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ENDORSED FILED
IN THE OFFICE OF

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Edmund G. Brown, Jr.
EDMUND G. BROWN, JR.
GOVERNOR OF CALIFORNIA

Date: May 2, 2012

To: D. Whitley

From: Chapter Two Compliance Unit

Subject: **2012 OAL DETERMINATION NO. 6 (S)**
(CTU2012-0313-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation memorandum titled "Proposed Changes to Programming Due to AB 109 Staff Reductions" dated December 29, 2012, issued by California State Prison, Solano

On March 13, 2012, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether a memorandum titled "Proposed Changes to Programming Due to AB 109 Staff Reductions" and dated December 29, 2012, constitutes an underground regulation. The memorandum was issued by the warden at California State Prison, Solano, 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 was issued by California State Prison, Solano, and applies solely to the inmates of California State Prison, Solano. 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.

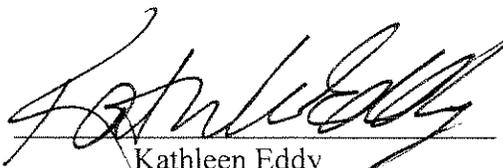
(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

(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

Memorandum

Date: December 29, 2011

To: ALL CONCERNED

Subject: PROPOSED CHANGES TO PROGRAMMING DUE TO AB 109 STAFF REDUCTIONS

Based on the proposed changes in staffing as a result of AB109, the following information identifies proposed and anticipated plans and changes anticipated to take effect on January 2, 2012, at the California State Prison - Solano. The information is separated for each Division. The purpose of this document is to be utilized for information sharing, so all staff can be aware of the proposed changes.

One institution wide change that will impact all Divisions will be a change in the 1700 hour institutional count. Count time will move to 1630 hours. This will resolve several issues which have been identified through recent discussions with staff and inmates.

LEVEL II FACILITY C & D, 2nd Watch

STAFFING CHANGES: One S&E post is scheduled to be deleted and two posts transitioned to rover positions on each Fac C & D. Level II has already attained the reduced population of approximately 352 inmates. The workload will be reduced; fewer inmates to count, account for, and monitor. We would also expect to see a reduction in RVR's and appeals.

YARD SCHEDULE: Yard schedule has been modified to reflect 3 buildings rotating yard at one time. This schedule is subject to increase or decrease depending on yard participation.

- Due to the suspension of the 3/W yard program, the previously scheduled afternoon yard break has been reduced to extend yard time during 2/W.

2/W DAILY TIMELINE (APPROXIMATE)

0600 All 2/W staff on duty. Equipment accountability
0605 Feed morning meal (all staff) early workers/diabetics release
0630 Medication call by bldg. begins (approx)
0730 Law Library opens (TH/F/SA)
0830 (upon completion of morning meal) yard opens with a minimum of two officers to monitor
0830 Recreation Cart & Band Equipment inventory and issuing begins
0855-0905 Building unlock
0955-1005 Building unlock
1000-1200 Monitor release of yard for "C" status inmates
1000-1015 One officer to check inmates through the quad for "C" side unlock
1055-1105 Building unlock
1100 Law Library Closed (TH/F/SA)
1100-1115 One officer to check inmates through the quad for "C" side unlock
1130 Law Library Opens (M/W/F)
1200-1215 One officer to quad for "C" side unlock
1230-1245 One officer to check inmates through the quad for "C" side unlock
1330 Yard recall. Yard closed for the day (may change as evaluated). Law Library Opens T/W

FACILITY C AND D, 3rd Watch

STAFFING CHANGES: Two S&E posts are scheduled to be deleted and one post is being transitioned to a rover position on each Fac C & D.

YARD SCHEDULE: Yard program is suspended due to lack of Response from Level III. The alarm response will be continually re-evaluated based on staffing changes and response. After all the staffing changes are made and the population levels stabilize, modifications to the yard program may be considered.

- In building programs will occur primarily during 3/W, and may also be scheduled during 2/W, however the focus will be to provide as many activities as possible to compensate for yard closure on 3/W. In-Building Self Help/Religious/Videos and other approved programs will be available via approved and posted schedules and via the officer's discretion. This will allow for inmates to have access to positive information and reduce stress in the buildings. Inmates are NOT permitted to attend self help program in a building other than their housing unit unless they are presenters, in which case they will have verification and the schedule will reflect who the presenter are.
- Level II will commence full dayroom/phone activities simultaneously with the scheduled self help program. Allowing dayroom activities does not increase the number of inmates in the building.

