

OFFICE OF ADMINISTRATIVE LAW

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SUSAN LAPSLEY
Director

Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: August 6, 2009

To: Ricky Gray

From: Chapter Two Compliance Unit

Subject: **2009 OAL DETERMINATION NO. 16(S)**
(CTU2009-0609-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition Challenging as Underground Regulations: 1) a Memorandum Dated December 28, 2006, with a Subject Heading "Double Cell Housing Policy" and 2) Operational Procedure 222, section 405, titled "CDCR Form 1882-B ASU/SHU Double Cell Review"

On June 9, 2009, you submitted a petition to the Office of Administrative Law (OAL) alleging that the California Department of Corrections and Rehabilitation (CDCR) had issued, used, enforced or attempted to enforce underground regulations. Your petition asks for a determination as to whether a Memorandum dated December 28, 2006, with a subject heading "Double Cell Housing Policy" (Memorandum) and Operational Procedure 222 (OP 222), section 405, titled "CDCR Form 1882-B ASU/SHU Double Cell Review" constitute underground regulations.

The Memorandum is signed by Derral G. Adams, Warden, at California State Prison, Corcoran. It describes some options that may be utilized if an inmate refuses to be double-celled. One of the options to be utilized, if applicable, is: "Immediately inventory the inmate's property and store pending the outcome of ASU placement and/or subject to disciplinary action...." Another listed option is: "Upon the first refusal of accepting a cellmate, staff shall complete a CDCR 115, Rules Violation Report," The Memorandum is attached hereto as Exhibit A.

OP 222, section 405 is unsigned and includes no information to identify it with Corcoran or any other correctional facility. Although it includes the acronym CDCR, there is no indication that it was issued directly from that agency. It describes some of the procedures for double cell assignments. You challenge the following statements in this document: "Each inmate candidate who agrees to the assignment is expected to sign the CDCR Form 1882-B to indicate compatibility. If an inmate refuses to sign the agreement, then this shall also be documented in the designated section of the form." OP 222, section 405 is attached hereto as Exhibit B.

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.

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 rules in the Memorandum challenged by your petition apply solely to the inmates of California State Prison, Corcoran. The Memorandum, dated December 28, 2006, was issued by Derral G. Adams, Warden, at California State Prison, Corcoran. Inmates housed at other institutions are controlled by those other institutions' rules dealing with double cell housing. The rules you challenge were issued by the California State Prison, Corcoran, and apply only to inmates at the California State Prison, Corcoran. Therefore,

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.

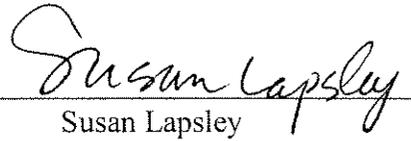
² Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

"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.

these rules are "local rules" and are exempt from compliance with the APA pursuant to Penal Code section 5058(c)(1).³

Since OP 222, section 405 is unsigned and includes no information to identify it with Corcoran or any other correctional facility, or to indicate whether it was issued directly from CDCR, OAL is unable to determine whether OP 222, section 405 was created as a set of rules for more than one correctional facility or solely for California State Prison, Corcoran. Consequently, OAL can make no determination as to whether the rules in OP 222, section 405 are underground regulations.

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

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.)

EXHIBIT

A

Memorandum

Date: DEC 28 2006

To: All Concerned

Subject: DOUBLE CELL HOUSING POLICY

*copies to
LT'S
ST'S*

It is departmental policy; therefore, the expectation that inmates double-cell and accept housing assignments as directed by staff. This double-cell policy is to be adhered to in our General Population, Administrative Segregation Unit (ASU), and Security Housing Unit (SHU) settings. If staff determine an inmate is suitable for double-celled housing, the inmate shall be expected to accept the housing assignment. The inmate shall be held accountable and responsible for his actions and subject to disciplinary action as a result of staff enforcing the double-cell housing assignment.

Upon determination by an Institutional Classification Committee (ICC) that an inmate warrants single-cell status, an "S" suffix shall be affixed to the inmate's custody determination. All other inmates are expected and required to be double-celled.

