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STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

2015 OAL DETERMINATION NO. 5
(OAL FILE NO. CTU2014-1010-01)

REQUESTED BY: RICKY T. FOSTER

CONCERNING: Modification of Level IV 270/180-design Housing Placement Screening Criteria (Memorandum dated September 26, 2012) issued by the California Department of Corrections and Rehabilitation.

DETERMINATION ISSUED PURSUANT TO GOVERNMENT CODE SECTION 11340.5.

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of "regulation" as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations (CCR), title 1, section 250.¹ OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

CHALLENGED RULE

Modification of Level IV 270/180-design Housing Placement Screening Criteria, a Memorandum dated September 26, 2012, issued by the California Department of Corrections and Rehabilitation, which is attached hereto as Exhibit A (hereafter referred to as "Housing Placement Screening Criteria Memorandum").

¹ As defined by title 1, section 250(a), an

"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.

DETERMINATION

OAL determines that the Housing Placement Screening Criteria Memorandum meets the definition of "regulation" that should have been adopted pursuant to the APA but was not; and therefore, is an underground regulation.

FACTUAL BACKGROUND

On October 10, 2014, Ricky T. Foster (Petitioner), submitted a petition to OAL challenging the Housing Placement Screening Criteria Memorandum issued by the Director of the Division of Adult Institutions of the California Department of Corrections and Rehabilitation (Department) as an underground regulation.

OAL accepted the petition for consideration on December 9, 2014. The petition was published in the California Regulatory Notice Register on December 19, 2014. Comments from the public were solicited until January 20, 2015. No comments were received. A response to the petition from the Department was due no later than February 2, 2015. OAL received a response from the Department dated April 3, 2015. In that OAL informed the Department that a response was due by February 2, 2015 on December 9, 2014, OAL will not consider the response of the Department and will make its own independent determination absent consideration of this additional information.

The Housing Placement Screening Criteria Memorandum contains criteria for consideration when classification and housing placements are made concerning adult inmates. The Department adopted regulations on Inmate Housing Assignments (title 15, CCR, section 3269) and on Administrative Segregation (title 15, CCR, section 3335), which detail factors to be considered in deciding where inmates should be housed. Section 3269 of title 15 of the CCR states:

§ 3269. Inmate Housing Assignments.

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.

(a) Upon arrival at an institution, facility, or program reception center, a designated custody supervisor shall screen an inmate for an appropriate housing assignment. The screening authority involved in the review and approval of an inmate's housing assignment must evaluate all factors to be considered when completing the Initial Housing Review, including but not limited to:

- Inmate name, CDC number, and Personal Identification number.

- Personal factors such as race, date of birth, age, weight, height, birth place, and whether the inmate is a foreign national.
 - Receiving Institution.
 - County of commitment.
 - Out to court return and escape history.
 - Length of sentence.
 - Enemies and victimization history.
 - Criminal influence demonstrated over other inmates.
 - Previous housing status.
 - Reason(s) for prior segregation.
 - History of "S" suffix determination pursuant to CCR subsection 3377.1(c).
 - History of in-cell assaults and/or violence.
 - Security Threat Group affiliation.
 - Involvement in a race based incident(s).
 - Nature of commitment offense.
 - Documented reports from prior cellmate(s) that the inmate intimidated, threatened, forced, and/or harassed him or her for sex.
 - Documentation that the cellmate(s) refused to return to a cell occupied by the inmate because of fear, threats, or abuse perpetrated by the inmate.
 - Documentation that the inmate has been the victim of a sexual assault or was previously single celled.
 - Adjudicated Department Rules Violations Reports (RVR) where the inmate was found guilty as a perpetrator in an act of physical abuse, sexual abuse, sodomy, or other act of force against a cellmate.
- (b) The screening authority shall complete the Initial Housing Review stating if the inmate is suitable for dorm/cell housing with or without special restrictions. Restrictions are any case factors which may limit the inmate's housing placement options such as, but not limited to:
- Security issues including ASU and SHU placement.
 - Request for Protective Custody.
 - Medical or mental health issues.
 - Personal factors such as age, weight, and height.
 - Integrated Housing Code.
- Staff shall ensure that the housing policies regarding special category inmates covered under specific litigation remain in place during the housing assignment.
- (c) Upon placement in an ASU or SHU, inmates shall be screened for an appropriate cell assignment using the same criteria as inmates being screened for housing in the general population. The reason for ASU or SHU placement shall also be taken into consideration.
- Based on available information and the inmate interview, the screening authority shall determine if the inmate is suitable for single or double celled housing, and shall complete a CDC Form 114-A1 (rev. 10/98), Inmate Segregation Profile. Unless approved for single cell assignment, an inmate in ASU or SHU is expected to share a cell with another inmate.
- (d) Single cell status shall be considered for those inmates who demonstrate a history of in-cell abuse, significant in-cell violence towards a cell partner, verification of predatory behavior towards a cell partner, or who have been