3/W DAILY TIMELINE (APPROXIMATE)

1400-1420 All 3/W staff on duty and all Equipment is accounted for
1600 Recall from other activities (i.e., self help, religion, etc.) to prepare for count
1630 Begin Count
1700 Officer relieves front entrance/key control, for a lunch 30 min lunch break (until 1730)
1645 Count clears
1655 Chow begins
1700 Medication Distribution begins - call for Diabetic
1700 Medication Distribution begins - call for regular medication
1900 Chow complete
1900 In-Building Self Help commences according to schedule
1915 Evening activities begin
1945 Medication complete
2000 PM Medication Distribution begins
2100 Recall to Prepare for Count

BUNK VACANCIES: In an effort to strategically coordinate the anticipated bed vacancies, level II supervisors solicited input from line staff and a plan was initiated to identify bunks which will remain vacant. The 6 bunks in all level II E Buildings directly behind the officer's podium and the top bunks in the center of the building will remain vacant to allow better visibility in the back of the building. It is expected this will increase safety by not housing inmates behind the officer's podium and allow for better visibility in the back of the building. Level II 270 buildings have vacated upper bunks only in dorms 1 and 12. The back dorms are difficult for staff to monitor because it is the furthest part of the buildings, building officers will determine who will be housed in those more difficult to monitor dorms. Additionally, to allow a designated space for In Building Self Help programs, dorm 6 in each 270 building has been completely vacated. This space will continue to be used by the inmate population; however it will provide a dedicated place to hold In Building Self Help programs, dedicated TV/VCR and supplies used for the program and allow for direct supervision by building staff. Because the 3/W yard program was eliminated, dayroom use will be increased and having this dedicated space will not take away from dayroom use.

CLOTHING DISTRIBUTION, MEDICATION, VISITING. Will remain unchanged.

LIBRARY: Will remain unchanged.

RELIGIOUS SERVICES: Unchanged-Continued re-evaluation of religious program.

EDUCATION: Will remain unchanged. The inmates will be released on 2/W and report to their assigned class on C Side or Education A. There were no changes to staffing on C Side.

CANTEEN: The canteen will fill all orders in advance by pre-order which will expedite processing and allow the inmates more yard time. Inmates will submit them to facility custody staff during the morning meal. In the event a unit is not scheduled for yard (or during 3/W hours), the canteen staff will communicate with facility staff who will release inmates in small/controlled numbers to the window to sign for and receive their canteen. Refer to the Business Services Division for additional information.

FEEDING PROCESS:

One dining hall per yard will be staffed and operational. Process changed approximately 6 weeks ago and is proving to be efficient and successful.

LEVEL III FACILITY A & B, 2nd Watch

As a result of AB 109 California State Prison-Solano (SOL) is tasked with implementing a schedule to accommodate a third watch program for inmates on Level III to take affect on or about January 2, 2011.

Breakfast would begin at approximately 0615 hours utilizing one dining hall. The feeding process would remain unchanged and continue as it is today. This process will repeat Monday through Sunday with the exception of designated holidays and special occasion meals.

DAYTIME PROGRAM: Upon the completion of the morning meal and medication, day time program would commence at approximately 0830 hours. This would consist of all A1A unassigned and A2B inmates on a rotational basis (one tier every other day) on Monday through Friday and on occasions when A1A assigned inmates are off due to program/assignment closure. Each level III facility would commence yard program until approximately 1145 hours, allowing all close custody inmates to return to their designated housing unit for count. After the twelve o'clock count has cleared all inmates that returned for close custody count would be allowed the opportunity to return to their scheduled programming.

The housing units would run yard and inside programs by tier on a rotational basis (one tier would have inside activities every other day). Inside activities would consist of phones, showers and day room. For the tiers with outside activities: yard, canteen (bag and go), laundry exchange, and self-help/IL-tag programs (to be determined) would be available.

The canteen process is described in the Business Services Division.

All A1A unassigned and A2B inmates would have shower access during second watch from 0830 to the 1330 Monday through Friday prior yard recall. At approximately 1330 hours both facilities would announce yard re-call and secure each facility prior to shift change.

LEVEL III ON WEEKENDS AND HOLIDAYS: All A1A assigned inmates would participate in outside activities. All remaining A2B inmates would participate in indoor activities (i.e. day room and phones) on a rotational basis.

