

OFFICE OF ADMINISTRATIVE LAW

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ENDORSED - FILED
in the office of the Secretary of State
of the State of California



FEB 8 2012

2:50pm
AS.

DEBRA BOWEN
Secretary of State

Date: February 8, 2012

To: Kenneth Keel

From: Chapter Two Compliance Unit

Subject: **2012 OAL DETERMINATION NO. 1 (S)**
(CTU2011-1223-01)

(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation a memorandum titled
"Single Occupancy Cell Criteria"

On December 23, 2011, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether a memorandum titled "Single Occupancy Cell Criteria" constitutes an underground regulation. The memorandum is dated December 9, 2011, and signed by a Facility Captain at Folsom State Prison. The memorandum sets out a list of criteria to be used to determine individual eligibility for single occupancy cell housing. The memorandum 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 Folsom State Prison and applies solely to the inmates of Folsom State Prison. Inmates housed at other institutions are governed by those other institutions' criteria for single cell occupancy. 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.

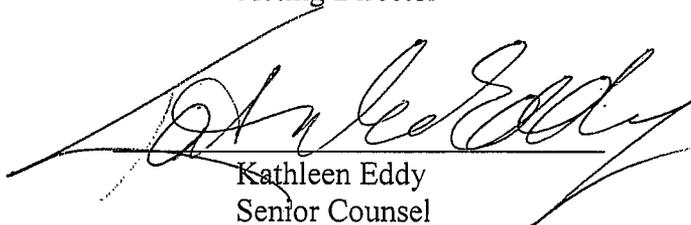
(D) The challenged rule has expired by its own terms.

(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
Rick Hill, Warden, Folsom State Prison

Exhibit A

DIVISION OF ADULT OPERATIONS

FOLSOM STATE PRISON

P.O. Box 71

Repres, CA 95671

**Memorandum**

Date: December 9, 2011

To: Staff/Inmates - Unit V

Subject: **SINGLE OCCUPANCY CELL CRITERIA**

The following criteria will be utilized to determine individual eligibility for single occupancy cell housing:

- The number of cells available for single occupancy status may vary.
- The individual must have a current job assignment or be medically unassigned.
- Individual time in Unit V may be considered.
- The individual must be disciplinary free (only one 128A allowed) during the previous ninety (90) days.
- Single Occupancy Cell status is not guaranteed. Negative inmate behavior, staff discretion, institutional needs, departmental directives or other factors may result in the loss of single occupancy cell status.

Approved By:

A handwritten signature in cursive script, appearing to read "N. Fransham", written over a horizontal line.

N. Fransham

Facility Captain