

OCT 15 2018

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STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

2018 OAL DETERMINATION NO. 3
(OAL MATTER NO. CTU2018-0402-01)

REQUESTED BY: GEORGE HAMILTON

CONCERNING: Correctional Offender Management Profiling for Alternative Sanctions Exclusionary Criteria and Process Memorandum, dated August 19, 2015, 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 challenged rule is a memorandum issued by the Department of Corrections and Rehabilitation (Department), dated August 19, 2015, and titled "Correctional Offender Management Profiling for Alternative Sanctions Exclusionary Criteria and Process." This memorandum is attached as Exhibit A and will be referred to as the "Memorandum."

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.

DETERMINATION

OAL determines that the Memorandum meets the definition of “regulation” that should have been adopted pursuant to the APA, but was not. It is, therefore, an underground regulation.

FACTUAL BACKGROUND

On April 2, 2018, George Hamilton (Petitioner) submitted a petition to OAL challenging the Memorandum as an underground regulation.

OAL accepted the petition for consideration on June 1, 2018. The petition was published in the California Regulatory Notice Register (Notice Register) on June 15, 2018. Comments from the public were solicited until July 16, 2018. No comments were received. The Department declined to submit a response to the petition which would have been due by July 30, 2018.

The Memorandum was signed by Millicent Tidwell, the Director of the Division of Rehabilitative Programs, and Kelly Harrington, the Director of the Division of Adult Institutions. It was addressed to Associate Directors of the Division of Adult Institutions, Wardens, Classification Staff Representatives, Classification and Parole Representatives, and Correctional Counselor IIIs.

As stated in the Memorandum, “[o]n July 7, 2011, [the Department] and the California Correctional Peace Officers Association negotiated the administration of the COMPAS Core Assessment for the new [California Code of Regulations], Title 15, §3375.6....” This regulation, section 3375.6, states in relevant part:

3375.6.(a) A validated needs assessment tool...will identify criminogenic needs which are most predictive of criminal behavior. The tool identifies a needs value that demonstrates the level of need from high to low and shall be utilized to assist in placing the inmate in a rehabilitative program. Currently the automated needs assessment tool that is being utilized is the Correctional Offender Management Profiling For Alternative Sanctions (COMPAS)....

(1) An automated needs assessment tool shall be administered during the reception center process for all inmates.

(2)....

(3) An automated needs assessment tool shall be administered during the initial or annual review process for inmates who do not have a completed automated needs assessment tool....

In the Memorandum, the Department excludes the following inmates from completing the COMPAS Core Assessment:

- Offenders in Mental Health Services Delivery System at the following levels of care:
 - Enhanced Outpatient
 - Mental Health Crisis Beds
 - Intermediate Care Treatment Facility

- Acute Psychiatric Program
- Or any higher level of care
- Offenders classified as *Condemned*
- Offenders sentenced to a term of *Life without the Possibility of Parole*.

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, California Code of Regulations, section 250.

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 Memorandum affects current and future inmates. The inmates who fall into one of the categories of excluded offenders listed in the Memorandum are excluded from completing the COMPAS Core Assessment. Therefore, the Memorandum applies to a clearly defined class of persons.

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 specifies categories of offenders who are excluded from completing the COMPAS Core Assessment. Without the assessment, the inmate is excluded from the benefits of qualifying for possible placement in a rehabilitative program pursuant to section 3375.6,

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.

title 15, of the California Code of Regulations. Thus, the Memorandum establishes administration criteria for management of the prisons. The Memorandum thereby implements, interprets, and makes specific Penal Code sections 5054 and 5058.

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

The final issue to examine is whether the Memorandum 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.

PUBLIC COMMENTS

OAL did not receive any public comments.

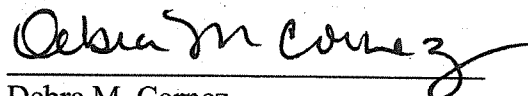
AGENCY RESPONSE

The Department declined to respond to the petition.

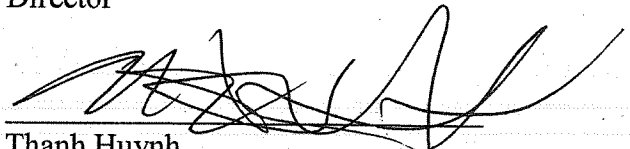
CONCLUSION

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

Date: October 15, 2018



Debra M. Cornez
Director



Thanh Huynh
Senior Attorney

EXHIBIT A

Memorandum

Date : August 19, 2015

To : Associate Directors, Division of Adult Institutions
Wardens
Classification Staff Representatives
Classification and Parole Representatives
Correctional Counselor IIIs

Subject : **CORRECTIONAL OFFENDER MANAGEMENT PROFILING FOR ALTERNATIVE SANCTIONS EXCLUSIONARY CRITERIA AND PROCESS**

The purpose of this memorandum is to amend the California Department of Corrections and Rehabilitation's (CDCR's) exclusionary criteria for the administration of the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) Core Assessment. It is the expectation all Classification and Parole Representatives shall provide training on the contents of this memorandum to the Correctional Counselor (CC) staff. Please ensure a copy of this memorandum is provided to all CC staff.

