

## OFFICE OF ADMINISTRATIVE LAW

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SUSAN LAPSLEY  
Director

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*Debra Bowen*  
DEBRA BOWEN  
SECRETARY OF STATE

Date: October 26, 2010  
To: Walter McCuff  
From: Chapter Two Compliance Unit  
Subject: **2010 OAL DETERMINATION NO. 23(S)**  
**(CTU2010-0913-02)**  
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;  
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Policy Memo 10/023,  
issued by California Substance Abuse Treatment Facility and State Prison at  
Corcoran, titled Gate Pass Clearances

On September 13, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether Policy Memo 10/023, titled Gate Pass Clearances, constitutes an underground regulation. Policy Memo 10/023 establishes criteria for clearing inmates for gate passes and allowing them access to vocational program areas. Policy Memo 10/023 was issued by the warden at California Substance Abuse Treatment Facility and State Prison at Corcoran and 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,<sup>1</sup> which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).<sup>2</sup> 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.

<sup>1</sup> "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.

<sup>2</sup> 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 (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.4<sup>th</sup> 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 was issued by the warden of California Substance Abuse Treatment Facility and State Prison at Corcoran, and applies solely to the inmates of California Substance Abuse Treatment Facility and State Prison at Corcoran. Inmates housed at other institutions are governed by those other institutions' criteria for Gate Pass Clearances. Therefore, the rule is a "local rule" and is exempt from compliance with the APA pursuant to Penal Code section 5058(c)(1). It is not an underground regulation.<sup>3</sup>

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<sup>3</sup> The rule challenged by your petition is 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.



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SUSAN LAPSLEY  
Director



Kathleen Eddy  
Senior Counsel

Copy: Matthew Cate  
Tim Lockwood

# Exhibit A

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State of California

Department of Corrections and Rehabilitation

**Memorandum****Policy Memo 10/023**

Date: July 9, 2010

To: All Staff

Subject: GATE PASS CLEARANCES

The purpose of this memorandum is to provide counseling staff and committee members a systematic and standard process for clearing inmates for gate passes and allowing them access to the vocational program area. In addition, effective immediately, inmates that have been sentenced to Life Without the Possibility of Parole (LWOP) will not be allowed access to a program behind work change and will not be gate pass clear.

The following criteria shall be utilized when placing an inmate on a Vocational or PIA waiting list:

- NO LWOP's
- No Close A Custody
- Must be within 25 years of Minimum Eligible Parole Date
- Must be within 25 years of Earliest Possible Release Date
- No Special/Public Interest Cases "PIC"
- All inmates with an Escape history, including convictions and information within the central file such as Rules Violations Reports, Confidential Memorandums, and Informational Chronos (CDC 128B's) shall be referred to the Institutional Classification Committee for evaluation
- Felony holds on a case by case basis

In addition, inmates serving life terms may not be cleared to work in an inner perimeter work assignment, such as the Correctional Treatment Center or in the following positions: complex porters, visiting porters, dialysis porters, or grounds crews.

The classification call sheet shall be specific when clearing an inmate for a gate pass. This criteria is being established to ensure that the inmates assigned and the level of staff supervision required is sufficient to ensure institutional security and public safety.

This policy memorandum will remain in effect until incorporation into Department Operations Manual, Supplement Section 52020, Inmate Count and Movement, during the next scheduled revision.

Your cooperation is expected and appreciated. If you have questions regarding this directive, please contact Kelly Santoro, Associate Warden Complex III, at extension 7210.

  
KATHLEEN ALLISON  
Warden (A)

California Substance Abuse Treatment Facility and State Prison at Corcoran