posted. The unit officer (s) shall maintain control of the remote control for the televisions and will maintain the volume at reasonable levels. Hearing impaired inmates shall be provided closed captioning upon request.

3. Inmates will be allowed to check out board games and cards by utilizing their State ID in exchange, beginning at 0900 hours and will be returned at the Officers announcement of game recall. All games shall be turned in by the final dayroom recall every night.

4. Game tables will not be covered by anything (i.e. blankets, sheets, towels, etc.). Dominoes, cards, etc. will not be slammed on the tables.

L. Inmate Telephone Use

The telephone program will be conducted from 0900 hours through 2100 hours (excluding meal and count times). All calls are to be made "Collect" and are subject to being monitored. The following rules shall be strictly adhered to:

1. Inmates in Privilege Group A1-A, shall be afforded an opportunity by Gym Officers to sign up for one 15 minute telephone call per day, based on available phone slots. Telecommunications device for the deaf (TDD) usage shall not exceed 40 minutes per day.

2. Inmates in Privilege Group A2-B shall be allowed one phone call per month.

3. Telephone/TDD sign-ups shall be conducted on third watch of the preceding day. TDD sign-up sheets shall be maintained in the Disability Placement Program binder in each Gym. Hearing impaired inmates shall be advised of the procedure to sign up for TDD use during orientation. TDD calls shall be arranged through the Facility Sergeant and will be consistent with the inmate's privilege group.

4. Telephone calls of a disrespectful or threatening manner will not be tolerated.

5. Three-way party calls are prohibited.

M. Showers

Showers shall be open from the following approximate times; 0900 hours to 1130 hours, 1400 hours to 1600 hours, and 1900 hours to 2100 hours. There will be no yelling, running, singing, horse playing, or washing of state clothing in the shower area. Wheelchair users

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will have first priority to shower at the beginning of every shower period. Shower accommodation chronos completed by a licensed CDCR Physician shall be honored. Shower benches and chairs shall be cleaned and disinfected prior to each shower period. A shower hose maintained by the unit Officer's when not in use will be available to mobility impaired inmates.

housed in Gyms shall be provided the opportunity to shave during the evening dayroom. Staff shall collect all razors issued at dayroom recall. The only exception to the designated hours shall be documented medical concerns and/or inmate work related issues. While collecting razors, staff shall inspect the razor to ensure the collected razor is intact and tamper free. The collected used razors shall be disposed of pursuant to institutional procedures.

N. Visiting

Visiting will be permitted with approved visitors in accordance with the regulations set forth in the CCR, Title 15, Section 3173, Department Operations Manual (DOM) Section 54020, Visiting, and KVSP DOM Supplement 54020 Visiting.

1. Regular visits will be conducted in the Facility Visiting room.
2. Inmates shall submit to an unclothed body search before and after their visit.
3. Family visits will be conducted in the Family Visiting Unit based on proper authorization and available units.

All razors will be kept in a secured/locked location in the housing unit's supply closet and or the designated razor box. Third Watch Floor staff will complete the Daily Razor Accountability form (Attachment A), ensuring all issued/returned razors are accounted for on a daily basis. Additionally, a Primary Storage Quarterly Razor Inventory Form (Attachment B) shall be completed once a week to account for all razors in the primary storage located in each Gym. Any discrepancies in the inventory of razors shall be immediately reported to the Facility Sergeant.

O. Medical/Dental Services:

Access to Health Care Services will be provided in the Facility Medical Clinic. Prescription and over-the-counter medication will be distributed from the Facility Medical Clinic. Unless an emergency exists, inmates are required to submit a CDCR 7362, Health Care Services Request Form to the Facility Clinic.

Inmates are prohibited from possessing razors outside the established time frames. If an inmate is found in possession of a razor outside the established time frames or is in possession of an altered razor, the involved staff shall confiscate the razor and issue the appropriate disciplinary action (i.e. CDCR 128-A, CDCR 115).

Inmates on the Heat Alert List will not be restricted from Gym placement. The Unit Officers will monitor and document the air temperature within the Gyms on a daily basis per OP #213, Heat Plan.

P. Issuance of Hygiene Supplies and Accountability and Inventory of Razors

1. Inmates shall be issued hygiene supplies which are consistent with the amount and items issued to general population inmates, on a weekly basis.
2. Housing unit staff shall issue razors to all inmates requesting to shave. Inmates

Attachments:

- Attachment A – Daily Razor Accountability Form
- Attachment B – Primary Storage Quarterly Razor Inventory Form

Original Signed By:

Approved: _____

K. HARRINGTON
Warden
Kern Valley State Prison

June 24, 2010

Date: _____