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**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

**2016 OAL DETERMINATION NO. 3
(OAL FILE NO. CTU2016-0225-01)**

REQUESTED BY: RICKY FOSTER

**CONCERNING: Memorandum titled "Enhanced Program Facility
Institutions/Facilities" 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 a memorandum titled "Enhanced Program Facility Institutions/Facilities" dated December 31, 2013 (Memorandum). The Memorandum is addressed to Wardens and Associate Directors of the Division of Adult Institutions. The Memorandum indicates that certain General Population (GP) and Sensitive Needs Yard (SNY) institutions were being designated as Enhanced Program Facilities (EPFs). The Memorandum lists seven correctional institutions that would be designated as EPFs as of January 1, 2014. It also states how inmates are placed in the enhanced programs, how they are removed from the programs and lists various options for program enhancements to be instituted at the selected individual correctional institutions, such as:

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.

- Access to college degree programs
- Additional Self Help Groups
- Hobby craft programs
- Technology, canteen and yard photo privileges, food sales, among other options.

The Memorandum states that enhancements will be provided by EPFs to inmates at the selected EPFs "based on their behavior and willingness to meet programming expectations." The Memorandum states that inmates will be identified via the facility's classification process at annual or program reviews. It then lists exclusionary factors and mandatory expectations of program participants. In addition, it lists how inmates will be removed from participating in the EPF program.

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 Institutions/Facilities," dated December 31, 2013, meets the definition of "regulation" that should have been adopted pursuant to the APA, but was not.

FACTUAL BACKGROUND

On February 25, 2016, Ricky Foster (Petitioner) submitted a petition to OAL challenging the Memorandum as an underground regulation.

OAL accepted the petition for consideration on April 25, 2016. The petition was published in the California Regulatory Notice Register on May 6, 2016. Comments from the public were solicited until June 6, 2016. No comments were received. The Department declined to submit a response to the petition which would have been due by June 20, 2016.

The challenged rule contained in the Memorandum was sent to the Wardens and Associate Directors of the Division of Adult Institutions for the Department, as well as to others. It designates seven General Population (GP) and Sensitive Needs Yard (SNY) institutions/facilities as being Enhanced Program Facilities/Institutions (EPFs). The Memorandum concerns current and/or future inmates under the custody of the Department and selects those certain institutions for special program enhancements and/or privileges that will be extended to some, but not all, inmates based upon the criteria set forth in the Memorandum. Each of the seven institutions is identified as an "Enhanced Program Facility."

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, section 250 of the California Code of Regulations.

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

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

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 in the Memorandum affects current and future inmates. Certain institutions are selected to be EPFs and selected inmates are allowed to participate in these special enhancement programs based upon criteria as determined by the Department. The Memorandum concerns current and future inmates under the custody of the Department and the programs apply to only the selected institutions. The special program enhancements and privileges will be extended to some, but not all, inmates, as identified in the Memorandum. The Memorandum affects current and future inmates who may be interested in participating in these enhanced programs.

The Memorandum, 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.

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 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 Division 3 of Title 2 of the Government Code [the APA], 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.

The Memorandum creates a special category of institution and indicates which institutions will be designated as EPFs. In addition, the Memorandum sets forth criteria as to which inmates will be allowed to participate in the special enhancements provided at these designated EPFs. The Memorandum establishes criteria for the administration and management of the prisons, as well as the inmates housed in those institutions. Thus, the Memorandum implements, interprets and makes specific Penal Code sections 5054 and 5058.

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

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

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 Department:

(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 court indicated that only policies that *did not apply generally* would meet the requirements of the "local rule" exemption.

The challenged rule in this case, the Memorandum, does not apply to just one institution, but applies generally throughout the state. It indicates that "participating" inmates will be allowed program enhancements based upon the Department's designation of their institution as an EPF and selection of the inmate to participate in the program pursuant to the requirements and articulated criteria that apply to all inmates. Therefore, the Memorandum does not fall within the local rule exemption.

PUBLIC COMMENTS

OAL did not receive any public comments.

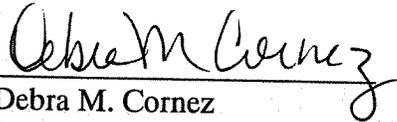
AGENCY RESPONSE

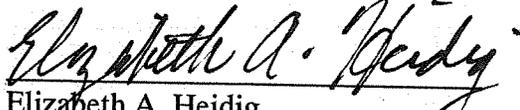
The Department declined to respond to the petition.

