

OFFICE OF ADMINISTRATIVE LAW

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2009 SEP 23 PM 1:28



SUSAN LAPSLEY
Director

Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: September 23, 2009

To: Arelio Lendo

From: Chapter Two Compliance Unit

Subject: **2009 OAL DETERMINATION NO. 22(S)**
(CTU2009-0401-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation an Addendum to DOM
Section 53130.6.2 and an Addendum to DOM Section 53130.7.2

On April 1, 2009, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether two documents titled "Addendum to DOM Section 53130.6.2 Group Privileges and Restrictions" and "Addendum to DOM Section 53130.7.2 Group Privileges and Restrictions" constitute underground regulations. The documents were issued on March 11, 2009, and March 7, 2009, respectively. The Addendum to DOM section 53130.6.2 was signed by the Acting Warden at California Correctional Center, Susanville. The Addendum to DOM section 53130.7.2 was signed by the Warden at California Correctional Center, Susanville. Both documents are attached hereto as Exhibits A and B respectively.

The Addendum to DOM section 53130.6.2 establishes the yard schedule for the buildings and tiers in the Lassen Unit at the California Correctional Center, Susanville. The Addendum to DOM section 53130.7.2 establishes the daily schedule for work calls, facility and close custody recall and unlocks for the Lassen Unit.

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

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

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 11342.600 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 (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....

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 rules challenged by your petition apply solely to the inmates of the California Correctional Center, Susanville. Both documents were issued by either the warden or the acting warden of, and applied to the Lassen Unit at, the California Correctional Center, Susanville. Inmates housed at other institutions are controlled by those other institution's criteria for yard and daily schedules. The rules you challenged were issued by the California Correctional Center, Susanville, and apply only to inmates at the California Correctional Center, Susanville. Therefore, the rules are "local rules" and are exempt from compliance with the APA pursuant to Penal Code section 5058(c)(1).³

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.

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.

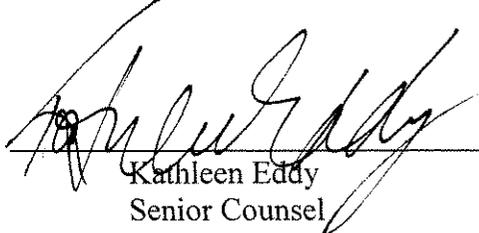
(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground

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



Kathleen Eddy

Senior Counsel

Copy: Matthew Cate
John McClure

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.)

Exhibit A

PAGE 1

State of California

Department of Corrections & Rehabilitation
 California Correctional Center

Memorandum

Date : March 11, 2009

To : All Department Operations Manual Holders

Subject: **ADDENDUM TO DOM SUPPLEMENT 53160.6.2, GROUP PRIVILEGES AND RESTRICTIONS**

Effective immediately, on pages 1, 2 and 3, the section titled, Alternating Schedule for Lassen Unit, delete all current yard schedules and replace with the following:

- *Lassen Unit will be recalled for count at the following times:*
 - *1200 Hours Facility Recall*
 - *1545 Hours Facility Recall*
 - *2045 Hours Facility Recall*