victimized in-cell by another inmate. Staff shall consider the inmate's pattern of behavior, not just an isolated incident. An act of mutual combat in itself does not warrant single cell status. The following factors must be considered when evaluating single cell status, noting these factors are not exclusive of other considerations:

(1) Predatory behavior is characterized by aggressive, repeated attempts to physically or sexually abuse another inmate.

(2) Documented and verified instances of being a victim of in-cell physical or sexual abuse by another inmate.

(e) Should the screening authority determine that single cell designation is appropriate, the inmate's case factors shall be reviewed by a classification committee for determination of appropriate housing and designation for an "S" suffix. A classification committee may consider whether an inmate with single cell designation has since proven capable of being double-celled.

(f) In cases where single cell status is recommended by clinical staff due to mental health or medical concerns, a classification committee shall make the final determination of an inmate's cell assignment. The classification committee shall consider the clinical recommendations made by the evaluating clinician with assistance from the clinician who participates in the committee and review the inmate's case factors when determining the housing assignment. Single cell status based upon clinical recommendation is usually a temporary short-term measure and must be periodically reviewed, minimally at an inmate's annual review or more frequently at the inmate's/clinician's request.

(g) If an inmate refuses to be housed as determined to be appropriate to this section, the inmate shall be subject to the disciplinary process, with the potential to be housed in alternative and more restrictive housing. Refusal to participate will result in the issuance of a Rules Violation Report (RVR) for Conduct, subsection 3005(c), Refusing to Accept Assigned Housing, for the Specific Act of Willfully Resisting, Delaying, or Obstructing any Peace Officer in the performance of Duty (CCR subsection 3323(f)(6)). Subsequent acts of the above listed offense will result in the issuance of additional disciplinary reports and consideration for placement in more restrictive housing such as an ASU or a SHU.

Title 15, section 3335 of the CCR, provides further criteria as to when Administrative Segregation is appropriate for an inmate.

The Housing Placement Screening Criteria Memorandum challenged as an alleged underground regulation contains additional specific exclusionary criteria for Level IV 270-design housing. For example, those inmates that have had a "Determinate Security Housing Unit (SHU) term in the last three years for a Division A-1, A-2, or B disciplinary offense involving assaultive behavior or weapons possession" are excluded from that type of housing. Likewise, inmates found guilty of battery or assault on two or more occasions within a 12-month period are excluded from Level IV 270-design housing for one year from the date the inmate was found guilty of the last Rules Violation Report.

UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), provides that:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of Government Code section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency has issued, utilized, enforced, or attempted to enforce a rule that meets the definition of “regulation” as defined in Government Code section 11342.600 and should have been adopted pursuant to the APA (Gov. Code sec.11340(b)). An OAL determination is not enforceable against the agency through any formal administrative means, but it is entitled to “due deference” in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

ANALYSIS

OAL's authority to issue a determination extends only to the limited question of whether the challenged rule is a “regulation” subject to the APA. This analysis will determine (1) whether the challenged rule is a “regulation” within the meaning of Government Code section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in Government Code section 11342.600 as:

... 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.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must

implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).²

As stated in *Tidewater*, the first element used to identify a “regulation” is whether the rule applies generally. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations.³

The Housing Placement Screening Criteria Memorandum was issued by Kathleen L. Dickinson, Director of the Division of Adult Institutions for CDCR and was addressed to:

Associate Directors, Division of Adult Institutions
Wardens
Classification Staff Representatives
Classification and Parole Representatives, and
Correctional Counselors III, Reception Centers

The Housing Placement Screening Criteria Memorandum indicates that “[CDCR] is making classification and housing changes of inmates as a result of the recent Public Safety Realignment. . . .” Its subject is: “Modification of Level IV 270/180-Design Housing Placement Screening Criteria.” It further states that the “changes require reevaluation of the exclusionary criteria for housing Level IV inmates in Level IV 270-design facilities.” Inmates that may be Level IV inmates in a Level IV 180-design or Level IV 270-design facility may be subject to the criteria of this Housing Placement Screening Criteria Memorandum. It specifically “supersedes all prior memoranda addressing the placement of inmates in a Level IV 180-design facility or Level IV 270-design facility.”

