STATE OF CALIFORNIA – GOVERNMENT OPERATIONS AGENCY

EDMUND G. BROWN JR., Governor

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

DEBRA M. CORNEZ
Director

ENDORSED FILED
IN THE OFFICE OF

2014 APR 28 PM 2:29

DEBRA BOWEN
SECRETARY OF STATE

April 28, 2014

The Honorable Debra Bowen
Secretary of State
1500 11th Street
Sacramento, CA 95814

Re: Revised 2014 OAL Determination No. 6 (S) dated April 25, 2014
(CTU 2014-0226-03) which should be 2014 OAL Determination No. **8** (S).

Dear Secretary Bowen:

On April 25, 2014, the Office of Administrative Law filed 2014 OAL Determination No. 6 (S) with your office. Upon further review, the Office of Administrative Law realized 2014 OAL Determination No. 6 (S) should have been filed with the determination number 2014 OAL Determination No. **8** (S). Please file this letter with the determination, 2014 OAL Determination No. 6 (S), that was filed on April 25, 2014, along with the enclosed, corrected determination. Also please note that the only change to 2014 OAL Determination No. 6 is to the number. Thank you for your assistance, and please do not hesitate to contact us with any concerns or questions.

Sincerely,

Elizabeth Heidig
Senior Counsel

Cc: Matthew Cate
Timothy Lockwood

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DEBRA M. CORNEZ
Director

Date: April 25, 2014

To: Robert Ellis

From: Chapter Two Compliance Unit

Subject: **2014 OAL DETERMINATION NO. 8 (S)**
(CTU2014-0226-03)
(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: "Allowable Property at High Desert State Prison"

On February 26, 2014, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether the memorandum titled: "Allowable Property at High Desert State Prison" constitutes an underground regulation. The memorandum is dated June 19, 2013. This memorandum titled: "Allowable Property at High Desert State Prison" was issued by F. Foulk, the warden at the High Desert State Prison and is attached 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 F. Foulk, Warden of High Desert State Prison and governs the allowable property for inmates at High Desert State Prison. Inmates housed at other institutions are governed by those other institutions' criteria for allowable property. 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

(B)

Department of Corrections and Rehabilitation
High Desert State Prison

Memorandum

Date : June 19, 2013

To : HDSP Inmate Population

Subject : **ALLOWABLE PROPERTY AT HIGH DESERT STATE PRISON**

All items allowed at High Desert State Prison (HDSP) are listed in the HDSP Matrix – Authorized Personal Property Schedule (APPS), which is located in the HDSP DOM Supplement 54030. Check with your facility law library for details.

The following items listed below, while approved in the HDSP DOM Supplement, Section 54030, are exempt at the local level and are pending Director's level approval.

1. Andis Hair Trimmers
2. Non-approved long handled tooth brushes
3. Nail Clippers
4. Cream Filled Pastries and Cookies
5. Black Lined Fleece Gloves (Dickies)
6. Kneaded Erasers (General Brand) – Approved Director's level - November 2012
7. Fan/Light with Metal Style Spring Clamp

Any inmate in the process of purchasing or has purchased and awaiting delivery of any of the items above will not receive those items. Inmates in possession of any of the items listed above will be confiscated and processed according to DOM section 54030.12.2.

Should you have any questions, contact your Inmate Advisory Council representative.

F. FOULK
Warden (A)

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Elizabeth A. Heidig
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State of California

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