Inmates requiring celled housing are not entitled to single-cell assignment, housing location of choice, or to a cellmate of choice. If the inmate refuses to be double-celled, staff shall utilize the following options, if applicable, to the inmate's housing setting:

- Immediately place the inmate on walk-alone yard status. A CDCR 128B, General Chrono, shall be completed with a copy forwarded to the Unit Correctional Counselor I for referral to ICC.
- Immediately inventory the inmate's personal property and store pending the outcome of ASU placement and/or subject to disciplinary action pursuant to California Code of Regulations, Title 15, Section 3315.
- Upon the first refusal of accepting a cellmate, staff shall complete a CDCR 115 Rules Violation Report, charging the inmate with "Refusing a Direct Order," a Division "F" level offense.
- Upon adjudication of the CDCR 115, staff shall attempt to double-cell the inmate by physically escorting the inmate or prospective cellmate to the designated cell. If the inmate again refuses to double-cell or accept the prospective cellmate, staff shall issue a CDCR 115 charging him with the

Exhibit (A)

specific act of "Willfully Delaying/Obstructing a Peace Officer in Performance of their Duties," a Division D level offense.

- If the inmate conveys to staff a threat against any prospective cellmate and the threat prevents staff from double-celling the inmate, the inmate shall be issued a CDCR 115 charging him with the specific act of "Willfully Delaying/Obstructing a Peace Officer in Performance of their Duties by Means of Threat," a Division D level offense.
- If the inmate willfully threatens the prospective cellmate with death or great bodily injury and causes the prospective cellmate to reasonably be in sustained fear for his safety, the inmate shall be issued a CDCR 115 charging him with the specific act of "Threatening the Life of (name of person)" or "Threatening Serious Bodily Injury to (name of person)," a Division B level offense pursuant to CCR Section 3323 (d)(7).
- If the inmate's verbal statements directed toward the prospective cellmate do not rise to the threshold of a felony level threat (the inmate does not threaten the prospective cellmate with death or great bodily injury and causes the prospective cellmate to reasonably be in sustained fear of his safety), the inmate shall be charged with the specific act of "Conduct Which May Lead to Force and Violence," a Division F level offense.

It is also a behavioral expectation that all inmates serving an indeterminate SHU term with no double-cell prohibitions be double-celled prior to being considered for release from SHU.

This procedure only applies to those cases determined by ICC to meet the criteria for double-cell housing.

If you have any questions or concerns, please contact D. D. Ortiz, Associate Warden, Housing, at extension 6122.



DERRAL G. ADAMS
Warden
California State Prison, Corcoran

EXHIBIT

B

PLAN NUMBER AND TITLE

Operational Procedure No.: 222

October 2007

Operational Procedure Title: Security Housing Unit (SHU)

Sec. 405 CDCR Form 1882-B ASU/SHU Double Cell Review

- A. Unless approved for single cell assignment, or other administrative concerns are determined, an inmate in SHU is expected to share a cell with another inmate. The process for assigning more than one inmate to the same cell in SHU shall be initiated by staff recommendation or per request by the inmate candidates. The documentation for the process shall be the CDCR Form 1882-B. All sections of this form shall be complete prior to physically placing two inmates into a SHU cell together.
- B. Approval of double cell assignments shall be based upon ICC action, an interview with each inmate candidate, consideration of each inmate's signature affirming compatibility, and an evaluation of the inmate's safety concerns.
- C. The housing of SHU and ASU inmates together is permitted pending transfer. ASU inmates may be placed on Double Cell status with a compatible SHU inmate.
- D. Each inmate candidate who agrees to the assignment is expected to sign the CDCR Form 1882-B to indicate compatibility. If an inmate refuses to sign the agreement, then this shall also be documented in the designated section of the form. All ASU/SHU inmates, upon being double cell approved by ICC, shall be required to take a cellie. Refusal shall result in a CDCR 115, Rules Violation Report, being issued.
- E. A staff member at the level of Correctional Officer or Correctional Counselor I or above shall complete Parts 1 and 2 by identifying the initiator of the request, interviewing each inmate, and having the inmates sign to indicate that their placement in the same cell is a compatible assignment. The staff member performing this function shall also provide his or her printed name and signature as the staff witness.
- F. The staff witness shall forward the CDCR Form 1882-B to a staff member at the level of Correctional Lieutenant, Correctional Counselor II, or above. The approving authority shall be responsible for considering each inmates case factors and deciding to approve or disapprove the proposed cell assignment.
- G. An approving authority may determine there is no information available to indicate that the inmates are incompatible, but there are other circumstances which lead the evaluator to believe that approving the assignment would be contrary to legitimate penological interests or may threaten institutional safety and security.
- H. When evaluating compatibility, the Approving Authority shall consider each inmates background, and make a discretionary decision based on the following:
 - Enemy and victimization history.
 - Prison gang or disruptive group history.
 - Criminal influence demonstrated over other inmates.
 - Vulnerability of the inmate due to medical or mental conditions and treatments.
 - Prior housing due to safety concerns.
 - Reason(s) for SHU placement.
 - SHU or ASU status.
 - Age and social/ethnic background.

Exhibit (B)