

OFFICE OF ADMINISTRATIVE LAW

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IN THE OFFICE OF

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Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: August 15, 2011
To: Dwight Coleman
From: Chapter Two Compliance Unit
Subject: **2011 OAL DETERMINATION NO. 12(S)**
(CTU2011-0606-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Administrative Segregation
Inmate Personal Property

On June 6, 2011, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether a memorandum titled "Administrative Segregation Inmate Personal Property" constitutes an underground regulation. The memorandum is dated November 12, 2009, and was issued by the warden at Pleasant Valley State Prison. It 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 11342.600,¹ 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.

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.

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.

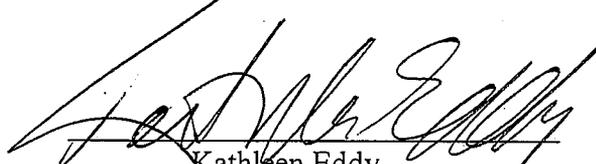
Similarly, the rule challenged by your petition was issued by Pleasant Valley State Prison and applies solely to the inmates of Pleasant Valley State Prison. Therefore, the rule is a "local rule" and is exempt from compliance with the APA pursuant to Penal Code section 5058(c)(1). It is not an underground regulation.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.


Debra M. Cornez
Assistant Chief Counsel
Acting Director


Kathleen Eddy
Senior Counsel

Copy: Matthew Cate
Tim Lockwood

Exhibit A

2 of 2 pages**Memorandum**

Date : November 12, 2009

To : All PVSP Custody Staff

Subject: **ADMINISTRATIVE SEGREGATION INMATE PERSONAL PROPERTY**

In accordance with the Department Operations Manual (DOM), Section 54030, Chapter 5, Article 43:

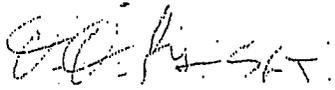
Effective immediately, the Administrative Segregation 1 (ASU 1) Property Officer and all [←] yards shall come into compliance on receiving and issuing inmate property. The ASU 1 Property Officer shall insure all property received into ASU 1 meets the following criteria:

1. All Boxes must be labeled front and back with the inmate's name, CDC #, and number of boxes.
2. Boxes must have a CDC 1083 inside a U-save envelope attached to the box.
3. Boxes must measure approximately 12" X 14" X 24". Property shall not be placed in bags, cereal boxes, etc.,
4. Boxes are limited to 30 pounds maximum.

Failure to comply with these procedures shall result in the property being returned to the sending facility for re-packaging in the proper manner. No property shall be stored in ASU 1 while the inmate is pending Ad-Seg placement, or is out to court, out to medical, housed at the Correctional Treatment Center, on ten day confinement to cell. The Property Officer will only accept property from inmates housed in ASU 1 or Building D4. After hours, the ASU 1 Floor Officer #1 shall receive the property for storage.

Once the inmate is released from ASU 1 or Building D4, the Property Officer will have the inmate sign his respective 1083, acknowledging he has received all of his property. This will greatly reduce the amount of inmate appeals regarding personal property.

If you have any questions, please contact R. Reyes, ASU 1 Property Officer at extension 5141 or D. Reeves, ASU 1 Sergeant at extension 5156.



D. D. REEVES
ASU 1 Sergeant



R. REYES
ASU 1 Property Officer