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, but was not.

Date: September 6, 2016


Debra M. Cornez
Director


Elizabeth A. Heidig
Assistant Chief Counsel

cc: Scott Kernan, Secretary
Timothy Lockwood, Chief

EXHIBIT A

APPENDIX B – CDCR MEMORANDUM: ENHANCED PROGRAM FACILITY INSTITUTIONS

State of California

Department of Corrections and Rehabilitation

Memorandum

Date : December 31, 2013

To Associate Directors, Division of Adult Institutions
Wardens

Subject: ENHANCED PROGRAM FACILITY INSTITUTIONS/FACILITIES

As part of the California Department of Corrections and Rehabilitation (CDCR) Blueprint, we are designating certain General Population (GP) and Sensitive Needs Yard (SNY) institutions/facilities as Enhanced Program Facility (EPF). EPF will offer incentives for inmates who, based on their own behaviors and choices, are ready to take full advantage of programming opportunities.

Effective January 1, 2014, the following institutions/facilities will be designated as an EPF:

- Kern Valley State Prison, Level IV GP 180, Facility B
- High Desert State Prison, Level IV GP 180, Facility C
- Salinas Valley State Prison, Level IV GP 270, Facility B
- Pleasant Valley State Prison, Level III GP 270, Facility C
- California State Prison, Corcoran, Level IV SNY 270, Facility B
- Substance Abuse Training Facility, Level III SNY 270, Facility E
- Valley State Prison, Level II SNY

Program Options

Program enhancements will be primarily volunteer based and self help options intended to incentivize and reinforce positive life choices. These options may include, but are not limited to:

- Access to college degree programs
- Additional Self Help Groups
- Hobby craft programs

Recreational and enhanced privilege options may include, but are not limited to:

- Technology based privileges, as they are approved
- Microwave in the dayroom
- Increased canteen draw
- Increased canteen list
- Expansion of property matrix (see attached matrix)
- Yard photo programs

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- Food sales (more frequent basis)
- Sports and game tournaments
- Self-Help/volunteer sponsored events (concerts, guest speakers etc.)

Placing Inmates into the Program

Initial Activation: The EPF implementation process will not require mass screening or transfer of inmates from a designated facility. Inmates currently residing on a designated EPF institution/facility will remain, provided they are willing to meet the program's expectations.

Ongoing: EPF placement will be based on their behavior and willingness to meet programming expectations. Inmates who have been identified as possible EPF participants shall be evaluated via the facility's classification process at the inmate's annual or program review. Inmates identified for transfer to an EPF shall be reflected in the Institution Classification Committee/Unit Classification Committee CDCR Form 128G and Classification Staff Representative endorsement CDCR Form 128G.

Exclusionary factors are as follows:

- Security Housing Unit (SHU) Term within the past 12 months. (Imposed SHU term)
- Rules Violation Reports (RVR) for Security Threat Group related behavior within the past 12 months.
- RVR for controlled substance and alcohol related behavior within the past 12 months. This shall include:
 1. Possession of any controlled substance, alcohol or paraphernalia.
 2. Use/under the influence of any controlled substance or alcohol.
 3. Production of alcohol.
 4. Refusal to provide a urine sample for the purpose of testing for the presence of controlled substance or alcohol.
- C/C status within the past 12 months.

Removing Inmates from the Program

To ensure program viability, participants are required to strictly adhere to the following behavioral and programming expectations in order to remain on an EPF. EPF participants must:

- Program with all inmate groups.
- House according to their current integrated housing code.
- Participate in random drug testing.
- Participate in assigned work, education, training, and self help programs.
- Continually work to resolve enemy concerns or conflicts.
- Comply with rules and regulations.

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- Participate in the Correctional Offender Management Profiling for Alternative Sanctions risk and needs assessment.

Initial Activation: Inmates who do not wish to participate in the EPF shall be transferred using existing transfer protocols to a non EPF institution/facility. This may or may not require endorsement or transfer to an alternate institution.

Ongoing: Removing an EPF participant shall be the responsibility of the facility's Captain. Inmates who fail to meet the behavioral criteria shall be removed from the EPF program. Removal from the EPF program shall not mandate Administrative Segregation placement. A classification committee shall evaluate the inmate's programming needs and transfer him to an alternate non EPF institution/facility accordingly. Housing pending transfer shall be determined based on the inmate's individual case factors.

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



M. D. STAINER
Director
Division of Adult Institutions

Attachment

cc: Kelly Harrington
Terri Gonzalez
Ron Davis