

OFFICE OF ADMINISTRATIVE LAW

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IN THE OFFICE OF

2011 SEP -7 PM 2:30



Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: September 7, 2011

To: Dontay Johnson

From: Chapter Two Compliance Unit

Subject: **2011 OAL DETERMINATION NO. 18 (S)**
(CTU2011-0819-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation a memorandum titled
"Window Coverings/Staff & Inmate/Prison Security"

On August 19, 2011, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether a memorandum titled "Window Coverings/Staff & Inmate/Prison Security" (memorandum) constitutes an underground regulation. The memorandum is dated November 11, 2009, and was issued by two facility captains and an associate warden at Kern Valley State Prison. The memorandum 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 memorandum challenged by your petition was issued by two facility captains and an associate warden at Kern Valley State Prison and applies solely to the inmates of Kern 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

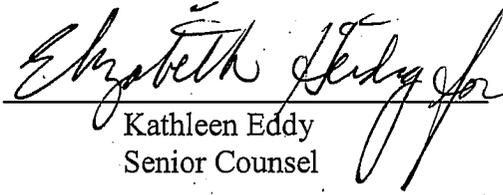
³ The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

- (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

Memorandum

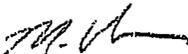
ate : November 11, 2009

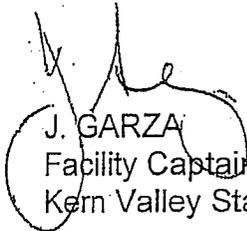
o : All Complex I Staff
All Complex I Inmates

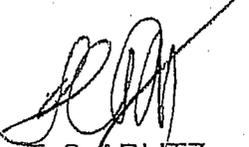
Subject : **WINDOW COVERINGS / STAFF & INMATE SAFETY / PRISON SECURITY**

Recent tours of Complex I Housing Units have revealed inmates are utilizing items to cover cell windows (i.e. front and back). Furthermore, inmates are misusing state property (i.e. sheets, etc.) to construct curtains for privacy. The above practice is not allowed and compromises the safety of staff/inmates as the inside of the cell can not be safely seen. Therefore, effective immediately inmates will not be allowed to cover cell windows, construct curtains, etc. and will be subject to the appropriate disciplinary action if discovered to be in violation of this direction. Additionally, effective immediately, inmates will only be authorized to post approved pictures, etc. in the designated area of the cell.

Your adherence to the above criteria is expected.


M. CABRERA
Facility Captain (A)
Kern Valley State Prison


J. GARZA
Facility Captain
Kern Valley State Prison


T. S. ARLITZ
Associate Warden, Complex I
Kern Valley State Prison