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SUSAN LAPSLEY
 Director



2010 JUN 23 PM 2:45
 DEBRA BOWEN
 SECRETARY OF STATE

Date: June 23, 2010
 To: John Steffen
 From: Chapter Two Compliance Unit
 Subject: **2010 OAL DETERMINATION NO. 13(S)**
(CTU2010-0505-01)
 (Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
 Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation DOM¹ Supplement #116, titled
 "North Program and Activity Schedule for SNY Inmates"

On April 30, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether DOM Supplement #116, titled "North Program and Activity Schedule for SNY Inmates" issued by the California Correctional Training Facility constitutes an underground regulation. DOM Supplement #116 is dated August 2010, 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 11342.600,² which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).³ 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 (CDCR):

¹ The DOM is the Department Operations Manual published by the California Department of Corrections and Rehabilitation.

² "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.

³ 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.

(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 the Correctional Training Facility. Although you did not provide a complete copy of the document, DOM Supplement section #116 was issued by that institution. Inmates housed at other institutions are governed by those other institutions' criteria. The rule you challenged was issued by the Correctional Training Facility, and applies only to inmates at that institution. 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.⁴

⁴ 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:

(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.

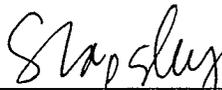
(B) The challenged rule is contained in a California statute.

(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



Elizabeth A. Heidig
Staff Counsel

Copy: Matthew Cate
John McClure

Exhibit A



California Department of Corrections and Rehabilitation
CORRECTIONAL TRAINING FACILITY

DOM SUPPLEMENT #116
North Program and Activity Schedule
for SNY Inmates

	shower program and in-hall activities for close custody inmates. (If the housing unit sergeant determines the number of inmates to be unmanageable the yard/fence side rotation will be implemented). NO CLOSE CUSTODY INMATES WILL BE RELEASED TO THE YARD DURING THIS TIME.
NOTE:	NO CLOSE CUSTODY IN HALL ACTIVITIES OR SHOWERS WILL BE CONDUCTED IN THE CLOSE CUSTODY HOUSING UNIT IF THE UNIT IS NOT SECURED PRIOR TO 1930 HOURS
1930 Hrs	A1A assigned Yard Release (Only when Dorms are activated, Dorms and Housing Units on a rotational schedule): After the completion of the evening meal, all returning inmates are to be secured. When control announces Red Card Program for the yard, officers will commence with the Red Card Privilege Program. A1A assigned MEDIUM CUSTODY ONLY inmates possessing a Red privilege Card and a Green I.D. card. Will be released to the recreation yard and/or dayroom utilizing the assignment roster. Unit without yard will conduct a controlled dayroom/shower program. All non-close custody inmates that have not been released prior to 1945 hours will be released after the closed custody count clears.
2000 Hrs	If units are not secured by approximately 2000 hours, no yard program will be conducted for the unit. Close Custody Count: No close custody in-hall activities
2030 Hrs	Front door open for courtesy inbound for workers only. These workers shall be given the opportunity to shower. Cells will be unlocked specifically for these workers only. All inmates during dayroom/shower program will remain on the first tier.
2050 Hrs	Yard recall (All programs terminated)
2100 Hrs	Halls and Dorms secured for 2130 hours count
2130 Hrs	MANDATORY INSTITUTIONAL COUNT
2130 Hrs	STAFF TRAINING
2200 Hrs	SHIFT CHANGE - 1 st Watch Staff on Duty, (relate pertinent information to First Watch Staff)

SECTION 02 - WORK/PRIVILEGE GROUP
This section explains the various Work/Privilege groups and their associated programs. Including relative to Loss of Privilege (LOP) and Confined to Quarters (CTQ).

A1/A - Definition - An inmate assigned to a full-time work/training assignment or unassigned and meet criteria for this privilege group. (Refer to CCR Title 15, Section 3044(b) (1) and 3044(d)).

YARD/DAYROOMS - A1/A ASSIGNED

A1/A assigned inmates only returning to their building during scheduled in-lines must initially return to their cells, due to yard / fence shower program.

YARD/DAYROOMS - A1/A UNASSIGNED
A1/A Unassigned inmates will be provided yard/shower programs daily M-F at 1000 hours (Please refer to OP#88 program release times). In order to prevent yard overcrowding, and increased supervision of the yards for the safety of staff and inmates, unassigned A1/A inmates will not be provided night, weekend, and Holiday yards. Modifications may be made to the yard schedule if the yard becomes overcrowded.

NIGHT YARD/DAYROOM
All A1/A assigned medium custody inmates from both Halls, with a Red privilege and a Green I.D. card on their off work hours may receive night yard. All A1/A assigned inmates with Red Cards on their off work hours may receive dayroom. Staff will utilize a controlled shower/dayroom program to avoid overcrowding and increased supervision for the safety of staff and inmates.

No night yard for close B inmates, A1/A Unassigned inmates, and A1/A Assigned inmates without possession of their Red Privilege card and Green I.D. card.

SHOWERS - A1/A ASSIGNED
Assigned inmates with Red Cards will be allowed to shower on a daily basis.

SHOWERS A1/A UNASSIGNED
A1/A unassigned inmates will be afforded showers (except weekends, holidays, and night yards) on a daily basis M-F at their program times (Refer to OP schedule for release times).

A2B - Definition - Involuntary unassigned. An inmate is placed on a waiting list pending availability of a full-time work/training assignment or an inmate unassigned awaiting adverse transfer to another institution. (Refer to CCR Title 15, Section 3044(b) (2) and 3044 (e)).

YARD/DAYROOM
A2/B inmates will attend yard with their building rotation.

A2/B inmates are restricted to their cells during evening hours and weekends, holidays except for