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 SECRETARY OF STATE

DEBRA M. CORNEZ
 Assistant Chief Counsel/Acting Director

Date: November 29, 2011
 To: Jerry Pollard
 From: Chapter Two Compliance Unit
 Subject: **2011 OAL DETERMINATION NO. 25(S)**
(CTU2011-1017-02)
 (Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
 Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation California Code of Regulations, title 15, sections 3269 and 3315(f)(5)(N)(1) and (2) relating to inmate housing assignments

On October 17, 2011, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether California Code of Regulations, title 15, sections 3269 and 3315(f)(5)(N)(1) and (2) are underground regulations. These two sections of the California Code of Regulations relate to inmate housing assignments and are attached hereto at 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

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250:

The following definitions shall apply to the regulations contained in this chapter:

(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*

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.

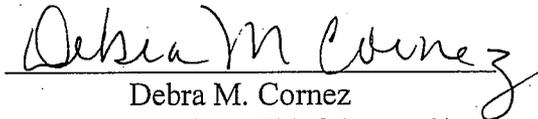
and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA... (Emphasis added.)

The sections you challenge as underground regulations, California Code of Regulations, title 15, sections 3269 and 3315(f)(5)(N)(1) and (2) are properly adopted regulations and filed with the Secretary of State pursuant to the APA. Section 3269 was originally filed with the Secretary of State as an emergency regulation on March 18, 2008. The Certificate of Compliance for this emergency adoption was filed on September 15, 2008. The section was amended without regulatory effect on March 28, 2011. No other amendments have been made.

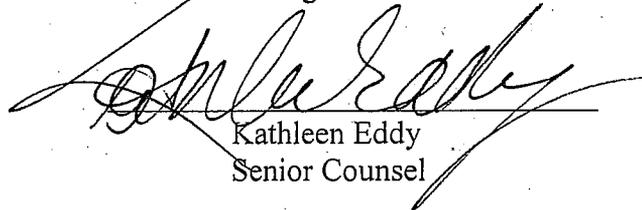
Section 3315 was initially filed with the Secretary of State prior to 1977. Subdivision (f)(5)(N)(1) and (2) was filed in the same emergency adoption with the Secretary of State on March 18, 2008. The Certificate of Compliance for this emergency adoption was filed with the Secretary of State on September 15, 2008.

For the reasons discussed above, we find that the rule challenged by your petition is not an underground regulation.³

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

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.)

Exhibit A

Title 15. Crime Prevention and Corrections
Division 3. Adult Institutions, Programs and Parole
Chapter 1. Rules and Regulations of Adult Operations and Programs
Subchapter 4. General Institution Regulations
Article 1.6. Inmate Housing
§ 3269. Inmate Housing Assignments.

Inmates shall accept Inmate Housing Assignments (IHAs) as directed by staff. It is the expectation that all inmates double cell, whether being housed in a Reception Center, General Population (GP), an Administrative Segregation Unit (ASU), a Security Housing Unit (SHU), or specialty housing unit. If staff determines an inmate is suitable for double celling, based on the criteria as set forth in this section, the inmate shall accept the housing assignment or be subject to disciplinary action for refusing. IHAs shall be made on the basis of available documentation and individual case factors. Inmates are not entitled to single cell assignment, housing location of choice, or to a cellmate of their choice.

(a) Upon arrival at an institution, facility, or program reception center, a designated custody supervisor shall screen an inmate for an appropriate housing assignment. The screening authority involved in the review and approval of an inmate's housing assignment must evaluate all factors to be considered, including but not limited to:

- Length of sentence.
 - Enemies and victimization history.
 - Criminal influence demonstrated over other inmates.
 - Reason(s) for prior segregation.
 - History of "S" suffix determination pursuant to CCR subsection 3377.1(c).
 - History of in-cell assaults and/or violence.
 - Prison gang or disruptive group affiliation and/or association.
-
- Nature of commitment offense.
 - Documented reports from prior cellmate(s) that the inmate intimidated, threatened, forced, and/or harassed him or her for sex.
 - Documentation that the cellmate(s) refused to return to a cell occupied by the inmate because of fear, threats, or abuse perpetrated by the inmate.
 - Documentation that the inmate has been the victim of a sexual assault.
-
- Adjudicated Department Rules Violations Reports (RVR) where the inmate was found guilty as a perpetrator in an act of physical abuse, sexual abuse, sodomy, or other act of force against a cellmate.

(b) The screening authority shall complete a CDCR Form 1882 (rev. 2/07), Initial Housing Review, stating if the inmate is suitable for dorm/cell housing with or without special restrictions. Restrictions are any case factors which may limit the inmate's housing placement options such as, but not limited to:

- Security issues including ASU and SHU placement.
- Request for Protective Custody.
- Medical or mental health issues.
- Integrated Housing Code.

Staff shall ensure that the housing policies regarding special category inmates covered under specific litigation remain in place during the housing assignment.

(c) Upon placement in an ASU or SHU, inmates shall be screened for an appropriate cell assignment using the same criteria as inmates being screened for housing in the general population. The reason for ASU or SHU placement shall also be taken into consideration.

Based on available information and the inmate interview, the screening authority shall determine if the inmate is suitable for single or double celled housing, and shall complete a CDC Form 114-A1 (rev. 10/98), Inmate Segregation Profile. Unless approved for single cell assignment, an inmate in ASU or SHU is expected to share a cell with another inmate.

(d) Single cell status shall be considered for those inmates who demonstrate a history of in-cell abuse, significant in-cell violence towards a cell partner, verification of predatory behavior towards a cell partner, or who have been victimized in-cell by another inmate. Staff shall consider the inmate's pattern of behavior, not just an isolated incident. An act of mutual combat in itself does not warrant single cell status. The following factors must be considered when evaluating single cell status, noting these factors are not exclusive of other considerations:

(1) Predatory behavior is characterized by aggressive, repeated attempts to physically or sexually abuse another inmate.

(2) Documented and verified instances of being a victim of in-cell physical or sexual abuse by another inmate.

(e) Should the screening authority determine that single cell designation is appropriate, the inmate's case factors shall be reviewed by a classification committee for determination of appropriate housing and designation for an "S" suffix. A classification committee may consider whether an inmate with single cell designation has since proven capable of being double-celled.

(f) In cases where single cell status is recommended by clinical staff due to mental health or medical concerns, a classification committee shall make the final determination of an inmate's cell assignment. The classification committee shall consider the clinical recommendations made by the evaluating clinician with assistance from the clinician who participates in the committee and review the inmate's case factors when determining the housing assignment. Single cell status based upon clinical recommendation is usually a temporary short-term measure and must be periodically reviewed, minimally at an inmate's annual review or more frequently at the inmate's/clinician's request.

(g) If an inmate refuses to be housed as determined to be appropriate to this section, the inmate shall be subject to the disciplinary process, with the potential to be housed in alternative and more restrictive housing. Refusal to participate will result in the issuance of a Rules Violation Report (RVR) for Conduct, subsection 3005(c), Refusing to Accept Assigned Housing, for the Specific Act of Willfully Resisting, Delaying, or Obstructing any Peace Officer in the performance of Duty (CCR subsection 3323(f)(6)). Subsequent acts of the above listed offense will result in the issuance of additional disciplinary reports and consideration for placement in more restrictive housing such as an ASU or a SHU.

Note: Authority cited: Section 5058, Penal Code. Reference: 5054, Penal Code.

HISTORY

1. New section filed 3-18-2008 as an emergency; operative 3-18-2008 (Register 2008, No. 12). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 8-25-2008 or emergency language will be repealed by operation of law on the following day.
2. Certificate of Compliance as to 3-18-2008 order, including amendment of subsection (f), transmitted to OAL 8-18-2008 and filed 9-15-2008 (Register 2008, No. 38).
3. Change without regulatory effect amending subsection (a) filed 3-28-2011 pursuant to section 100, title 1, California Code of Regulations (Register 2011, No. 13).

Title 15. Crime Prevention and Corrections
Division 3. Adult Institutions, Programs and Parole
Chapter 1. Rules and Regulations of Adult Operations and Programs
Subchapter 4. General Institution Regulations
Article 5. Inmate Discipline
§ 3315. Serious Rule Violations.

....

(f) Disposition. Upon completion of the fact-finding portion of the disciplinary hearing, the inmate may be found:

(1) Not guilty and the charges dismissed.

(2) Guilty of an administrative rather than a serious rule violation. In such case, the CDC Form 115 shall be reduced to an administrative level offense and the inmate may be assessed only a disposition authorized in section 3314.

(3) Guilty as charged or guilty of an included serious rule violation and assessed a credit forfeiture pursuant to section 3323.

(4) If the violation included an act related to the use, possession, or distribution of controlled substances, controlled medication, drugs or drug paraphernalia; or if the inmate refused to submit to a test for controlled substances or drugs, the disposition shall include an order for the inmate to submit to mandatory random drug testing for one year from the date of the order.

....

(5) The disposition may or when mandated shall include assessment of one or more of the following:

....

