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DEBRA M. CORNEZ
Director

Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: April 25, 2014

To: Joseph Sherman

From: Chapter Two Compliance Unit

Subject: **2014 OAL DETERMINATION NO. 7 (S)**
(CTU2014-0303-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation a memorandum titled:
"2007 Sensitive Inmate Work Assignments (Revised)"

On March 3, 2014, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether the memorandum titled: "2007 Sensitive Inmate Work Assignments (Revised)" constitutes an underground regulation. The memorandum is dated March 7, 2007. This "2007 Sensitive Inmate Work Assignments (Revised)" memorandum was issued by the warden at the R.J. Donovan Correctional Facility 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 R.J. Donovan Correctional Facility and applies solely to the inmates of the R.J. Donovan Correctional Facility. Inmates housed at other institutions are governed by those other institutions' criteria for Sensitive Inmate Work Assignments. 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.

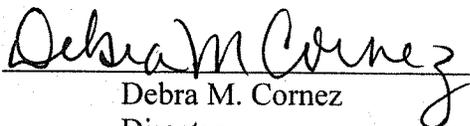
(B) The challenged rule is contained in a California statute.

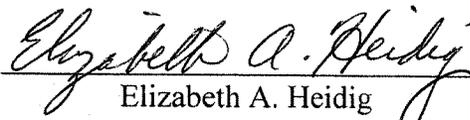
(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

(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

Memorandum

Date : March 7, 2007

To : All Concerned

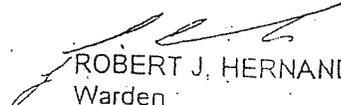
Subject: 2007- SENSITIVE INMATE WORK ASSIGNMENTS (REVISED)

The placement of inmates in work assignments at the Richard J. Donovan Correctional Facility have been reviewed for compliance with the memorandum dated July 8, 1999, authored by David Tristan, Deputy Director, Institutions Division, on Prohibition of Prisoner Access to Personal Information in the Performance of Work.

The following positions are to be considered as "sensitive" positions at the Richard J. Donovan Correctional Facility. Inmates described in the California Penal Code Sections 4017.1 and 5071 are prohibited from these job assignments. Additionally, any inmate with any forgery and / or fraud history (including credit cards) which includes convictions, arrest, plea bargains, and CDC 115's ect. will be excluded from these positions:

1. Prison Industry Authority-Optical-All Positions
2. Prison Industry Authority-Administration-All Positions
3. Prison Industry Authority-All Clerical Positions
4. Education Department Clerks & Aides Assigned to Facility 1 & 3
5. All Library Clerks
6. Minimum Property Clerk
7. Minimum Warehouse Clerks
8. Minimum In-Service Training Clerks
9. Minimum Procurement Clerks
10. Family Visiting Clerk
11. Inmate Day Labor Clerks
12. Chaplain's Clerks & Porters-All positions-All Facilities
13. Associate Warden Clerks
14. Central Services-Watch Office Clerks & Porters
15. Medical Administration Office Clerks & Porters
16. Psychiatric Services-Clerks & Porters
17. Correctional Treatment Center Medical Record's Clerks & Porters
18. Medical & Dental Workers-All Positions-All Facilities
19. Reception Center Workers-All Positions Located in Medical, Dental, & Records
20. Administration Building-All Positions
21. Plant Operations-All-Clerical Positions
22. Inmate Assignment Clerks
23. Substance Abuse Programs-All Clerical Positions
24. Firefighter/Hazmat Specialist
25. All Canteen Clerks

If you require any additional information, please contact the Inmate Assignment Lieutenant, D. P. McMahan, at extension 7610.


ROBERT J. HERNANDEZ
Warden

R. J. Donovan Correctional Facility