

**OFFICE OF ADMINISTRATIVE LAW**

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**DEBRA M. CORNEZ**  
Director

**ENDORSED - FILED**  
In the office of the Secretary of State  
of the State of California

**SEP 07 2018**

3:35pm

Date: September 7, 2018  
To: Vadim S. Miesegaes  
From: Chapter Two Compliance Unit  
Subject: **2018 OAL DETERMINATION NO. 2 (S)**  
**(CTU2018-0709-01)**  
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;  
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation the Administrative Directive No 613.2, subject "Beverages Containing Caffeine", dated September 27, 2016, issued by Department of State Hospitals, Atascadero State Hospital.

On 7/9/2018, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether Administrative Directive No 613.2, Beverages Containing Caffeine (Directive No. 613.2) constitutes an underground regulation. The challenged rule 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,<sup>1</sup> which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).<sup>2</sup> Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment.

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250:

<sup>1</sup> "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.

<sup>2</sup> 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.

(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 [Emphasis added].

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. The Legislature has enacted an exemption with respect to the control and elimination of contraband at state hospitals. Welfare and Institutions Code section 7295(j), establishes exemptions expressly for the California Department of State Hospitals (DSH):

(j) Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, the hospital and the department may implement, interpret, or make specific this section without taking regulatory action [Emphasis added].

This exemption applies when a rule is adopted by a hospital to implement, interpret, or make specific Welfare and Institutions Code section 7295(a), which specifically deals with the control of contraband items at state hospitals:

(a) To ensure its safety and security, a state hospital that is under the jurisdiction of the State Department of State Hospitals, as listed in Section 4100, may develop a list of items that are deemed contraband and prohibited on hospital grounds and control and eliminate contraband on hospital grounds.

Pursuant to the provisions of Welfare and Institutions Code section 7295(a), Atascadero State Hospital, in Administrative Directive No. 613.2, classified caffeinated beverages as contraband at Atascadero State Hospital and established procedures to control patient access to caffeinated beverages, and therefore, Administrative Directive No. 613.2, is not an underground regulation.<sup>3</sup>

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<sup>3</sup> 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.

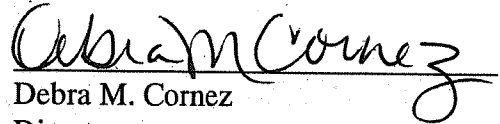
(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

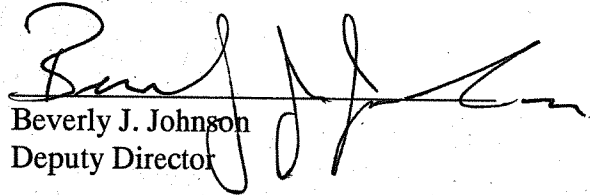
(D) The challenged rule has expired by its own terms.

(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.

September 7, 2018  
Date

  
Debra M. Cornez  
Director

  
Beverly J. Johnson  
Deputy Director

Copy: Stephanie Clendenin, Interim Director  
Patrice Huber

# Exhibit A

# DEPARTMENT OF STATE HOSPITALS – ATASCADERO

## OPERATING MANUAL

### SECTION – SUPPORT SERVICES

#### ADMINISTRATIVE DIRECTIVE No. 613.2

#### SUBJECT: BEVERAGES CONTAINING CAFFEINE

Effective Date: September 27, 2016



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Cancellation: This directive cancels Administrative Directive No. 613.2 dated September 2, 2015, same subject.

#### I. POLICY

Caffeinated beverages shall be classified as contraband items due to the health and safety risks they present to the patient population. Patients may not receive or possess caffeinated beverages from any source except as provided below.

#### II. PURPOSE

It is the policy of this hospital to provide the best possible treatment for patients and the safest possible environment for patients and staff. There is convincing evidence that caffeine ingestion and/or abuse can be harmful to mentally disordered persons, causing restlessness, nervousness, excitement, insomnia, and psychomotor agitation. In addition, caffeine may compromise the efficacy of a treatment regime that includes various psychologically active medications.

#### III. PROCEDURES

- A. Patients shall be allowed one (1) six-ounce cup of caffeinated coffee with breakfast and dinner from the Dining Rooms, self-dispensed by the patients from coffee urns. The caffeinated beverage shall be made available by Nutrition Services and monitored by nursing staff. When a special event lunch is provided in the Dining Rooms instead of sack lunches on the units, such as on Thanksgiving/Christmas, caffeinated coffee may also be served.
- B. Whether a plastic or paper cup is used, patients will receive six (6) ounces of hot coffee when the cup is about two-thirds full. Because the coffee temperature range is 150 to 175°F, nursing staff will monitor that patients avoid filling their cups to the brim in order to prevent the risk of hot coffee spills.
- C. Patients who desire decaffeinated coffee may request this substitute by asking a serving line staff member.
- D. A patient may be denied access to all caffeinated beverages pursuant to the psychiatrist's or physician's order to prevent adverse effects of caffeine on the

patient's mental or physical health. If a patient has a diet order including "No Caffeine" or "Caffeine-Free," nursing staff will communicate the diet order to the Diet Office following procedures in AD No. 612, Diets & Nourishments: Ordering, Service, and Monitoring. Nursing staff will ensure the patient does not self-dispense caffeinated coffee in the dining room and will assist him as needed in requesting the decaf coffee substitute from the serving line staff.

- E. Delivered sack lunches are without coffee/decaf coffee. However, when the entire unit will consume their breakfast or dinner on the unit, e.g., during a lockdown or quarantine, caffeinated coffee can usually be provided either pre-brewed in an insulated container or as instant coffee packets, except the Enhanced Treatment Unit is provided carafes of pre-brewed *decaf* coffee with their delivered breakfasts and dinners due to "No Caffeine/Caffeine-Free" orders.
- F. When a patient requires a meal on the unit for breakfast or dinner, a packet of decaf coffee will be provided for a "No Caffeine/Caffeine-Free" order or when a patient requests this substitute as communicated by the unit staff to the Dining Room Office.
- G. For contraband control, when caffeinated or decaf coffee packets are provided, unit staff will handle and reconstitute the individual packets of coffee crystals.
- H. Emergencies may preclude the provision of coffee/decaf coffee to patients.
- I. No beverage containing caffeine (coffee, instant coffee, tea/tea bags or caffeinated soft drinks) will be made available to patients from any other sources within the hospital (such as the Canteen, unit staff, events, or other hospital staff source). Caffeinated beverages shall not be provided by staff or volunteers as gifts, token rewards, or as part of a treatment plan.
- J. Patients may not receive beverages containing caffeine through the mail or from visitors.
- K. Nothing in this policy prevents the administration of caffeine-containing medications for a medical condition pursuant to a physician's medical order.

  
STIRLING PRICE  
Executive Director

Updated – No changes

Cross-Reference(s):

A.D. No. 612 - Diets & Nourishments: Ordering, Service, and Monitoring  
A.D. No. 805 - Contraband