

OFFICE OF ADMINISTRATIVE LAW

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

SUSAN LAPSLEY
 Director



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 THE DIRECTOR

Susan Lapsley
 Director

Date: July 26, 2010

To: Sean Dunne

From: Chapter Two Compliance Unit

Subject: **2010 OAL DETERMINATION NO. 15(S)**
(CTU2010-0630-01)
 (Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
 Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation the Prohibition Against
 "Fishing" in Administrative Segregation Units at Pleasant Valley State Prison

On June 30, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a memorandum issued by Pleasant Valley State Prison prohibiting "fishing"¹ in Administrative Segregation Units constitutes an underground regulation. The rule is in a memorandum dated February 18, 2010, and titled "Fishing/Fishlines in Administrative Segregation Units". This memorandum was issued by the associate warden at Pleasant Valley State Prison 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

¹ "Fishing" is the use of threads, usually unraveled from sheets or garments, to pass items between inmate cells.

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.

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 of the Pleasant Valley State Prison. It was issued by M. E. Spearman, the associate warden at Pleasant Valley State Prison. Inmates housed at other institutions are governed by those other institutions' criteria for "fishing." The rule you challenge was issued by Pleasant Valley State Prison, and applies only to inmates at Pleasant Valley State Prison. 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:

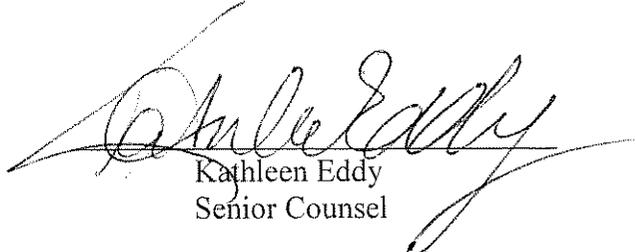
- (f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may 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



Kathleen Eddy

Senior Counsel

Copy: Matthew Cate
Tim Lockwood

Exhibit A

Memorandum

Date : February 18, 2010

To : All Administrative Segregation Inmates

Subject: **FISHING/FISHLINES IN ADMINISTRATIVE SEGREGATION UNITS**

The October 16, 2008 memorandum "FISHING/FISHLINES IN ADMINISTRATIVE SEGREGATION" is being amended to read as follows (**bold print reflects changes to the original memorandum**):

The purpose of this memorandum is to clarify the Pleasant Valley State Prison Administration's position regarding "Fishing," and to notify the inmate population of the steps that will be taken to alleviate the practice.

"Fishing" in the Administrative Segregation (Ad-Seg) Units has been, and continues to be, a significant problem. "Fishing" is viewed by this Administration as a major breach in the overall security of the Ad-Seg units. "Fishing" can be used to move contraband and pass intelligence, which could lead to violence and/or disruption within the Prison. Ad-Seg staff has been instructed to vigorously enforce a no "Fishing" policy on all three Watches. Inmates who are identified by staff as "Fishing," will be issued a Division "D" Rules Violation Report (CDC 115), for the specific act, "Willfully Delaying a Peace Officer in the Performance of Duty." **The Reporting Employee shall describe in the circumstance portion of the CDC 115 how the inmate's actions delayed them from performing their duties as a Peace Officer.** Some of the inmate-manufactured equipment used to "Fish," could be considered as a weapon or weapon stock. Inmates found in possession of such items will be charged accordingly. Hearing/Senior Hearing Officers have been instructed to charge the replacement cost for any State materials utilized in the construction of a "Fishline," and to impose loss of CANTEEN privileges as part of the disposition of the CDC 115.

In summary, the practice of "Fishing" must stop immediately. Stepped up enforcement will begin effective the date of this memorandum. Your cooperation is expected and appreciated.



M. E. SPEARMAN
Associate Warden
Housing C/D/E

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