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STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

2015 OAL DETERMINATION NO. 7
(OAL MATTER NO. CTU2014-1117-02)

REQUESTED BY: Bruce Carter

CONCERNING: Notice of Change to Department Operations Manual Chapter 3, Article 20, Seniority Status (Transmittal Letter Number: 12-15), Revised November 1, 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, 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

Notice of Change to Department Operations Manual Chapter 3, Article 20, Seniority Status (Transmittal Letter Number: 12-15), Revised November 1, 2012, issued by the California Department of Corrections and Rehabilitation, attached hereto as Exhibit A (hereafter referred to as "DOM Changes to Seniority Status Document").

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 DOM Changes to Seniority Status Document 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 November 17, 2014, Stephen J. Horvath, Esq., submitted a petition to OAL on behalf of Bruce Carter (Petitioner) challenging the DOM Changes to Seniority Status Document issued by the Deputy Director of Human Resources of the California Department of Corrections and Rehabilitation (Department) as an underground regulation.

OAL accepted the petition for consideration on January 16, 2015. The petition was published in the California Regulatory Notice Register on January 30, 2015. Comments from the public were solicited until March 2, 2015. OAL received only one comment on the matter, which was an email dated March 2, 2015, from Petitioner’s counsel. A response to the petition from the Department was due no later than March 16, 2015. A timely response from the Department was received on March 16, 2015. A rebuttal to the Department’s response was due no later than 15 days after receipt of the Department’s response. A rebuttal was received on April 1, 2015. Due to the state holiday on March 31, 2015, the rebuttal was timely.

The DOM Changes to Seniority Status Document revises how the Department calculates seniority for the Correctional Sergeant and Correctional Lieutenant classifications. It states, among other things, that:

Correctional Sergeant and Correctional Lieutenant seniority shall be based on:

- Where a limited term assignment is terminated, (Captain back to Correctional Lieutenant and/or Correctional Lieutenant back to Correctional Sergeant) the seniority accrued in the higher classification shall be calculated into the former supervisory classification in which the employee is returning.
- Total continuous service in class (employees who accept a transfer to a non-custody classification, but do not leave the Department, will receive credit for the previous seniority earned upon return to their former classification), or, in the event of tie;
- Total continuous service in class combined with continuous total State service or, in the event of tie;
- The highest figure as determined by the last four digits of the employee’s social security number.

According to both Petitioner’s counsel and the Department, the DOM Changes to Seniority Status Document concerns Excluded employees, not covered by any Memorandum of Understanding (MOU).

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 DOM Changes to Seniority Status Document was issued by Andrea Wallin-Rohmann, Deputy Director, Human Resources, for the California Department of Corrections and Rehabilitation to provide all Department Operations Manual (DOM) holders with information about calculating seniority for Correctional Sergeant and Correctional Lieutenant classifications. It applies to all Correctional Sergeants and Correctional Lieutenants.

Therefore, the DOM Changes to Seniority Status Document applies generally to the defined class of those who are or may be eligible for Correctional Sergeant and Correctional Lieutenant classifications within the Department.

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 Deputy Director for Human Resources, is implementing, interpreting and making specific the duties delegated to the Secretary pursuant to section 5054 of the Penal Code when deciding how to calculate seniority status for Correctional Sergeants and Correctional Lieutenants through the DOM Changes to Seniority Status Document.

The DOM Changes to Seniority Status Document, 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.⁴ Pursuant to Government Code section 11346, the procedural

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.

⁴ Although the State Personnel Board has an exemption from the APA for some regulations concerning examination, selection and classification criteria in Government Code section 18210, that exemption solely applies to the State Personnel Board and would not apply to a regulation promulgated by the Department.

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.) Further direction was provided in the case of *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 74 Cal.Rptr.2d 407, when the court stated: “[w]hen the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language.” (*United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, at 1010.)

INTERNAL MANAGEMENT EXEMPTION

The Department states that the DOM Changes to Seniority Status Document is not subject to the APA in that it is exempt pursuant to the *internal management* exemption of Government Code section 11340.9 (d), which states:

This chapter does not apply to any of the following:

...

(d) A regulation that relates only to the internal management of the state agency. . . .

There have been numerous cases that have helped to clarify what is meant by “the internal management of the state agency.”

In order for a rule to fall within the internal management exemption of the APA, courts have articulated a two prong analysis. They will look to see who is directly affected by the rule; and, whether the rule is a matter of serious consequence involving an important public interest.

