

OFFICE OF ADMINISTRATIVE LAW

300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826

DEBRA M. CORNEZ
Assistant Chief Counsel/Acting Director

PROCESSED FILED
IN THE OFFICE OF
2011 OCT 21 AM 8:11



Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: October 21, 2011

To: Janis Ramazzini

From: Chapter Two Compliance Unit

Subject: **2011 OAL DETERMINATION NO. 21(S)**
(CTU2011-0906-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation California Code of Regulations, title 15, section 3173.1, titled "Visiting Restrictions with Minors."

On September 6, 2011, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether California Code of Regulations (CCR), title 15, section 3173.1 constitutes an underground regulation. Section 3173.1 of title 15 states:

§ 3173.1. Visiting Restrictions with Minors.

(a) For inmates convicted of Penal Code (PC) Section(s) 261, 264.1, 266c, 269, 285, 286, 288, 288a, 288.5, or 289 when the victim is a minor, visitation with the minor victim shall be prohibited, except as authorized by an order of the juvenile court pursuant to Welfare and Institutions Code Section 362.6. Visitation pursuant to such an order shall be limited to non-contact status.

(b) For inmates convicted of PC Section(s) 261, 264.1, 266c, 285, 286, 288, 288a, 288.5, or 289 when the victim is a minor, visitation with any minor who is not the victim of the crime shall be limited to non-contact status except as authorized by the Institution Classification Committee.

(c) For inmates convicted of PC Section(s) 273a, or 273d, visitation with the minor victim shall be limited to non-contact status.

(d) For inmates convicted of violating PC Section(s) 187, 269, 273a, 273ab, or 273d, when the victim is a minor, visitation with any other minor shall be limited to non-contact status except as authorized by the Institution Classification Committee.

(e) When an inmate has been arrested, but not convicted, of any crime involving a minor victim included in this Section, a classification committee shall determine whether all visitation with a minor(s) is to be limited to non-contact status.

Unless otherwise prohibited, the inmate's visiting status shall be unrestricted until a classification committee has done the following:

- (1) Made a case-by-case determination whether the inmate poses a threat of harm to minor visitors in contact visitation.
- (2) Considered the circumstances of the misconduct involving a minor victim in

determining whether the inmate poses a threat of harm to minor visitors in contact visitation. In making its determination, the classification committee shall consider, but is not limited to, arrest reports, probation officer reports, court transcripts, parole revocation transcripts.

(f) If a classification committee, when making a decision regarding the visiting status of an inmate described in (e) above, determines that the inmate will pose a threat of harm to minor visitors in contact visitation, it will order all the inmate's visitation with minors be restricted to non-contact visiting status.

(g) If an inmate disagrees with the decision of a classification committee, the inmate may file an inmate grievance via the CDCR Form 602 appeal process as outlined in sections 3084 through 3084.9.

Note: Authority cited: Sections 5058 and 5058.3, Penal Code. Reference: Sections 1202.05, 5054 and 5054.2, Penal Code; Section 362.6, Welfare and Institutions Code; and *People v. Glass* (2004) 114 Cal.App.4th 1032.

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).

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 you challenge as an underground regulation, California Code of Regulations, title 15, section 3173.1 was adopted by the Department of Corrections and Rehabilitation on December 5, 2005, as an emergency by operational necessity. It was operative on December 5, 2005. A Certificate of Compliance as to the December 5, 2005 order was transmitted to OAL on April 24, 2006, and filed with the Secretary of State pursuant to the APA on June 6, 2006.

For the reason discussed above, we find that the rule challenged by your petition is not an underground regulation.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 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:

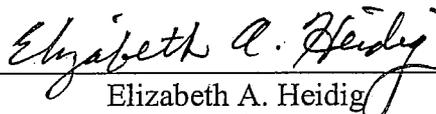
(f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may 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:

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



Elizabeth A. Heidig
Senior Counsel

Copy: Matthew Cate
Tim Lockwood

-
- (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.)