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2011 OCT 26 PM 1:07



Edmund G. Brown, Jr.
GOVERNOR
STATE OF CALIFORNIA

Date: October 26, 2011

To: Timothy Peoples Jr.

From: Chapter Two Compliance Unit

Subject: **2011 OAL DETERMINATION NO. 22 (S)**
(CTU2011-0901-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation section 29.22, titled
"PACKAGES," of Operational Procedure 29.

On September 1, 2011, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether section 29.22, titled "PACKAGES," constitutes an underground regulation (Operational Procedure 29.22). The rule is in Operational Procedure 29, dated March 1996, revised February 2010, titled "ADMINISTRATIVE SEGREGATION." Operational Procedure 29.22 concerns a requirement that inmates be disciplinary free for a period of one year when housed in the Administrative Segregation Unit (ASU) in order to be eligible to receive a package. Operational Procedure 29.22 was issued by the warden at the Salinas 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 Salinas Valley State Prison and applies solely to the inmates of the Salinas Valley State Prison. Inmates housed at other institutions are governed by those other institutions' criteria for eligibility to receive packages when housed in ASU. 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.

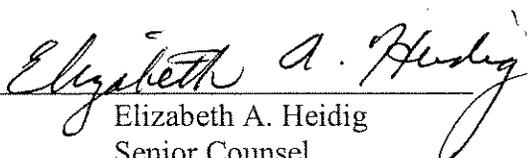
(D) The challenged rule has expired by its own terms.

(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



Elizabeth A. Heidig
Senior Counsel

Copy: Matthew Cate
Tim Lockwood

Exhibit A

California Department of Corrections and Rehabilitation Salinas Valley State Prison OPERATIONAL PROCEDURE 29	Title: ADMINISTRATIVE SEGREGATION
	Developed: MARCH 1996
	Revised: FEBRUARY 2010

Legal Mail

The Facility "D" Legal Officer will deliver incoming legal mail to ASU on the same day of receipt. The mail will be delivered to the ASU Sergeant. The ASU Sergeant will assign a staff member to distribute the mail. The inmate acknowledging receipt of this legal mail will sign the legal mail log. Legal mail receipt will be documented on the 114A.

The Floor Officer who will process it in accordance with existing policies and procedures will pick up outgoing legal mail.

29.21
CANTEEN

The maximum allowable canteen draw as set forth for inmates assigned to ASU and Privilege Group D is forty-five dollars, once each month.

Canteen Draw Order Form, CDC-184, will be distributed on Saturday each week to inmates for their designated draw. The form will be picked up and submitted to the Canteen Manager on the following Tuesday. The Canteen Manager will provide ASU staff with a list of those inmates who have funds available and those inmates will receive an ASU Inmate Canteen Price List. Orders will be picked up and delivered to the canteen on Tuesday.

The Canteen Manager will notify ASU staff when canteen is ready to be picked up and delivered to the ASU inmates. This will generally transpire on Fridays. The canteen items will be stored in a secure area overnight, and be distributed in the unit on Saturdays.

Canteen orders will be confirmed by the ASU Search and Escort Officer along with the canteen worker and then delivered to the inmate. The inmate and Search and Escort Officer will inventory the items and confirm the charges with the sales receipt. If the order is correct, the inmate will sign the Canteen Draw Order form, which will be placed in the ASU canteen order file. Refusal of any canteen item will be considered a refusal of the total order and the entire order will be returned to the canteen. ~~Canteen orders will be accepted on the approved ASU canteen order form only.~~ Once the inmate has signed the canteen form, attesting to receiving the ordered items, ASU staff will inspect all canteen items and repackage those in foil or glass containers or packaging inappropriate for the ASU.

29.22
PACKAGES

Inmates housed in the ASU are authorized one package per year not to exceed thirty pounds and must comply with institutional package requirements. The inmates must remain disciplinary free for a period of one year in the ASU in order to be eligible to receive a package.

Quarterly packages addressed to inmates who have been retained in the ASU by ICC shall not be issued but will be stored with the exception of the food items. If a package is received, the inmate may choose one of the following options: