

OFFICE OF ADMINISTRATIVE LAW

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Debra Bowen
 DEBRA BOWEN
 SECRETARY OF STATE

Date: February 25, 2011

To: Eric Eleson

From: Chapter Two Compliance Unit

Subject: **2011 OAL DETERMINATION NO. 5 (S)**
(CTU2011-0103-02)
 (Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
 Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation a memorandum dated October 26, 2010, from Mule Creek State Prison dealing with the delivery of first class mail.

On January 3, 2011, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a memorandum dated October 26, 2010, from Mule Creek State Prison dealing with the delivery of first class mail constitutes an underground regulation. This memorandum was issued by the warden at Mule Creek 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.

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), expressly establishes exemptions for the California

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.

Code section 5058, subdivision (c), expressly establishes exemptions 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 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.

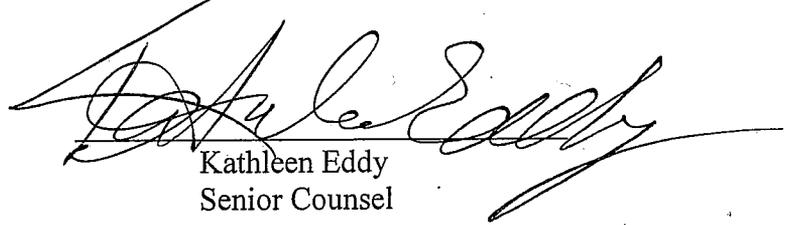
(D) The challenged rule has expired by its own terms.

(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

Memorandum

Date : October 26, 2010

To : INMATE POPULATION

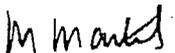
Subject : AMENDED MAILROOM PROCEDURES FOR INMATE MAIL

In order to comply with California Code of Regulations (CCR) Title 15 Section 3133 (a) (1) (4), Mule Creek State Prison (MCSP) Mailroom will no longer deliver First Class Mail that weighs over 13 ounces. Package Services are Parcel Post, Bound Printed Matter, Media Mail, and Library Mail. With the exception of parole clothes and third party special purchase health appliances, inmates shall not be allowed to receive package services directly from personal correspondents.

Packages containing parole clothes or third party special purchase health care appliances must be clearly marked with either "**Parole Clothes**" or "**Health Care Appliance**" on the outside of the package. Inmate mail that is in clear violation of CCR sections 3006, 3133 or 3135 shall be referred to staff not below the level of Correctional/Facility Captain for determination and appropriate action.

When incoming or outgoing mail/packages/publications addressed to or being sent by an inmate are withheld or disallowed, the inmate shall be informed via "CDCR 1819, Notification of Disapproval-Mail/Packages/Publications (Rev. ~~08/08~~)" ~~of the reason and allowed to choose the disposition option. Inmates will~~ have fifteen (15) days, after the Notification of Disapproval has been forwarded, to inform the mailroom staff of the choice of disposal, otherwise material will be destroyed. Choice of disposal is located on the CDCR 1819.

This amended procedure is **effective November 1, 2010** and will be incorporated into the MCSP Operational Procedure 54010 Inmate Mail.


M. MARTEL
Warden