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Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: September 3, 2013
To: Nicholas Wilds
From: Chapter Two Compliance Unit
Subject: **2013 OAL DETERMINATION NO. 5 (S)**
(CTU2013-0711-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation page 8 titled "Property Limits," of the California Correctional Institution (CCI) Orientation Manual.

On July 11, 2013, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether page 8 titled "Property Limits," of the California Correctional Institution (CCI) Orientation Manual, constitutes an underground regulation. The rule appears to be in the Orientation Manual of the California Correctional Institution in Tehachapi, California (Page 8 of the manual is the only page provided). No title or author contribution was provided except for the designation on the upper left hand corner that states: "CCI Orientation Manual Facilities A and B SHU/ASU"). Page 8 of the CCI Orientation Manual, titled "Property Limits," appears to have been issued by the warden of CCI. A copy 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 CCI and applies solely to the inmates of the CCI. Inmates housed at other institutions are governed by those other institutions' criteria for Property Limits. 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.

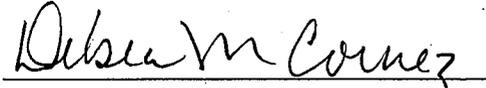
(B) The challenged rule is contained in a California statute.

(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


Elizabeth A. Heidig
Senior Counsel

Copy: Dr. Jeffrey Beard
Tim Lockwood

Exhibit A

ITEM	AMOUNT	SHU	ASU
Jumpsuit	2		1
Socks	3 pair (Gray or white, solid color only)		1
Underwear	3		1
Undershirts	3		1
State Soft Sole Shoes	1 pair		1
Towel	2		
Orthopedic Shoes*	1 pair (upon order of physician)		1
Mattress	1		
Sheets	2		2
Blankets	2		2
Watch Cap (Beanie)	1 only (State or Personal)		1
Jacket	1		1

C. PROPERTY LIMITS:

1. All television and radios coming from the vendors and other institutions shall have their speakers removed at Receiving and Release/Property Room prior to issuance. The appliance must have an earphone jack provided by the manufacturer. The inmate shall sign the modification form authorizing the removal of the speakers. This modification form absolves this institution and staff from all liabilities surrounding the alteration of the appliance (speaker removal) and disposal of excess parts. If the inmate should refuse to sign the modification form, the appliance will be mailed out of the institution at the inmate's expense. The inmate will have 30 days to provide the funds necessary to accomplish this task. After the 30 days, the appliance will be donated or disposed of per institutional procedures.
2. All televisions and radios will have the screws and other areas filed (sealed) and the inmate's name, CDCR number, and the serial number inscribed on the appliance for identification purposes.
3. The inmate is aware that removing the speakers may void the manufacturer's warranty and the vendors will not accept the return of items that have been inscribed. The removal of the speakers is a permanent modification (CCI will not replace the speakers when the inmate leaves CCI).
4. Any new orders of appliances will meet the clear case (see through) technology. Inmates who currently possess appliances that are not clear technology will be able to retain them as long as the item is serviceable and was/is modified to meet the institutional procedures. All appliances from other institutions will be tested and searched (opened and resealed) by the Property Officers to ensure that the appliance is operational and free of contraband.

APPLIANCES (SHU ONLY) (EITHER A TELEVISION OR A RADIO)	
Television	Quantity: One (1) Description: 13" or less. No remote controls or dials must be manufactured with earplug jack. Antenna must be removed. Value of TV not to exceed \$300. No AC adapter. New orders must be of clear plastic manufacture.
Radio	Quantity: One (1) Description: Electrical only. Must have AC power cord. Portable AM/FM with built in antenna and ear plug jack. Value of radio not to exceed \$75. New orders must be of clear plastic manufacture.
Television Cable	Quantity: One (1) each
Radio/TV Earbuds or Headphones	Quantity: One (1) each