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 IN THE OFFICE OF

2007 SEP -7 PM 3: 04



John Brown
 JOHN BROWN
 SECRETARY OF STATE

Date: September 7, 2007
 To: Robert Fuentes
 From: Chapter Two Compliance Unit
 Subject: **2007 OAL DETERMINATION NO. 16(S)**
(CTU 07-0726-02)

(Issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 270(f)(2)(E))
Petition challenging as an underground regulation Operational Procedure 143, issued by California State Prison - Sacramento concerning video arraignments.

On July 26, 2007, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether Operational Procedure 143 issued by California State Prison - Sacramento, is an underground regulation. Operational Procedure 143 (OP 143) establishes the procedures to be used by prison personnel in California State Prison - Sacramento (CSP Sacramento) for video arraignments.

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, which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).¹ 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 11342.600² 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 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....

¹ 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.

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.

This exemption is called the "local rule" exemption. It applies only when a rule is established for a single correctional institution. Your petition alleges OP 143, which is issued by CSP Sacramento, is an underground regulation. OP 143 sets out the responsibilities of the prison personnel for arranging video arraignments for inmates. It establishes the procedure for scheduling the video arraignments, how and by whom the inmate will be escorted to the video room, and what protective equipment is to be used for specified classifications of inmates. By its own terms, OP 143 applies only to video arraignments at CSP Sacramento.

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:

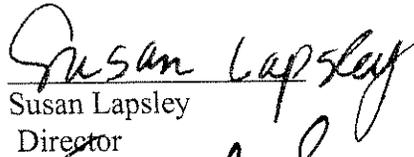
The Donovan inter-institutional correspondence policy applies solely to correspondence entering or leaving Donovan. It applies to Donovan inmates in all instances.

...

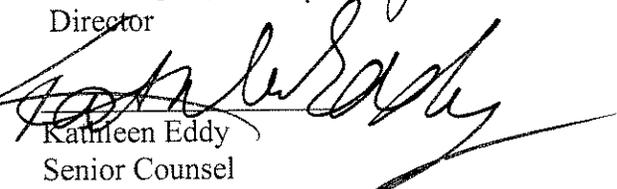
The Donovan policy is not a rule of general application. It applies solely to Donovan and, under Penal Code section 5058, subdivision (c)(1), is not subject to APA requirements.

Similarly, OP 143 applies solely to CSP Sacramento. Video arraignments at other institutions are controlled by each institution's own procedures. Therefore, OP 143 is a "local rule." As such, it is exempt from compliance with the APA and is not an underground regulation.³

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³ For this reason, pursuant to subdivision (f)(2)(E) of section 270, a rule which is included in a statutory exemption is the proper subject of a summary disposition letter. California Code of Regulations, Title 1, section 270, subdivision (f) provides: (f)(1) If facts presented in the petition or obtained by OAL during its review ... 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 used 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.)