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Director

ENDORSED FILED
IN THE OFFICE OF

2010 OCT -6 AM 8:10



Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: October 6, 2010

To: Robert Erbe

From: Chapter Two Compliance Unit

Subject: **2010 OAL DETERMINATION NO. 18(S)**
(CTU2010-0809-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation DOM Supplement section
14010.21.2

On August 9, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether Department Operations Manual (DOM) Supplement section 14101.21.2, titled Copying Services, at California Rehabilitation Center constitutes an underground regulation. DOM Supplement section 14101.21.2 establishes the procedures for requesting photocopies of legal and non-legal documents. The DOM Supplement was issued by the Associate Warden at California Rehabilitation Center and is attached hereto as Exhibit A.¹

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.

¹Notations on Exhibit A were made by petitioner.

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.

³Such 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 of the California Rehabilitation Center. It was issued by the Associate Warden of Program A at California Rehabilitation Center. Inmates housed at other institutions are governed by those other institutions' criteria for copying services. The rule you challenged was issued by the California Rehabilitation Center, and applies only to inmates at the California Rehabilitation Center. 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:

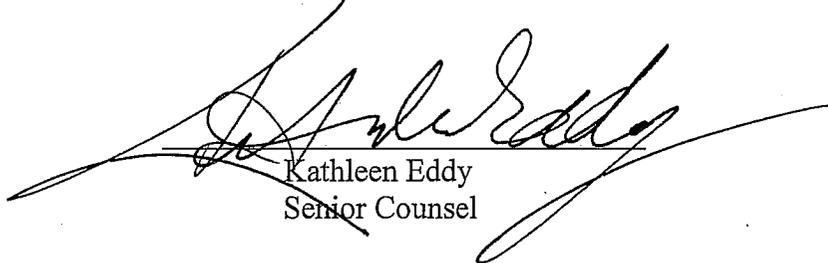
- (f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may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

EXHIBIT (A)

CALIFORNIA REHABILITATION CENTER = cre (SUPPLEMENT)

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|--|--|
|  <p>California Department of Corrections and Rehabilitation OPERATIONS MANUAL</p> | Chapter: 10000 General Administration |
| | Subchapter: 14000 Technical Support |
| | Section: 14010 Legal Matters |

" RESPONSIBILITY FOR REVIEW
LAST REVIEW

ASSOCIATE WARDEN PROGRAM A
OCTOBER 2007

14010.21.2 NOT IN D.O.M. *
COPYING SERVICES

Inmates may request photocopies of approved legal and/or non-legal documents subsequent to his Law Library visit from their individual counselors. To obtain copies, the steps indicated below must be followed.

INVASIVE/OPPRESSIVE
IMPLEMENTED TO DISSUADE
DELAY
LOWFRONT
MONITOR
REVIEW

* The inmate will submit a request for interview to his/her assigned Correctional Counselor I (CC I): TIMELY

Upon interview with his CC I, the inmate will submit the documents to be copied along with a California Department of Corrections (CDC) Form 193, Trust Account Withdrawal Order indicating the appropriate monetary amount for the number of copies requested at the rate of 10 cents for one side and 20 cents for two sides. Items shall be provided at no charge to an indigent inmate as described in the California Code of Regulations, Sections 3161 and 3165(d).

The CC I is responsible for:

- * Reviewing all copies to ensure they meet the criteria specified in Subsection 14010.21.2, Legal Documents and/or Subsection 14010.21.3, Non-legal Documents.
- * Submitting the CDC Form 193 to his respective Facility Captain who will review, initial, and return it to the CC I.
- * Copy the documents, using the copy machines in the Law Library.
- * Personally delivering the CDC Form 193 to the Inmate Trust Account Office.
- * Ensuring that confidentiality is maintained pursuant to Department Operations Manual, Chapter 10000, General Administration, Subchapter 13000, Public Relations; and Section 13030, Information Practices

SEE REVERSE