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SECRETARY OF STATE

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2007 OAL DETERMINATION NO. 9
(OAL FILE # CTU 07-0525-02)

REQUESTED BY: **INFINITY (AKA KEITH A. BROWN)**

AGENCY: **DEPARTMENT OF CORRECTIONS AND REHABILITATION AND IRONWOOD STATE PRISON**

CONCERNING: **OPERATIONAL PROCEDURE #119**

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 is an "underground regulation" as defined in Government Code section 11340.5[1] and California Code of Regulations, title 1, section 250, and must therefore be adopted pursuant to the Administrative Procedure Act (APA). OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

ISSUE

The sole issue for OAL is whether Operational Procedure #119, entitled "General Population Yard Procedures," issued by Ironwood State Prison constitutes an underground regulation pursuant to section 11340.5.

DETERMINATION

OAL determines that Operational Procedure #119 meets the definition of a regulation pursuant to section 11342.600, however, it is exempt from the requirements of the APA pursuant to Penal Code section 5058 and is therefore not an underground regulation.

[1] Unless specified otherwise code references are to the California Government Code.

FACTUAL BACKGROUND

In May, 2007, the petitioner submitted a petition to OAL alleging that the California Department of Corrections and Rehabilitation (CDCR) and Ironwood State Prison (ISP) issued, used, enforced, or attempted to enforce an underground regulation as defined in California Code of Regulations, title 1, section 250, in violation of Government Code section 11340.5. The alleged underground regulation is Operational Procedure #119 (OP #119), issued by Ironwood State Prison. The title of OP #119 is "General Population Yard Procedures."

OP #119 is dated December, 2005. It is signed by Derrick Ollison, Warden (A) of ISP. OP #119 deals with many issues including inmate movement from cell to library, support groups, religious services, and documentation for the orientation of new inmates. It also establishes a procedure for making telephone calls, having access to showers and other aspects in inmate life.

PETITIONER'S ARGUMENT

The petitioner argues that OP #119 is a regulation within the meaning of Government Code section 11342.600. He contends that OP #119 does not fall under any express statutory exemption from the APA, and must, therefore, be adopted as a regulation pursuant to the APA.

AGENCY RESPONSE

CDCR did not submit a response to this petition.

UNDERGROUND REGULATIONS

Section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the APA. It states, in part:

> (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 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 section 11340.5 it creates an underground regulation. "Underground regulation" is defined in California Code of Regulations, title 1, section 250 as follows:

> 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.

OAL is empowered to issue its determination as to whether or not an agency employs an underground regulation pursuant to section 11340.5 subdivision (b). An OAL determination that an agency is using an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference"[2] in any subsequent litigation of the issue.

ANALYSIS

To determine that an agency is in violation of section 11340.5, it must be demonstrated that the alleged underground regulation actually is a regulation as defined by section 11342.600, that it has not been adopted pursuant to the APA, and that it is not subject to an express statutory exemption from the APA.

A regulation is defined in 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, 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).)

The first element of a regulation is whether the rule applies generally. For an agency rule to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class,

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[2] *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244

kind, or order.[3]

OP #119 applies to all general population inmates at ISP. This is a "class, kind or order." The first element required by *Tidewater* is therefore met.

The second element is that the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure. Pursuant to Penal Code section 5003, CDCR

> ...has jurisdiction over the following prisons and institutions:
> ....
> (t) Those other institutions and prison facilities as the Department of Corrections or the Director of Corrections may be authorized by law to establish, including, but not limited to, prisons in Madera, Kern, Imperial, and Los Angeles Counties.

ISP was opened in 1994, by the Department of Corrections and Rehabilitation, which was then known as the Department of Corrections.[4]

OP #119 was issued to implement, interpret, or make specific the Penal Code which is enforced or administered by CDCR and ISP. The second element in *Tidewater* is therefore met.

The third step in the analysis is to determine whether an exemption from the requirements of the APA applies to the challenged rule. Pursuant to section 11346, the procedures 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." A rule which meets the elements established in *Tidewater* but which is expressly exempt from the requirements of the APA is not an underground regulation.

Penal Code section 5058 establishes exemptions expressly for CDCR (emphasis added):

> (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...*

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[3] *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556; see *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (a standard of general application applies to all members of any open class).

[4] In 2005, the Department of Corrections was reorganized into the Department of Corrections and Rehabilitation. Pursuant to Penal Code section 12838.5, CDCR "...is vested with, all the powers, functions, duties, responsibilities, obligations, liabilities, and jurisdiction of the following entities, which shall no longer exist: ... Department of Corrections,..."

This exemption is called the "local rule" exemption. It applies only when a rule is established for a single correctional institution. OP #119 was issued by the Warden of ISP, and applies only to inmates at ISP.

In *In re Garcia* (67 Cal.App.4th 841), the court discussed the nature of a "local rule" dealing with correspondence between inmates at Richard J. Donovan Correctional Facility (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 #119 applies only to inmates at ISP. Similar inmates housed at other institutions are controlled by that other institution's internal policies. Therefore, OP #119 is a "local rule" and is exempt from compliance with the APA.

CONCLUSION

For these reasons, OAL concludes that OP #119 issued by Ironwood State Prison is a local rule and is not, therefore, an underground regulation.

Date: August 10, 2007

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