

**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 APR -6 PM 2:13



*Edmund G. Brown, Jr.*  
 EDMUND G. BROWN, JR.  
 GOVERNOR OF THE STATE

Date: April 6, 2011

To: G. Garcia

From: Chapter Two Compliance Unit

Subject: **2011 OAL DETERMINATION NO. 6(S)**  
**(CTU2010-1223-01)**  
 (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 in Section VII of the Calipatria State Prison Inmate Orientation Handbook titled "Housekeeping/Cell Standards."

On December 23, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether the following language of Section VII of the Calipatria State Prison Inmate Orientation Handbook titled "Housekeeping/Cell Standards" constitutes an underground regulation. The rule is found in the 2006 version of the Calipatria State Prison Inmate Orientation Handbook at p. 23.<sup>1</sup> The challenged rule was issued by the warden at the Calipatria State Prison and is attached hereto as Exhibit A. The challenged rule is:

Once you are assigned to a cell, search it thoroughly. Immediately report all contraband, damaged or missing fixtures, (television cable outlets, etc.) to the Housing Unit Officer, otherwise you will be held responsible.

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,<sup>2</sup> which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).<sup>3</sup> Nothing in this

<sup>1</sup> The challenged rule apparently also appears in the 2008 version of the Calipatria State Prison Inmate Orientation Handbook as it is cited verbatim in the Petitioner's Rules Violation Report dated 11-16-2010 by a Calipatria state prison employee.

<sup>2</sup> "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.

<sup>3</sup> 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

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), 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.4<sup>th</sup> 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 Calipatria State Prison and applies solely to the inmates of the Calipatria State Prison. Inmates housed at other institutions are governed by those other institutions' criteria for housekeeping and cell standards. 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.<sup>4</sup>

---

with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

<sup>4</sup> 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.

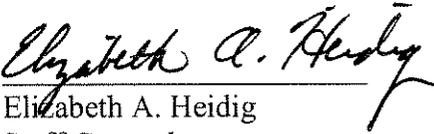
(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

(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  
Staff Counsel

Copy: Matthew Cate  
Tim Lockwood

# Exhibit A

## VII. HOUSEKEEPING/CELL STANDARDS

You are held responsible for all items found/discovered in your cell. You are also responsible for the status of your cell. You are expected to maintain your cell in a

clean and sanitary condition. You are limited to six (6) cubic feet of State and personal property. Once you are assigned to a cell, search it thoroughly. Immediately, report all contraband, damaged or missing fixtures (television cable outlets, etc.) to the Housing Unit Officer, otherwise you will be held responsible. Photographs may be displayed on the inside of your locker or on a 2"x3" wall space immediately next to the wall shelf only. Display or possession of pornography (obscene material) is not permitted. Inmates may not openly/publicly display/possess photographs, pictures, drawings or other pictorial representation of persons engaged in sexual acts, actual or simulated, masturbation, excretory functions, lewd exhibitions of the genitals that are obscene. Inmates are prohibited from possessing or receiving materials that show frontal nudity of either gender. Frontal nudity includes the display/depiction of the female breast, including the areola/nipple, display of the genital area of males or females. Prohibited materials found in the possession of an inmate during routine cell searches will be treated as contraband. Contraband items will be handled by either disposing of the item or mailing it out at the expense of the inmate. Windows, cell fronts and cell lights are not to be covered at any time.

No articles are permitted on the window ledges. Doors are not to be covered at any time. Responsibility including cost for the repair of any window discovered broken in the cell, will be of the inmate(s) occupying the cell. Lights, televisions and/or radios are to be turned off when you leave your cell. Makeshift shelving and/or cupboards are not permitted. No curtains or clotheslines are allowed. No items are to be suspended from the top bunk that obscures the view of the bottom bunk. Towels, blankets and other items of bedding are not to be used as table coverings or rugs. Your cell will be inspected a minimum of once a week.