

OFFICE OF ADMINISTRATIVE LAW

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Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: February 3, 2014
To: Scott Cook
From: Chapter Two Compliance Unit
Subject: **2014 OAL DETERMINATION NO. 2 (S)**
(CTU2013-0930-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Pelican Bay State Prison
Operational Procedure No. 228, titled the Hunger Strike Procedure

On December 23, 2013, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether the Pelican Bay State Prison Hunger Strike Procedure constitutes an underground regulation. The rule is in Operational Procedure No. 228, titled Hunger Strike Procedure, dated June 2013 (Operational Procedure No. 228). This Operational Procedure No. 228 was issued by the warden at the Pelican Bay 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):

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.

...

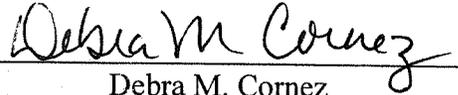
The Donovan policy is not a rule of general application. It applies solely to Donovan and, under Penal Code section 5058, subdivision (c)(1), is not subject to APA requirements.

Similarly, the rule challenged by your petition was issued by Pelican Bay State Prison and applies solely to the inmates of Pelican Bay State Prison. Inmates housed at other institutions are governed by those other institutions' procedures for handling hunger strikes. 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

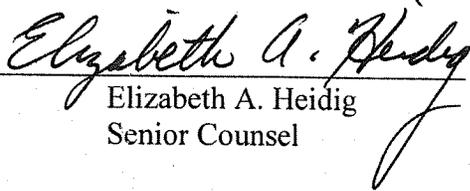
³ The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

- (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

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION
Pelican Bay State Prison
Crescent City, California 95532

June 2013

I. PLAN NUMBER AND TITLE:

Operational Procedure No. 228
Operational Procedure Title: Hunger Strike Procedure

II. PURPOSE AND OBJECTIVES:

A. Purpose

The purpose of this policy is to delineate the roles and responsibilities of custody staff during an individual or mass organized inmate hunger strike.

B. Objectives

To establish a framework/guideline for Pelican Bay State Prison staff to understand and ensure uniform handling of inmates participating in an individual hunger strike or mass organized hunger strike.

III. REFERENCES:

California Penal Code, Sections 5054 and 5058; Department Operations Manual, Section 55010; California Code of Regulations (CCR), Title 15, Sections 3335, 3341.5, and 3351; and Inmate Hunger Strike, Volume 4, Chapter 22, Health Care Services.

IV. APPROVAL AND REVIEW:

This plan will be reviewed and updated annually, in June, by the Correctional Administrator, Central Services; reviewed by the Chief Deputy Administrator; and approved by the Warden.

Last revised: September 2012

V. RESPONSIBILITY:

The Warden has the overall responsibility for the implementation of this procedure.

VI. DEFINITIONS:

Hunger Strike

A hunger strike is a method of non-violent resistance or pressure in which inmates refuse state-issued meals and/or fluids for religious, political, mental health, or other grievance related reasons, usually with the objective to achieve a specific goal.

Mass Organized Hunger Strike

Ten or more inmates assigned to an area united with a common goal or set of demands which disrupts institution operations and requires statewide or institutional mobilization to effectively and safely evaluate and manage the inmates' needs.

Hunger Strike Participant

An inmate who is identified by the California Department of Corrections and Rehabilitation (CDCR) custody staff as participating in an individual or mass organized hunger strike.

VII. PROCEDURES:

Staff who become aware of an inmate or group of inmates on a hunger strike shall do the following:

A. Identify a Hunger Strike Participant

When an inmate(s) refuses nine or more consecutive state issued meals, they shall be identified as a participant of a hunger strike.

B. Report and Document Requirements

Although not recognized as a hunger strike participant until they meet the above definition (*Identify a Hunger Strike Participant*), custody staff that become aware of an inmate who appears to be on a hunger strike, or if the inmate or inmate group declares a hunger strike, shall do the following:

- Immediately notify the respective facility/unit Sergeant and/or Lieutenant where the inmate is housed.
- Facility/unit Sergeant or Lieutenant shall immediately notify the respective Captain and Correctional Administrator.
- The Watch Commander shall notify the Administrative Officer of the Day (AOD) if the hunger strike initiates during non-business hours. The Watch Commander shall document the contact on an AOD Report in addition to recording the hunger strike on the Daily Activity Report.
- The Warden shall inform the Associate Director of his/her respective mission, immediately, but no later than 72 hours, of all hunger strikes.
- Refer the inmate to Mental Health services for a mental health assessment.

