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SUSAN LAPSLEY
Director

Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: December 6, 2010

To: Michael Flanery

From: Chapter Two Compliance Unit

Subject: **2010 OAL DETERMINATION NO. 29(S)**
(CTU2010-1012-02)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as underground regulations "Facility B Rules"

On October 12, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a document titled "Facility B Rules" constitutes an underground regulation.¹ Specifically, you challenge one provision titled "Dining Hall Procedures" and the requirement that there be "[s]ingle file movement on the white line to and from meals." Although the document you provided is not complete and lacks a title page, it is labeled "Facility B Rules" at the top. It is attached as Exhibit A. "Facility B Rules" appears to be a document issued by the warden at the California Substance Abuse Treatment Facility/Corcoran.

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.

¹ Other documents were also provided: (1) a copy of meeting minutes of the Inmate Advisory Council of Facility B and Facility B Staff discussing the "white line rule" dated August 23, 2010, and (2) a copy of page 4 of 9 of "PPIM" General Population Feeding Procedures, OP-203, containing the rule of following the yellow/white line going to and from the housing units to the dining rooms (the source of this "PPIM" document was not identifiable by OAL). This Summary Disposition will only address the document titled "Facility B Rules."

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.

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* (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 appears to have been issued by California Substance Abuse Treatment Facility/Corcoran and applies solely to the inmates of the California Substance Abuse Treatment Facility/Corcoran. Inmates housed at other institutions are governed by those other institutions' criteria for procedures to and from the dining rooms. 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

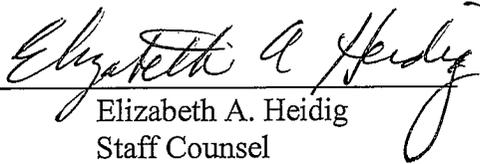
⁴ The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

- (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



Elizabeth A. Heidig
Staff Counsel

Copy: Matthew Cate
Tim Lockwood

Exhibit A

Facility B Rules

Facility Rules:

1. During alarms all inmates on the exercise yard will assume a prone position. In housing units and dining facilities, take a seated position along the wall, remain seated at tables or benches or remain on bunks, and cease all movement. Follow all instructions from staff.
2. No horse-playing; this will be considered behavior which might lead to violence, and an CDC-115 under CCR 3005(d)(1).
3. UHT inmates are to go to the head of the line for services, when UHT is set.
4. Do not enter "out of bounds" areas without staff permission.

Housing Unit Rules:

1. No Exercising in the building.
2. Keep your area clean and neat when not in it. Property limited to 6 cubic feet, with approved exceptions.
3. Unlocks are hourly, a 5 minute inline followed by a 5 minute outline.
4. Dress properly in the dayroom. Shirts required, pants/sweats required, no walking around dayroom in underwear.
5. Follow the Chain of Command, if you have a problem, start with your building officer. The IAC is also available as a means of addressing facility, not individual, issues with supervisory staff.
6. No sagging or improper wear of clothing items.
7. Games are passed out and turned in on the hour.
8. No playing radios or TVs without headphones.
9. No talking or movement during count, until cleared by unit Officers.
10. No clothing hanging on sides of bunks, or on rails, no clotheslines, tenting or rolled mattresses, or any other items which can block visibility to the back of the dorms. Should mattresses be rolled they must be at the head of the bed.
11. No pornographic (frontal nudity). No display of sexually suggestive materials, either from magazines, periodicals, or personal photos inside or outside of your locker. Staff members will have the final determination of what is sexually suggestive. If you are informed that it is by **any** staff member, it is.
12. Lines are permitted between lockers only, not made of state property, and only temporary. No lines are permitted forward of the first locker in the dorm. TV's (only) may be hung near the head of the bed for viewing, using no state property. All hanging items must be easily removed for inspection. Staff is not responsible for items damaged because they could not be easily removed.
13. ~~Medical appliances may only be used for the purposes they were designed for, not as storage areas, or drying racks, etc.~~

Dining Hall Procedures:

1. Single file movement on the white line to and from meals.
2. Controlled seating (fill in every seat in the row, unless directed otherwise by staff).
3. Controlled releases don't dump your tray until you are excused or directed to by staff.
4. Do not pass food or get up. No movement in the dining hall unless directed by staff.
5. State blues only with shirt tucked in, even if covered by a jacket. No personal clothes as outerwear in the dining facility. Shirts to be tucked prior to arriving at the dining facility, and remain tucked until after you have left the immediate area of the dining facility, (where staff searches and supervises the entry/exit of the dining facility).
6. No personal cups allowed; personal cups may be subject to confiscation.
7. Only one serving of a drink per inmate, i.e. one serving of juice, followed by one serving of coffee, etc.
8. No throwing objects at the birds.
9. No crossing the yard, you must remain on the asphalt during meals.

New Arrivals:

1. Unit staff will retain your ID card until after you are seen by the Unit Classification Committee.
2. You will receive your ID card from Unit Officer prior to meals, or appointments; return it immediately upon your return to the unit.
3. Arrange initial laundry issue with your Unit Officer.