

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

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2014 OAL DETERMINATION NO. 10
(OAL FILE NO. CTU2014-0127-01)

Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

REQUESTED BY: ROBERT K. WALTERS

CONCERNING: Memorandum titled "Enhanced Program Facility Increased Personal Property" dated December 31, 2013, issued by the Department of Corrections and Rehabilitation.

DETERMINATION ISSUED PURSUANT TO GOVERNMENT CODE SECTION 11340.5.

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of "regulation" as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250.¹ OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

CHALLENGED RULE

The rule challenged as an underground regulation is found in a memorandum titled "Enhanced Program Facility Increased Personal Property," dated December 31, 2013 (Memorandum). The Memorandum is addressed to a number of wardens at various state correctional institutions. The Memorandum indicates that certain institutions were selected to participate in an EPF (Enhanced Program Facility) program. Inmates that participate in the EPF would be authorized to possess certain additional personal property items as listed in the Memorandum effective January 1, 2014.

¹ As defined by title 1, section 250(a), an

"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.

The Memorandum was signed by M. D. Stainer, Director, Division of Adult Institutions, Department of Corrections and Rehabilitation (Department). A copy of the Memorandum is attached to this determination as Exhibit A.

DETERMINATION

OAL determines that the challenged rule, the Memorandum titled "Enhanced Program Facility Increased Personal Property" dated December 31, 2013, meets the definition of "regulation" that should have been adopted pursuant to the APA.

FACTUAL BACKGROUND

On January 27, 2014, Robert Walters (Petitioner) submitted a petition to OAL challenging the Memorandum as an underground regulation.

OAL accepted the petition for consideration on March 26, 2014. The petition was published in the Notice Register on April 11, 2014. Comments from the public were solicited until May 12, 2014. No comments were received. The Department declined to submit a response to the petition which would have been due by May 27, 2014.

The Department has adopted regulations governing what personal property inmates may possess. When an inmate enters an institution, they are allowed only certain personal property as delineated in title 15 of the California Code of Regulations. There are different lists of allowable personal property stated in section 3190 of title 15, depending upon the inmate's privilege group or assigned security level and/or institution mission or disciplinary situation. Subdivision 3190(b) of title 15 lists five personal property schedules that have been incorporated by reference into the California Code of Regulations. They are:

- (1) Authorized Personal Property Schedule - Reception Center Male Inmates (Rev. 10/1/13). This personal property schedule applies to all facilities which operate Male Reception Center Housing.
- (2) Authorized Personal Property Schedule - General Population Levels I, II, and III, Male Inmates (Rev. 10/1/13). This personal property schedule applies to all facilities which operate Levels I, II, III Male Inmate Housing.
- (3) Authorized Personal Property Schedule - Level IV Male Inmates (Rev. 10/1/13). This personal property schedule applies to all facilities which operate Level IV Male Inmate Housing.
- (4) Authorized Personal Property Schedule - Administrative Segregation Units (ASU) / Security Housing Units (SHU) / Psychiatric Services Units (PSU) Male Inmates (Rev. 10/1/13). This personal property schedule applies to all facilities which operate ASU/SHU/PSU Male Inmate Housing.
- (5) Authorized Personal Property Schedule - Female Inmates (Rev. 10/1/13). This personal property schedule applies to all facilities which operate Female Inmate Housing. . . .

In addition, there is a "The Non Disciplinary Segregation (NDS) Personal Property Matrix (12/30/2013)" which "identifies a separate list of allowable personal property afforded to

inmates housed in ASU for non disciplinary reasons as affirmed by a classification committee” (Cal. Code Regs., tit. 15, sec. 3190(c).)

There is also a Religious Personal Property Matrix (Revised 6/27/2013) which “identifies a separate list of allowable personal religious property” (Cal. Code Regs., tit. 15, sec. 3190(c).)

There may also be local facility exemptions to the property lists. (Cal. Code Regs., tit. 15, sec. 3190(b).)

UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), provides that:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of Government Code section 11340.5, it creates an underground regulation as defined in title 1,

OAL may issue a determination as to whether or not an agency has issued, utilized, enforced, or attempted to enforce a rule that meets the definition of “regulation” as defined in Government Code section 11342.600 and should have been adopted pursuant to the APA (Gov. Code, sec. 11340(b)). An OAL determination is not enforceable against the agency through any formal administrative means, but it is entitled to “due deference” in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

ANALYSIS

OAL's authority to issue a determination extends only to the limited question of whether the challenged rule is a “regulation” subject to the APA. This analysis will determine (1) whether the challenged rule is a “regulation” within the meaning of Government Code section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in Government Code section 11342.600 as:

. . . 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.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).²

As stated in *Tidewater*, the first element used to identify a “regulation” is whether the rule applies generally. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations.³

The challenged rule found in the Memorandum was sent to at least seven institutions and concerns current and/or future inmates under the custody of the Department. The Department has selected certain institutions for a special program whereby certain inmates will be authorized to have additional possessions. Each of the seven institutions is identified as an “Enhanced Program Facility.” The Memorandum states that the Division of Adult Institutions (DAI) selected each of the institutions to implement this new program. The program allows participating inmates personal property items that are in addition to the items allowed pursuant to section 3190 of title 15 of the California Code of Regulations. Therefore, all current and future inmates may be affected by which institutions are selected or not selected for the program.

The rule, therefore, applies generally, and the first element of *Tidewater* is met.

The second element used to identify a “regulation” as stated in *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency’s procedure.

The Department adopted regulations at section 3190, and elsewhere in title 15 of the California Code of Regulation, to further implement, interpret and make specific various provisions of its responsibility pursuant to the Penal Code. Section 3190 of title 15 provides lists of what personal property certain inmates may possess. Likewise, the Memorandum also indicates what personal property certain institutions and inmates may be allowed as an Enhanced Program Facility. Penal Code section 5058(a) states:

The director may prescribe and amend rules and regulations for the administration of the prisons and for the administration of the parole of persons sentenced under Section 1170 except those persons who meet the criteria set forth in Section 2962. The rules and regulations shall be promulgated and filed pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of

² Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

³ See also *Roth v. Department Of Veterans Affairs*, (1980) 110 Cal.App.3d 14, 19; 167 Cal.Rptr. 552, 557.

Division 3 of Title 2 of the Government Code, except as otherwise provided in this section and Sections 5058.1 to 5058.3, inclusive. All rules and regulations shall, to the extent practical, be stated in language that is easily understood by the general public.

Penal Code section 5054, states in part:

Commencing July 1, 2005, the supervision, management and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the Secretary of the Department of Corrections and Rehabilitation.

Penal Code section 2601, states in part:

Subject only to the provisions of that section, each person described in Section 2600 shall have the following civil rights:

(a) Except as provided in Section 2225 of the Civil Code, to inherit, own, sell, or convey real or personal property, including all written and artistic material produced or created by the person during the period of imprisonment. . . .

In that the Memorandum further implements, interprets and makes specific what inmates are allowed to possess at the institutions identified as EPF institutions, it is further implementing, interpreting and making specific Penal Code sections 2601, 5054 and 5058, and section 3190 of title 15 of the California Code of Regulations.

The Memorandum, therefore, meets the definition of “regulation” in Government Code section 11342.600.

The final issue to examine is whether the challenged rule falls within an express statutory exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to Government Code section 11346, the procedural requirements established in the APA “shall not be superseded or modified by any subsequent legislation *except to the extent that the legislation shall do so expressly.*” (Emphasis added.)

The agency has not identified an express statutory exemption from the APA that would apply to the Memorandum, nor did OAL find such an exemption.

The challenged rule in this case, the Memorandum, does not apply to only one institution, but provides that certain “participating” inmates at certain selected institutions will also be allowed additional property based upon the Department’s selection of their institution as an EPF. Therefore, the Memorandum does not fall within the local rule exemption.

PUBLIC COMMENTS

OAL did not receive any public comments.

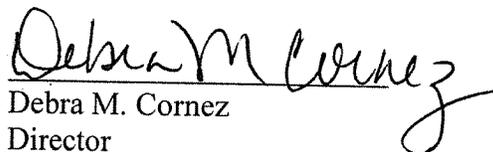
AGENCY RESPONSE

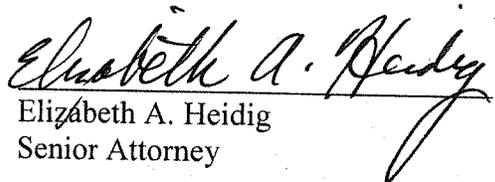
The Department declined to respond to the petition. However, we note that the Memorandum indicates that the Division of Adult Institutions within the California Department of Corrections and Rehabilitation "is currently in the process of requesting the EPF Pilot Program in accordance with Penal Code Section 5058.1." A review of OAL records did not disclose any rulemakings concerning the subject of this Memorandum at the time this determination was issued.

