

OFFICE OF ADMINISTRATIVE LAW

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IN THE OFFICE OF

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Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: August 23, 2011
To: Gerald Cruz
From: Chapter Two Compliance Unit
Subject: **2011 OAL DETERMINATION NO. 17(S)**
(CTU2011-0801-02)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Operating Procedure #03-047, titled "Health Care No-Show"

On August 1, 2011, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether Operating Procedure (OP) #03-047, titled "Health Care No-Show," constitutes an underground regulation. OP #30-047 establishes the procedures to be used when an inmate refuses health care. OP#03-047, dated March 17, 2010, was issued by the Chief Executive Officer for Health Care and the warden at San Quentin 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.

...

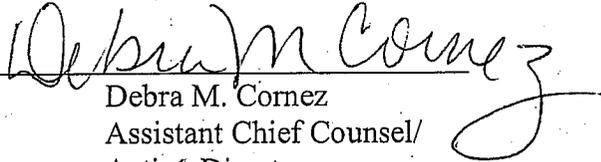
The Donovan policy is not a rule of general application. It applies solely to Donovan and, under Penal Code section 5058, subdivision (c)(1), is not subject to APA requirements.

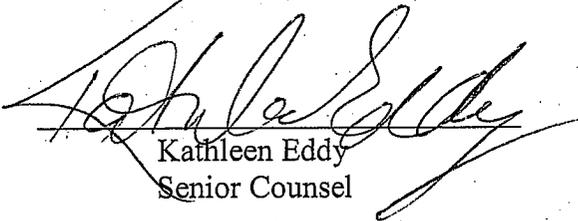
Similarly, the rule challenged by your petition was issued by San Quentin State Prison and applies solely to the inmates of San Quentin State Prison. Therefore, the rule is a "local rule" and is exempt from compliance with the APA pursuant to Penal Code section 5058(c)(1). It is not an underground regulation.³

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

CALIFORNIA DEPARTMENT
OF CORRECTIONS AND
REHABILITATION

Operating Procedure #03-047
Approval Date: March 17, 2010

California State Prison – San Quentin

Health Care No-Show

POLICY:

California State Prison – San Quentin (CSP-SQ) inmate's have a right to refuse health care. Refusals of care require an explanation of the risks associated with that refusal and legal documentation to be filed in the inmate-patient's unit health record (UHR).

REFERENCES:

Volume I, Chapter 11, Inmate Medical Services Policy and Procedures
Volume IV, Chapter 4, Inmate Medical Services Policy and Procedures
Volume IV, Chapter 5, Inmate Medical Services Policy and Procedures

APPROVAL AND REVIEW:

This procedure shall be reviewed annually by the Quality Management Committee (QMC) or designee for approval.

RESPONSIBILITY:

The Chief Executive Officer – Health Care and the Warden shall ensure compliance with this policy and procedure.

PROCEDURE:

A. Inmate-patients have a right to refuse health care (dental, medical, mental health), however refusals of care require an explanation to the inmate-patient of the risks associated with that refusal as well as legal documentation that must be filed within the UHR.

B. **Administrative Segregation Unit, Condemned, Reception Center General Population and Reception Center Special Program Inmates:**

Health Care Access Unit (HCAU) shall review the daily movement sheet and the daily health care list from the health care scheduling office technicians (OT). The HCAU staff will identify the number of inmates requested to be seen, and coordinate with the housing unit custody staff to have the inmates removed from their assigned cell and placed in holding cells or any suitable staging area. The HCAU staff shall report to the respective housing unit and identify the inmate, conduct unclothed body searches of inmates from Administrative Segregation or Condemned housing units; and perform clothed body searches of Reception Center and Special Program inmates before exiting the housing unit and proceeding with the escort to the CHSB to the scheduled appointment. During the scheduled days of Unit Classification and/or Institutional Classification Committees (UCC/ICC) both housing unit and HCAU staff shall work collaboratively to have the inmate removed from the cell and processed accordingly to be escorted to the scheduled appointment.

Any inmate-patient wishing to refuse treatment, shall report to or be escorted to the clinic in accordance with his ducat and policy. Once the inmate-patient is at the clinic, the clinical staff or designee will explain the consequences of refusing treatment and the requirements for rescheduling the appointment in the future. If the inmate-patient still wishes to refuse the service, he will sign the CDCR 7225, Refusal of Examination and/or Treatment Form. The clinical staff will then sign the form certifying that they witnessed the inmate-patient's refusal.

