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SUSAN LAPSLEY
Director

2008 SEP 17 AM 9:55

Date: September 17, 2008

To: Joel Holley

From: Chapter Two Compliance Unit

Subject: **2008 OAL DETERMINATION NO. 27(S)**
(CTU2008-0805-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation California State Prison—Solano Department Operations Manual Supplement section 53130.

On August 5, 2008, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether California State Prison—Solano Department Operations Manual (DOM) Supplement section 53130 constitutes an underground regulation. Section 53130 requires that inmates assigned in food service areas for over two years are to be unassigned or reassigned.

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.

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(c) establishes exemptions expressly for the California Department of Corrections and Rehabilitation (CDCR):

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[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.

> (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, DOM Supplement section 53130 was issued by California State Prison—Solano. It applies only to inmates at California State Prison—Solano. Inmates housed at other institutions are controlled by those other institutions' procedures and policies for employment in the prison kitchens. Therefore, DOM Supplement section 53130 is a "local rule" and is exempt from compliance with the APA.[3]

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.

Susan Lapsley
SUSAN LAPSLEY
Director

Kathleen Eddy
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[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 in relevant part:

> (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:
> ...
> *(E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule.* [Emphasis added.]