In *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, the court found that a rule governing tenure of a professor at a university is a matter of serious consequence involving an important public interest, and therefore, does not fall within the APA's internal management exemption.

Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, found that a State Personnel Board rule in a "Personnel Transactions Manual" governing withdrawal of state employees' resignations was not within the "internal management" exemption to the APA. The court further stated that “[r]ules that interpret and implement other rules have no legal effect unless they have been promulgated in substantial compliance with the APA.” (*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, at 205.)

Armistead, supra, provided further discussion on the internal management exemption, partially disapproving *Poschman* as to whether the APA needed to be followed as to all regulations concerning an agency's organization or procedure but not on the issue of whether the rule was exempt as internal management. *Armistead* states:

What rules relate only to internal management?

Section 11371(b) of the APA, quoted above,⁵ exempts every rule that “relates only to the internal management of the state agencies.” The board argues that PTM section 525.11 is such a rule. We disagree.

PTM section 525.11 is designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements board rule 445. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citations omitted.] (“Respondents have confused the internal rules which may govern the department's procedure . . . and the rules necessary to properly consider the interests of all . . . under the . . . statutes”).^{FN3}

FN3. Compare *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, which held a rule affecting tenure of teachers invalid for failure to comply with the APA. The court rejected Chancellor Dumke's contention that the rule related only to internal management, stating: “Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.” (Id., p. 943, 107 Cal.Rptr. p. 603.) We disapprove, however, the implied holding in *Poschman* that the whole of article 4 of chapter 4.5 of the APA applies to regulations prescribing an agency's organization or procedure. See section 11421(a).

The board argues that, since the PTM is supposed to be distributed only to personnel officers and since others' requests to see it are screened to ensure that reasons for examining it are legitimate, we should infer that it was written for internal use only. That it is not readily accessible to affected employees and the public does not persuade us that section 525.11 relates to internal management only. The section obviously was intended to be generally applied, to make specific for all state civil service employees the limits on their right to withdraw resignations. In fact, the insistence on restricted access does indeed increase our concern. [Citations omitted.] [*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, at 203.]

In *Stoneham v. Rushen* (*Stoneham I*) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130, the court stated that rules governing state prison inmate classification do not fall within the “internal management” exemption of the APA because the rules were of general application significantly affecting the male prison population.

Any doubt as to the applicability of the APA should be resolved in favor of the APA. The court in *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, stated:

A major aim of the APA was to provide a procedure whereby people to be affected may be heard on the merits of proposed rules. (*Armistead v. State Personnel Board, supra*, 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744.) Rules that relate “only to the internal management of the state agency” are

⁵ Government Code section 11371(b) renumbered to section 11342.600.

exempt from the APA. (Gov.Code, § 11342, subd. (g).) Since the protest procedures affect the protest rights of third party bidders, they do not fall within the narrow internal management exception. “Further, because the Legislature adopted the APA to give interested persons the opportunity to provide input on the proposed regulatory action [citation], we are of the view that any doubt as to the applicability of the APA’s requirements should be resolved in favor of the APA.” (*Grier v. Kizer* (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, disapproved on another point in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 927 P.2d 296.) (*United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, at 1010.)

When applying the two prong internal management exemption analysis to the DOM Changes to Seniority Status Document, we conclude the DOM Changes to Seniority Status Document only *directly* affects the employees of the issuing department; but may tangentially affect inmates. In light of the fact that we find that the challenged rule does concern a matter of serious consequence involving an important public interest, we do not need to delve deeper into the issue of the effect of the rule on others than the defined class.

As the court in *Armistead* found, when a regulation is intended to be generally applied, and makes specific the limits on state civil service employees’ rights to withdraw resignations, such a rule does not come within the internal management exemption of Government Code section 11340.9(d) because it concerns a matter of serious consequence involving an important public interest.

Similarly, in *Ligon v. State Personnel Board* (1981) 123 Cal.App.3d 583, the appellate court found “invalid, for failure to comply with the Administrative Procedure Act, the board’s ‘Procedures Regarding Claims of Out-of-Class Experience.’ . . .”⁶ The court stated that the challenged personnel policy governing seniority credit for out-of-class experience was a regulation rather than a rule relating to only the internal management of a state agency. The court further held that an important right was implicated and that the employee was entitled to reasonable attorney fees under the Code of Civil Procedure section 1021.5.⁷

We likewise conclude that the DOM Changes to Seniority Status Document concerns a matter of serious consequence involving an important public interest; namely, calculation of seniority status for Correctional Officers and Correctional Lieutenants. Therefore, it does not meet the second prong of the internal management exemption. In doing so, we rely upon the case law which has concluded that rules regarding the following comparable matters are *not* internal management:

1. termination of employment (*Armistead*)
2. professorial tenure (*Poschman*)

⁶ We note that the exemption in Government Code section 18211 was enacted by the Legislature in 1996, after the decision in *Ligon*.