The California Code of Regulations (CCR), Title 15, §3375(b), states, "The classification process shall take into consideration the inmate's needs, interests and desires, his/her behavior and placement score in keeping with the Department and institution's/facility's program and security missions and public safety." On July 7, 2011, CDCR and the California Correctional Peace Officers Association negotiated the administration of the COMPAS Core Assessment for the new CCR, Title 15, §3375.6, which states, in part, "An automated needs assessment tool shall be administered during the reception center process for all inmates," and "An automated needs assessment tool shall be administered during the initial or annual review process for inmates who do not have a completed automated needs assessment tool."

This memorandum replaces the Directors' Memorandum dated, September 20, 2013, titled, *Correctional Offender Management Profiling For Alternative Sanctions Exclusionary Criteria*.

Administration of the COMPAS Core Assessment at Reception Center

Since September 20, 2013, Reception Center (RC) CCs have been mandated to administer the COMPAS Core Assessment to all offenders during the RC processing, unless otherwise excluded. Classification Services Representatives (CSR) shall not endorse an RC offender to a non RC institution if a COMPAS Core Assessment has not been completed, unless the offender currently meets the exclusionary criteria noted within, or upon approval of the Classification Services Unit (CSU) Chief or designee.

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COMPAS Core Assessment Exclusions

Please note life-term inmates not classified as *Life without the Possibility of Parole* or *Condemned*, and offenders housed in either Conservation Camps, Modified Community Correctional Facilities, or California Out-of-State Correctional Facilities are no longer excluded from the COMPAS Core Assessment.

The following inmates are excluded from completing the COMPAS Core Assessment:

- Offenders in Mental Health Services Delivery System at the following levels of care:
 - Enhanced Outpatient
 - Mental Health Crisis Beds
 - Intermediate Care Treatment Facility
 - Acute Psychiatric Program
 - Or any higher level of care
- Offenders classified as *Condemned*
- Offenders sentenced to a term of *Life without the Possibility of Parole*

Pending the COMPAS Core Assessment, there shall not be a delay to offenders who are endorsed and pending transfer from an Administrative Segregation or Security Housing Unit.

COMPAS Core Assessment Refusals

It is imperative CC staff complete a COMPAS Core Assessment for all qualifying offenders on their caseload. Offenders declining or refusing to complete a COMPAS Core Assessment shall be encouraged to participate. If compliance is not achieved after the inmate is given a direct order to participate, appropriate disciplinary action shall be followed. Rules Violation Reports (RVRs) shall not delay transfer unless the outcome of the RVR impacts the inmate's level of placement. The CSR will provide direction via the endorsement chrono, reminding the sending institution of their responsibility for the completion of the disciplinary process.

Updating a COMPAS Core Assessment

Each non excluded offender must be administered the latest version of the Assessment available. If the offender has an existing COMPAS Core Assessment for the current term, the update process can be accomplished using the copy and edit function within the COMPAS software suite. This will only require the CC to fill out an additional three to four questions, depending on the gender of the offender. A step-by-step guide to utilizing this

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function is attached to this memorandum. If the offender does not have a COMPAS Core Assessment consistent with their current term, a new assessment must be completed.

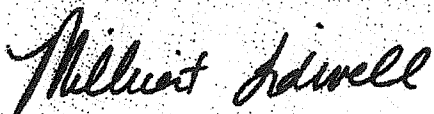
CSR Use of the COMPAS Core Assessment

The CSR is expected to determine the completion of a COMPAS Core Assessment for all non excluded offenders prior to endorsement. Completion will be accomplished by verifying the presence of a COMPAS Bar Chart from the current term, which may be obtained in the Case Sum section of the electronic central file in Strategic Offender Management System, Electronic Records Management System, or by documentation describing the reason(s) for its absence. It is expected the COMPAS Core Assessment will be completed one time with each new term. A new term is defined as *New Commitment* or *Parole Violator with New Term*.

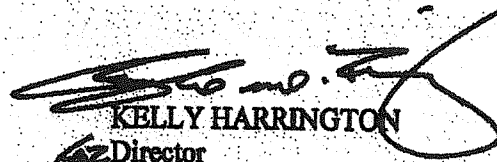
Validation of Core COMPAS During Annual Review

The RC Assessment process outlined on page 1 directs RC CCs to ensure offenders with new terms are always assessed prior to transfer to a main line facility; however, during the annual review process, verification the inmate has completed a COMPAS Core Assessment is necessary. In the event the Assessment is incomplete, an Assessment should be administered at that time.

For questions related to the COMPAS Core Assessment, contact Yong Lee, Staff Services Manager I, Division of Rehabilitative Programs, at Yong.Lee@cdcr.ca.gov or (916) 322-8016. For any classification related questions, contact Natasha Thompson, CC III, CSU, at Natasha.Thompson@cdcr.ca.gov or (916) 322-4151.



MILLICENT TIDWELL
Director
Division of Rehabilitative Programs



KELLY HARRINGTON
Director
Division of Adult Institutions

Attachments

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Kathleen Allison
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