

OFFICE OF ADMINISTRATIVE LAW

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

ENDORSED FILED
 IN THE OFFICE OF

2011 JAN 20 PM 2:04



Debra Bowen
 DEBRA BOWEN
 SECRETARY OF STATE

Date: January 20, 2011
 To: James Dailey
 From: Chapter Two Compliance Unit
 Subject: **2011 OAL DETERMINATION NO. 2 (S)**
(CTU2010-1229-01)

(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 Issued by Mule
 Creek State Prison in Department Operations Manual Supplement Section
 54030 Prohibiting Used Books

On December 29, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether language in Department Operations Manual (DOM) Supplement section 54030 prohibiting used books constitutes an underground regulation. The copy of the challenged rule that you included with your petition did not have identifying information, but you assert that this section is in the DOM Supplement used at Mule Creek State Prison in Ione, California. The section does not appear in the statewide DOM; therefore, we base this determination on your assertion that the challenged rule is found in the DOM Supplement issued by Mule Creek State Prison. A DOM Supplement is adopted by an individual prison to supplement the general, statewide rules found in the statewide DOM. The challenged rule 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

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.

policy issues involved in the subject of this determination.

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 appears to have been issued by Mule Creek State Prison and applies solely to the inmates of Mule Creek 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.

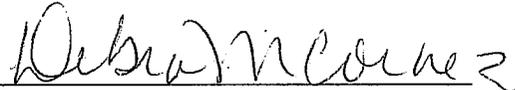
(B) The challenged rule is contained in a California statute.

(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.

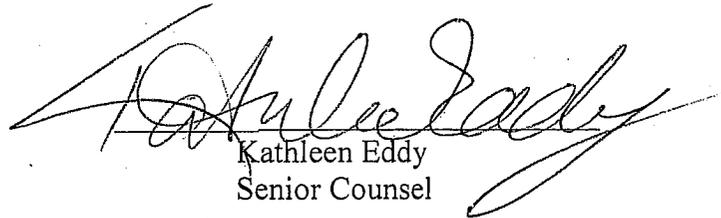
(E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule. [Emphasis added.]

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

Value shall not exceed \$75.00 per pair.

Inmates are not permitted to receive, wear, or have under their control, any item of personal clothing that is designed, manufactured, or give the appearance of a dress, or sport shirt, polo shirt or other similar type shirt. The only exception is when the article of clothing is specifically authorized by the Warden or designee as special clothing for court or dress out purposes.

MISCELLANEOUS
PROPERTY
RESTRICTIONS

In addition to restrictions noted in the authorized personal property schedule, the following restrictions shall apply to specific items of miscellaneous property:

Watches shall be wrist or pocket-style.

- Not have sets or stones.
- Not exceed \$50.00 value.
- Have been manufactured without calculator, alarm, radio, TV, game, or communication capabilities.

Ring restrictions shall be as follows:

- Total value of rings shall not exceed \$100.00.
- Rings shall be plain, free of diamonds, stones and nuggets.

Religious medals and chains shall not have sharp points or edges, and shall not exceed a combined value of \$100.00. Chain not to exceed 18' in length.

Guitar strings may be received with the musical instrument but must be nylon. No metal strings are allowed. Inmates may possess two (2) sets of strings.

High intensity lamps shall not exceed a three (3) pound weight or 12 inches extended length. Lamp not to exceed 30 watts, flexible neck only.

Extension cords shall be three prong (to include ground wire) #14, UL approved and not to exceed six (6) feet in length. Three part receptacle opposite plug end is authorized. Two prong extension cords are not permitted in order to comply with fire department safety regulations.

Footlockers: Inmates in possession of footlockers will be responsible for the shipping costs upon the inmate's transfer, parole, or discharged. Footlockers will not be transferred to another institution.

Book and magazine restrictions are as follows:

- Inmates shall not possess more than a total of ten (10) books and/or magazines.
- Magazines shall be obtained by subscription only.
- Inmates shall not join or belong to book clubs.

- Books are only authorized if shipped from a warehouse where the customer does not have contact with the product prior to the items being shipped to the Inmate. Used books are prohibited.

Religious books and tapes may be received from established publishing companies, religious bookstores, churches and/or other religious organizations.

- Customer contact with religious items being sent to inmates at MCSP is prohibited. Used books or tapes will not be accepted.
- Religious books, tapes and any other material must identify the source (sender) by a verifiable return address label indicating from where the material was sent. Approval by the Associate Warden Programs/Housing and a chaplain at MCSP are required for all religious items other than books and tapes.
- No restrictions, other than those required for safety and security will be placed on any religious materials sent/donated to the inmate population. Any bulk-type religious material may be sent to the designated Institutional Chaplain through the Associate Warden Programs/Housing.
- Religious correspondence courses/programs are to be processed the same as any other religious materials or literature.

Photographs/portraits shall not exceed eight (8) inches by ten (10) inches. Polaroid type photographs or those with attached backs shall not be allowed, except, for those that were taken within an institution.

Photo albums shall not exceed 9 inches by 12 inches. No padding is allowed on or in album covers.

Chess, checkers, dominos, and table games shall not exceed a \$25.00 value and shall not contain dice.

Ball point pens/pencils shall be clear barrel, non-metallic and each inmate may possess a total of 4.

Batteries (8 disposable) may be received for battery-operated items on an exchange basis. The Inmate must have the battery-operated item on his property card.

Combs shall be the small plastic pocket style or palm style only. Large style combs are not approved.

Sunglasses - No steel frames, non-mirrored, no red or blue lenses. Purchase value not to exceed \$50.00

Appliances, clothing, or other miscellaneous property in color or accents of red or blue will not be allowed. Color restrictions also apply to plastic containers, cups, bowls, tumblers, pitchers, thermal mugs and plastic storage containers.