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Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: November 17, 2011
To: Andres Medina
From: Chapter Two Compliance Unit
Subject: **2011 OAL DETERMINATION NO. 24(S)**
(CTU2011-1017-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Kern Valley State Prison's Addendum to Department Operations Manual Supplement 54020, concerning visiting procedures

On October 17, 2011, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether Kern Valley State Prison's Addendum to Department Operations Manual Supplement 54020, concerning visiting procedures, constitutes an underground regulation. The rule is in a memorandum dated August 19, 2011, issued by the warden at Kern Valley State Prison and 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.

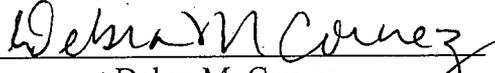
The Donovan policy is not a rule of general application. It applies solely to Donovan and, under Penal Code section 5058, subdivision (c)(1), is not subject to APA requirements.

Similarly, the rule challenged by your petition was issued by Kern Valley State Prison and applies solely to the inmates of Kern Valley State Prison. Inmates housed at other institutions are governed by those other institutions' procedures for visitations. 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

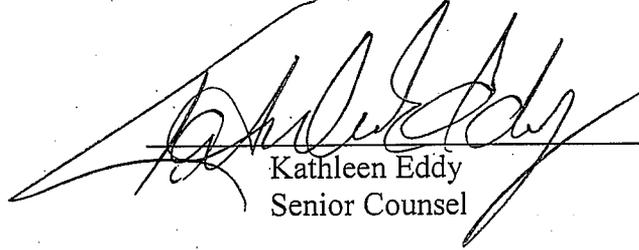
³ The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

- (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

Date: August 19, 2011

To: All Staff

Subject: ADDENDUM TO DEPARTMENT OPERATIONS MANUAL SUPPLEMENT 54020- VISITING

To explore alternatives to the current procedure for processing visitors for visiting at Kern Valley State Prison and possibly alleviate the overcrowding and long wait times for visitors. The following pilot program shall be implemented effective September 17, 2011.

54020.11.05 VISITING APPOINTMENT PROCEDURES FOR KERN VALLEY STATE PRISON

Visiting processing times will now be separated into two different processes: Visiting times for Scheduled appointments will occur from 0800 – 1100 hours and Open Visiting (Visiting for Visitors that miss their scheduled time or do not have an appointment) which will occur from 1100 -1330 hours. Visiting still ends at 1430 hours in each Facility visiting room.

Appointments for contact visits will be scheduled up to two weeks in advance.

CONTACT and NON-CONTACT APPOINTMENTS CAN BE MADE BY ONE OF THE FOLLOWING THREE WAYS:

IN PERSON

CONTACT

Ten appointments for each Facility will be assigned per each half hour starting at 8:00 AM to 10:30 AM when visitors exit the Visitor Processing Center at the conclusion of their visit they may schedule their next visit

NON-CONTACT

Three appointments for each Facility will be assigned per hour starting at 8:30 AM to 1:30 PM. When visitors exit the Visitor Processing Center, at the conclusion of their visit; they may schedule their next visit.

BY PHONE

CONTACT

~~Visitors may make an appointment by calling (661) 721-6360 or (661) 720-4952 on Mondays through Fridays between the hours of 7:00 AM to 8:00 AM and 12:00 PM to 1:00 PM. Ten appointments for each Facility will be assigned per each half hour starting at 8:00 AM to 10:30 AM.~~

NON-CONTACT

Visitors may make an appointment by calling (661) 721-6360 or (661) 720-4952 on Mondays through Fridays between the hours of 7:00 AM to 8:00 AM and 12:00 PM to 1:00 PM. Three appointments for Each Facility will be assigned per hour starting at 8:30 AM to 1:30 PM.

BY EMAIL

CONTACT and NON-CONTACT

Visitors may also make appointments by emailing their request to visit to CDCRInstitutionsKVSPVisiting@cdc.ca.gov starting at 12:00 PM Saturday until 12:00 PM Wednesdays. (Requests will be addressed in the order in which they are received). The email must contain the following information: Visitors Name, Visitors Drivers License #, ID number, Inmates Name, CDCR Number, Inmates Housing, and name and age of any minors attending the visit.

(Sample email: "I Visitor Jane Doe drivers license number A1234567 would like to visit Inmate Jones CDCR # D54321 housed in C1-123L on January 02nd and 3rd." the following minors will be visiting with me; John Doe age 4 and Suzie Doe age 7)

Visitors who make appointments by email will be notified by email confirming their appointment time. Ten Contact appointments for Each Facility will be assigned per each half hour starting at 8:00 AM to 10:30 AM. There will be three Non-Contact appointments for each Facility per Hour starting at 8:30 AM until 1:30 PM.

Visitors will be limited to scheduling one visit per visiting day no more than two weeks in advance. Visiting staff will schedule an appointment for visitors based on date and time availability.

CONTACT:

Visitors will be required to report to the Visitor Processing Center at the time of their scheduled appointment for processing and may not proceed into the processing area until their scheduled time unless requested by the Visiting Staff. If the visitor arrives late for the scheduled appointment they will not be processed as an appointment. Once open processing begins at 11:00 AM, the visitor will be allowed to process.

NON-CONTACT

Visitors will be required to report to the Visitor Processing Center thirty (30) minutes prior to their scheduled appointment for processing and may not proceed into the

processing area until their scheduled time unless requested by the Visiting Staff. If the visitor arrives late for the scheduled appointment they will not be processed as an appointment.

OPEN VISITING

Beginning at approximately 11:00 AM on visiting days, the Visitor Processing Staff will begin to process visitors who do not have an appointment. Visitors will be allowed to line up in the south parking lot visiting station outside the Visitor Processing Center starting at 10:30 AM. When there are no visitors with an appointment waiting to be processed, visitors without appointments will be processed into visiting.

VISITOR PASSES

Visitor passes will be picked up and filled out at the south parking lot visiting station. The numbers on the passes are for counting purposes only and do not signify a place in line or an order for processing.

ARRIVAL ON INSTITUTIONAL GROUNDS:

Visitors are not to arrive on institutional grounds more than 60 minutes prior to their scheduled processing time.

Any questions relating to this Visitor Appointment Processing procedure should be directed to the Visiting Sergeant at (661) 721-6300, extension 5708 or the Visiting Lieutenant at (661) 721-6300, extension 5711 or 5712.

Original Signed By:

MARTIN BITER
Warden (A)
Kern Valley State Prison

August 23, 2011

Date