CONCLUSION

In accordance with the above analysis, OAL determines that the Memorandum meets the definition of "regulation" that should have been adopted pursuant to the APA.

Date: August 11, 2014


Debra M. Cornez
Director


Elizabeth A. Heidig
Senior Attorney

cc: Dr. Jeffrey Beard
Timothy Lockwood

EXHIBIT A

Memorandum

Date : December 31, 2013

To : Martin Biter, Warden, Kern Valley State Prison
 Frederic Foulk, Warden (A), High Desert State Prison
 Randolph Grounds, Warden, Salinas Valley State Prison
 Scott Frauenheim, Warden (A), Pleasant Valley State Prison
 Rawland Swift, Warden (A), California State Prison – Corcoran
 Stuart Sherman, Warden (A), California Substance Abuse Treatment Facility – Corcoran
 Ron Davis, Warden, Valley State Prison

Subject: **ENHANCED PROGRAM FACILITY INCREASED PERSONAL PROPERTY**

The Division of Adult Institutions (DAI) has selected your institutions to participate in the Enhanced Program Facility (EPF) Pilot Program. DAI is currently in the process of requesting the EPF Pilot Program in accordance with Penal Code Section 5058.1.

Effective January 1, 2014, the EPF will be implemented at the selected institutions; inmates participating in the EPF, via the classification process, will be authorized to possess the following personal property items. These items are in addition to items authorized in the Authorized Personal Property Schedule:

- Athletic Shorts 2 pr White/gray only, no logos/printing, no inside pockets.
- Sweatpants 2 pr White or light gray only, no inside pockets.
- Sweatshirt 2 pr White or light gray only, no inside pockets.
- Undershirts 5 ea White or light gray only. Any combination of crew neck, v-neck, long sleeve, or sleeveless athletic tank top. Turtle neck and mock turtle neck are not permitted.
- Socks 6 ea White or gray only, any combination of sort to knee-high.
- Tennis Shoes 1 pr No shades of red or blue. Low, mid, or high tops are permitted. Must be predominantly white in color. No K-Swiss, Bugle Boys, Joy Walkers, Pumps, Gels, British Knights, DC, or Airlifts. Shoe laces white only. Not to exceed \$75. No hidden compartments, zippers, or laces that are covered or concealed. No metal components including eyelets. Shoelaces included, one for one exchange.
- Gloves 1 pr Cold weather gloves upon approval of Warden. No zippers, pockets, or metal. White or gray only. One for one exchange.
- Ballpoint Pens 2 ea Non-metal, clear plastic only. Blue/Black ink only.
- Card Stock/Drawing paper 10 sheets White only. 12" x 12" max. size.
- Digital Media Device 1 ea

All current regulations and policies remain in effect regarding an inmate's ~~responsibility to purchase and possess personal property to include Department~~

Martin Biter, Warden, Kern Valley State Prison
Frederic Foulk, Warden (A), High Desert State Prison
Randolph Grounds, Warden, Salinas Valley State Prison
Scott Frauenheim, Warden (A), Pleasant Valley State Prison
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Ron Davis, Warden, Valley State Prison
Page 2

Operations Manual, Section 54030.4, Volume, which states in part "The combined volume of state-issued and authorized personal property shall not exceed six cubic feet."

These items will be included in the next revision of DOM, Article 43 – Inmate Property and DOM, Section 54030.20, Inmate Property Matrix, High Security and Transitional Housing.

If you have any questions, please contact Ron Davis, Warden, Valley State Prison, at (559) 665-6169 or via e-mail at ron.davis@cdcr.ca.gov.



M. D. STAINER

Director

Division of Adult Institutions

cc: Kelly Harrington
Ralph Diaz
Connie Gipson
Vimal Singh
Jay Virbel
Ron Davis