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Director

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Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: January 20, 2010
To: Russell Sanders
From: Chapter Two Compliance Unit
Subject: **2010 OAL DETERMINATION NO. 1 (S)**
(CTU2009-1204-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation a policy at California State Prison, Solano, concerning attendance at religious banquets

On December 4, 2009, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a policy at California State Prison, Solano, concerning attendance at religious banquets constitutes an underground regulation. The rule is in a Second Level Appeal Response signed on October 29, 2009, on behalf of Gary Swarthout, Acting Warden at California State Prison, Solano. The rule, as stated in the Second Level Appeal Response, a copy of which is attached hereto as Exhibit A, requires:

... inmates to attend at least fifty percent of regularly scheduled religious services or worship (not including special services, teachings, counseling, etc.) for the duration of six months prior to being authorized to attend a food banquet,

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

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.

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, 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 applies solely to the inmates of the California State Prison, Solano. The rule was issued by the warden of California State Prison, Solano, in the Second Level Appeal Response. Inmates housed at other institutions are governed by those other institution's criteria for attendance at religious food banquets. The rule you challenged was issued by the California State Prison, Solano, and applies only to inmates at California State Prison, Solano. 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.

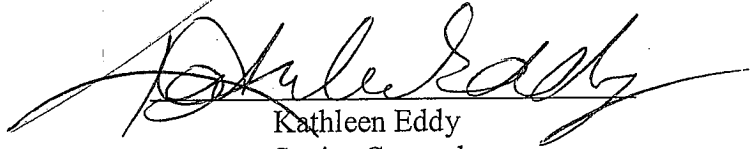
(E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule. (Emphasis added.)

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



SUSAN LARSLEY

Director



Kathleen Eddy

Senior Counsel

Copy: Matthew Cate
Timothy Lockwood
John McClure

Exhibit A

11/6 ✓

STATE OF CALIFORNIA

DEPARTMENT OF CORRECTIONS AND REHABILITATION

MEMORANDUM

Date: October 29, 2009

To: R. DANIELS (T-06015) 15-N-1-U
California State Prison-Solano

Subject: **SECOND LEVEL APPEAL RESPONSE LOG NO. CSP-S-09-02023**

ISSUE:

It is the appellant's position that the Policy of California State Prison-Solano (SOL) of determining as to who can attend religious banquets, and establishing a requirement that an inmate must attend 50% of the regularly scheduled religious services for the six (6) months period preceding a banquet in order to attend that banquet is an "arbitrary criteria".

Appellant contends that the 50% participation requirement has not undergone the requirements of the Administrative Procedures Act regarding the promulgation of rules by a state agency. Furthermore the appellant contends that the policy is not compliant with RLUIPA in that the State is deciding who has a sincerely held belief by setting an arbitrary quota. Furthermore, the appellant contends that the policy has been established because of budgetary concerns. In addition, appellant contends that the policy must pass the four tests of The Turner Standard to show reasonability of a rule.

Appellant requests that the administration at SOL ceases implementing this policy, document this policy and how it complies with RLUIPA's requirement that it is the least restrictive burden, and document Solano's compelling governmental interest. Furthermore, the appellant requests that SOL document under Turner, the four tests and how they have been passed. The appellant requests that SOL document how this policy complies with the Administrative Procedures Act.

INTERVIEWED BY: NAME, Jewish Chaplain, Rabbi Leah Sudran at the First Level of Review.

REGULATIONS: The regulations regarding this issue are:

California Code of Regulations (CCR), Title 15, Subsection 3053 Food for Religious Events.

(a) Inmate religious groups shall not be permitted more than two events each year where foods with religious significance are provided by the institution in place of the regularly planned meal.

CCR, Title 15, Subsection 3054 Religious Diet Program.

(a) Each institution shall make reasonable efforts, as required by law, to accommodate those inmates who have been determined, pursuant to CCR, Title 15, subsection 3054.3(b)(1), to require a religious diet

(c) Religious meals shall not be restricted from inmate based on their classification or housing placement...

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CCR, Title 15, Subsection 3210 Establishment of Religious Programs.

(a) Institution heads shall make every reasonable effort to provide for the religious and spiritual welfare of all interested inmates, including, but not limited to, affording inmates a reasonable accommodation to attend a scheduled Religious Service...

(c) Reasonable time and accommodation shall be allowed for religious services in keeping with facility security and other necessary institutional operations and activities...

