

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

2012 MAY -2 PM 2: 14



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

Date: May 2, 2012

To: Kenneth Trask

From: Chapter Two Compliance Unit

Subject: **2012 OAL DETERMINATION NO. 5 (S)**
(CTU2012-0308-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Policy 11/025 prohibiting the wearing of kuffi caps and yarmulkes during specified activities at North Kern State Prison

On March 8, 2012, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether Policy 11/025, which prohibits the wearing of kuffi caps and yarmulkes during specified activities at North Kern State Prison, constitutes an underground regulation. Policy 11/025 was issued by the warden at North Kern 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.

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, Policy 11/025, was issued by North Kern State Prison and applies solely to the inmates of North Kern State Prison. Therefore, Policy 11/025 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.

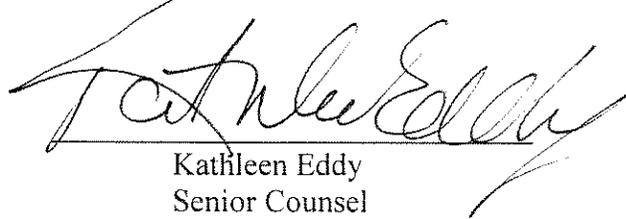
(D) The challenged rule has expired by its own terms.

(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

State of California

Department of Corrections and Rehabilitation

Memorandum

EXHIBIT
A

Date: August 17, 2011

Policy 11/025

To: All Staff
North Kern State Prison

Subject: ADDENDUM TO DEPARTMENT OPERATIONS MANUAL (DOM) SUPPLEMENT
101060.3 RELIGIOUS PROGRAMS (ISLAMIC AND JEWISH RELIGIOUS
ARTIFACTS)

Effective immediately, the following religious artifacts are not authorized to be worn during work and/or leisure activities by general population and reception center inmates assigned to North Kern State Prison. The items are as follows:

- Islamic (Kuffi Caps)
- Judaism (Yarmulkes)

The head gear may be worn in the inmate's cell or during the religious service of choice in the chapel.

This policy addendum will remain in effect until incorporated into the next revision of DOM Supplement 101060.3 Religious Programs. If you have any questions regarding this documentation please contact the Community Resource Manager D. McDaniel at extension 5800.


MAURICE JUNIOUS
Warden (A)
North Kern State Prison