

OFFICE OF ADMINISTRATIVE LAW

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

SUSAN LAPSLEY
Director

IN THE OFFICE OF
2010 NOV -4 18

Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: November 4, 2010
To: Richard Bell
From: Chapter Two Compliance Unit
Subject: **2010 OAL DETERMINATION NO. 26(S)**
(CTU2010-0910-01)
(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 Response to First Level Appeal, Log# CSP-S-09-2300 addressing requirements for access to chapel time and space at California State Prison, Solano

On September 10, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether "Response to First Level Appeal, Log# CSP-S-09-2300" (Response) addressing requirements for access to chapel time and space at California State Prison, Solano contains an underground regulation. The Response states:

Any new [faith] group must establish an average of ten (10) faith members in informal meetings held outside the chapel over the previous six (6) months [to grant the faith group's request for chapel time and space].

The rule is stated in a Response to First Level Appeal, Log# CSP-S-09-2300, dated December 26, 2009, and signed by the Associate Warden of California State Prison, Solano. The rule as stated in the Response to First Level Appeal was affirmed in a document titled Second Level Appeal Response Log No.: SOL 09-2300. The Second Level Appeal Response is dated February 18, 2010, and is signed by the Warden at California State Prison, Solano. Both documents are 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 11342.600,¹ which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).² Nothing in this

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

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):

(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* (1998) 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 was issued by California State Prison, Solano and applies solely to the inmates of the California State Prison, Solano. Inmates housed at other institutions are governed by those other institutions' criteria for access to chapel time and space 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.³

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.

³ 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.

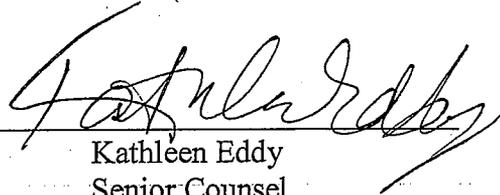
(B) The challenged rule is contained in a California statute.

(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking

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



Kathleen Eddy
Senior Counsel

Copy: Matthew Cate
Tim Lockwood

-
- (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 : December 26, 2009

To : INMATE BELL
D-34780, 6-205-L
California State Prison-Solano

Subject: RESPONSE TO FIRST LEVEL APPEAL, LOG# CSP-S-09-02300

This is in response to First Level Appeal, Log# CSP-S-09-02300. In this appeal, appellant is requesting access to chapel and other "enumerated accommodations" for the Neterian faith group. Appellant also requests the current underground practice of exclusion of Neterians from the chapel be declared a violation of RLUIPA.

On December 23, 2009, Muslim Chaplain, A. Nasir, interviewed inmate Bell. Chaplain Nasir also interviewed two other inmates listed on the attachment to this appeal as follows: Inmate Wilson (F-96520) and Inmate Jones (K-66089).

Appellant and the other inmates interviewed for this appeal were informed about the policy that is applied to all new faith groups that request chapel time and space. Any new group must establish an average of ten (10) faith members in informal meetings held outside the chapel over the previous six (6) months. At these gatherings, attendance must be taken and each attendee must sign in. These sign-in sheets must be kept and turned in to the chaplain assigned to the faith group requesting chapel time. Appellant and the inmates interviewed were ~~informed the Neterian faith group is currently being accommodated with those approved~~ religious accommodations, including a no-meat diet card, approved artifacts and religious literature.

Based on the foregoing, this appeal is partially granted. Appellant's request for Neterian access to chapel is denied, pending the Neterian faith group following the prevailing policy that applies to all new faith group requests for chapel time and space. Since this policy applies equally to all new faith group requests for chapel time, there is no underground practice of exclusion of Neterians from the chapel. Appellant's request for enumerated accommodations is granted, and will continue to be in the future, barring any violation of California State Prison-Solano's faith group policy that applies to all faith groups. If appellant is dissatisfied with the First Level appeal response, this issue may be submitted to the Second Level for Review.


DAWN LOREY
Associate Warden, Central Services
California State Prison-Solano

Memorandum

Date: February 18, 2010

To: R. BELL (D-34780) 6-205L
California State Prison-Solano

Subject: SECOND LEVEL APPEAL RESPONSE LOG NO.: SOL 09-02300

GROUP APPEAL

ISSUE:

It is appellant's position that California State Prison-Solano (SOL) inmates that observe the Neterian faith are being denied access to the chapel for religious services and other enumerated accommodations.

