

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 the Secretary of State
of the State of California

OCT 03 2016

1:48 PM

Date: October 3, 2016
To: Mark Steward
From: Chapter Two Compliance Unit
Subject: **2016 OAL DETERMINATION NO. 4 (S)**
(CTU2016-0802-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging the California Department of Corrections and Rehabilitation (CDCR) Folsom State Prison DOM Supplement, Section 101040.50, titled "Recreational Activities," as an underground regulation.

On 8/2/2016, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether Folsom State Prison Department Operations Manual (DOM) Supplement Section 101040.50 "Recreational Activities" constitutes an underground regulation. Folsom State Prison is an institution under the jurisdiction of the California Department of Corrections and Rehabilitation (CDCR). The rule is in the Folsom State Prison DOM Supplement dated June 2016. Folsom State Prison DOM Supplement Section 101040.50 "Recreational Activities" was issued by the warden at the Folsom 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

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.

issues involved in the subject of this determination.

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. Rackley, Warden and L. Cahayla, Associate Warden Programs, and applies solely to the inmates of the Folsom State Prison. Inmates housed at other institutions are governed by those other institutions' criteria for access to yards for recreational activities. 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.

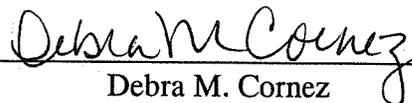
(B) The challenged rule is contained in a California statute.

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

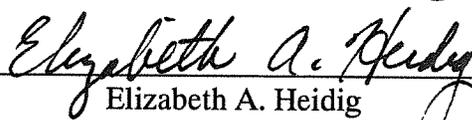
(D) The challenged rule has expired by its own terms.

(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
Assistant Chief Counsel

Copy: Scott Kerman, Secretary
Tim Lockwood, Chief, Regulation and Policy Management Branch

Exhibit A

**FOLSOM STATE PRISON
DEPARTMENT OPERATIONS MANUAL SUPPLEMENT**

RECREATION & PHYSICAL EDUCATION PROGRAMS

Chapter: 100000, Adult Programs
Subchapter: 101040, Recreation & Physical Education
Section: 101040.4, Recreational Activities
Reference: ACA Standard # 4-154

Reviewed By: Associate Warden-Programs
Review Annually: June
Date of Last Review: June 2015

101040.4.6 Movies/Videos

The Folsom State Prison (FSP) Television Studio Supervisor will be responsible for providing the Inmate Advisory Council (IAC), at both FSP and Folsom Women's Facility (FWF), the California Department of Corrections and Rehabilitation (CDCR) approved movie selection list. The IAC submits the committee's movie selection list to the Associate Warden-Programs (AWP) for review and approval. Upon the AWP's approval, the FSP Television Specialist then provides the list to the Associate Warden Business Services (AWBS) for approval. Once approved, the Television Specialist delivers the list to the Canteen Manager to process the order for Inmate Welfare Fund (IWF) payment approval.

101040.4.9 Arts-in-Corrections

Closed until further notice.

101040.5 Recreational Activities

Activity Hours

Hours of operation for the FSP daytime Recreation Program are:

- Monday through Friday: 0830 to 1500 hours,
Saturday/Sunday: 0830 to 1500 hours.

Main Yard access on Saturdays/Sundays/Holidays is reserved for inmate workers on their Regular Days Off. Inmates that are "A1A Unassigned" may only access the yard Monday through Friday on second watch.

Night Recreation Program is limited to assigned workers meeting the criteria. The program commences at approximately 1630 hours and ends at approximately 2030 hours (Yard Recall). Close B Custody inmates are authorized access to night yard, but must return to their housing units prior to 2000 hours.

Yard In-Line, Reverse Line and Yard Recall hours of operation:

- Two separate main yard programs will operate daily on second watch. The first yard will begin at approximately 0830 hours and end at 1130 hours, at which time a mandatory in-line will occur.
- The second yard program (reverse line) will begin at approximately 1200 hours and end at 1500 hours.

The Coach will facilitate the distribution of recreational equipment to the various program areas.

101040.6 Recreation and Physical Education Equipment

All recreational equipment (i.e., table games and equipment) will be checked out at the Athletic Department. Inmates shall check out equipment and games by exchanging their identification (ID) cards for the item being checked out. Inmates shall not be permitted to check out recreation equipment or games without surrendering their ID card. This will be adhered to on all the facility, housing units and mini-yards.

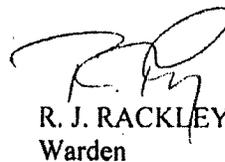
Yard Officers

When the Coach is absent, a designated Yard Officer will coordinate the distribution of recreation equipment and games during both the day and night yard programs.



L. CAHAYLA
Associate Warden Programs (A)

4-17-16
Date



R. J. RACKLEY
Warden

4/13/16
Date