(d) A request for a religious service accommodation that requires a specific time, location and/or item(s) not otherwise authorized, will be referred to a Religious Review Committee (RRC) for review and consideration. The RRC shall be comprised of designated chaplains, and a correctional captain or their designee...

CCR, Title 15, Section 3000 Definitions.

Religious Review Committee (RRC) means a committee formed and maintained at each institution that reviews and reaches a decision regarding requests for reasonable accommodation and/or access to religious services.

Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): United States Department of Justice, Civil Rights Division, Title 42, The Public Health and Welfare, Chapter 21C, Protection of Religious Exercise in Land Use and By Institutionalize Persons, §2000cc-1. Protection of Religious Exercise of Institutionalized Persons

(a) General rule: No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person, (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): United States Department of Justice, Civil Rights Division, Special Litigation Section, Religious Exercise of Institutionalized Persons

... This provision prohibits a state or local government from substantially burdening the religious exercise of such an institutionalized person, unless the government demonstrates that imposition of the burden furthers a compelling governmental interest and is the least restrictive means available to further that interest.

DISCUSSION:

It was found that the RRC developed a local practice that requires inmates to attend at least fifty percent of regularly scheduled religious services or worship (not including special services, teachings, counseling, etc.) for the duration of six months prior to being authorized to attend a food banquet, with exceptions for new inmates. The RRC is the body authorized to make decisions regarding requests for religious service accommodation (CCR Title 15, Subsection 3210 Establishment of Religious Programs). This recent practice is not current policy, but is planned for inclusion in the revised SOL DOM Supplement, Religious

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Programs. The RRC determined an acceptable gauge for an inmate's sincerely held religious belief is consistent, ongoing participation in regularly scheduled religious worship services for the purposes of food banquet attendance. SOL's current acceptable practice for consistent, ongoing participation has been defined as 50% attendance rate at regularly scheduled worship services, taking into account inmate illnesses and other factors.

It was found that SOL inmates are not being denied their religious right to practice their religion or worship. Furthermore, it was found that religious groups may be permitted up to two events (banquets) annually where food with religious significance is provided, but such banquets are not required to be offered. These events are an optional part of each institution's programming, and non-attendance would not prevent an inmate from practicing his faith. According to the United States Department of Justice (DOJ), Civil Rights Division, in the passing of RLUIPA, Congress found that the right to assemble for worship is at the very core of the free exercise of religion. It is found that SOL is not prohibiting inmates from assembling or practicing their faith. With the exception of food banquet attendance, no limitations or requirements with respect to the percentage of time an inmate attends services are in place for attendance at regularly scheduled religious services or special ceremonies. All inmates are still able to assemble and freely practice their religious beliefs.

The matter of attending religious banquets does not require a policy that undergoes the requirements of the Administrative Procedures Act. Attending a religious banquet does not require the application of the "least restrictive burden" requirement. Banquets are optional aspects of the programming at CDCR, and many of the prisons of CDCR do not permit any banquets. The Turner tests do not apply to attending a banquet.

In addition there is ample proof that in the case of the Asatru faith specifically, the meal itself is not part of the religious ritual. I have brought documentation for that here from the Federal Bureau of Prisons, Technical Reference, Inmate Religious Beliefs and Practices, from Ravenbok, and from Frigga's Web Association.

As per the United States Department of Justice, Federal Bureau of Prisons, Technical Reference, Inmate Religious Beliefs and Practices, dated 03/27/09, which serves as a practical guidelines for administration of inmate religious beliefs and practices, the Asatru religion does not require any special foods for its practice. It does acknowledge that "pork is generally eaten at the Yule Feast." However, the feast is separate from the religious rituals themselves. It reads in part "The Blot is a ritual sacrifice made in honor of a God or Goddess. Some groups retain the ancient practice of an animal sacrifice, in which an animal is sacrificed to the Gods and Goddesses and then cooked and eaten at the feast after the Blot. Some Asatruar make only a symbolic animal sacrifice, offering an edible image, such as a cookie, in the shape of an animal. This is an appropriate alternative for incarcerated Asatruar. Most modern Asatruar make their sacrifice symbolically with homemade mead, an alcoholic drink. Wine and beer may also be used. Fruit juice or a non-fermented mixture of water, honey and fruit juice is a suitable alternative in Bureau facilities.