Appellant requests cessation of the underground practice to exclude Neterians from access to the chapel, and other required necessities, and that the practice be declared a violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA).

INTERVIEWED BY: A. Nasir, Muslim Chaplain, at the First Level of Review.

REGULATIONS: The rules governing this issue are:

California Code of Regulations, Title 15, Section (CCR) 3084.2.
Appeal Preparation.

~~... (f) Group appeal. If a group of inmates intend to appeal a~~
decision, action, or policy affecting all members of the group, one appeal form with the name and departmental identification number of the inmate who prepared the appeal shall be submitted.

(2) The inmate submitting the appeal shall be responsible for sharing the written response with the inmates who signed the appeal attachment.

CCR 3210. Establishment of Religious Programs.

(a) Institution heads shall make every reasonable effort to provide for the religious and spiritual welfare of all interested inmates, including, but not limited to, affording inmates a reasonable accommodation to attend a scheduled Religious Service if they are unable to do so due to conflicting work/education assignments. Reasonable accommodation may include, but is not limited to, modified work schedule, use of accrued time or allowable breaks, granting of a job/assignment change, changes of regular days off, etc. Use of reasonable accommodation shall in no way adversely impact an inmate's credit earning status.

... (d) A request for a religious service accommodation that requires a specific time, location and/or item(s) not otherwise authorized, will be referred to a Religious Review Committee (RRC) for review and consideration. The RRC shall be comprised of designated chaplains, and a

correctional captain or their designee. Accommodation for religious services that are not granted, shall be for reason(s) which would impact facility/unit safety and security, and orderly day to day operations of the institution.

CCR 3380. Chief Executive Officer.

... (c) Subject to the approval of the Director of Corrections, wardens, superintendents and parole region administrators will establish such operational plans and procedures as are required by the director for implementation of regulations and as may otherwise be required for their respective operations. Such procedures will apply only to the inmates, parolees and personnel under the administrator.

DISCUSSION:

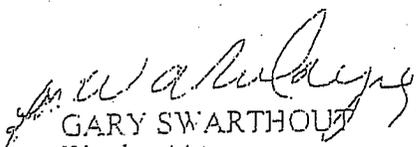
On December 26, 2009, the appeal was partially granted. The appellant and other group appellants were interviewed. It was explained to appellant that SOL has a requirement for initiation of new faith groups. The requirement stipulates that new faith groups must establish an average of ten faith members in informal meetings held outside the chapel over a period of six months, and that documented group attendance must be kept, including individual group participant signatures on sign-in sheets. Following compliance of the above requirement, the Neterian faith group would be granted access to the chapel for religious services. It was also noted that the current Neterian faith group was appropriately tentatively accommodated; including staff approval for no-meat religious diet cards, religious artifacts and religious literature. Appellant's request for the current SOL practice to be declared a violation of RLUIPA was denied.

On January 10, 2010, appellant requested Second Level Review. Appellant reiterates his contention that the Neterian faith group is being subjected to arbitrary staff restrictions that were not applied to other faith groups. Appellant adds a request that a Neterian chaplain be hired at SOL.

DECISION: The appeal is partially granted.

Appellant's request for cessation of the current practice to restrict access to the chapel, and other required necessities, for the Neterian faith group and to declare the practice a violation of RLUIPA is partially granted. The Second Level Review concurs with the First Level Review decision, in that CCR §3210(a)(d) and §3380(c) duly authorize SOL to tentatively restrict access to newly established inmate religious faith groups. It is the institutional position that once the Neterians faith group complies with requirements described in the First Level Response they will be considered for access to the chapel. Additionally, the Neterian faith group has been accommodated as to other religious practice requirements, such as religious no-meat diet cards, that allow them to practice their faith pending approval to access the chapel. Appellant's added request to hire a Neterian chaplain is denied, as a Neterian chaplain is not required to practice his faith.

The appellant is advised that per CCR §3084.2(f)(2) he must share this appeal response with other inmates that signed the appeal. Appellant is also advised that this appeal issue may be submitted for a Second Level of Review.


GARY SWARTHOUT
Warden (A)
California State Prison-Solano