Visiting program would be unchanged and continue as it currently operates. Religious, Self-Help and IL-Tag programs TBD, would operate on a rotational basis in accordance with the (one tier on second watch Saturday and the other tier second watch Sunday) pending availability of programs. The yard recall would be consistent with the scheduled time already in place for the weekends and holidays.

LEVEL III FACILITY A & B, 3rd Watch

At approximately 1530 hours all A1A assigned inmate would begin returning to their assigned housing units. After each building is secure, afternoon showers would begin with the release of about 12 inmates at a time until approximately 1615 hours. All inmates would return to their assigned cells in preparation for the 1630 hour institution count.

After the 1700 hour institutional count has cleared, the evening meal process would begin. The feeding process would remain unchanged and continue as it is today. This process would continue Monday through Sunday with the exception of designated holidays and special occasion meals.

EVENING PROGRAM: Upon the completion of the evening meal and medication, evening program would commence at approximately 1830 hours. This would consist of all inmates being allowed to continue the shower program and have access to the telephones, on a rotational basis (one tier every other day) Monday through Friday. At 1950 hours all close custody inmates would return to their designated cells for the close custody count and remain in the housing units for the evening. Evening program will close at 2145 hours.

The number of inmate participants for each Self-Help, Law Library, and IL-Tag program will be determined based upon frequency, duration and availability of that individual program.

Religious, Self-Help, and IL-Tag programs TBD, would operate on a rotational basis in accordance with the (one tier on second watch Saturday and the other tier second watch Sunday) pending availability of programs. The yard recall would be consistent with the scheduled time already in place for the weekends and holidays

CENTRAL SERVICES

Pursuant to the position reductions associated with AB-109, several Central Services posts, and any associated relief, will be deleted as of January 2, 2012. Adjustments will be made to daily operations in order to facilitate this reduction in staffing and are listed below:

- **Post 151402-Central Services S&E (First Watch):** Duties performed by this post will be absorbed by the other two first watch Central Services S&E Officers.
- **Post 251538-Central Services SAP B:** Only one officer will remain assigned to SAP, and hours will be adjusted to 0730-1530, in order for the remaining officer to be present during SAP programs. If additional assistance is needed outside those hours, Central Services S&Es will assist as directed by the Watch Commander.

- **Post 251535-PIA Laundry Officer:** Hours will be adjusted for the remaining PIA Laundry Officers to reflect 0600-1400 and 1000-1800, Monday through Friday with SSH RDOs, in order for there to be at least one officer present at all times in the laundry.
- **Post 251433-R&R Officer:** Duties performed by this post will be absorbed by the remaining R&R staff.
- **Post 251462-Recycling Officer (RASP):** Duties performed by this post will be assumed by the Materials and Store Supervisor II (M&SSII) currently assigned to RASP. Any custodial duties will be performed by the Out-Grounds Officer and overall custodial supervision will be the responsibility of the Voc/Industries Sergeant.

BUSINESS SERVICES

The following outlines the Business Services programs to assist staff in understanding the impacts to various areas of the institution.

Canteen: Hours of operation will remain the same as current schedule; however, the canteen window will not be open for inmates to walk up and make selections. All orders will be filled on the pre-order system as described below.

- Inmates will complete their canteen order forms and submit them to facility custody staff during the morning meal.
- Upon the completion of the meal, these orders will be given to canteen staff who will pull the orders and stage them at the window.
- Once the orders are ready, the canteen staff will advise the facility staff which orders are ready to be picked up.
- Facility staff will release those inmates in small/controlled numbers to the window to sign for and receive their canteen.

CLOTHING: Laundry bag collection and return to the housing units will be unchanged from current procedure. Exchange of unserviceable and missing clothing will be done at the clothing windows during yard time similar to current practices.

WAREHOUSE: No change to current procedures

CULINARY - DINING HALLS: One dining hall per yard will be used. This is the same as the current process on all facilities. There will be only one dining hall officer per level instead of the current one officer per facility. This officer will be responsible for counts/outcounts for all inmates assigned to that level instead of only the inmates assigned to one facility.

CULINARY - LEVEL III BREEZEWAY: The third watch Level III Breezeway position has been deleted. The main kitchen officers will have to control movement in and out of the breezeway for all culinary activities. The Health Care Access staff will have to control movement in and out of the breezeway for all medical actives.

HEALTH CARE ACCESS

No changes in program for Health Care Access.

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No changes in program for Health Care Access.

Questions may be directed to the Division Head.



GARY SWARTHOUT

Warden

California State Prison - Solano