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Director



ENDORSED - FILED
in the office of the Secretary of State
of the State of California

MAR 6 2015

11:52 AM

Date: March 6, 2015

To: Aaron Bjorkstrand

From: Chapter Two Compliance Unit

Subject: **2015 OAL DETERMINATION NO. 2 (S)**
(CTU2015-0107-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Department of Corrections and Rehabilitation D.O.M. section 54010.14, titled "Correspondence that is Offensive/Threatening/Contains Security Concerns."

On January 7, 2015, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether Department Operations Manual (D.O.M.) section 54010.14, issued by the Department of Corrections and Rehabilitations, constitutes an underground regulation. The challenged rule 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). Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment.

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250:

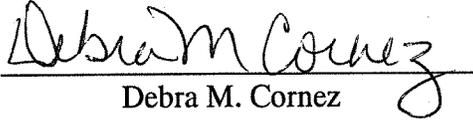
The following definitions shall apply to the regulations contained in this chapter:

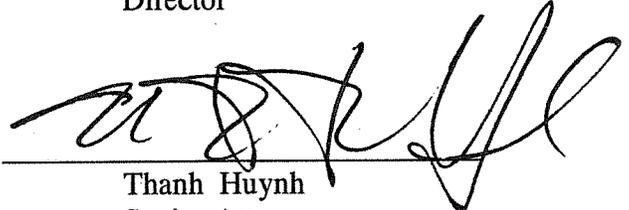
¹ "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

(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. [Emphasis added.]

The rule you challenge as an underground regulation, D.O.M. section 54010.14, was duly adopted in title 15, section 3135 of California Code of Regulations as a regulation pursuant to the APA and filed with the Secretary of State on July 17, 2008. The challenged rule is not, therefore, an underground regulation.²

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


Thanh Huynh
Senior Attorney

Copy: Dr. Jeffrey Beard
Tim Lockwood

² A rule which is contained in a properly adopted regulation is the proper subject of a summary disposition letter. California Code of Regulations, Title 1, section 270, subdivision (f) 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.]

Exhibit A

shall remove the pages and shake them to ensure the absence of prohibited material.

Inmates shall sign for all confidential mail at the time of delivery. This shall be accomplished by use of a permanent log book or use of receipts. If receipts are used, the receipts shall be forwarded to the mailroom for filing. The log book, at a minimum, must record the date of delivery, the inmates name and departmental identification number, and the senders name and address.

54010.12.4 Confidential Enclosures

Newspapers, published articles, pamphlets, books, etc., enclosed in confidential correspondence shall not be treated as confidential mail and shall be handled as outlined below.

54010.12.5 Examination of Enclosures in Confidential Correspondence

The inmate may consent to an immediate examination of the enclosure by staff who issues the mail. Such examination shall be limited to the extent necessary to determine if the enclosure may be safely admitted into the institution/facility under the standards of CCR Sections 3006, 3134, 3135, and 3145, or DOM Sections 54010.8.1, 54010.13, and 54010.14. If the enclosure can be safely admitted into the institution/facility, it shall be given to the inmate. If, in the examiner's opinion, the enclosure does not meet the standards of CCR and cannot be safely admitted into the institution/facility, it shall be referred to staff at not less than the Correctional/Facility Captain level for final determination. If the enclosure is not released to the inmate at this level, the process outlined in DOM Section 54010.15 shall be followed and the inmate shall be allowed to return the enclosure to the sender or dispose of it pursuant to CCR Section 3191(c).

54010.12.6 Inmate Declines Consent for Examination of Confidential Enclosures

The inmate may decline to consent to examination of enclosures in confidential mail by any staff. When this occurs, the enclosure shall be immediately placed in an envelope and sealed in the presence of the inmate. The separate envelope will, at the inmates choosing, be returned to the sender with the mailing cost charged to the inmate's trust account, or disposed of pursuant to CCR 3191(c). The inmate is entitled to keep the letter or correspondence and the envelope it came in.

54010.12.7 Restriction of Confidential Mail Privileges

Administrative action may be taken to restrict, for cause, the confidential mail privileges afforded to an attorney based upon the information contained in this Article. The confidential mail privilege may be a statewide suspension for any offense that could be prosecuted as a felony. Only the Secretary or his/her designee shall issue a statewide suspension of confidential mail privileges.

