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Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: January 21, 2014

To: Alfonso Garcia

From: Chapter Two Compliance Unit

Subject: **2014 OAL DETERMINATION NO. 1(S)**
(CTU2013-1202-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Operations Procedure No. 257; Debriefing Program/Phase I and Phase II

On December 2, 2013, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether the rules contained in Operations Procedure No. 257, Debriefing Program/Phase I and Phase II (OP 257), dated March 2013, constitute underground regulations. In particular, you were concerned with the double ceiling rule on page three. OP 257 was issued by the warden at the California State Prison-Corcoran and is attached hereto as Exhibit A. OP 257 is part of a Debriefing Program administered by California State Prison-Corcoran pursuant to a Pilot Program for Security Threat Group Identification, Prevention, and Management. The Pilot Program was duly adopted and filed with the Secretary of State on October 18, 2012. It is found in the California Code of Regulations at title 15, section 3999.13.

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):

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 rules challenged by your petition were issued by California State Prison-Corcoran and apply solely to the inmates of the California State Prison-Corcoran in implementation of the Pilot Program. It is the local implementation of a duly adopted Pilot Program. Inmates housed at other institutions are governed by those other institutions' implementation criteria. 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

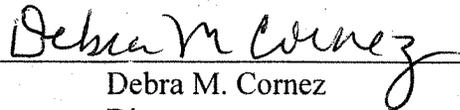
³ The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

- (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.]**

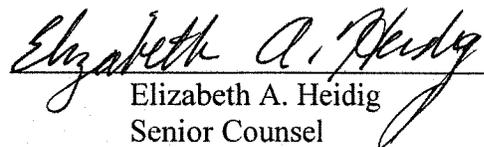
Also, please note that California Code of Regulations, title 15, section 3269, directly addresses the issue of "double celling" and Inmate Housing Assignments. It states in part:

Inmates shall accept Inmate Housing Assignments (IHAs) as directed by staff. It is the expectation that all inmates double cell, whether being housed in a Reception Center, General Population (GP), an Administrative Segregation Unit (ASU), a Security Housing Unit (SHU), or specialty housing unit. If staff determines an inmate is suitable for double celling, based on the criteria as set forth in this section, the inmate shall accept the housing assignment or be subject to disciplinary action for refusing. IHAs shall be made on the basis of available documentation and individual case factors. Inmates are not entitled to single cell assignment, housing location of choice, or to a cellmate of their choice.

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

CALIFORNIA DEPARTMENT OF CORRECTIONS & REHABILITATION
CALIFORNIA STATE PRISON CORCORAN
CORCORAN, CALIFORNIA

March 2013

I. PLAN NUMBER AND TITLE:

Operations Procedure Number: 257
Operations Procedure Title: Debriefing Program / Phase I and Phase II

II. PURPOSE AND OBJECTIVE:

- A. The two phases of the "Debriefing" program were designed to review and monitor the sincerity of each individual and ensure the inmate participating in the program is not a threat to staff or any other inmates and has truly left all Security Threat Group (STG) criminal activity behind. We cannot eliminate a possible threat that goes undetected by staff; however, this program helps minimize the chance of these threats being carried out.
- B. Phase I of the program, "Debriefing", is designed to obtain sufficient verifiable information from the subject, which adversely impacts the STG. In addition, a successful debriefing provides staff with information about the STG's structure, activities and affiliates.
- C. Phase II of the program, is handled by the Transitional Housing Unit (THU) at Kern Valley State Prison (KVSP). The THU allows for a period of staff observation and a time for the inmate to adjust back into a group yard setting. This observation/adjustment helps to ensure an inmate will be able to program with other inmates of all races and ethnic groups as well as other disassociated STG members/associates in a general population setting.

III. REFERENCES:

- A. California Code of Regulations, Title 15, Sections 3378(c)(2) and 3378(c)(5).
- B. California Code of Regulations, Title 15, Section 3378.1 and 3378.2.
- C. California Department of Corrections Operation Manual (DOM), Confidential Sections 55070.20 through 55070.20.8.3.

IV. APPROVAL AND REVIEW:

- A. The Warden has overall responsibility for the operation of this procedure.
- B. The Chief Deputy Warden, Operations has the overall functional responsibility for this procedure.
- C. The Associate Warden, Security Housing Units (SHU) is responsible for monitoring and implementation of this procedure.
- D. The Facility Captain of Facility IV-A is responsible for overseeing the application and adherence to the mandates of this procedure.

V. METHODS:

- A. There are two phases in the debriefing program. Phase I is the interview and intelligence gathering phase where the STG Investigator/Lieutenant attempts to verify whether an inmate has dropped out of a gang and/or is sincere in his desire to defect from STG membership and/or association.
- B. Phase II is the observation phase where inmates must participate in the THU for a minimum six month period.