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In the descriptions of Asatru written by its major organizations, it is explained that the religious services/rituals as currently practiced do not include either animal sacrifice or the consumption of meat. In place of the consumption of meat, the ceremonial drink, called mead, is consumed. The Ravenbok: The Raven Kindred Ritual Book by Lewis Stead and the Raven Kindred, 3rd edition reads "The Blot is the most common ritual within Asatru. In its simplest form a blot is making a sacrifice to the Gods. In the old days this was done by feasting on an animal consecrated to the Gods and then slaughtered. As we are no longer farmers and our needs are simpler today, the most common blot is an offering of mead or other alcoholic beverage to the deities." (page 6) The author goes on to write "The blot consists of three parts, the hallowing or consecrating of the offering, the sharing of the offering, and the libation. Each of these is equally important. The only physical objects required are mead, beer or juice; a horn or chalice; a sprig of evergreen used to sprinkle the mead; and a ceremonial bowl, known as a Hlautbowl, into which the initial libation will be made." (page 8)

The pamphlet "Asatru in Brief" by Reeves Hall of Frigga's Web reads "A blot is an offering of food or drink, commonly mead or ale, to the gods. A blot can be as simple as pouring out a bottle of beer to the gods in your backyard, or it can be an elaborate community ceremony. However, the intent is always the same. An exchange of gifts creates a bond between two people. In a blot, Asatruers thank the gods for their gifts and offer gifts in return. This celebrates and strengthens the bond between the gods and humankind. A sumbel is a series of ritualized toasts. The participants sit in a circle, and a vessel of drink (a drinking horn full of mead is traditional) is passed around the circle at least three times." The author goes on to write "It is customary, but not required, to use alcoholic beverages in blot and sumbel and to share feasts of meat and grain."

I myself have been the sponsor for Asatru at SOL for four years and have witnessed many of their banquets. The ceremonies are exactly as described above, involving the sharing of a drink and toasts. After the ritual is completed, the ceremonial circle is ritually dissolved, and the meal is consumed in a non-ceremonial way, simply as a meal separate from the ritual. There is, in other words, no explicit religious element in the meal itself.

This year, in order to accommodate the Asatru on Yard 3 of which inmate Daniels is a member, the Asatru group will have two occasions to celebrate Yule. On December 19 there will be a banquet, which will be limited to those who have attended services for 50% of the time in the past 6 months, except for special cases of illness or for new inmates who were previously members of Asatru at other prisons. On December 26 there will be a Yule Celebration, which will be the time for the ceremonies described above. If the inmates so choose they can conduct the ceremonies at both events, but the inmates who are unable to attend on December 19 will definitely be able to participate in the religious ceremonies on December 26, which is actually a more appropriate day for the celebration of Yule which is 12 days from December 20-December 31.

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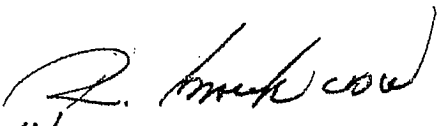
DECISION: The appeal is partially granted.

Appellant's request for documentation on how this policy complies with RLUIPA's requirement that it is the "least restrictive burden" and that SOL document Solano's compelling governmental interest is denied. This policy does not fall under the purview of RLUIPA and does not require documentation on how it complies with RLUIPA. Appellant's request that SOL document how this policy complies with the Admin. Procedures Act and Turner is denied. This policy is governed by the provisions of Title 15, which authorize the RRC to make such decisions. The Turner tests do not apply to this policy, which is not pertaining to a religious service.

Your fourth action requested that the Turner standard (Walker v. Sumner 917 F.2d 382 (9th Cir. 1990) be adhered to is denied. SOL does not have in-house legal counsel available to determine if compliance by CDCR, SOL or institutional staff is required. Information about this court case was not included in your appeal and no additional information was found. Your request to comply with the above mentioned case cannot properly be addressed at this level.

Appellant's request for documentation of this policy and the administration's rationale for implementing it are granted. As stated above, banquets for many faiths, including Asatru are not a required component of the religious practices. Banquets that are not a requirement for your religious observances do not fall under the provisions of RLUIPA, the RRC is authorized to make decisions on who can attend the banquets without needing to prove that it is a compelling governmental interest or the least restrictive burden or that it has not made an arbitrary determination of who has a sincerely held belief. The RRC can determine that a certain amount of attendance is enough demonstration of sincerity for purposes of determining who has the privilege of attending a special banquet meal. As stated above the policy is planned for inclusion in the revised SOL DOM Supplement.

The appellant is advised that this issue may be submitted for a Second-Level of Review.


4/ **GARY SWARTHOUT**
Warden (A)
California State Prison-Solano