⁷ The court also held that the policy was invalid as there was no authority for permitting the employee’s out-of-class work experience to be substituted for the actual time needed in the job classification.

3. what out-of-class experience may be used to meet minimum requirements for advancement to higher civil service positions. (*Ligon*)

We believe that the challenged rule declaring how seniority status will be calculated for Correctional Sergeants and Correctional Lieutenants is likewise a matter of serious consequence involving an important public interest.

AGENCY RESPONSE

The Department provided a response to the petition, primarily stating:

1. Only correctional sergeants and correctional lieutenants were affected by the revision and their voices were heard on the merits.
2. The internal management exemption applies.
3. The challenged rule just applies to the Department.
4. It does not adversely affect inmates or their families.
5. It does not address a matter of serious consequence involving an important public interest.
6. The challenged rule only concerns in-class seniority status and does not define work experience.

The fact that the Department met with certain representatives of the affected class does not disavow the need to conduct rulemaking pursuant to the APA. The remainder of the agency's arguments have been addressed *supra*, or are not dispositive on an analysis of whether the challenged rule is a regulation subject to the APA.

PETITIONER'S REPLY

The Petitioner refutes the Department's position of the effect of the challenged rule and states that the implication of the rule may affect the disciplinary hearings of inmates; and therefore, affects others than just the employees of the issuing agency. Petitioner further states that it concerns a matter of serious consequence involving important public interests; namely, that it removes "qualifying pay periods from the seniority credit for time in the position, which makes the employee eligible for merit pay increases, preferential order in receiving overtime assignments, and preferential order in the post-and-bid process by which shifts and assignments are allocated."⁸ In that we conclude that the challenged rule concerns a matter of serious consequence involving an important public interest, we do not address the indirect affect that the challenged rule may have on inmates.

Petitioner also claims that the challenged rule abolishes the appointing authority's discretion to credit limited term appointments toward promotions to other state agencies and contends that the retroactive application of the rule in a July 2, 2014 memorandum from the Department has caused significant ramifications to the affected class. The Department contends that those ramifications are due to duly adopted regulations and not the challenged rule. In that the challenged rule goes beyond the issue of influence on acquiring permanent

⁸ Reply to Petition, dated April 1, 2015, page 5.

status in a position, we do not have to address that issue here to make a determination as to whether the challenged rule is an underground regulation.

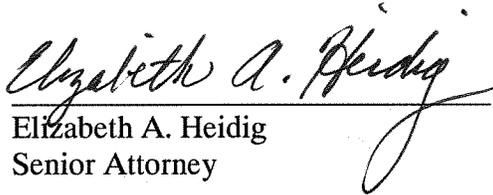
CONCLUSION

In accordance with the above analysis, OAL determines that the DOM Changes to Seniority Status Document meets the definition of "regulation" that should have been adopted pursuant to the APA but was not; and therefore, is an underground regulation.

Date: June 1, 2015



Debra M. Cornez
Director



Elizabeth A. Heidig
Senior Attorney

cc: Dr. Jeffrey Beard
Timothy Lockwood

EXHIBIT A



Department of Corrections and Rehabilitation
**NOTICE OF CHANGE
TO DEPARTMENT OPERATIONS MANUAL**

Chapter 3, Article 20, Seniority Status

Transmittal Letter Number:
12-15

Revision Date:
November 1, 2012

The purpose of this document is to provide all Department Operations Manual (DOM) holders with information regarding the attached amendment to DOM Chapter 3, Article 20, Seniority Status.

This Article is revised to clarify how seniority is calculated for the Correctional Sergeant and Correctional Lieutenant classifications.

Please inform all persons concerned of the contents of this Notice, which shall remain in effect until incorporated into the next edition of the DOM. Inquiries regarding the subject matter may be directed to Tiffany Pena, Human Resources, at (916) 324-7079.