A first offense of a non-serious mail rule violation of the Department's mail regulations shall result in a written warning or up to a six-month suspension of the attorney's confidential mail privileges.

A second offense of a non-serious mail rule violation shall result in modification/suspension of confidential mail privileges for a period of up to 12 months.

A third offense of a similar nature and/or a first offense that could be charged as a felony that jeopardizes the safety of persons or the security of the facility, shall result in confidential mail privileges being suspended for a minimum period of one year or beyond for an indefinite period.

The attorney must petition the Warden or Secretary for reinstatement of his/her confidential mail privilege.

54010.13 Staff Confidentiality Requirements

Any person who examines the content of mail under the authority of this Article or in connection with an appeal by an inmate of a ruling under this Article shall keep the content of the examined material in strict confidence.

No original, copy, excerpt, or summary of personal correspondence to or from an inmate shall be made or be placed in an inmate's C-file unless such correspondence is or has been the subject of:

- Legal, disciplinary, criminal investigation, or casework determination and actions affecting the inmate.
- When the recipient of an inmate's disturbing or offensive mail corresponds with the facility and requests administrative action subject to CCR Section 3135.
- If an inmate requests that a copy of personal correspondence be placed in their C-file and the inmate's caseworker deems it appropriate to do so

based on the relationship of the correspondence to the inmates incarceration.

54010.14 Correspondence that is Offensive/Threatening/Contains Security Concerns

Non-confidential correspondence may be disallowed if the text of such correspondence presents a danger or a threat of danger to any person or place. The authority to disallow such correspondence shall not be delegated below the level of Correctional/Facility Captain.

Disagreement with the sender's or receiver's morals, values, attitudes, veracity, or choice of words shall not be cause for correctional staff to disallow mail. Correctional staff shall not challenge nor confront the sender or receiver with value judgments.

Certain correspondence, including but not limited to the following, is disallowed, regardless of values or morals in order to ensure the safety and security of the institution/facility:

- Any mail of a character tending to incite murder, arson, a riot, or any form of violence or physical harm to any person or any ethnic, gender, racial, religious, or other group.
- Threatens blackmail or extortion.
- Contraband, or sending or receiving contraband.
- Concerns plans to escape or assist in an escape.
- Concerns plans to disrupt the order, or breach the security of any institution/facility.
- Concerns plans for activities which violate the law, these regulations, or local procedures.
- Contains coded messages.
- Describes the making of any weapon, explosive, poison, or destructive device.
- Contains illustrations, explanations, and/or descriptions of how to sabotage or disrupt computers, communications, or electronics.
- Contains maps depicting any area within a ten-mile radius of an institution/facility.
- Contains gambling or lottery information or paraphernalia.
- Contains obscene material in nature as described in Section 54010.15.
- Contains human or animal hair, substances, or fluids.

54010.15 Obscene Material

Inmates shall not possess or have under their control, obscene material and/or mail containing information concerning where, how, or from whom obscene material may be obtained.

Obscene material means catalogs, advertisements, brochures, and/or material taken as a whole, which to the average person applying contemporary statewide standards, appeals to the prurient interest. It is material which taken as a whole, depicts or describes sexual conduct, and when taken as a whole, lacks serious literary, artistic, political, or scientific value.

Additionally, material is considered obscene when it appears from the nature of the matter or the circumstances of its dissemination, distribution, or exhibition that it appeals to deviant sexual groups.

Material subject to the test of the above includes, but is not limited to:

- Portrays sexually explicit materials, which are defined as materials that show frontal nudity including personal photographs, drawings, and magazines and pictorials that show frontal nudity.
- Portrays, displays, describes, or represents penetration of the vagina or anus, or contact between the mouth and genitals.
- Portrays, displays, describes, or represents bestiality, sadomasochism, or an excretory function, including urination, defecation, or semen.
- Portrays, displays, describes, or represents the nudity of a minor or person who appears to be under 18 years old.
- Portrays, displays, describes, or represents conduct that appears to be non-consensual behavior.
- Portrays, displays, describes, or represents conduct that appears to be forceful, threatening, or violent.
- Portrays, displays, describes, or represents conduct where one of the participants is a minor, or appears to be under 18 years old.