

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

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2009 OAL DETERMINATION NO. 21
(OAL FILE NO. CTU2009-0407-01)


DEBRA BOWEN
SECRETARY OF STATE

REQUESTED BY: PHILIP CRAIGIE

CONCERNING: Memorandum Titled Exemption for Entertainment Appliances in
Administrative Segregation Units

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 "regulation" as defined in Government Code section 11342.600¹ and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of "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 250.² OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

CHALLENGED RULE

The challenged rule is a Memorandum titled "Exemption for Entertainment Appliances in Administrative Segregation Units" (Memorandum) signed by Marisela Montes, Deputy Director of the Division of Adult Institutions of the California Department of Corrections (CDCR) and Rehabilitation, dated December 15, 2008. The Memorandum is attached hereto as Exhibit A.

DETERMINATION

OAL determines that the Memorandum meets the definition of "regulation" that should have been adopted pursuant to the APA.

¹ Unless otherwise specified, all references are to the Government Code.

² As defined by title 1, section 250(a), an

"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.

FACTUAL BACKGROUND

On December 15, 2008, the Deputy Director of the Division of Adult Institutions of CDCR issued a memorandum to Associate Directors and Wardens. The Memorandum is titled "Exemption for Entertainment Appliances in Administrative Segregation Units" and states:

Due to the current fiscal situation and the cost to retrofit housing units it has now been determined that the following institutions are permanently excluded from allowing the use of entertainment appliances in the Administrative Segregation Units:

CSP—Corcoran	Deuel Vocational Institution
Folsom State Prison	California Medical Facility
San Quentin State Prison	Richard J. Donovan Correctional Facility
Calipatria State Prison	CSP-Los Angeles County
North Kern State Prison	Centinela State Prison

A temporary exemption regarding the use of entertainment appliances in the Administrative Segregation Units will continue to apply for the following institutions. A review next fiscal year will be conducted to determine if it is fiscally feasible to provide funding to retrofit the housing units.

CSP-Solano
High Desert State Prison
Wasco State Prison

On April 7, 2009, Phillip Craigie (Petitioner) submitted a petition to OAL challenging the Memorandum as an underground regulation. The petition was accepted for consideration on May 8, 2009. The acceptance was published in the Notice Register on May 22, 2009, with a request for comments from the public. No comments from the public were received. CDCR did not submit a response to the petition.

UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), provides that:

(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 “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].

ANALYSIS

OAL's authority to issue a determination extends only to the limited question of whether the challenged rule is a “regulation” subject to the APA. This analysis will determine (1) whether the challenged rule is 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 [59 Cal.Rptr.2d 186], 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)).³

As stated in *Tidewater*, the first element used to identify a “regulation” is whether the rule applies generally. As *Tidewater* points 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 states that ten listed institutions are permanently excluded from allowing the use of entertainment appliances in Administrative Segregation Unit housing. The Memorandum also states that three other institutions are temporarily excluded from allowing the use of entertainment appliances in Administrative Segregation Unit housing but that the temporary exclusion will be reviewed the following fiscal year. The Memorandum, by its terms, applies to all inmates of these 13 institutions who are assigned to the Administrative Segregation Unit housing who also own entertainment appliances or who may wish to purchase entertainment appliances in the future. The Memorandum, therefore, applies to all inmates of the 13 listed prisons who are assigned to

³ Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

Administrative Segregation Unit housing. This group of persons is a “clearly defined class of persons.”

The first element of *Tidewater* is met.

The second element used to identify a “regulation” as stated in *Tidewater* 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 was reorganized into the Department of Corrections and Rehabilitation.⁴ 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.

Penal Code section 2601 discusses inmate rights:

...each person described in Section 2600 shall have the following civil rights:

(a) Except as provided in Section 2225⁵ of the Civil Code, to inherit, own, sell, or convey real or personal property, including all written and artistic material produced or created by the person during the period of imprisonment. However, to the extent authorized in Section 2600, the Department of Corrections may restrict or prohibit sales or conveyances that are made for business purposes.

....

⁴ 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.

⁵ Civil Code section 2225 discusses the ability of a convicted felon to financially benefit from the sale of the story of his or her crime.

Penal Code section 2600 states:

A person sentenced to imprisonment in a state prison may during that period of confinement be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests.

....