Original signed by:

ANDREA WALLIN-ROHMANN
Deputy Director
Human Resources

Attachment

CHAPTER 3 - PERSONNEL, TRAINING, AND EMPLOYEE RELATIONS

ARTICLE 20 — PERSONNEL POLICIES

Revised July 15, 1999

Updated January 10, 2010

[Sections 33010.1 through 33010.18.1 are unchanged]

33010.18.2 Seniority Status

Revised November 1, 2012

The Officers' (including intermittent employees) seniority shall be in accordance with MOU, Bargaining Unit 6.

Seniority for employees (including intermittent employees) in all other bargaining units shall be in accordance with their respective MOU.

Correctional Sergeant and Correctional Lieutenant seniority shall be based on:

- Where a limited term assignment is terminated, (Captain back to Correctional Lieutenant and/or Correctional Lieutenant back to Correctional Sergeant) the seniority accrued in the higher classification shall be calculated into the former supervisory classification in which the employee is returning.
- Total continuous service in class (employees who accept a transfer to a non-custody classification, but do not leave the Department, will receive credit for the previous seniority earned upon return to their former classification) or, in the event of tie;
- Total continuous service in class combined with continuous total State service or, in the event of tie;
- The highest figure as determined by the last four digits of the employee's social security number.

A break in State service of 12 months or more shall result in loss of all seniority credits.

[Sections 33010.19 through 33010.34 are unchanged]

**BIS
TIME & SHIFT
SENIORITY PROCESS**

BIS SENIORITY LOAD PROCESS

- Communication with institutions is given in advance to ensure PPAS seniority is up to date.
- Approximately 2 weeks prior to go-live the PPAS file is received.
- A spreadsheet of employees' is prepared relevant to their QPPs and hire dates.
- A Time Balance Report is run to verify there are no QPPs already accumulated in SAP prior to the institution's initial load.
- The Data Management Team loads the QPPs and hire date information into the employee's master data utilizing the spreadsheet.
- A Seniority Sequence Number Program is run in SAP to apply the ranking number.
- The seniority data is loaded into TeleStaff.
- Institutions verify the data and send any adjustments to BIS.

QPPs ARE EARNED ON A MONTHLY BASIS

- Scheduled shifts in TeleStaff are transferred to SAP via the Daily Interface.
- Upon completion of the Pay Period, each employee will or will not earn a QPP in SAP based solely on the number of hours worked or paid leave scheduled in TeleStaff. The employee must have a minimum of 88 hours of physical working time or paid leave to earn a QPP in SAP.
- Seniority Sequence Number Program is ran the first week of each month in SAP, this program gives each employee in the institution a sequence number based on the seniority matrix as shown below:

R06 Criteria	S06 Criteria
1. Qualifying Pay Periods in BU06	1. Qualifying Pay Periods in current classification
2. Hire Date in BU06	2. Hire Date in current classification
3. Last 4 digits of SSN – Low to High	3. Qualifying Pay Periods for State Service
4. Middle 2 digits of SSN – Low to High	4. State Hire Date
5. First 3 digits of SSN – Low to High	5. Last 4 digits of SSN – High to Low

- Each employee's current month's sequence number is read and determines the ranking order on the SAP Seniority Report.
- This sequence number is then transferred to TeleStaff for each employee.
- The sequence of employees is then used for the Fill by Rules in TeleStaff.

NEW HIRES AND TRANSFERS

- New hires and transfers must be keyed into SCO immediately following their effective date and the SCO position must exist in SAP for the successful transfer of data from TeleStaff to SAP for every employee.
- The Master Scheduler will give the employee a profile in TeleStaff.

- Live institutions must notify BIS when they receive a transfer from a non-live institution, they must provide BIS with the following data:
 1. Class hire date
 2. State hire date
 3. Class QPPs as of the 1st of the month in which you receive the transfer
 4. State QPPs as of the 1st of the month in which you receive the transfer
- BIS loads the seniority data that has been provided by Personnel at the receiving institution into SAP.
- After the seniority data has been loaded into SAP by BIS, Personnel must verify the data is correct.
- The employee is scheduled for shifts in TeleStaff and data begins interfacing with SAP within one to three days of the first schedule.

QPP AND HIRE DATE VALIDATION

See Attachment C – BU06 Seniority Reconciliation Process, this also includes the steps for running a seniority report and screen shots with examples of reports with missing information that would need action taken by Personnel Transactions.

CORRECTING DISCREPANCIES AFTER VALIDATION

Send requests to correct seniority to m_bistimeshiftlog@cdcr.ca.gov and include the correct State Hire Date, Classification Hire Date, and QPPs.