

OFFICE OF ADMINISTRATIVE LAW

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SUSAN LAPSLEY
Director

Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: November 5, 2009

To: James Cato

From: Chapter Two Compliance Unit

Subject: **2009 OAL DETERMINATION NO. 25(S)**
(CTU2009-0910-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition Challenging as an Underground Regulation a Memorandum Dated September 18, 2007, with a Subject Heading "Compact Discs Containing Explicit Lyrics"

On September 10, 2009, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a Memorandum dated September 18, 2007, with a subject heading "Compact Discs Containing Explicit Lyrics" (Memorandum), constitutes an underground regulation. This Memorandum is signed by J. Mattingly for James A. Yates, Warden. James A. Yates is the warden of Pleasant Valley State Prison, Coalinga, California. The Memorandum is addressed to "All Staff" and "All Inmates." You specifically challenge the provision requiring the confiscation as contraband of all compact discs that contain explicit lyrics. A copy of the Memorandum that was included with the petition is attached hereto as Exhibit A.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,¹ which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).² 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 "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.

² 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:

(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 applies solely to the inmates of Pleasant Valley State Prison, Coalinga, California. The Memorandum was issued by James A. Yates, warden of Pleasant Valley State Prison, and applies only to inmates at Pleasant Valley State Prison. Inmates housed at other institutions are governed by those other institutions' rules dealing with contraband. Therefore, the rule is a "local rule" and is exempt from compliance with the APA pursuant to Penal Code section 5058(c)(1).³

³ The rules challenged by your petition are 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.

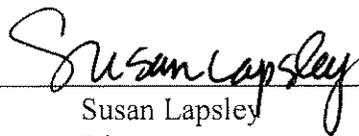
(B) The challenged rule is contained in a California statute.

(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



George Shaw
Staff Counsel

Copy: Matthew Cate
John McClure
Tim Lockwood

EXHIBIT

A

Memorandum

Date : September 18, 2007

To : All Staff
All Inmates

Subject: COMPACT DISCS CONTAINING EXPLICIT LYRICS

It has come to my attention some inmates have received Compact Discs (CDs), in their Vendor Quarterly Package (VQP); that contain explicit lyrics that promote or depict gang activity, unlawful activities, or any matter of a character tending to incite murder; arson; riot; or any form of violence or physical harm to any person, or any ethnic, gender, racial, religious, or other groups.

This memorandum is being generated to clarify the exclusion of CDs that meet this criteria. The presence of this type of material within a correctional facility clearly creates safety and security risks as well as an atmosphere that is not conducive to the rehabilitative mission of the California Department of Corrections and Rehabilitation (CDCR).

CDs that possess the aforementioned characteristics will be confiscated as contraband in accordance with the California Code of Regulations (CCR), Title 15, Sections 3006, 3023, and 3270, and processed as such.

If you have any questions or concerns, please contact, P. D. Brazelton, Correctional Captain, Central Operations, at extension 5382.

(4) J. Mattingly
JAMES A. YATES
Warden

3006.(1) given to INTERP

Defined BY The Dept. Prison Gangs & Disruptive Groups IN Prison

3023 - GANG ACTIVITY - DEFINITION OF GANGS NOT LYRICAL REPERT.

3070. General Rule

No definition, no mention of "explicit lyrics"