These Penal Code sections give CDCR broad powers to adopt regulations dealing with the care, custody, treatment, training, discipline and employment of inmates, including the inmates' right to own personal property. The Memorandum directly affects the rights of the inmates assigned to the Administrative Segregation Unit in the 13 specified institutions to own entertainment appliances. The Memorandum interprets, implements and makes specific Penal Code sections 5058, 2600, and 2601 by prohibiting inmates assigned to the Administrative Segregation Unit of the 13 specified institutions from owning personal property in the form of entertainment appliances.

In addition to these sections of the Penal Code, regulations adopted by CDCR also deal with inmates' personal property. California Code of Regulations, title 15, section 3190 was amended in 2008 to incorporate by reference the Authorized Personal Property Schedule (APPS) into the regulation. The APPS contains a standardized list of allowable personal property items based upon privilege group, assigned security level, and institution mission.⁶

California Code of Regulations, title 15, section 3190(b), includes a process for obtaining local exceptions to the APPS:

(b) ... A list of allowable property shall be developed and updated by each mission-based region no more frequently than twice yearly. Local exceptions to the individual mission-based property lists shall also be identified. All changes to the Authorized Personal Property Schedule shall be adopted in accordance with the rulemaking requirements of the Administrative Procedure Act (Government Code Sections 11340 through 11364).

The most recent version of the APPS, dated February 2008, includes no exemptions for entertainment appliances at any Administrative Segregation Unit at any institution.

The Memorandum, therefore, interprets, implements and makes specific Penal Code sections 5058, 2600 and 2601 because it lists the personal property an inmate may possess. The

⁶ For example, the APPS would allow an inmate assigned to Administrative Segregation Unit housing at Deuel Vocational Institution is to have one audio entertainment appliance, AM/FM radio only, or one television set, AC power only, no batteries, portable models only. The APPS prohibits an inmate at the Reception Center at Deuel Vocational Institution from having any audio entertainment appliance.

The APPS also allows an inmate assigned to security Level I, II or III housing at California State Prison, Solano to possess one AM/FM radio/CD/cassette tap player or any combination, or one television set, AC power only, no batteries, portable models only. The APPS also allows Inmates assigned to General Population at California State Prison, Solano to have one audio entertainment appliance if they are assigned to Privilege Groups A or B. Those assigned to Privilege Group C may not have an audio entertainment appliance.

Memorandum also attempts to amend CDCR's own regulation by imposing exceptions to the APPS as incorporated by California Code of Regulation, title 15, section 3190, without following the procedures it adopted for making exceptions in that section. By its own terms, section 3190 recognizes that those exceptions must be adopted pursuant to the requirements of the APA.

The second element of *Tidewater* is met.

The Memorandum, therefore, meets the definition of "regulation" in Government Code section 11342.600.

The final issue to examine is whether the challenged rule falls within an express statutory exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to section 11346, the procedural requirements 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.*" (Emphasis added.)

The agency has not identified an express statutory exemption from the APA that would apply to the Memorandum, nor did OAL find such an exemption.

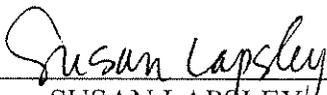
AGENCY RESPONSE

CDCR did not submit a response to the petition.

CONCLUSION

In accordance with the above analysis, OAL determines that the Memorandum titled "Exemption for Entertainment Appliances in Administrative Segregation Units" signed by Marisela Montes, Deputy Director of the Division of Adult Institutions of the California Department of Corrections and Rehabilitation, dated December 15, 2008, meets the definition of "regulation" that should have been adopted pursuant to the APA.

Date: September 18, 2009



SUSAN LAPSLEY
Director



Kathleen Eddy
Senior Counsel

Exhibit A

Exhibit B

State of California

Department of Corrections and Rehabilitation

Memorandum

Date : December 15, 2008

To : Associate Directors
Wardens

Subject: **EXEMPTION FOR ENTERTAINMENT APPLIANCES IN ADMINISTRATIVE SEGREGATION UNITS**

Due to the current fiscal situation and the cost to retrofit housing units it has now been determined that the following institutions are permanently excluded from allowing the use of entertainment appliances in the Administrative Segregation Units:

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High Desert State Prison
Wasco State Prison

If you have any concerns or questions regarding this issue, please contact Anthony Freese, Facility Captain, Standardized Procedures Unit at (916) 322-7599.

By: J. Montes

MARISELA MONTES
Deputy Director
Division of Adult Institutions

cc: Scott Kernan
Suzan Hubbard
Linda Barnett
Anthony Freese

Please Return to Petitioner

NOTE: The Memorandum was marked Exhibit B by the Petitioner.