VI. PHASE I, INTERVIEW PROCESS:

- A. An inmate validated as a member or associate of a STG shall be afforded the opportunity to disassociate/debrief from that STG per his own request. Although staff may ask an inmate if he wishes to debrief, CDCR staff shall not solicit an inmate to participate, nor shall they force an inmate to self-incriminate to participate in the program.
- B. This phase is designed to obtain sufficient verifiable information from the subject, which has an adverse impact on the STG. In addition, a successful debriefing provides staff with information about the STG's structure, activities and affiliates. Inmates who indicate a desire to disassociate from a STG shall be given specific instructions by the STG Investigator/Lieutenant on how to prepare an autobiography. This autobiography is detailing their initiation into the gang and all subsequent activities with the gang. The STG Investigator/Lieutenant shall review the inmate's autobiography and conduct an interview with the inmate to assess the inmate's sincerity to debrief/dropout. Once the autobiography is reviewed and accepted, the STG Investigator/Lieutenant will produce a CDCR 128B noting the autobiography is acceptable. This CDCR 128B is required prior to the inmate's placement into the dropout/debrief buildings in Facility 4A. The STG Investigator/Lieutenant or Office of Correctional Safety (OCS) Gang Intelligence Operations shall document the information from the autobiography in a "Debrief Report" and forward it to OCS for final approval or rejection. Once approved, the OCS shall generate a CDCR 128B, Debrief Acceptance Chrono. The facility housing this inmate shall schedule the inmate for a program review with the Institutional Classification Committee (ICC) to confirm receipt of the CDCR 128B. The ICC shall subsequently refer the case to a Classification Staff Representative (CSR) for endorsement to Phase II.

VII. PHASE II, TRANSITIONAL HOUSING UNIT:

- A. Validated STG inmates that have completed Phase I of the debriefing program shall be subject to a period of observation in a segregated housing setting with other inmates who have also completed Phase I. The period of observation shall not be less than six months and not greater than 12 months. The THU is conducted at Kern Valley State Prison (KVSP).

- B. Upon the institutions receipt of a CDCR 128B, Debrief Review and Acceptance chrono from OCS, the inmate shall be brought before ICC for referral to CSR for endorsement to transfer to KVSP to participate in the THU.
- C. The CDCR 128G should indicate wording similar to "S" will be required to participate in the 6 month Transitional Housing Unit (THU) program at KVSP upon "S's" completion of Phase 1 and receipt of an acceptance chrono from OCS and CSR endorsement.
 - 1. **Double Cell:**
 - a) All inmates participating in Phase I and Phase II of the Debrief Program should be double celled in accordance with departmental procedures. Being double celled is a required part of the Debrief Program unless precluded by ICC.
 - b) It is the inmate's responsibility to work with staff and to find and identify a compatible cell partner. This should occur immediately upon conclusion of ICC approving his double cell status.
 - c) Once the inmate has identified a potential cell partner, he shall notify unit staff, who shall facilitate a meeting between the prospective cell partners via separate rotunda holding cells. If both inmates indicate compatibility, both shall sign a CDCR 1882B, Double Cell Review, prior to housing together.
 - d) Should the inmate fail to identify a potential cell partner within the first week, the unit Sergeant shall conduct an interview with the inmate and assess the inmate's sincerity in his attempts to locate a cell partner.
 - e) The Sergeant shall complete a CDCR 128B, General Chrono, documenting his findings of the inmate's efforts and the provision of one more week during which the inmate must acquire a cell partner or progressive discipline shall be taken; barring any legitimate reason for failure to double cell.
 - f) If the inmate refuses to double cell, unit staff shall issue a direct order to the inmate. The inmate's refusal to comply with the order shall result in the issuance of a CDCR 115, Rules Violation Report.

VIII. **INMATE SAFETY CONCERNS**

- A. The unit Sergeant shall interview any inmate expressing concerns for his safety. Should the inmate's concerns not be resolved during the interview, the Sergeant shall notify the Facility Lieutenant and or Captain. If warranted, the Sergeant shall place the inmate on single cell status pending further investigation.

The Sergeant shall document on a CDCR 128B the reason the inmate is single cell and forward a copy to the respective CCI/CCII. The unit Sergeant shall address/resolve all safety concern/issues and submit a closure document within ten days of the initial interview.

- B. At the conclusion of the ten days, if the inmate's concerns are validated and an enemy situation does exist, the inmate(s) shall be reassigned to an alternate Phase I unit. If this is not feasible in resolving the situation, the inmate(s) shall be reviewed by the ICC for program review.

IX. INMATE MOVEMENT

- A. All inmates will be physically escorted when they exit their assigned cells.
- B. Inmates released for yard or out of unit escort shall be subject to an unclothed search, prior to leaving the unit and/or entering the yard.
- C. When returning an inmate to his cell, all unit staff shall ensure the inmate is not allowed access and/or entry into any cell other than his assigned cell.

Original Signed By/

Connie Gipson
Warden (A)
California State Prison-Corcoran