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Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: December 10, 2010

To: Daniel Carpenter

From: Chapter Two Compliance Unit

Subject: **2010 OAL DETERMINATION NO. 30(S)**
(CTU2010-1021-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation In-Cell Handicraft
Departmental Operations Manual Supplement, Mule Creek State Prison

On October 21, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a document titled "In-Cell Handicraft" constitutes an underground regulation. The rule is contained in Section 101050 of the Mule Creek State Prison Departmental Operations Manual Supplement (rev. July 2010) and sets out various requirements for inmate handicraft activities at Mule Creek State Prison. This document was issued by the warden at the Mule Creek State Prison and is attached hereto as Exhibit A.¹

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,² which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).³ 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.

¹ Exhibit A has two attachments, only one of which was provided to OAL (Attachment A).

² "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.

³ 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.

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 was issued by Mule Creek State Prison and applies solely to the inmates of the Mule Creek State Prison. Inmates housed at other institutions are governed by those other institutions' requirements for inmate handicraft activities. 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.⁴

⁴ 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.

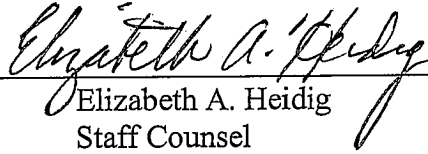
(D) The challenged rule has expired by its own terms.

(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 LAPSLEY
Director



Elizabeth A. Heidig
Staff Counsel

Copy: Matthew Cate
Tim Lockwood

Exhibit A

Post

MULE CREEK STATE PRISON
DEPARTMENTAL OPERATIONS MANUAL
SUPPLEMENT

Section: 101050
IN-CELL HANDICRAFT

REVISED: JULY 2010

101050.4
INMATE ELIGIBILITY

Inmates must be in Privilege Group A or B to be eligible to participate in the In-Cell Handicraft Program at Mule Creek State Prison (MCSP).

Inmates are only allowed to participate in the In-Cell Handicraft Program during non-working/training hours. Inmates may only participate in the program within their assigned cell, building dayroom or exercise yard. Handicraft items may not be worked on during work assignments. Inmates found to be misusing handicraft items or using handicraft items in an unauthorized area or at an unauthorized time will be subject to disciplinary action and/or suspension of handicraft privileges. In such instances the inmate will be required to send home at his expense, donate, or destroy all previously authorized handicraft items.

Inmates assigned to Administrative Segregation Unit (ASU) are not eligible to participate in the In-Cell Handicraft Program. Inmates assigned to ASU shall have handicraft property stored with other disallowed property until the inmate returns from ASU.

Any inmate who abuses the In-Cell Handicraft Program privileges shall be subject to loss or suspension of eligibility. In the event an inmate loses his eligibility to participate in the program, he will be required to send home at his expense, donate, or destroy all handicraft materials.

Handicraft property is limited to the quantities noted in Attachment A. Handicraft property is included in the six (6) cubic feet of allowable property.

Inmates are not allowed to share, barter, or sell handicraft items or products made from handicraft materials. Handicraft projects will only be displayed within the inmate's cell in accordance with existing regulations. Any handicraft item/project that is determined to present a security risk/violation shall be confiscated pursuant to institutional procedures. Inmates using the In-Cell Handicraft Program privilege in any unauthorized fashion are subject to disciplinary action and/or loss of handicraft privileges.

101050.5
HANDICRAFT
ACTIVITY

Inmates participating in the In-Cell Handicraft Program shall be required to maintain copies of approved in-cell handicraft ordering receipts. The receipts shall be made available to staff upon request.

CRAFTS APPROVED
FOR MCSP

Only the following crafts will be allowed to be made by inmates at MCSP:

- Bead Craft, Beading
- Drawing
- Painting
- Paper craft
- Origami

Any item made by an inmate that is deemed to violate the safety and security of the institution will be confiscated and processed as contraband per institutional procedures.

101050.7
HANDICRAFT TOOLS
AND MATERIALS

Only those items on the approved list of In-Cell Handicraft items and ordered through an approved vendor shall be received by the inmate. Items received from other sources shall be returned to sender. All approved items are subject to change without notice.

Handicraft items may only be purchased and received from the current approved handicraft vendor, and in the approved quantities (Attachment A).

The minimum In-Cell Handicraft order will be \$10 (excluding tax, shipping/handling and IWF charges). Orders may be placed once per quarter and shall not exceed a total of \$180 for A1A and \$90 for A2B work group/privilege groups per order (excluding tax, shipping/handling and IWF charges). Handicraft orders are separate from and are not part of Quarterly Package order process.

Handicraft items may be ordered by qualifying inmates through the Special Purchase clerk. Purchase orders from family and friends must be shipped directly from a MCSP approved vendor.

In-Cell Handicraft order forms shall be available in the housing units via the Special Purchase clerks. Completed forms, including a CDC 193 Trust Account Withdrawal Order, shall be reviewed and forwarded by the Special Purchase clerk to the Receiving and Release (R&R) Sergeant. The R&R Sergeant will review the requested order and if appropriate, sign the form. The R&R Sergeant will ensure the inmate qualifies for In-Cell Handicraft (not on C-Status) and will then forward the order to the Trust Office for processing.

The Trust Office will verify available funds and prepare a check for the amount of the purchase, including tax, shipping/handling and IWF charges. The Trust Office will forward the order and check to the vendor for processing. The Trust Office will forward a copy of the approved order form to the inmate. This copy will serve as the inmate's receipt of ordered items and shall be maintained by the inmate. When received at the institution the order will be sent to R&R for issuance to the inmate.