If an inmate-patient refuses to report to the designated clinic when issued a ducat after being directed by custody staff to report, custody staff will immediately notify the housing unit supervisor and the HCAU Escort Sergeant. If custody staff are unable to convince the inmate to voluntarily exit the cell to attend his scheduled appointment, a review, as described in the next paragraph, will be conducted to forcibly remove the inmate from the cell to attend the appointment. Inmates who refuse to exit the cell to attend a scheduled/ducat appointment will not be allowed to attend any other activities during the time of the scheduled/ducat appointment. If the inmate-patient has not been brought to the clinic within thirty (30) minutes of the scheduled appointment, the inmate accountability procedure shall go into effect.

The custody staff will inform the clinic staff of the inmate-patient's refusal to leave the cell. If the clinical staff believes that treatment of the inmate-patient is vital to the health and welfare of the inmates and staff at CSP-SQ the clinical staff will discuss this concern with the Chief Executive Officer – Health Care (CEO-HC) or designee. If the CEO-HC or designee agrees with the clinical staff, ~~the CEO-HC or designee will contact the HCAU Captain to initiate a controlled use of force to bring the inmate-patient to the clinic so the clinical staff can explain the consequences of refusing treatment and complete the CDCR 7225, Refusal of Examination and/or Treatment Form as noted above. Inmate-patients that have delayed the process due to refusing and/or resulting in the controlled use of force shall receive a CDCR 115, Rules violation Report for the specific act of, "Willfully Delaying a Peace Officer in the Performance of Their Duties."~~

C. General Population (non-escorted) inmates:

Inmate-patients that do not require an escort must report to their scheduled appointment timely. If the inmate-patient fails to report to a scheduled ducat appointment within 15 minutes of the assigned ducat time, the clinical staff shall contact the HCAU Escort Sergeant at extension 3855 or have the sergeant paged via the HCAU building entrance officer at extension 3663.

The HCAU Escort Sergeant will review the daily movement sheet to ensure the inmate-patient does not have a conflicting ducat. If there is no indication that the inmate-patient has been ducated to another location, the Escort Sergeant shall contact the sergeant in charge of the inmate-patient's assigned housing unit.

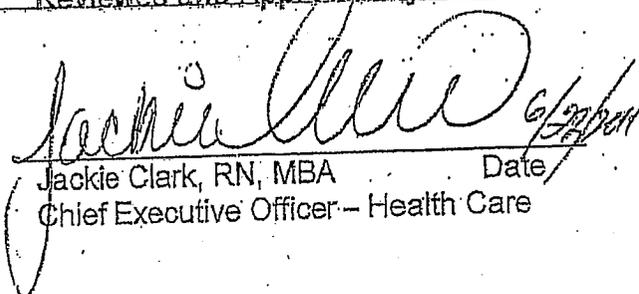
The housing unit sergeant shall have housing unit staff conduct a clothed body search of the inmate-patient. The housing unit staff shall search the housing unit; yard areas, canteen, culinary, visiting, and any other areas inmates from that housing unit might be located. If the inmate-patient is located, he shall be escorted to the clinic immediately. If staff is unable to locate the inmate-patient during this search, a recall of all inmates in the housing unit shall be conducted. Recall should be initiated no more than 30 minutes after the inmate-patient was identified as missing by custody and clinical staff.

The housing unit staff shall continue to search for the inmate-patient as the recall is occurring. Once the inmate-patient is located, he will be escorted to the clinic immediately and all other inmates in that housing unit will be released back to normal program.

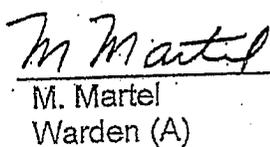
The housing unit staff that located the inmate-patient shall document the areas searched and the subsequent location the inmate-patient was discovered on a CDCR 115. The CDCR 115 shall be forwarded to the HCAU Escort Sergeant before the end of the shift and forwarded to the Institutional Disciplinary Unit.

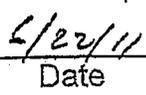
If the inmate-patient is not located during the recall of the housing unit, the housing unit sergeant shall notify the HCAU Escort Sergeant immediately. The HCAU Escort Sergeant will contact the Watch Commander to recall the institution and initiate an emergency count if necessary.

Reviewed and Approved By:


Jackie Clark, RN, MBA
Chief Executive Officer - Health Care

Date


M. Martel
Warden (A)


Date

Attachment A: Form CDCR 7225 Refusal of examination and/or treatment
Attachment B: Flowchart