

**OFFICE OF ADMINISTRATIVE LAW**

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**SUSAN LAPSLEY**  
Director

ENDORSED FILED  
IN THE OFFICE OF

2009 NOV 16 PM 4:10



*Debra Bowen*  
DEBRA BOWEN  
SECRETARY OF STATE

Date: November 16, 2009  
To: Ricky Gray  
From: Chapter Two Compliance Unit  
Subject: **2009 OAL DETERMINATION NO. 26(S)**  
**(CTU 2009-1001-01)**  
(Summary Disposition issued pursuant to Gov. Code, sec.  
11340.5; Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging California Code of Regulations, title 15,  
section 3162(b) as an underground regulation.

On October 1, 2009, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether the California Code of Regulations, title 15, section 3162(b) is an underground regulation. This section provides:

b) Legal duplicating services for an inmate shall be restricted (provided such restrictions will not interfere with the inmate's access to the courts) when that inmate abuses the service to such an extent that other inmates are deprived of the services or it results in an unnecessary expense to the state. The authority to place such restrictions shall not be delegated to staff below the level of correctional captain. The reasons for any restrictions on the services provided an inmate shall be documented on a CDC Form 128-B (Rev. 4.74), General Chrono, and placed in the inmate's central file.

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

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250:

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<sup>1</sup>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.

The following definitions shall apply to the regulations contained in this chapter:

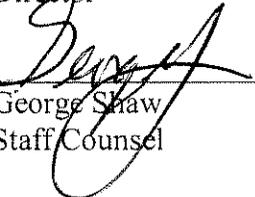
(a) "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, *but has not been adopted 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. (Emphasis added.)

The section you challenge as an underground regulation, California Code of Regulations, title 15, section 3162(b), was duly adopted as a regulation pursuant to the APA and filed with the Secretary of State on August 18, 1978, in compliance with the APA. Subsequent amendments were also duly adopted pursuant to the APA and filed with the Secretary of State on April 18, 1980 and October 19, 1993. The challenged rule is not, therefore, an underground regulation.<sup>2</sup>

The petition also alleges that California Code of Regulations, title 15, section 3162(b) was not properly enforced as applied to you. OAL does not have the jurisdiction or authority to review and evaluate actions taken by other state agencies pursuant to a duly adopted regulation.

The issuance of this summary disposition letter does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code or to seek declaratory relief pursuant to section 11350 of the Government Code.

  
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Susan Lapsley  
Director

  
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George Shaw  
Staff Counsel

Copy: Matthew Cate  
John McClure  
Tim Lockwood

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<sup>2</sup>A rule which is contained in a properly adopted regulation 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.* (Emphasis added.)
  - (D) The challenged rule has expired by its own terms.