- Interview the participating inmate(s) to determine, if possible, the following information:
 - Reason for the hunger strike
 - When the inmate(s) began the hunger strike
 - What is being refused specifically: food and/or fluids
- Document the information in addition to the date and time of discovery by staff, and the date and time of last meal on a CDCR Form 128-B, General Chrono (individual) or a CDCR Form 837, Crime/Incident Report (mass organized).
- If the inmates are participating in a mass organized hunger strike, immediately notify the inmate's facility/yard/unit clinic Registered Nurse (RN) or medical staff designee by providing a Mass Hunger Strike List of participants. The Mass Hunger Strike List of participants shall be updated daily.
- If the inmate is a participant in **an individual** hunger strike, document on a CDCR Form 128-B. Immediately notify the inmate's facility/yard/unit clinic RN or medical staff designee by providing a copy of the completed CDCR Form 128-B. A copy of the CDCR Form 128-B shall be filed in the Unit Health Record (UHR) and Central File.
- For inmates housed in the Security Housing Unit or Administrative Segregation Unit, document the refusal of each meal on the CDCR Form 114-A, Inmate Segregation Record. For inmates housed in the Psychiatric Services, document the refusal of each meal on the Program Activity Report.
- Two calendar days after the inmate has been identified as a hunger strike participant, the facility/unit Sergeant or Lieutenant shall interview the participating inmate(s) in an attempt to resolve the hunger strike issues and document the information on a CDCR Form 128-B. A copy of the CDCR Form 128-B shall be sent to facility/unit manager and the inmate's facility/yard/unit clinic RN or medical staff designee. A copy shall be filed in the UHR, Central File, and Warden's office.
- Five business days after the inmate has been identified as a hunger strike participant, and every five business days thereafter, the facility/unit Captain or designee shall interview the inmate(s) in an attempt to resolve the hunger strike issues and document the information on a CDCR Form 128-B until the conclusion of the hunger strike. A copy of the CDCR Form 128-B shall be sent to the inmate's facility/yard/unit clinic RN or medical staff designee. A copy of the CDCR Form 128-B shall be filed in the UHR, Central File, and Warden's office.

- Ensure disciplinary action is taken against participating inmates and those inmates identified as instrumental leaders in organizing, planning, and perpetuating a hunger strike, in accordance with the CCR, Title 15, Section 3315, Serious Rule Violations, (a)(3)(L), Participation in a strike or work stoppage.

C. Program Operations

In keeping with the safety and security of the institution, the following program operations shall apply in the event of an individual hunger strike or mass organized hunger strike:

- If it is determined that the hunger strike or mass organized hunger strike is causing significant disruption to the safety and security of the institution, personnel resources, and normal operations of the institution, the Warden is authorized discretion to place the affected areas on modified program, following all modified program protocols. Wardens are directed to consult with their designated Associate Director.
- Inmate(s) identified as strike leaders, instrumental in organizing, planning, and perpetuating a hunger strike, shall be isolated from non-participating inmates.
- If an inmate participating in an individual or mass organized hunger strike is housed in a celled housing unit with a non-participating inmate, one of the inmates shall be relocated.
- Within a general population setting, discretion should be exercised in determining if isolating participants is more practically achieved through the movement of non-participating inmates from the impacted housing area. Hunger strike leaders within the general population should be reviewed for placement into segregated housing consistent with CCR, Title 15, Section 3335, Administrative Segregation.
- Inmate(s) participating in an individual or mass organized hunger strike shall have their canteen/food items removed from their cells, appropriately inventoried, documented on a CDCR Form 1083, Property Inventory Receipt. The canteen items will be returned to the inmate upon resolution of their hunger strike.
- All non-legal incoming/outgoing mail and authorized telephone calls will be monitored for all hunger strike participants.

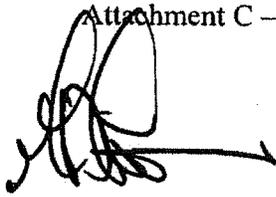
- All visits for identified/documented leaders of a mass organized hunger strike will be suspended during their involvement in the hunger strike. Only inmates with active legal cases will be allowed attorney visits. If an inmate participating in a hunger strike receives a visit, he/she shall be monitored to determine if they consumed food during the visit. If an inmate consumes food during the visit, the information shall be documented on a CDCR Form 128-B and the hunger strike shall be considered over. A copy of the CDCR Form 128-B shall be sent to the inmate's facility/yard/unit clinic RN or medical staff designee. A copy shall be filed in the UHR, Central File, and Warden's office.
- If a mass organized hunger strike disrupts normal institution operations, the Warden has authorization to suspend inmate visiting activities and utilize assigned resources to offset impacts in managing the institution disruption.
- All staff shall continue to offer every participating inmate the regular provision of state-issued food at every regularly scheduled meal serving time, except as otherwise prescribed by a physician.

VIII. RESOURCE SUPPLEMENTS:

Attachment A -- Hunger Strike, Individual Inmate Checklist

Attachment B -- Hunger Strike, Mass Organized Hunger Strike Checklist

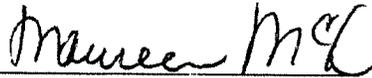
Attachment C -- Hunger Strike, Health Care Concerns



G. D. LEWIS
Warden (A)

6/26/13

Date



MAUREEN MCLEAN
Chief Executive Officer

6/27/13

Date

Contact Person: Correctional Administrator, Central Services

Operational Procedure No. 228
Hunger Strike
Individual Inmate Checklist

Attachment A

PURPOSE:

The purpose of this checklist is to assist the Facility Lieutenant and response staff in responding to California Department of Corrections and Rehabilitation's (CDCR) requirements associated with inmates participating in a hunger strike.

