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Director

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Debra Bowen
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SECRETARY OF STATE

Date: June 23, 2014

To: Manuel Martinez

From: Chapter Two Compliance Unit

Subject: **2014 OAL DETERMINATION NO. 9 (S)**
(CTU2014-0428-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation the Disallowance of
Graphing Paper at Pelican Bay State Prison

On April 28, 2014, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether the disallowance of graphing paper at Pelican Bay State Prison constitutes an underground regulation. The rule is in Section 54010 of the Pelican Bay State Prison Operations Manual Supplement, dated August 2012. This Section 54010 of the Pelican Bay State Prison Operations Manual Supplement, dated August 2012, 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):

(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 Pelican Bay State Prison and applies solely to the inmates of the Pelican Bay State Prison. Inmates housed at other institutions are governed by those other institutions' criteria as to whether graphing paper is allowed. 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.

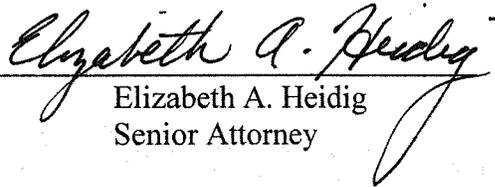
(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

(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 Attorney

Copy: Dr. Jeffrey Beard
Tim Lockwood

Exhibit A

	PELICAN BAY STATE PRISON	Chapter: 50000 Custody/Security Operations
	OPERATIONS MANUAL	Subchapter: 54000 Services
	SUPPLEMENT Supersedes Planditen 11/15/2012	Section: 54000 Inmate Mail

- of 500 sheets)
- Forty (40) plain non-stamped envelopes/postcards

Disallowed Writing Paper, Envelopes, and Greeting Cards:

- Colored paper is not allowed (except yellow, lined paper)
- Letterhead paper is not allowed
- Cotton paper and art paper are not allowed
- Peel and stick envelopes are not allowed
- Graphing paper is not allowed

GP inmates may receive postage stamps, envelopes (with or without the stamps previously applied), or embossed envelopes through the mail. The ASU, PSU, and SHU inmates may only receive plain non-stamped or embossed envelopes. Metered reply envelopes that are sent in with correspondence must adhere to the CCR, Title 15, Section 3134(b), General Mail Regulations.

Each incoming mailing is limited to forty (40) pieces of postage (embossed or stamped envelopes/postcards) per inmate. The value of the stamps will be commensurate of the rate of Domestic, First Class Rate postage. During the period of USPS rate increases, supplemental postage will be accepted up to \$1 per mailing for ninety (90) days from the date of the increase.

Blank greeting cards are available through the Canteen and from the Chaplain on a limited basis. A limit of five (5) greeting cards will be allowed in incoming mail. Cards may not be musical, electronic, voice-recorded, include glitter, plastic, reflective material, or exceed 8½" x 11" in size. Material with stickers, glitter, whiteout, lipstick, perfume, or reflective plastic will be disallowed.

All Drawings: Homemade drawings, paintings, or colorings from anyone will be photocopied, and the photocopy will be delivered to the inmate.

While inmates are allowed Internet downloaded articles and e-mails; Social Networking print-outs and/or profiles; e.g., Myspace, Facebook,