Therefore, the Housing Placement Screening Criteria Memorandum applies generally to the defined class of Level IV inmates.

The second element used to identify a “regulation” as stated in *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency’s procedure. Penal Code section 5054 specifically provides that the care and custody of inmates, as well as the management and control of state prisons, is vested in the Secretary of the Department. It states:

Commencing July 1, 2005, the supervision, management and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the Secretary of the Department of Corrections and Rehabilitation.

The Secretary, through the Department’s Director of the Division of Adult Institutions, is implementing, interpreting and making specific the duties delegated to the Secretary pursuant to section 5054 of the Penal Code when deciding on the criteria for appropriate inmate housing assignments as that articulated in the Housing Placement Screening Criteria Memorandum.

² Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

³ See also *Roth v. Department Of Veterans Affairs*, (1980) 110 Cal.App.3d 14, 19; 167 Cal.Rptr. 552, 557.

In addition, CDCR has adopted regulations concerning Inmate Housing Assignments. As stated *supra*, section 3269 of title 15 of the California Code of Regulations details criteria and procedures for assigning inmates to housing. The Housing Placement Screening Criteria Memorandum furthers interprets section 3269 of title 15 when adding to the criteria to be considered when deciding on appropriate inmate housing assignments.

The Housing Placement Screening Criteria Memorandum, therefore, meets the definition of “regulation” in Government Code section 11342.600.

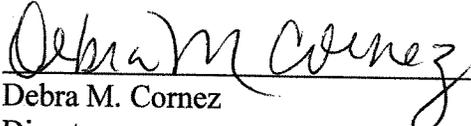
The final issue to examine is whether the challenged rule falls within an express statutory exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to Government Code section 11346, the procedural requirements established in the APA “shall not be superseded or modified by any subsequent legislation *except to the extent that the legislation shall do so expressly.*” (Emphasis added.)

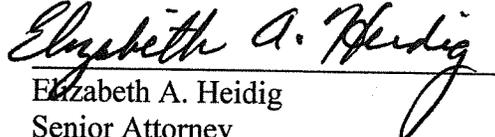
The Department has not identified an express statutory exemption from the APA that would apply to the Housing Placement Screening Criteria Memorandum, nor did OAL find such an exemption.

CONCLUSION

In accordance with the above analysis, OAL determines that the Housing Placement Screening Criteria Memorandum meets the definition of “regulation” that should have been adopted pursuant to the APA but was not; and therefore, is an underground regulation.

Date: April 20, 2015


Debra M. Cornez
Director


Elizabeth A. Heidig
Senior Attorney

cc: Dr. Jeffrey Beard
Timothy Lockwood

EXHIBIT A

Memorandum

Date : September 26, 2012

To : Associate Directors, Division of Adult Institutions
Wardens
Classification Staff Representatives
Classification and Parole Representatives
Correctional Counselors III, Reception Centers

Subject : **MODIFICATION OF LEVEL IV 270/180-DESIGN HOUSING PLACEMENT SCREENING CRITERIA**

The California Department of Corrections and Rehabilitation (CDCR) is making classification and housing changes of inmates as a result of the recent Public Safety Realignment. These changes require reevaluation of the exclusionary criteria for housing Level IV inmates in Level IV 270-design facilities in order to ensure the most restrictive housing remains designated for those offenders who, based on their behavior, require more controlled movement and the additional security measures provided by the Level IV 180-design facilities.

This memorandum supersedes all prior memoranda addressing the placement of inmates in a Level IV 180-design facility or Level IV 270-design facility.