IMPORTANT DATES:

Date/time inmate refused first meal: _____

(or) Date/time inmate appears or declared hunger strike: _____

Date/time inmate refused ninth consecutive meal: _____

Date/time inmate accepted meal: _____

NOTIFICATIONS:

When the inmate appears to be on, or declares to be on a hunger strike and when the inmate is observed eating, notify:

- Facility Captain
- Associate Warden
- Watch Commander (Administrative Officer of the Day if non-business hours)
- Public Information Officer
- Facility Clinic Registered Nurse
- Mental Health referral

OPERATIONS:

- If a participating inmate is housed with a non-participating inmate, relocate one of the inmates.
- Remove all canteen/food items from cell.
- Elevate level of custodial monitoring (mail, phone, visiting, passing, etc.).

INTERVIEWS:

Initial interview will be completed by the Unit Officer along with a CDCR Form 128-B documenting:

- Inmate's name, CDCR number, housing, date, and time
- Date/time inmate began the hunger strike
- Reason for the hunger strike (if known)
- If the inmate is refusing water and/or if the inmate has access to water

Two days after hunger strike identification, a Sergeant will document on a CDCR Form 128-B:

- Inmate's name, CDCR number, housing, date, and time
- Reason for the hunger strike (if known)
- All or any attempts to resolve inmate issues

Five business days after hunger strike identification, (and every five business days after), a Facility/Unit Captain will document on a CDCR Form 128-B:

- Inmate's name, CDCR number, housing, date, and time
- Attempts to resolve the hunger strike issues

Operational Procedure No. 228
Hunger Strike
Mass Organized Hunger Strike Checklist

Attachment B

PURPOSE:

The purpose of this checklist is to assist the Incident Commander and response staff in responding to California Department of Corrections and Rehabilitation's (CDCR) requirements associated with a Mass Organized Hunger Strike.

IMPORTANT DATES:

Date/time inmates appear to be or declared: _____

Date/time Mass Hunger Strike ends: _____

NOTIFICATIONS:

When it appears to be a mass organized hunger strike, when inmates are observed eating, or conclusion, notify:

- Facility Captain
- Associate Warden
- Watch Commander (Administrative Officer of the Day if non-business hours)
- Public Information Officer
- Warden
- Chief Executive Officer
- Facility Clinic Registered Nurse

OPERATIONS:

- Compile a mass organized hunger strike list of participants and update daily.
- If a participating inmate is housed with a non-participating inmate, relocate one of the inmates.
- Remove all canteen/food items from cells.
- Elevate level of custodial monitoring (mail, phone, visits, passing, etc.).
- Assess non-essential programs.
- Identify hunger strike leaders and isolate/remove from unaffected areas.
- Complete Incident Report/Rules Violation Reports

INTERVIEWS:

Initial interview will be completed by the Unit Officer along with a CDCR Form 128-B documenting:

- Inmate's name, CDCR number, housing, date, and time
- Date/time inmate began the hunger strike
- Reason for the hunger strike (if known)
- If the inmate is refusing water and/or if the inmate has access to water

Two days after mass organized hunger strike identification, a Sergeant will document on a CDCR Form 128-B:

- Inmate's name, CDCR number, housing, date, and time
- Reason for the hunger strike (if known)
- All or any attempts to resolve inmate issues

Five business days after mass organized hunger strike identification, (and every five business days after), a Facility/Unit Captain will document on a CDCR Form 128-B:

- Inmate's name, CDCR number, housing, date, and time
- Attempts to resolve the hunger strike issues

Operational Procedure No. 228

Attachment C

Hunger Strike Health Care Concerns

PURPOSE:

The purpose of this checklist is to assist the Facility Lieutenant or Incident Commander and response staff in responding to California Department of Corrections and Rehabilitation's (CDCR) requirements associated with a the interagency relationship during a hunger/mass organized hunger strike.

IMPORTANT DATES:

Date/time of hunger strike determination: _____

Date/time of conclusion: _____

NOTIFICATIONS:

- Chief Executive Officer (during mass organized hunger strike)
- Facility Clinic Registered Nurse
- Mental Health referral

HEALTH CARE OPERATIONS/MASS ORGANIZED HUNGER STRIKE:

Within 24 hours of notification:

- All participants will be provided notice of continued health care.
- Designated health care staff will provide daily observations of all participants.

Within 72 hours of notification:

- Identification of all High Risk inmates.

Within 7 days of notification:

- All participants will be scheduled for a Face-to-Face triage assessment.
- All participants will be provided education on the adverse effects of the hunger strike.

After 14 days of notification and every 7 days thereafter:

- All participants will be scheduled for a Primary Care Provider (PCP) visit.

After 21 days of notification:

- All participants will receive written notification regarding a Physician Order for Life Sustaining Treatment.
- PCP determination of capacity for informed consent.