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DEBRA M. CORNEZ
Director

ENDORSED - FILED
in the office of the Secretary of State
of the State of California

OCT 30 2018

/s/SDP



Date: October 30, 2018

To: Eugene A. Sinohue

From: Chapter Two Compliance Unit

Subject: **2018 OAL DETERMINATION NO. 4 (S)**
(CTU2018-0831-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Mule Creek State Prison
D.O.M. Supplement, Section 54010.22; titled Correspondence between
Inmates/Parolees/Probationers

On 8/31/2018, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether Mule Creek State Prison D.O.M. Supplement, Section 54010.22; titled Correspondence between Inmates/Parolees/Probationers, constitutes an underground regulation. Mule Creek State Prison D.O.M. Supplement, Section 54010.22 was issued by the warden at the Mule Creek 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 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 Mule Creek State Prison and applies solely to the inmates of Mule Creek State Prison. Inmates housed at other institutions are governed by those other institutions' criteria for correspondence between other inmates, parolees and probationers. 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.

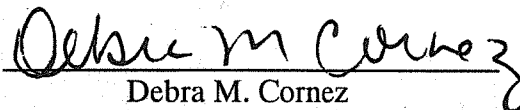
(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

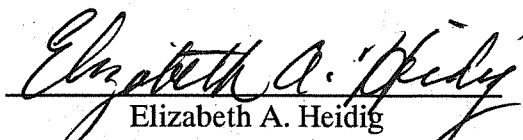
(D) The challenged rule has expired by its own terms.

(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.

October 30, 2018


Debra M. Cornez
Director


Elizabeth A. Heidig
Assistant Chief Counsel

Copy: Ralph M. Diaz, Secretary (A), CDCR
Ying Sun, RPMB, CDCR

Exhibit A

and must be accompanied by copies of each CDCR 1819, letters to the publisher, and copies or pictures of the text which violates the CCR for each issue published during the year.

DAI will review each of the submitted requests and determine if the publication meets the criteria for placement on the centralized list. DAI will review the proposed publication and base its decision on the information received. Thus, all necessary documents with detailed evidence to substantiate the findings should be submitted. Should the publication contain text only, it is recommended that the text in question be highlighted to assist in the review process. Should DAI deny the request to place the publication on the Centralized List of Disapproved Publications, upon notification, MCSP shall take the immediate steps necessary to issue the publication to the inmate(s) addressed.

Upon approval of the request, DAI will send a letter to the publisher notifying them the publication is being placed on CDCR's Centralized List of Disapproved Publications, thus prohibiting the publication from being possessed by inmates housed within CDCR.

Publications enumerated on the Centralized List are not allowed at MCSP. MCSP may not add items to this list.

The Mailroom shall utilize the Disapproved Publication Tracking Chart (Attachment D) to track any publication being withheld and/or disallowed. Copies of the chart shall be submitted to SPU no later than the 15th day of each month.

Mailroom staff may only use the attached Centralized List of Disapproved Publications dated July 2013 (Attachment E) when excluding publications. All prior lists shall be discarded. This list shall be available/posted for all Mailroom staff.

MCSP D.O.M.

Supplement

54010.22

CORRESPONDENCE
BETWEEN INMATES /
PAROLEES /
PROBATIONERS

Due to the sensitive needs mission at MCSP, correspondence between inmates, parolees, and probationers has been revised in accordance with CCR 3139(f) and will now be limited to the following exceptions:

- Immediate family members as defined in CCR 3000.
- Co-litigants on active cases, until the case is resolved.
- Incarcerated natural parent of the inmate's child.

Mail privileges between inmate and any of the above types of correspondents may not be restricted unless the inmate or the correspondent violates CCR 3006 or other CCR section.

Inmates may request consideration for correspondence approval to correspond with the above by contacting their CCI via a CDC GA-22,