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SUSAN LAPSLEY
 Director

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 IN THE OFFICE OF

2010 MAY 26 PM 2:14



Debra Bowen
 DEBRA BOWEN
 SECRETARY OF STATE

Date: May 26, 2010

To: Ronald Russell

From: Chapter Two Compliance Unit

Subject: **2010 OAL DETERMINATION NO. 9(S)**
(CTU2010-0330-01)
 (Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
 Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as underground regulations California Code of Regulations title 15, section 3006(c)(19) and California Department of Corrections and Rehabilitation's (CDCR) Form 115.

On March 29, 2010, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether California Code of Regulations (CCR) section 3006(c)(19) of title 15 and CDCR Form 115 constitute underground regulations. The challenged rules are attached hereto as Exhibit A and Exhibit B, respectively. Section 3006(c)(19), titled "Contraband" states:

(c) Except as authorized by the institution head, inmates shall not possess or have under their control any matter which contains or concerns any of the following:

...

(19) Cellular telephone or other electronic communications device.

Form 115 (Rules Violation Report), incorporated by reference into section 3312 of title 15, provides for the documentation of an inmate's misconduct when it is believed to be a violation of law or is not minor in nature.

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

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.

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250:

The following definitions shall apply to the regulations contained in this chapter:

(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. (Emphasis added.)

The section and form you challenge as underground regulations, California Code of Regulations, title 15, section 3006 (c)(19) and Form 115, were duly adopted as regulatory amendments pursuant to the APA and filed with the Secretary of State. Both section 3006(c)(19) and Form 115 (incorporated by reference into section 3312 of title 15) were filed with the Secretary of State on August 4, 2008, in compliance with the APA.

The petition also alleges that these regulatory amendments, as applied to you, were not properly enforced by CDCR. OAL does not have the jurisdiction or authority to review and evaluate actions taken by other state agencies pursuant to duly adopted regulatory amendments.

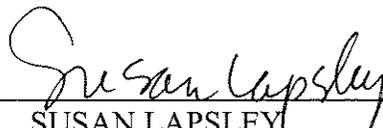
The petition further alleges the need for a Certificate of Compliance to be filed by CDCR with respect to these matters, and that none was filed. Please note that a Certificate of Compliance is only relevant to emergency regulatory matters. (See Government Code sections 11346.1(e) and 11349.6(d).) The rulemaking that was submitted with respect to the adoption of section 3006(c)(19) and Form 115 was not an emergency rulemaking. Therefore, the filing of a Certificate of Compliance was not necessary.

For the reasons discussed above, we find that the rule challenged by your petition 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

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
John McClure

Exhibit A

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 3. ADULT INSTITUTIONS, PROGRAMS AND PAROLE
CHAPTER 1. RULES AND REGULATIONS OF ADULT OPERATIONS AND PROGRAMS
ARTICLE 1. BEHAVIOR

§ 3006. Contraband.

Inmates may possess only the personal property, materials, supplies, items, commodities and substances, up to the maximum amount, received or obtained from authorized sources, as permitted in these regulations. Possession of contraband as defined in section 3000 may result in disciplinary action and confiscation of the contraband.

(a) Dangerous Property. Inmates may not possess or have under their control any weapons, explosives, explosive making material, poisons or any destructive devices, nor shall they possess or assist in circulating any writing or voice recording which describes the making of any weapons, explosives, poisons, or destructive devices.

(b) Money. Inmates may not possess money. If an inmate finds money and voluntarily surrenders it, and the rightful owner does not claim it within 30 days, it will be credited to the inmate's trust account.

(c) Except as authorized by the institution head, inmates shall not possess or have under their control any matter which contains or concerns any of the following:

(1) Any matter of a character tending to incite murder; arson; riot; or any form of violence or physical harm to any person, or any ethnic, gender, racial, religious, or other group.

(2) Blackmail or extortion.

(3) Contraband, or sending or receiving contraband.

(4) Plans to escape or assist in an escape.

(5) Plans to disrupt the order, or breach the security, of any facility.

(6) Plans for activities which violate the law, these regulations, or local procedures.

(7) Coded messages.

(8) A description of the making of any weapon, explosive, poison or destructive device.

(9) Illustrations, explanations, and/or descriptions of how to sabotage or disrupt computers, communications, or electronics.

(10) Diskettes.

