

OFFICE OF ADMINISTRATIVE LAW

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DEBRA CORNEZ
Director

Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

MEMORANDUM

TO: Secretary of State Archives

FROM: Kathleen Eddy, Senior Counsel
Office of Administrative Law *Kathleen Eddy*

DATE: October 29, 2012

RE: 2012 Office of Administrative Law Determination No. 10

On October 16, 2012, the Office of Administrative Law filed with the Secretary of State 2012 Office of Administrative Law Determination No. 10. Page 2 of 2012 Office of Administrative Law Determination No. 10 is incomplete. Attached is the correct 2012 Office of Administrative Law Determination No. 10.

Please attach this memorandum and the corrected 2012 Office of Administrative Law Determination No. 10 to the file originally filed on October 16, 2012.

Thank you for your help. If you have any questions, please call me at 916-323-7465.

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Date: October 16, 2012

To: Ricky Gray

From: Chapter Two Compliance Unit

Subject: **2012 OAL DETERMINATION NO. 10(S)**
(CTU2012-0731-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Operational Plan No. 222,
titled "Security Housing Unit (SHU)"

On September 14, 2012, the Office of Administrative Law (OAL) received the documents to complete your petition asking for a determination as to whether Operational Plan No. 222 (OP # 222), titled "Security Housing Unit (SHU)" constitutes an underground regulation. OP #222 contains guidelines and procedures for the multiple missions within the SHU. Specifically, your petition challenges section 405 titled "CDCR Form 1882B ASU/SHU Double Ceiling Review." You provided only three pages of the 13 pages of OP #222, including the pages with section 405. OP #222 was issued by California State Prison—Corcoran in October of 2011. A copy of the pages you provided 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.

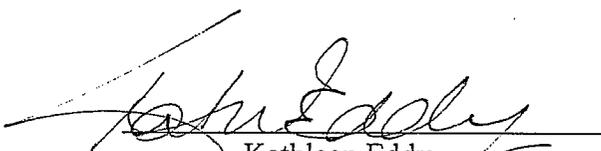
Similarly, the rule challenged by your petition was issued by California State Prison—Corcoran, and applies solely to the inmates of California State Prison--Corcoran. Therefore, the rule is a "local rule" and is exempt from compliance with the APA pursuant to Penal Code section 5058(c)(1). It is not 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
Director


Kathleen Eddy
Senior Counsel

Copy: Matthew Cate
Tim Lockwood

Exhibit A

CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION
 California State Prison - Corcoran
 Corcoran, California 93212-8800

October 2011

I. PLAN NUMBER AND TITLE

Operational Procedure No.: 222
 Operational Procedure Title: Security Housing Unit (SHU)

II. PURPOSE AND OBJECTIVES

- A. The procedure establishes specific operational guidelines for the approved program within the Security Housing Units (SHU) in Facilities IV-A and IV-B, as mandated by the California Code of Regulations (CCR), Title 15, Division 3, Chapter 1, Rules and Regulations and Departmental Operations Manual (DOM).
- B. The objective of this procedure is to establish an Operational Procedure (OP) that clearly delineates the multiple missions within the IV-A/IV-B SHU. To achieve this goal, the Mental Health Services Delivery System (MHSDDS) procedures have been interfaced into this plan to ensure the overall function of the SHU.

III. REFERENCES

CCR, Title 15 and DOM.

IV. APPROVAL AND REVIEW

This OP will be reviewed and/or revised annually during the month of October. This updated plan will be submitted to the Warden for approval.

V. RESPONSIBILITY

- A. The Warden has the overall responsibility for this OP.
- B. The Chief Deputy Warden-Operations and the Associate Warden-SHU are responsible for the administrative operation of this procedure.
- C. The Facility Captains assigned to IV-A/IV-B are responsible for full compliance within their respective facilities.

TABLE OF CONTENTS

CHAPTER / SECTION	TITLE	PAGE
Chapter 100	Unit Description	3
Section 101	Purpose of SHU	3
Chapter 200	Admission	3
Section 201	Procedure	3
Section 202	Physical Admission into SHU	3
Section 203	Inmate Placement and Cell to Cell Movement	7
Section 204	Minimum Eligible Release Date (MERD) Housing	7
Chapter 300	Classification Responsibilities	7
Section 301	Procedures to be Followed During Classification	7
Chapter 400	Records	8
Section 401	California Department of Corrections and Rehabilitation (CDCR) Form 114, Isolation Log Book	8
Section 402	CDCR 114A, Inmate Segregation Record	9
Section 403	CDCR Form 114A-1, Inmate Segregation Profile	12

Sec. 403 CDCR Form 114A-1, Inmate Segregation Profile

On the date of an inmate's arrival to CSP-COR for SHU placement, a review of the inmate's central file will be conducted by one of the Sergeants assigned to SHU and or the Watch Commander if the inmate is received during First Watch.

The reviewing supervisor will complete a CDCR 114A-1 for each inmate received and ensure every box and section is completed. The Facility Captain will make random reviews of CDCR 114A-1s to ensure compliance. These files are to be updated every 90 days by the First Watch assigned unit officer.

Sec. 404 CDCR Form 1882, Initial Housing Review

This form is to be completed by Lieutenant or Sergeant on all inmates being housed in SHU. The Facility Sergeant/Lieutenant or higher-ranking staff will review the incoming central files of all inmates transferring to the SHU to ensure proper placement and housing assignment. The completed CDCR 1882 will be distributed as indicated on the form.