Weeks 1&3

<i>Yard Period</i>	<i>Mon</i>	<i>Tues</i>	<i>Weds</i>	<i>Thurs</i>	<i>Fri</i>	<i>Sat</i>	<i>Sun</i>
<i>Morning</i>	<i>Bldgs 1&3</i>	<i>Bldgs 2&5</i>	<i>Bldgs 1&3</i>	<i>Bldgs 2&5</i>	<i>Bldgs 1&3</i>	<i>Bldgs 2&5</i>	<i>Bldgs 1&3</i>
<i>Dayroom</i>	<i>Lwr Tier</i>	<i>Uppr Tier</i>	<i>Lwr Tier</i>	<i>Uppr Tier</i>	<i>Lwr Tier</i>	<i>Uppr Tier</i>	<i>Lwr Tier</i>
<i>Noon</i>	<i>Bldgs 2&5</i>	<i>Bldgs 1&3</i>	<i>Bldgs 2&5</i>	<i>Bldgs 1&3</i>	<i>Bldgs 2&5</i>	<i>Bldgs 1&3</i>	<i>Bldgs 2&5</i>
<i>Dayroom</i>	<i>UpprTier</i>	<i>Lwr Tier</i>	<i>UpprTier</i>	<i>Lwr Tier</i>	<i>UpprTier</i>	<i>Lwr Tier</i>	<i>UpprTier</i>
<i>Night</i>	<i>Bldgs 1&3 Upper tier</i>	<i>Bldgs 2&5 Lower tier</i>	<i>Bldgs 1&3 Upper tier</i>	<i>Bldgs 2&5 Lower tier</i>	<i>Bldgs 1&3 Upper tier</i>	<i>Bldgs 2&5 Lower tier</i>	<i>Bldgs 1&3 Upper tier</i>
<i>Dayroom</i>	<i>Lwr Tier</i>	<i>UpprTier</i>	<i>Lwr Tier</i>	<i>UpprTier</i>	<i>Lwr Tier</i>	<i>UpprTier</i>	<i>Lwr Tier</i>

Weeks 2 & 4

<i>Yard Period</i>	<i>Mon</i>	<i>Tues</i>	<i>Weds</i>	<i>Thurs</i>	<i>Fri</i>	<i>Sat</i>	<i>Sun</i>
<i>Morning</i>	<i>Bldgs 2&5</i>	<i>Bldgs 1&3</i>	<i>Bldgs 2&5</i>	<i>Bldgs 1&3</i>	<i>Bldgs 2&5</i>	<i>Bldgs 1&3</i>	<i>Bldgs 2&5</i>
<i>Dayroom</i>	<i>Lwr Tier</i>	<i>Uppr Tier</i>	<i>Lwr Tier</i>	<i>Uppr Tier</i>	<i>Lwr Tier</i>	<i>Uppr Tier</i>	<i>Lwr Tier</i>
<i>Noon</i>	<i>Bldgs 1&3</i>	<i>Bldgs 2&5</i>	<i>Bldgs 1&3</i>	<i>Bldgs 2&5</i>	<i>Bldgs 1&3</i>	<i>Bldgs 2&5</i>	<i>Bldgs 1&3</i>
<i>Dayroom</i>	<i>Lwr Tier</i>	<i>Uppr Tier</i>	<i>Lwr Tier</i>	<i>Uppr Tier</i>	<i>Lwr Tier</i>	<i>Uppr Tier</i>	<i>Lwr Tier</i>
<i>Night</i>	<i>Bldgs 2&5 Upper tier</i>	<i>Bldgs 1&3 Lower tier</i>	<i>Bldgs 2&5 Upper tier</i>	<i>Bldgs 1&3 Lower tier</i>	<i>Bldgs 2&5 Upper tier</i>	<i>Bldgs 1&3 Lower tier</i>	<i>Bldgs 2&5 Upper tier</i>
<i>Dayroom</i>	<i>Lwr Tier</i>	<i>Uppr Tier</i>	<i>Lwr Tier</i>	<i>Uppr Tier</i>	<i>Lwr Tier</i>	<i>Uppr Tier</i>	<i>Lwr Tier</i>

Weekends and Holidays A1-A Yard Only

C-Status Yard Schedule Remains 1000-1200 Hrs. Mon. thru Fri.

This addendum will be incorporated into the above DOM Supplement at the next scheduled annual revision.


 R. E. BARNES
 Warden (A)

Exhibit B

ate of California

Department of Corrections and Reha
 California Correction.