(N) Violation of Refusing to Accept an Inmate Housing Assignment of subsection 3005(c) shall result in:

1. First offense violation shall result in loss of any or all of the following for up to 90 days: canteen, appliances, vendor packages, telephone privileges, and personal property.

2. Second offense and subsequent offense violation(s) shall result in loss of any or all of the following for up to 180 days: canteen, appliances, vendor packages, telephone privileges, and personal property, and referral to a classification committee for review and determination for program failure. An inmate who is deemed a program failure by a classification committee is subject to having his/her personal property/appliances disposed of in accordance with Departmental procedure.

....

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 295-300.3, 314, 530, 532, 646.9, 647, 653m, 2931, 2932, 2933, 4573.6, 5054, 5068 and 12020, Penal Code.

HISTORY

1. Amendment filed 2-24-77; effective thirtieth day thereafter (Register 77, No. 9).
2. Amendment filed 5-13-77; effective thirtieth day thereafter (Register 77, No. 20).
3. New subsection (g) filed 9-30-77; effective thirtieth day thereafter (Register 77, No. 40).
4. Amendment of subsection (a)(3), renumbering of subsections (a)(16)-(a)(19) to (a)(18)-(a)(21) and new subsections (a)(16)-(a)(17) filed 3-22-78; effective thirtieth day thereafter (Register 78, No. 12).
5. Amendment of subsections (a)(3), (b)(4) and (b)(5) filed 8-22-79; effective thirtieth day thereafter (Register 79, No. 34).
6. Amendment of subsection (d) filed 2-15-80; effective thirtieth day thereafter (Register 80, No. 7).
7. Amendment of subsection (b)(1) filed 9-24-81; effective thirtieth day thereafter (Register 81, No. 39).
8. Amendment of subsection (a)(19) filed 2-16-83; effective thirtieth day thereafter (Register 83, No. 8).
9. Amendment of subsections (a), (b)(4), (f)(4) and repealer and new subsection (d) filed 5-4-83; designated effective 6-1-83 pursuant to Government Code Section 11346.2(d) (Register 83, No. 19).
10. Editorial correction of subsections (b) and (c) filed 2-19-85 (Register 85, No. 8).
11. Amendment of subsections (b), (c), (e) and (g) filed 8-7-87 as an emergency; operative 8-7-87 (Register 87, No. 34). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 12-7-87.
12. Certificate of Compliance as to 8-7-87 order transmitted to OAL 12-4-87; disapproved by OAL (Register 88, No. 16).
13. Amendment of subsections (b), (c), (e) and (g) filed 1-4-88 as an emergency; operative 1-4-88 (Register 88, No. 16). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 5-3-88.
14. Certificate of Compliance as to 1-4-88 order transmitted to OAL 5-30-88; disapproved by OAL (Register 88, No. 24).
15. Amendment filed 6-2-88 as an emergency; operative 6-2-88 (Register 88, No. 24). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 9-30-88.
16. Certificate of Compliance transmitted to OAL 9-26-88 and filed 10-26-88 (Register 88, No. 50).
17. New subsection (a)(14), subsection renumbering, and amendment of Note filed 7-29-93 as an emergency; operative 7-29-93 (Register 93, No. 31). A Certificate of Compliance must be transmitted to OAL 11-26-93, or emergency language will be repealed by operation of law on the following day.