Sec. 405 CDCR Form 1882B ASU/SHU Double Cell Review

- A. Unless approved for single cell assignment, or other administrative concerns are determined, an inmate in SHU is expected to share a cell with another inmate. The process for double cell housing in SHU may be initiated by staff recommendation or by inmate request. The documentation for the process shall be the CDCR 1882B. All sections of this form shall be complete prior to physically placing two inmates into a SHU cell together.
- B. Approval of double cell assignments shall be based upon ICC action, an interview with each inmate candidate, consideration of each inmate's signature affirming compatibility, and an evaluation of the inmate's safety concerns.
- C. The housing of SHU and ASU (Expired MERD) inmates together is permitted. ASU inmates may be placed on double cell status with a compatible SHU inmate.
- D. Each inmate candidate who agrees to the assignment is expected to sign the CDCR 1882B to indicate compatibility. If an inmate refuses to sign the agreement, then this shall also be documented in the designated section of the form and will be considered a refusal of the Double Cell housing assignment. All ASU/SHU inmates, upon being double cell approved by ICC, shall be required to take a cellmate. Refusal shall result in a CDCR 115, Rule Violation Report, being issued and the inmate will be charged with Title 15, CCR Section 3005 (c), for the specific act of Delaying, Obstructing a Peace Officer in the Performance of Assigned Duties/Refusal to Accept Assigned Housing, a Division "D" Offense.
- E. A staff member at the level of Correctional Officer or CCI or above shall complete Parts 1 and 2 by identifying the initiator of the request, interviewing each inmate and having the inmates sign to indicate that their placement in the same cell is a compatible assignment. The staff member performing this function shall also provide his or her printed name and signature as the staff witness.
- F. The staff witness shall forward the CDCR 1882B to a Correctional Lieutenant, or above. The approving Lieutenant or higher shall be responsible for considering each inmates case factors and deciding to approve or disapprove the proposed cell assignment.

- G. An approving authority may determine there is no information available to indicate that the inmates are incompatible, but there are other circumstances, which lead the evaluator to believe that approving the assignment would be contrary to legitimate penological interests or may threaten institutional safety and security. In these cases this information will be documented on a CDCR 128B and forwarded to the respective Facility Captain prior to the end of the shift.
- H. When evaluating compatibility, the approving authority shall consider each inmates background, and make a discretionary decision based on the following:
 - Enemy and victimization history
 - Prison gang or disruptive group history
 - Criminal influence demonstrated over other inmates
 - Vulnerability of the inmate due to medical or mental conditions and treatments
 - Prior housing due to safety concerns
 - Reason(s) for SHU placement
 - Age and social/ethnic background

CHAPTER 500 - SECURITY

Sec. 501 Searches

Cell Searches/Inspection of SHU

A. Prior to an inmate's placement in a cell or departure from the unit, a search of the cell will be conducted. During all cell searches, the universal precaution policy will be followed. When a cell move occurs, both inmates entering and exiting the cells will undergo an unclothed body search, and a search of all property. All cell searches will be recorded in the building search log and the inmates CDCR 114A, in addition the Exhibit "B" will be updated to reflect any damage to the cell caused by the inmate (i.e., cutting, caulking).

Cell Light	Cell Light Switch
Cell Windows	Cell Door/Food Port
Cell Sink	Cell Toilet
Mattresses	Pillows
All Walls and Floors	

B. Rubber Mallet Security Checks

1. Rubber Mallets assigned to the housing units will be utilized during cell searches to insure the integrity of the physical structure and operation aspects of all items within the cell and the outer structure of the building.

The inspection will include:

Cell Lights	Cell Door/Food Port
Cell Windows	Cell Toilet Structural Integrity
Cell Sink Integrity	All Walls and Floors

2. The mallet utilized for the interior of the cell will be stored in each facility control booth. The mallets utilized for the exterior of the building windows will be stored in Complex Control when not in use.

ADMINISTRATIVE SEGREGATION UNIT/SECURITY HOUSING UNIT
DOUBLE CELL REVIEW

Name of Inmate (Last, First, MI)	CDC Number	Housing
Name of Inmate (Last, First, MI)	CDC Number	Housing

The above-listed inmates are being processed for occupancy of the same cell.

1. The request is being initiated per:

Administrative assignment by staff.

Request from one or both inmates to be assigned to the same cell.

2. During the interview with:

Staff Witness Printed Name	Signature
----------------------------	-----------

Both inmates stated agreement to the cell assignment and signed below to indicate compatibility.

Signature of Inmate _____ Signature of Inmate _____

Both inmates stated agreement, but one or both refused to sign the acknowledgment of compatibility.

One or both inmates refused the cell assignment.

3. After a review of the inmates' statements and the case factors in each inmate's C-file, it has been determined that:

There is no information available to indicate that the inmates are incompatible.

There is information which leads to the belief that the assignment of these inmates to the same cell is contrary to legitimate penological interests, or may threaten institution security or the safety of others.

4. Based on this evaluation, the double cell occupancy request is: APPROVED DISAPPROVED

APPROVING AUTHORITY
Signature: _____
Printed Name: _____
Title: _____

DATE: _____