The CDCR Department Operations Manual (DOM) Section 61010.11.6 outlines the exclusionary criteria for inmates to be housed in a Level IV 270-design institution. CDCR will be modifying the DOM in Fiscal Year 2012/13. Effective October 1, 2012, the following Level IV 270-design exclusionary criteria will be used when determining if an inmate is excluded from placement in a Level IV 270-design facility. It should be noted there is no longer a distinction between general population and sensitive needs yard inmates when determining Level IV 270/180-design placement.

Level IV 270-design exclusionary criteria

Group A:

1. Determinate Security Housing Unit (SHU) term in the last three years for a Division A-1, A-2, or B disciplinary offense involving assaultive behavior or weapons possession.
- * 2. Inmates found guilty of Participation in a Riot or Inciting a Riot on two or more occasions within a 12-month period shall be excluded from Level IV 270-design housing for one year from the date the inmate was found guilty of the last CDCR Form 115, Rules Violation Report (RVR).

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3. Inmates found guilty of Battery or Assault on two or more occasions within a 12-month period shall be excluded from Level IV 270-design housing for one year from the date the inmate was found guilty of the last RVR.
4. Indeterminate SHU term in the last two years, effective upon arrival to the general population (GP), due to being a validated member or associate of a prison gang.
5. Inmates released from serving an indeterminate SHU term as a result of in-custody misbehavior shall be excluded from Level IV 270-design housing for a period of two years, effective upon arrival to the GP, Level IV 180-design facility.

Correctional Counselors (CC) will use the above criteria when making a determination to place a "Y" or an "N" on the CDCR Forms 839, 840, and 841. Additionally, CCs shall use the above "reason codes" when an inmate is excluded from Level IV 270-design housing. For example, "A-1" will be used for an inmate who served a determinate SHU term in the last three years for a Division A-1, A-2, or B disciplinary offense involving assaultive behavior or weapons possession. A CC in the Reception Center (RC) will document why an inmate is excluded from Level IV 270-design housing on the Institution Staff Recommendation Summary or the CDCR Form 816, Readmission Summary. Classification committees shall document on the CDCR Form 128-G, Classification Chrono, why an inmate is excluded from Level IV 270-design housing.

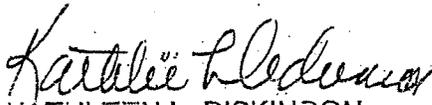
Inmates eligible for Level IV 270-design housing can still be housed on a Level IV 180-design facility. When a classification committee feels more restrictive housing is necessary but the inmate does not meet the above criteria, the classification committee shall clearly articulate the rationale for more restrictive housing.

Inmates excluded from Level IV 270-design housing but requiring "exceptional placement" may be allowed housing on a Level IV 270-design facility when RC counseling staff or a classification committee documents the reason for the "exceptional placement." Exceptional placements are limited to inmates requiring medical or mental health treatment programs, such as a developmental disability, Americans with Disabilities Act mobility impairment that impacts placement, or in need of specific medical programs not available on Level IV 180-design facilities.

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Wardens
Classification Staff Representatives
Classification and Parole Representatives
Correctional Counselors III, Reception Centers
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When a classification committee determines less restrictive housing is appropriate for an otherwise eligible Level IV 180-design housing inmate, the classification committee shall clearly articulate the rationale for their decision. When considering an eligible Level IV 180-design housing inmate for Level IV 270-design placement, the classification committee shall consider whether the inmate has a pattern of serious or violent behavior which warrants Level IV 180-design housing and therefore precludes Level IV 270-design housing, whether the inmate's history of serious or violent behavior was due to situational circumstances or premeditated and intentional in nature, whether the inmate's past or present gang or disruptive group affiliation will be a high risk in a Level IV 270-design setting, and/or whether the inmate's documented enemy/safety concerns limit available housing.

Please ensure all CC staff are provided with this updated housing placement information. Questions about applying the new exclusionary criteria may be referred to Chris Brown, Facility Captain, CSU, at (916) 445-1810, or via e-mail at Chris.Brown@cdcr.ca.gov. Questions specific to housing Level IV inmates should be referred to Gordon Wong, Facility Captain, PMU, at (916) 445-0373, or via e-mail at Gordon.Wong@cdcr.ca.gov.


KATHLEEN L. DICKINSON
Director
Division of Adult Institutions

cc: Terri McDonald
Kathleen Allison
Michael Stainer

Becky Alkire
Steve Albritton
Ross Meier

Gordon Wong
Chris Brown