Memorandum

te : March 13, 2007

: All DOM HOLDERS

bject: ADDENDUM TO DOM 53130.7.2 GROUP PRIVILEGES AND RESTRICTIONS

The following will be incorporated into DOM 53130.7.2 Group Privileges and Restrictions at the next revision date. This addendum replaces previous addendum dated March 7, 2007 :

Lassen Day 1

<i>Time</i>	<i>Yard</i>	<i>Dayroom</i>
0800	Work Call	Work Call
0830	A1A / A2B Upper tier, Buildings 1 & 3 L6 Upper Bunk	Lower tier Buildings 1,2,3 & 5
1000	"C" Status, Two way unlock	"C" Status, Two way unlock
1200	Facility Recall	Facility Recall
1230	A1A /A2B Lower tiers, Buildings 1 & 3 Lower Bunk L6	Upper tier Buildings 1,2,3, & 5
1430	Two way unlock	Two way unlock Worker Only Dayroom
1545	Facility Recall	Facility Recall
1830	Upon completion of evening meal, Upper tiers Buildings 2 & 5 A1A Only	Lower tier Buildings 1,2,3 & 5 A1A Only
1955	Yard Recall	Two way unlock
2030	Facility Recall	Facility Recall

Lassen Day 2

<i>Time</i>	<i>Yard</i>	<i>Dayroom</i>
0800	Work Call	Work Call
0830	A1A / A2B Upper tier, Buildings 2 & 5	Lower tier Buildings 1,2,3 & 5
1000	"C" Status, Two way unlock	"C" Status, Two way unlock
1200	Facility Recall	Facility Recall
1230	A1A /A2B Lower tiers, Buildings 2 & 5	Upper tier Buildings 1,2,3, & 5
1430	Two way unlock	Two way unlock Worker Only Dayroom
1545	Facility Recall	Facility Recall
1830	Upon completion of evening meal, Lower tiers Buildings 1 & 3 Lower Bunk L-6	Upper tier Buildings 1,2,3 & 5
1955	Yard Recall	Two way unlock

Lassen Day 3

Time	Yard	Dayroom
0800	Work Call	Work Call
0830	A1A / A2B Lower tier, Buildings 1 & 3 L6 Upper Bunk	Upper tier Buildings 1,2,3 & 5
1000	"C" Status Two way unlock	"C" Status Two way unlock
1200	Facility Recall	Facility Recall
1230	A1A /A2B Upper tiers, Buildings 1 & 3 Upper Bunks L6	Lower tier Buildings 1,2,3, & 5
1430	Two way unlock	Two way unlock Worker Only Dayroom
1545	Facility Recall	Facility Recall
1830	Upon completion of evening meal, Lower tiers Buildings 2 & 5	Upper tier Buildings 1,2,3 & 5
1955	Yard Recall In Line Only	Two way unlock
2030	Facility Recall	Facility Recall

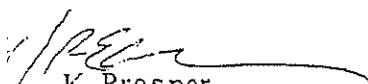
Lassen Day 4

Time	Yard	Dayroom
0800	Work Call	Work Call
0830	A1A / A2B Upper tier, Buildings 2 & 5 Lower	Upper tier Buildings 1,2,3 & 5
1000	"C" Status, Two way unlock	"C" Status, two way unlock
1200	Facility Recall	Facility Recall
1230	A1A /A2B Upper tiers, Buildings 2 & 5	Lower tier Buildings 1,2,3, & 5
1430	Two way unlock	Two way unlock Worker Only Dayroom
1545	Facility Recall	Facility Recall
1830	Upon completion of evening meal, Upper tiers Buildings 1 & 3 Upper Bunk L-6	Lower tier Buildings 1,2,3 & 5
1955	Yard Recall In Line Only	Two way unlock
2030	Facility Recall	Facility Recall

Lassen Even Calendar Weekend/Holiday Schedule

Time	Yard	Dayroom
0800	A1A Lower tiers, L6 Lower bunks	Upper tier
1000	Two way unlock	Two way unlock
1130	Facility Recall	Facility Recall
1230	A1A Upper tiers, L6 Upper Bunks	Lower tier
1430	Two way unlock	Two way unlock
1545	Facility Recall	Facility Recall
1830	Upon completion of evening meal, Lower tiers, L6 Lower Bunks A1A Only	Upper tier A1A Only
1955	Close Custody Recall - two way unlock	Two way unlock
2045	Facility Recall	Facility Recall

"C" Status inmates will be released daily at 1000 hours. "C" Status will receive same access as other inmates housed on their tier, either yard or dayroom.


K. Prosper
Warden