(11) Catalogs, advertisements, brochures, and material whose primary purpose is to sell a product(s) or service(s) and when taken as a whole, lacks serious literary, artistic, political, educational, or scientific value.

(12) Maps depicting any area within a ten mile radius of a facility.

(13) Gambling or a lottery.

(14) Markings on the envelope which are obscene in nature as described in subsection (15) below.

(15) Obscene material and mail containing information concerning where, how, or from whom obscene material may be obtained.

(A) Obscene material means material taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest; and is material which taken as a whole, depicts or describes sexual conduct; and which, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(B) When it appears from the nature of the matter or the circumstances of its dissemination, distribution, or exhibition that it appeals to deviant sexual groups.

(C) Material subject to the tests in paragraphs (A) or (B) includes, but is not limited to material that:

- (1) Depicts, displays, or describes penetration of the vagina or anus, or contact between the mouth and the genitals.
- (2) Depicts, displays, or describes bestiality, sadomasochism, or an excretory function including urination, defecation, or semen.
- (3) Portrays the nudity of a minor, or person who appears to be under 18 years old.
- (4) Portrays conduct which appears to be non-consensual behavior.
- (5) Portrays conduct which is or appears to be forceful, threatening, or violent.
- (6) Portrays conduct where one of the participants is a minor, or appears to be under 18 years old.
- (16) Material that is reasonably deemed to be a threat to legitimate penological interests.
- (17) Sexually explicit images that depict frontal nudity in the form of personal photographs, drawings, magazines, or other pictorial format.

(A) Sexually explicit material shall be defined as material that shows the frontal nudity of either gender, including the exposed female breast(s) and/or the genitalia of either gender.

(B) The following sexually explicit material shall be allowed:

1. Departmentally purchased or acquired educational, medical/scientific, or artistic materials, such as books or guides purchased by the department for inclusion in institution libraries and/or educational areas; or
2. Educational, medical/scientific, or artistic materials, including, but not limited to, anatomy medical reference books, general practitioner reference books and/or guides, National Geographic, or artistic reference material depicting historical, modern, and/or post modern era art, purchased or possessed by inmates and approved by the institution head or their designee on a case-by-case basis.

(18) Any tobacco product, or tobacco cessation product, that contains nicotine.

(19) Cellular telephone or other electronic communications device.

(d) Anything in the possession of an inmate which is not contraband but will, if retained in possession of the inmate, present a serious threat to facility security or the safety of inmates and staff, shall be controlled by staff to the degree necessary to eliminate the threat.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 2600, 2601, 2772, 2790, 4574, 5030.1, 5054 and 5057, Penal Code.

HISTORY

1. Amendment of subsection (a) filed 3-2-83; effective thirtieth day thereafter (Register 83, No. 12).

2. Change without regulatory effect amending section filed 10-29-90 pursuant to section 100, title 1, California Code of Regulations (Register 91, No.6).

3. Editorial correction of printing error in subsection (a) (Register 92, No. 5).

4. New subsection (c) and subsection relettering, renumbering and amendment of former subsections 3136 (a)-(h) to subsections 3006(c)(1)-(8), new subsections 3006(c)(9)-(15), and amendment of newly designated subsection (d) and Note filed 1-3-95 as an emergency; operative 1-3-95 (Register 95, No. 1). A Certificate of Compliance must be transmitted to OAL 6-12-95 or emergency

language will be repealed by operation of law on the following day.

5. New subsection (c) and subsection relettering, renumbering and amendment of former subsections 3136(a)-(h) to subsections 3006(c)(1)-(8), new subsections 3006(c)(9)-(15), and amendment of newly designated subsection (d) and Note refiled 6-13-95 as an emergency; operative 6-13-95 (Register 95, No. 24). A Certificate of Compliance must be transmitted to OAL by 11-20-95 or emergency language will be repealed by operation of law on the following day.

6. Reinstatement of section as it existed prior to emergency amendment filed 12-27-95 by operation of Government Code section 11346.1(f). Certificate of Compliance as to 6-13-95 order transmitted to OAL 11-9-95; disapproved by OAL and order of repeal as to 6-13-95 order filed on 12-27-95 (Register 95, No. 52).

7. Amendment of section and Note filed 12-27-95 as an emergency pursuant to Government Code section 11346.1; operative 12-27-95 (Register 95, No. 52). A Certificate of Compliance must be transmitted to OAL by 4-25-96 or emergency language will be repealed by operation of law on the following day.

