

**OFFICE OF ADMINISTRATIVE LAW**

300 Capitol Mall, Suite 1250  
Sacramento, CA 95814  
(916) 323-6225 FAX (916) 323-6826

**SUSAN LAPSLEY**  
Director

ENCLOSURE FILED  
IN THE OFFICE OF

2010 OCT -6 AM 8:11



*Debra Bowen*  
DEBRA BOWEN  
SECRETARY OF STATE

Date: October 6, 2010  
To: Samuel Banda  
From: Chapter Two Compliance Unit  
Subject: **2010 OAL DETERMINATION NO. 19 (S)**  
**(CTU2010-0823-01)**

(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;  
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation a new yard schedule at  
California State Prison, Los Angeles

On August 23, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether the new yard schedule at California State Prison, Los Angeles County constitutes an underground regulation. The rule is mentioned in the minutes of the Inmate Advisory Council meeting held on January 25, 2010. The minutes are attached hereto as Exhibit A.<sup>1</sup>

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>2</sup> which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).<sup>3</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> The notations on Exhibit A were made by the petitioner.

<sup>2</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>3</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 applies solely to the inmates of the California State Prison, Los Angeles County. Inmates housed at other institutions are governed by those other institutions' yard schedules. The rule you challenged was issued by the California State Prison, Los Angeles, and applies only to inmates at California State Prison, Los Angeles. 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>4</sup>

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<sup>4</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



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Kathleen Eddy  
Senior Counsel

Copy: Matthew Cate  
Tim Lockwood

# Exhibit A

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State of California

Department of Corrections

*Inmate Advisory Council Memorandum*  
C-Facility, CSP-Los Angeles County

Date : January 25, 2010

To : C. FORTSON, Captain  
C-Facility, CSP-LAC

Subject: IAC MEETING WITH CAPTAIN FORTSON MINUTES

On January 25, 2010, at approximately 1140 hours, the Inmate Advisory Council Executive Body was called to a meeting with Captain Fortson. In attendance at the meeting were:

- Captain Fortson
- Lieutenant Ocegueda
- C/O Kelly

IAC Executive Body: Chairman Crosthwaite (P20940), Vice-Chairman Wilson (D78626), Secretary Romero (C78835), Parliamentarian Berberena (C58942), and Sgt@Arms Buckner (C69181).

- ★ 1. Implementation of 'New Yard Schedule' (all bldg.s will have yard 2x per/wk) to begin Feb'10. No more than 100 I/M's on each side (as per 'safety ratio'). ★

IAC response: Since the yard program will be going back to being severely curtailed, why not maximize the amount of time that program (day room, phones, showers) can be run.

Also; Implementation of afternoon dayroom program – that is being conducted at other L-IV's – in addition to the AM and PM procedures already being done.

Taken under advisement.

2. Request for O.P.'s discussed – noted that formal requests have been submitted and will be included among the paperwork to be downloaded on Wednesdays (it was decided that all the paperwork needed to be copied & or downloaded will take place on Wednesdays of each week – as needed).
3. IAC Rep.'s release from their cells to conduct IAC business. The Captain said that IAC is supposed to be released after AM meal.
4. IAC Exec. Body Job Assignments: Lieutenant Ocegueda stated that he has been in contact with the Assignment Lt. (Campbell) and he's in the process of doing the assignments for the IAC on "A" Facility and he'll be formulating "C" Facility IAC in the same manner.
5. {Showers} Captain Fortson asked if showers were being conducted on a regular basis(?) This opened up a dialogue regarding the shower program as a whole and prompted the Captain to involve the Lt.. The Captain downloaded a copy of the current OP concerning showering of inmates and requested that all Facility staff be required to receive training and sign ACKNOLWEDGING training for this procedure.  
\* The Lt. was asked to report back to the Captain regarding this issue on Monday.

MINUTES FOR DECEMBER 29, 2009 IAC GENERAL BODY MEETING (cont'd)

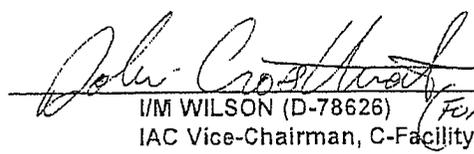
JANUARY 25, 2010

PAGE 2

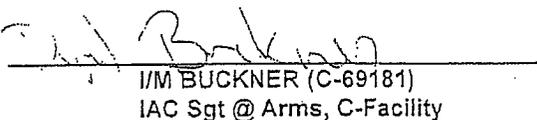
- 6. Canteen: The Captain asked how the canteen has been running. IAC expressed disapproval. At that time the Captain why isn't the canteen 'baging & dragging' so that the canteen items will be ready for the inmates when they get there to pick it up(?) It was decided that the problem with canteen goes hand-in-hand with the yard schedule. Inmates can only get their canteen when they go to the yard.

Meeting concluded @1210 Hrs.

  
 I/M CROSTHWAITE (P-20940)  
 IAC Chairman, C-Facility

  
 I/M WILSON (D-78626) (FOR WILSON)  
 IAC Vice-Chairman, C-Facility

  
 I/M ROMERO (C-78835)  
 IAC Chairman, C-Facility

  
 I/M BUCKNER (C-69181)  
 IAC Sgt @ Arms, C-Facility

  
 I/M BERBERENA (C-58942)  
 IAC Parliamentarian, C-Facility

01/27/10  
 Date

Noted:

  
 D. OCEGUEDA  
 Program Lieutenant, 2/W  
 C-Facility, CSP-LAC

2/4/10  
 Date

C. FORTSON  
 Captain, C-Facility  
 C-Facility, CSP-LAC

2/3/10  
 Date

M. MARTEL  
 Warden, CSP-LAC

\_\_\_\_\_  
 Date

MM/CF/sr

cc: Warden  
 IAC files  
 Housing Units: C1 through C5 & Gym