

OFFICE OF ADMINISTRATIVE LAW

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SUSAN LAPSLEY
Director

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IN THE OFFICE OF

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Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: April 26, 2010
To: Robert Dickerson
From: Chapter Two Compliance Unit

Subject: **2010 OAL DETERMINATION NO. 6(S)**
(CTU2010-0322-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Unauthorized Possession of
Razor Blades

On March 22, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether a prohibition against the possession of razor blades by inmates constitutes an underground regulation. The rule is found in two memoranda, dated November 7, 2002, and December 4, 2002. The memoranda prohibit all inmates of Pelican Bay State Prison from possession a razor blade except under the direct supervision of prison staff. The memoranda were issued by the warden at Pelican Bay State Prison and 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 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

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 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.

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 Pelican Bay State Prison. It was issued by Joe McGrath, Warden of Pelican Bay State Prison. Inmates housed at other institutions are governed by those other institutions' criteria for the possession of razor blades. The rule you challenged was issued by Pelican Bay State Prison, and applies only to inmates at Pelican Bay 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.³

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 provisions of the APA.

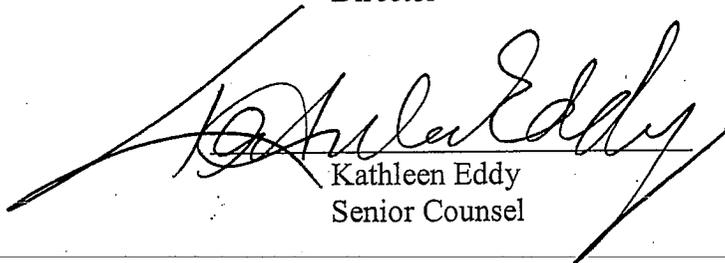
(D) The challenged rule has expired by its own terms.

(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
Timothy Lockwood
John McClure

Exhibit A

State of California

Memorandum

Date : November 7, 2002

To : All Correctional Lieutenants

From : Department of Corrections
Pelican Bay State Prison, P.O. Box 7000, Crescent City, CA 95532-7000

Subject : RAZOR BLADES AS WEAPONS

At Pelican Bay State Prison (PBSP), possession of razor blades by inmates is controlled due to the issuance and retrieval of razor blades by staff. A determination has been made by the Classification Services Unit (CSU) that based on the fact that PBSP controls the possession of razor blades by inmates, that if an inmate is found in possession of a razor blade outside the case, CSU will support a finding of guilt for Possession of a Weapon, a Division A-1 offense, and the accompanying SHU term for Possession of a Weapon.

*→ To support the charge and findings of possession of a weapon, the fact that razor blades are a controlled item at PBSP must be indicated in the circumstances of the Rules Violation Report, CDC 115. This must be included in the circumstances to advise the inmate as to the reason for the designation of "Possession of a Weapon," an A-1 offense, versus "Dangerous Contraband," a Division C offense. Additionally, this provides the inmate with the information necessary to prepare a defense to the possession of a weapon.

If you have any questions or concerns in this matter, please contact Nancy Threm, Correctional Counselor II, at extension 7753.

Original signed by:

JOE MCGRATH
Warden

State of California

Department of Corrections

Memorandum

Date : December 4, 2002

To : All concerned

From : Department of Corrections
Pelican Bay State Prison, P.O. Box 7000, Crescent City, CA 95532-7000

Subject: **INSTITUTIONAL POLICY ON RAZORS AND RAZOR BLADES AS
DEADLY WEAPONS**

This reaffirms the policy of this institution concerning inmate possession of razors and razor blades. Inmates will be issued a razor for immediate use under strict staff supervision. The razor must be returned, intact, after use to the issuing staff member.

Inmates are not allowed to possess razors at any time except as described above. Possession of a razor blade, with or without additional modification, will be considered POSSESSION OF A DEADLY WEAPON.

This policy applies to all inmates housed inside the secure perimeter of the institution.

Original signed by

JOE MCGRATH
Warden