8. Certificate of Compliance as to 12-27-95 order including amendment of subsections (c), (c)(3), and (c)(9), new subsection (c)(10) and subsection renumbering, amendment of newly designated subsections (c)(11), (c)(14) and (c)(15), new subsections (c)(15)(A)-(c)(15)(C), amendment of newly designated subsections (c)(15)(C)(1) and subsection renumbering, amendment of subsection (d) and Note transmitted to OAL 4-25-96 and filed 6-6-96 (Register 96, No. 23).

9. New subsections (c)(17)-(c)(17)(B)2. filed 9-30-2002 as an emergency pursuant to Penal Code section 5058.3; operative 9-30-2002 (Register 2002, No. 40). A Certificate of Compliance must be transmitted to OAL by 3-10-2003 pursuant to Penal Code section 5058.3 or emergency language will be repealed by operation of law on the following day.

10. Certificate of Compliance as to 9-30-2002 order transmitted to OAL 2-3-2003 and filed 3-18-2003 (Register 2003, No. 12).

11. Amendment of first paragraph filed 5-27-2004 as an emergency; operative 5-27-2004 (Register 2004, No. 22). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 11-3-2004 or emergency language will be repealed by operation of law on the following day.

12. Certificate of Compliance as to 5-27-2004 order transmitted to OAL 10-28-2004 and filed 12-14-2004 (Register 2004, No. 51).

13. New subsection (c)(18) and amendment of Note filed 7-7-2005 as an emergency; operative 7-7-2005 (Register 2005, No. 27). Pursuant to Penal Code section 5058.3, a Certificate of Compliance must be transmitted to OAL by 12-14-2005 or emergency language will be repealed by operation of law on the following day.

14. Certificate of Compliance as to 7-7-2005 order transmitted to OAL 12-13-2005 and filed 1-26-2005 (Register 2006, No. 4).

15. New subsection (c)(19) filed 8-4-2008; operative 8-4-2008 pursuant to Government Code section 11343.4 (Register 2008, No. 32).

Exhibit B

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 3. ADULT INSTITUTIONS, PROGRAMS AND PAROLE
CHAPTER 1. RULES AND REGULATIONS OF ADULT OPERATIONS AND PROGRAMS
SUBCHAPTER 4. GENERAL INSTITUTION REGULATIONS
ARTICLE 5. INMATE DISCIPLINE

This database is current through 5/14/10 Register 2010, No. 20.

§ 3312. Disciplinary Methods.

(a) Inmate misconduct shall be handled by:

(1) Verbal Counseling. Staff may respond to minor misconduct by verbal counseling. When verbal counseling achieves corrective action, a written report of the misconduct or counseling is unnecessary.

(2) Custodial Counseling Chrono. When similar minor misconduct recurs after verbal counseling or if documentation of minor misconduct is needed, a description of the misconduct and counseling provided shall be documented on a CDC Form 128-A, Custodial Counseling Chrono. A copy of the completed form shall be provided to the inmate and the original placed in the inmate's central file. Disposition of any contraband involved shall be documented in the CDC Form 128- A.

(3) Rules Violation Report. When misconduct is believed to be a violation of law or is not minor in nature, it shall be reported on a CDC Form 115 (Rev. 7/88), Rules Violation Report.

(A) Unless an inmate charged with serious misconduct requires temporary administrative segregation pursuant to section 3335(b) pending adjudication of the disciplinary charges, the inmate may be retained in regularly assigned housing, work, and program assignments.

(B) If the inmate is placed in segregated housing pending the disciplinary proceedings, the official making the housing decision shall ensure compliance with the provisions of article 7 of this subchapter.

(b) Chief Disciplinary Officer Review of Disciplinary Actions. All disciplinary methods and actions shall be reviewed by the chief disciplinary officer, who shall be the institution head or a designee not below the level of correctional administrator or parole administrator I.

(1) The chief disciplinary officer shall affirm, reverse or modify the disciplinary action and/or credit forfeiture. The chief disciplinary officer may order a different action, order a different method of discipline, dismiss a charge, order a rehearing of the charge, or combine any of these actions.

(2) Except upon discovery of information or evidence not available or reasonably discoverable at the time of a disciplinary action, an order for a different method of discipline or for rehearing of the charges shall not result in greater penalty or more severe action than that originally taken.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 2932 and 5054, Penal Code.