18. Certificate of Compliance as to 7-29-93 order transmitted to OAL 11-18-93 and filed 12-31-93 (Register 94, No. 1).
19. Amendment of section and Note filed 5-5-95; operative 6-5-95 (Register 95, No. 18).
20. Amendment of subsection (f)(4) filed 7-1-96 as an emergency; operative 7-1-96 (Register 96, No. 27). A Certificate of Compliance must be transmitted to OAL by 12-8-96 or emergency language will be repealed by operation of law on the following day.
21. Certificate of Compliance as to 7-1-96 order transmitted to OAL 9-23-96 and filed 11-4-96 (Register 96, No. 45).
22. Change without regulatory effect amending subsection (f)(5)(A) filed 12-2-96 pursuant to section 100, title 1, California Code of Regulations (Register 96, No. 49).
23. Amendment of subsections (c), (f)(5)(D) and (g) filed 10-16-97 as an emergency; operative 10-16-97 (Register 97, No. 42). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 3-25-97 or emergency language will be repealed by operation of law on the following day.
24. Certificate of Compliance as to 10-16-97 order transmitted to OAL 3-23-98 and filed 5-4-98 (Register 98, No. 19).
25. Amendment filed 8-27-98 as an emergency; operative 8-27-98 (Register 98, No. 35). A Certificate of Compliance must be transmitted to OAL by 2-3-99 or emergency language will be repealed by operation of law on the following day,
26. Amendment of subsection (a)(3)(M) filed 12-1-98 as an emergency; operative 12-1-98 (Register 98, No. 49). Pursuant to Penal Code 5058(e), a Certificate of Compliance must be transmitted to OAL by 5-10-99 or emergency language will be repealed by operation of law on the following day.
27. Amendment refiled 2-3-99 as an emergency, including further amendment redesignating former subsections (f)(5)(I)(1)-(3) as subsections (f)(5)(I)1.-3.; operative 2-3-99 (Register 99, No. 6). Pursuant to Penal Code section 5058(e), a Certificate of Compliance must be transmitted to OAL by 7-13-99 or emergency language will be repealed by operation of law on the following day.
28. Certificate of Compliance as to 12-1-98 order transmitted to OAL 5-7-99 and filed 6-4-99 (Register 99, No. 23).
29. Certificate of Compliance as to 2-3-99 order, including new subsection (f)(5)(H), subsection relettering and amendment of newly designated subsection (f)(5)(I), transmitted to OAL 5-12-99 and filed 6-24-99 (Register 99, No. 26).
30. New subsection (a)(3)(S); subsection relettering and amendment of Note filed 9-20-99 as an emergency; operative 9-20-99 (Register 99, No. 39). Pursuant to Penal Code section 5058(e) a Certificate of Compliance must be transmitted to OAL by 2-28-2000 or emergency language will be repealed by operation of law on the following day.

31. Certificate of Compliance as to 9-20-99 order transmitted to OAL 1-14-2000 and filed 2-22-2000 (Register 2000, No. 8).
32. Amendment of subsection (a)(3)(S) filed 10-4-2002 as an emergency pursuant to a certificate of operational necessity under Penal Code section 5058.3; operative 10-4-2002 (Register 2002, No. 40). Pursuant to Penal Code section 5058.3, this filing is deemed an emergency and a Certificate of Compliance must be transmitted to OAL by 3-13-2003 or emergency language will be repealed by operation of law on the following day.
33. Certificate of Compliance as to 10-4-2002 order, including further amendment of subsection (a)(3)(S), transmitted to OAL 3-12-2003 and filed 4-8-2003 (Register 2003, No. 15).
34. Amendment of subsection (f)(5)(B), new subsection (f)(5)(C) and subsection relettering filed 1-9-2004 as an emergency; operative 1-9-2004 (Register 2004, No. 2). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 6-17-2004 or emergency language will be repealed by operation of law on the following day.
35. Amendment of subsection (f)(5)(B), new subsection (f)(5)(C) and subsection relettering refiled 6-17-2004 as an emergency; operative 6-17-2004 (Register 2004, No. 25). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-24-2004 or emergency language will be repealed by operation of law on the following day.
36. Certificate of Compliance as to 6-17-2004 order transmitted to OAL 11-16-2004 and filed 12-29-2004 (Register 2004, No. 53).
37. New subsections (f)(5)(L)-(f)(5)(L)2. and amendment of Note filed 2-23-2007 as an emergency; operative 2-23-2007 (Register 2007, No. 8). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 8-2-2007 or emergency language will be repealed by operation of law on the following day.
38. Certificate of Compliance as to 2-23-2007 order transmitted to OAL 7-27-2007 and filed 9-5-2007 (Register 2007, No. 36).
39. New subsections (f)(5)(M)-(f)(5)(M)2. filed 12-28-2007; operative 12-28-2007 pursuant to Government Code section 11343.4 (Register 2007, No. 52).
40. New subsections (f)(5)(N)-(f)(5)(N)2. filed 3-18-2008 as an emergency; operative 3-18-2008 (Register 2008, No. 12). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 8-25-2008 or emergency language will be repealed by operation of law on the following day.
41. Amendment filed 8-4-2008; operative 8-4-2008 pursuant to Government Code section 11343.4 (Register 2008, No. 32).
42. Certificate of Compliance as to 3-18-2008 order transmitted to OAL 8-18-2008 and filed 9-15-2008 (Register 2008, No. 38).
43. New subsections (f)(5)(O)-(f)(5)(P)3. filed 10-6-2009; operative 10-6-2009 pursuant to Government Code section 11343.4 (Register 2009, No. 41).

44. Editorial correction restoring placement of subsections (f)(5)(N)1.-2. (Register 2010, No. 15).
 45. Amendment of subsections (a)(3)(B) and (f)(5)(K) filed 7-19-2011; operative 8-18-2011 (Register 2011, No. 29).
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