

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2008 OAL DETERMINATION NO. 1
(OAL FILE # CTU 07-0924-01)

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John F. ...
STATE

REQUESTED BY: ROBERT K. WALTERS

**CONCERNING: DEPARTMENT OF CORRECTIONS AND
REHABILITATION – INDETERMINATE SECURITY
HOUSING UNIT STATUS FOR DISRUPTIVE INMATES.**

**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 meets the definition of a "regulation" as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of a "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

ISSUE

On September 24, 2007, Mr. Walters submitted a petition to OAL challenging rules issued in a memorandum by the California Department of Corrections and Rehabilitation (Department). The rules contained in this memorandum are alleged underground regulations¹ issued in violation of Government Code section 11340.5.² The alleged underground regulations are contained in Memorandum DD81-02 (Memorandum), issued by W.A. Duncan, Deputy Director, Institutions Division, addressed to "Wardens, Classification and Parole Representatives, Classification Staff Representatives and

¹ An underground regulation is defined in title 1, California Code of Regulations, section 250: "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 Unless otherwise specified code references are to the California Government Code.

Correctional Counselor III's/Reception Centers." The subject of the Memorandum is "Indeterminate Security Housing Unit Status for Disruptive Inmates."

DETERMINATION

OAL determines that the Memorandum meets the definition of a "regulation" as defined in section 11342.600 and that it should have been adopted pursuant to the APA.

FACTUAL BACKGROUND

The Memorandum was issued on August 26, 2002. It is attached to this determination as Attachment #1. It states, in part:

Effective immediately, during the pre-Minimum Eligible Release Date review, classification staff shall consider Indeterminate SHU status for inmates who have demonstrated the desire to be disruptive and endanger the safety of others or the security of the institution. The following are examples of inmates who may qualify for consideration of Indeterminate SHU status:

1. Inmates currently serving a Determinate SHU term whose in-custody behavior reflects a propensity towards disruptive conduct, regardless of whether the inmate is not eligible for additional Determinate SHU term assessment.
2. Specifically, inmates who have been assessed three Determinate SHU terms for any offense or assessed two Determinate SHU terms for participation in a riot, melee, or disturbance. This requirement shall be subject to all SHU terms assessed on the same prison identification number different to the inmate's term status; e.g., "PVRTC", "PVWNT", etc.

Mr. Walters states that disciplinary action has been taken against him based upon enforcement of this Memorandum. Due to the Memorandum, the Determinate SHU sentence he had received was altered to an Indeterminate SHU term.

UNDERGROUND REGULATIONS

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

- (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 [Government Code] 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 as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency issues, utilizes, enforces, or attempts to enforce a rule that meets the definition of a "regulation" as defined in section 11342.600 and should have been adopted pursuant to the APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference" in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244.

To determine whether an agency issues, utilizes, enforces, or attempts to enforce an underground regulation in violation of section 11340.5, it must be demonstrated that the agency rule is a regulation not adopted pursuant to the APA and not exempt from the APA.

ANALYSIS

A determination of whether the challenged rule is a "regulation" subject to the APA depends on (1) whether the challenged rule contains a "regulation" within the meaning of section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

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. The Memorandum requires that all inmates in the SHU with determinate sentences that are considered disruptive and a danger to others or the institution be considered for Indeterminate SHU status. The Memorandum also lists the criteria to be used to classify an inmate as requiring consideration of Indeterminate SHU status. As *Tidewater* pointed out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations. The Memorandum applies to such a clearly defined class of persons - inmates housed in the SHU. The first element 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. On July 1, 2005, the Department of Corrections, under which this Memorandum was issued, was reorganized into the Department of Corrections and Rehabilitation.³ Penal Code section 5054 provides that:

Commencing July 1, 2005, the supervision, management and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the Secretary of the Department of Corrections and Rehabilitation.

Penal Code section 5058, subdivision (a), states:

The director may prescribe and amend rules and regulations for the administration of the prisons and for the administration of the parole of persons sentenced under Section 1170 except those persons who meet the criteria set forth in Section 2962. The rules and regulations shall be promulgated and filed pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except as otherwise provided in this section and Sections 5058.1 to 5058.3, inclusive. All rules and regulations shall, to the extent practical, be stated in language that is easily understood by the general public.

³ Penal Code section 5055:

Commencing July 1, 2005, all powers and duties previously granted to and imposed upon the Department of Corrections shall be exercised by the Secretary of the Department of Corrections and Rehabilitation, except where those powers and duties are expressly vested by law in the Board of Parole Hearings.