HISTORY

1. Amendment filed 5-13-77; effective thirtieth day thereafter (Register 77, No. 20).

2. Amendment of subsection (c) filed 2-15-80; effective thirtieth day thereafter (Register 80, No. 7).

3. Repealer of subsections (c) and (d) and new subsections (c), (d), (e), and (f) filed 4-18-80; effective thirtieth day thereafter (Register 80, No. 16).

4. Amendment of subsection (d) filed 5-4-83; designated effective 6-1-83 pursuant to Government Code section 11346.2(d) (Register 83, No. 19).

5. Amendment of subsection (b) filed 2-8-88; operative 3-9-88 (Register 88, No. 7).

6. Editorial correction of printing errors in CDC Forms 115 and 115-A and descriptive text (Register 92, No. 5).

7. Amendment including relocation of former subsections 3317(a)-(b)(2) to subsections 3312(a)(3)(A)-(B) filed 5-5-95; operative 6-5-95 (Register 95, No. 18).

15 CCR § 3312, **Search Term Begin 15 CA ADC § 3312** Search Term End
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Search Term Begin 15 CA ADC § 3312 Search Term End

END OF DOCUMENT

STATE OF CALIFORNIA
RULES VIOLATION REPORT

DEPARTMENT OF CORRECTIONS

CDC NUMBER	INMATE'S NAME	RELEASE/BOARD DATE	INST.	HOUSING NO.	LOG NO.
VIOLATED RULE NO(S).		SPECIFIC ACTS	LOCATION	DATE	TIME

CIRCUMSTANCES

REPORTING EMPLOYEE (Typed Name and Signature)	DATE	ASSIGNMENT	RDO'S
REVIEWING SUPERVISOR'S SIGNATURE	DATE	<input type="checkbox"/> INMATE SEGREGATED PENDING HEARING	
CLASSIFIED	OFFENSE DIVISION:	DATE	CLASSIFIED BY (Typed Name and Signature)
<input type="checkbox"/> ADMINISTRATIVE			
<input type="checkbox"/> SERIOUS			
		HEARING REFERRED TO	
		<input type="checkbox"/> HO <input type="checkbox"/> SHO <input type="checkbox"/> SC <input type="checkbox"/> FC	

COPIES GIVEN INMATE BEFORE HEARING

<input type="checkbox"/> CDC 115	BY: (STAFF'S SIGNATURE)	DATE	TIME	TITLE OF SUPPLEMENT
<input type="checkbox"/> INCIDENT REPORT LOG NUMBER:	BY: (STAFF'S SIGNATURE)	DATE	TIME	BY: (STAFF'S SIGNATURE) DATE TIME

HEARING

REFERRED TO CLASSIFICATION BPT/NAEA

ACTION BY: (TYPED NAME)	SIGNATURE	DATE	TIME
REVIEWED BY: (SIGNATURE)	DATE	CHIEF DISCIPLINARY OFFICER'S SIGNATURE	DATE
<input type="checkbox"/> COPY OF CDC 115 GIVEN INMATE AFTER HEARING	BY: (STAFF'S SIGNATURE)	DATE	TIME

CDC 115 (7/88)

STATE OF CALIFORNIA
CDC 115 (7/88)

DEPARTMENT OF CORRECTIONS

SUMMARY OF DISCIPLINARY PROCEDURES
(See Title 15 California Code of Regulations, Article 5 for details)

ADMINISTRATIVE VIOLATIONS

HEARING

A disciplinary hearing will normally be held within 30 days, but not less than 24 hours from the date you receive your copy of the CDC 115 violation report. You have the right to a fair hearing, but do not have the same procedural rights described for a serious rule violation. (*CCR 3314–3320*)

DISPOSITION

At the end of the hearing, you will be advised of the findings and disposition of the charge. Within five working days, following review of the CDC 115 by the Chief Disciplinary Officer, you will be given a copy of the completed rule violation report, which will contain a statement of the findings and disposition and the evidence relied upon to support the conclusions reached. (*CCR 3320*)

APPEAL

If you are dissatisfied with the process, findings or disposition, you may submit an inmate appeal, form CDC 602, within fifteen days following receipt of the finalized copy of the CDC 115. When filing your appeal, be sure to attach a copy of the finalized CDC 115 and any other pertinent documentation.

ABBREVIATIONS

HO—Hearing Officer; SC—Sub Committee; FC—Full Committee; SHO—Senior Hearing Officer; BPT—Board of Prison Terms.