

OFFICE OF ADMINISTRATIVE LAW

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2013 OCT 16 PM 3:50



Edmund G. Brown, Jr.
GOVERNOR
OF THE STATE OF CALIFORNIA

Date: October 16, 2013

To: Bryan Robledo

From: Chapter Two Compliance Unit

Subject: **2013 OAL DETERMINATION NO. 7 (S)**
(CTU2013-0819-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation the memorandum titled "Disapproved Explicit Material in First Class Mail and Publications," dated 5/16/13.

On August 19, 2013, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether the memorandum titled "Disapproved Explicit Material in First Class Mail and Publications," dated 5/16/13 (Disapproved Explicit Material Memo, hereafter), constitutes an underground regulation. The Disapproved Explicit Material Memo was issued by R. K. Bell, Correctional Administrator, Business Services, Pelican Bay 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.

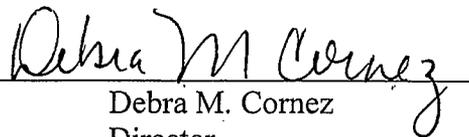
...
The Donovan policy is not a rule of general application. It applies solely to Donovan and, under Penal Code section 5058, subdivision (c)(1), is not subject to APA requirements.

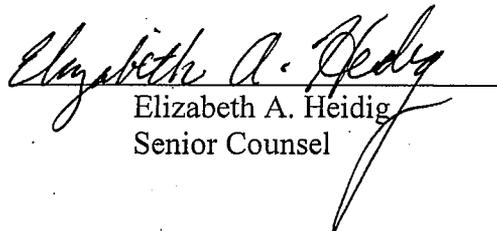
Similarly, the rule challenged by your petition was issued by Pelican Bay State Prison and applies solely to the inmates of the Pelican Bay State Prison. Inmates housed at other institutions are governed by those other institutions' criteria for disallowed mail and publications. Therefore, the rule is 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
Director


Elizabeth A. Heidig
Senior Counsel

Copy: Dr. Jeffrey Beard
Tim Lockwood

Exhibit A

State of California

Memorandum

Date : May 16, 2013

To : All Staff

From : Department of Corrections and Rehabilitation,
Pelican Bay State Prison, P.O. Box 7000, Crescent City, CA, 95532-7000

Subject : DISAPPROVED EXPLICIT MATERIAL IN FIRST CLASS MAIL AND PUBLICATIONS

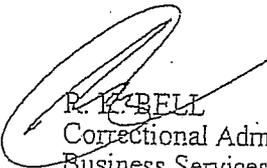
Pursuant to the First Amendment of the Constitution, the California Department of Corrections and Rehabilitation (CDCR) recognizes and supports the constitutional rights of inmates pertaining to mail and publications. However, the sections in the California Code of Regulations (CCR), Title 15, pertaining to the contents of mail and publications are very clear.

As required by current regulation, the decision to disallow mail and publications are completed by a staff member at the level of Captain (Adult Institution), or higher. The decision to disallow mail and publications is made following the guidelines set forth in the CCR, Title 15.

1. Explicit/nude photographs received from a private party, photograph company, or business [CCR, Title 15, Section 3006(c)(11)].
2. Brochures and catalogs showing and or selling explicit/nude photographs [CCR, Title 15, Sections 3006(c)(11)(15), and 3135(2)].
3. Explicit photographs with sheer or fishnet clothing through which the breasts or genitals can be seen [CCR, Title 15, Section 3006(c)(17)(A)].
4. Magazines or photographs that's primary purpose is the sexual arousal of the inmate viewer [In re Manuel Martinez (2013) HCPB12-5067].

When mail and publications are received at PBSP, they are reviewed on a case-by-case basis, and items that are disapproved will be noted on a CDCR 1819, Notification of Disapproval-Mail/Packages/Publications. Pursuant to current regulations, PBSP is not required to separate the allowable items from the non-allowable items.

If you have any questions or concerns, please contact Cyndy Williams, Office Services Supervisor I, Mailroom, at extension 7102.


R. K. BELL
Correctional Administrator (A)
Business Services

cc: Cyndy Williams