Whenever a power is granted to the secretary or a duty is imposed upon the secretary, the power may be exercised or the duty performed by a subordinate officer to the secretary or by a person authorized pursuant to law by the secretary.

The Departmental policy requiring certain inmates to be considered for Indeterminate SHU status and the criteria for classifying these inmates expressed in the Memorandum directly affects “the care, custody, treatment, training, discipline and employment of persons” in correctional institutions. The policy has a direct impact on inmates by resulting in an Indeterminate SHU status. The Memorandum, then, implements, interprets, or makes specific Penal Code sections 5054 and 5058. Furthermore, the Memorandum implements, interprets and makes specific title 15 California Code of Regulations, sections 3339 and 3341.5(c).⁴ The second element in *Tidewater* is therefore met.

The final issue to examine in determining whether the Department has created an underground regulation by issuing the Memorandum is determining if the Memorandum falls within an exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies.⁵ Exemptions may also be specific to a particular rulemaking agency or a specific program. 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.”

Penal Code section 5058 establishes exemptions expressly for the Department:

(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, provided that the following conditions are met:

(A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public.

(2) Short-term criteria for the placement of inmates in a new prison or other correctional facility, or subunit thereof, during its first six months of operation, or in a prison or other correctional facility, or subunit thereof, planned for closing during its last six months of operation, provided that the criteria are made available to the public and that an estimate of fiscal impact is completed pursuant to Sections 6650 to 6670, inclusive, of the State Administrative Manual.

⁴ The subject matter of these sections is confinement and release from the SHU.

⁵ See Government Code section 11340.9.

(3) Rules issued by the director that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code.

The first of these exemptions in Penal Code section 5058(c)(1) is called the "local rule" exemption. It applies only when a rule is established for a single correctional institution. In the case of this Memorandum, the requirements apply to all institutions in California. The Memorandum, therefore, cannot be classified as a "local rule."

The second exemption applies to situations where an institution is opening or is closing within six months. Again, that is not applicable here.

The final exemption is for rules that are excluded from disclosure to the public. The Memorandum has been widely distributed. There is no evidence that it is excluded from disclosure to the public.

We can find no other APA exemptions that would apply to this Memorandum. The Department has not identified any express exemption from the APA that would include this Memorandum.

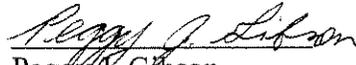
AGENCY RESPONSE

The Department did not submit a response to this petition.

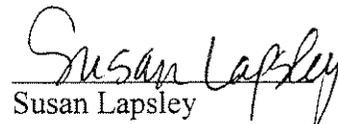
CONCLUSION

The Memorandum meets the definition of a "regulation" as defined in section 11342.600 and does not fall within any express APA exemption, and therefore, it should have been adopted pursuant to the APA.

Date: February 20, 2008


Peggy J. Gibson
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Susan Lapsley
Director

Memorandum

Date : August 26, 2002

To : Wardens
Classification and Parole Representatives
Classification Staff Representatives
Correctional Counselor IIIs/Reception Centers



Subject : INDETERMINATE SECURITY HOUSING UNIT STATUS FOR DISRUPTIVE INMATES

The purpose of this memorandum is to provide institution staff with direction relevant to the review and program consideration of inmates who complete a Determinate Security Housing Unit (SHU) term and continue to pose a threat to the safety of others or security of the institution. This perceived threat may be based on the inmate's behavior while in SHU housing or due to the inmate's disciplinary history while housed in the California Department of Corrections. Due to escalating violence occurring within the institutions, administrative staff are encouraged to review for appropriate housing those inmates who have a history of participating in disruptive behavior or fomenting violence and unrest.

This direction is appropriate and within the parameters of the California Code of Regulations, Title 15, Section 3341.5(c), which states, "An inmate whose conduct endangers the safety of others or the security of the institution shall be housed in a SHU."

Effective immediately, during the pre-Minimum Eligible Release Date review, classification staff shall consider Indeterminate SHU status for inmates who have demonstrated the desire to be disruptive and endanger the safety of others or the security of the institution. The following are examples of inmates who may qualify for consideration of Indeterminate SHU status:

1. Inmates currently serving a Determinate SHU term whose in-custody behavior reflects a propensity towards disruptive conduct, regardless of whether the inmate is not eligible for additional Determinate SHU term assessment.
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Wardens
Classification and Parole Representatives
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This directive does not negate institution staff's responsibility to properly identify and process inmates suspected of prison gang membership or association.

If you have questions or require additional information, please contact Marilyn Kalvelage, Chief, Institution Operations, Institutions Division, at _____ or for technical information, contact Linda Rianda, Chief, Classification Services Unit, at _____


W. A. DUNCAN
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