Upon receipt of a handicraft order the R&R Sergeant will ducaat the inmate. The R&R Sergeant will ensure that the order was received directly from an approved vendor and issue the order to the inmate. Any orders not received from an approved vendor will be returned to the sender at the inmate's expense or donated/destroyed pursuant to institutional procedure. The approved vendors have agreed that members of the public shall not have access to orders in any fashion. R&R will record all received handicraft items on the inmate's CDC 191 Property Card. R&R will ensure that the items received are approved and in the approved quantities. Inmates ordering replacement items will be required to bring the used item to R&R on a one for one exchange. The replaced item will be discarded and/or destroyed pursuant to institutional procedures.

Any items that are not approved or pose a threat to the safety and security of the institution or in excess of the approved quantities will not be allowed and inmates must mail out at their expense or donate the items. An inmate's failure to retain used items for a one for one exchange shall prevent the inmate from receiving additional items.

101050.7.2
FUNDS OF INMATES
TRANSFERRED WHILE
AWAITING ORDERS

If an inmate transfers after placing an order, the merchandise upon arrival, shall be returned to the vendor from which it came. The vendor will mail a refund check to the institution (less return postage and handling fees) for return to the inmate's Trust Account.

If an order is received while an inmate is in ASU the order shall be returned to the vendor at the inmate's expense. The R&R Sergeant shall not be required to hold the order pending the inmate's return to the general population. The R&R Sergeant may hold an order for a period of 30 days if an inmate is temporarily removed from MCSP other than ASU. The R&R Sergeant will verify the inmate's status and determine if retention of the order is consistent with this policy. The R&R Sergeant will forward a notice to the inmate that the order has been returned to the vendor. The inmate shall assume responsibility to communicate with the vendor for reissuance of the order or return of the funds.

It shall be the responsibility of the inmate to determine if the order is being submitted no later than 90 days prior to his release date. If an order is received after the inmate is released, the items shall be returned to the vendor. The vendor will be required to forward the refund to MCSP's Trust Office who in turn will forward the refund to the inmate's Parole Office. The inmate will be responsible to communicate with the vendor for refund of the purchased items.

A paroling/discharged inmate shall not be permitted to donate Handicraft Items to another inmate.

101050.7.3
HANDICRAFT ITEMS
FROM OTHER
INSTITUTIONS

Upon transfer from another institution, only those Handicraft Items identified on the approved list and in approved quantities shall be allowed to be received by the inmate. All other items will be disposed of in accordance with the California Code of Regulations Title 15, Section 3191.

101050.7.8
VOLUME OF
HANDICRAFT ITEMS

In-Cell Handicraft Items and completed in-cell handicraft projects, when combined with other personal and State property, shall not exceed six (6) cubic feet in the inmate's living area. The number of In-Cell Handicraft items in an inmate's cell shall not exceed the maximum allowable for each type of item, as identified on the approved list of Handicraft Items (Attachment A). Inmates are only allowed to possess three (3) projects at any one time. Completed projects must be mailed out at inmate expense.

Completed In-Cell Handicraft Projects shall be mailed out of the institution at the inmate's expense. The mailing of such items shall be processed via the R&R Sergeant. The inmate shall submit a Request for Interview form to the R&R Sergeant, requesting to be educated for the purpose of processing outgoing handicraft items. A completed Trust Account Withdrawal Order will accompany the package to be mailed, and must contain the name and address of the person where the package is to be mailed. The inmate shall have sufficient funds in his Trust Account prior to mailing the item(s) out. The purpose shall be identified as "Handicraft Mail-Out" on the Trust Account Withdrawal. Handicraft orders received by the institution are limited to one (1) box only.

APPROVED
RELIGIOUS ITEMS
FOR NATIVE
AMERICAN INDIANS

Native American Indians are authorized to have a combination of five (5) religious items in their cells (Beaded necklaces, medallions or chains, bracelets and other spiritual items) per inmate.

ATTACHMENTS

Attachment A – Approved In-Cell Handicraft Items and Vendors
Attachment B – MCSP Handicraft Rules and Regulations

M. Martel
M. MARTEL
Warden

7/26/10
Date

ATTACHMENT A

APPROVED LIST OF IN-CELL HANDICRAFT ITEMS
AND APPROVED VENDOR

Approved In-Cell Handicraft Items	Maximum Allowable
1. Paints, water based only, bottles or tubes (No Metal or Glass). 2oz. Maximum	25
2. Mediums, water based only slow blending and retarder only. 4oz. Maximum	4
3. Paint Brushes, sets and individual. Not to exceed 8 1/2" in total length.	5
4. Canvas, pads, tablets or single sheets (no frame or backing) 18" x 24" maximum.	6 pads or 50 sheets
5. Paper, individual sheets 18" x 24" maximum	200 sheets
6. Pastels, crayons, "Nupastel" color sticks.	30 pieces
7. Pencils, colored, drawing, charcoal, pastel.	20 (per article 43)
9. Charcoal sticks, squares.	25
10. Stumps / Tortillons (paper only).	6
11. Hard erasers (no soft, pliable type erasers).	4
12. Beading needle (Fire Mountain Gems only)	1
13. Thread (Fire Mountain Gems only)	25 yards maximum ("00" weight)
14. Beads (Fire Mountain Gems only)	200 grams total

APPROVED IN-CELL HANDICRAFT VENDOR:

DICK BLICK CO. (GALESBURG, IL)
FIRE MOUNTAIN GEMS