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SUSAN LAPSLEY
Director

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IN THE OFFICE OF

2010 MAY 26 PM 2:16



Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: May 26, 2010

To: Derrick Martin

From: Chapter Two Compliance Unit

Subject: **2010 OAL DETERMINATION NO. 10(S)**
(CTU2010-0406-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Memorandum titled "3 and 5 Percent Redirection Plans"

On April 6, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a memorandum dated February 10, 2010, constitutes an underground regulation. The memorandum is titled "3 and 5 Percent Redirection Plans." This memorandum was issued by the warden at the Correctional Training Facility and is attached hereto as Exhibit A.¹ The memorandum sets out the plans for possible 3% and 5% reductions in funding that may be imposed in the future at the Correctional Training Facility.

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.

¹ The memorandum references attachments which were not included with the petition, and to which OAL did not have access; therefore, this determination is specific to the text of the memorandum.

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.

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.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 and staff of the Correctional Training Facility. It was issued by Randy Grounds, Warden (A) of the Correctional Training Facility. The proposed budget reductions are specific to the Correctional Training Facility and would apply only at the Correctional Training Facility. Inmates and staff at other institutions are governed by those other institutions' plans for any proposed reduction in funding. Therefore, the challenged 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:

- (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.



SUSAN LAPSLEY

Director



Senior Counsel

Kathleen Eddy

Copy: Matthew Cate
John McClure

Exhibit A

Memorandum

Date : February 10, 2010

To : James D. Hartley
Associate Director (A)
General Population Level II/III
Camps & Community Correctional Facilities

Subject : **3 AND 5 PERCENT REDIRECTION PLANS**

Attached are the 3% and 5% Redirection Plan Attachments #1 and #2 for the Correctional Training Facility. These savings are accomplished utilizing rotating yard/program closures for the inmate population at Central and North facilities and redirecting associated staffing to offset overtime. Using the average hourly rates as reported in TEMS, we anticipate saving \$186,000 per month with the implementation of the 3% Redirection Plan and \$305,000 per month with the 5% plan.

The implementation of the 3% Redirection Plan will require the following:

- All CCI staff will respond to all Code 1 and Code 3 alarms.
- All remaining designated custody staff will continue to respond to all alarms.
- Central Services Sergeant will serve as the Code 2 response supervisor replacing the Culinary Sergeant in this capacity.
- Cell Feeding
- Controlled Movement for priority ducats, Health Care Services appointments, SAP, Vocational Programs and Education.
- No Dayroom activities due to alarm response.
- North Central Services S&E's will become code II responders.
- To accomplish medication distribution, Health Care Services personnel will be required to distribute medications within the housing unit as opposed to the open pill lines.

When implementing the 5% Redirection Plan, the changes identified in the 3% Plan will remain in effect and will also include the following:

- During the 5% Redirection Plan, Central Facility Unit I and Unit III custody staff (gate officers) will rotate within their respective units to conduct necessary releases, i.e. Education, Textiles. For example, this rotation will require a staff member from E-Wing to report to F-Wing to assist in controlled releases.
- Central Facility Unit I and Unit III counseling staff will assist with PIA (Textiles) and Work Assignment releases if deemed necessary. This option would not be feasible if the East Dorm was deactivated.

If you have any questions regarding the attached plans, please contact me at (831) 678-5951.


RANDY GROUNDS
Warden (A)

Exhibit A