STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2020 OAL Determination NUMBER 4
(OAL MATTER numbers CTU2019-0923-01 and CTU2019-1211-01)

REQUESTED BY: **Joseph R. McCoy and David A. Perysian**

CONCERNING: **Non-Designated Programming Facilities; Memoranda dated April 24, 2018, April 25, 2018, and September 10, 2019, 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 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 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."[1]

CHALLENGED RULE

The challenged rules are contained in four memoranda issued by the California Department of Corrections and Rehabilitation (Department) concerning the implementation of Non-Designated Programming Facilities (NDPF).

The memoranda challenged by Joseph R. McCoy, attached hereto as Exhibit A, are (1) a letter from the Director of the Division of Adult Institutions, Kathleen Allison, that appears to be directed to Division of Adult Institutions Associate

[1] As defined by California Code of Regulations, title 1, section 250(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.

Directors and Wardens,[2] (2) the "Non-Designated Programming Facility Frequently Asked Questions," dated April 25, 2018, and (3) the "MSF Non-Designated Programming Facilities Conversion Schedule," printed April 24, 2018.

The fourth memorandum, challenged by David A. Perysian and attached hereto as Exhibit B, is titled "Amended Non-Designated Programming Facility Expansions for 2018/19," dated September 10, 2018, signed by Secretary Ralph M. Diaz, and addressed to all Wardens, Associate Directors, Division of Adult Institutions, Classification Staff Representatives, Classification and Parole Representatives, and Correctional Counselors III, Reception Centers.

Collectively, the challenged memoranda are referred to as the "Memoranda."

DETERMINATION

OAL determines that the Memoranda concerning the implementation of NDPFs meet the definition of "regulation" that should have been adopted pursuant to the APA, but were not. The Memoranda are, therefore, underground regulations.

FACTUAL BACKGROUND

On September 23, 2019, OAL received the petition from Mr. McCoy. Mr. McCoy's petition was incomplete for failure to certify that a copy of the petition and all attachments were sent to the Department. OAL notified Mr. McCoy that the petition was incomplete on November 22, 2019, and received the required certification on December 9, 2019.

On December 11, 2019, OAL received the petition from Mr. Perysian. The petitions of Mr. McCoy and Mr. Perysian (Petitioners) challenge the Memoranda attached as Exhibit A and Exhibit B, respectively, as underground regulations. Because both petitions concern NDPFs, OAL accepted both petitions for consideration on January 31, 2020, and notified petitioners that OAL would address them with one determination.

OAL published a summary of the petitions in the California Regulatory Notice Register on February 7, 2020, and solicited comments from the public until March 9, 2020. OAL did not receive any comments. A response to the petition from the Department was due no later than March 23, 2020. No response was received from the Department.

Exhibit A, the letter signed by the Director of the Division of Adult Institutions, Kathleen Allison, attached a copy of the Non-Designated Programming Facility

[2] Mr. McCoy only provided page 2 of the letter for OAL review.

Frequently Asked Questions (NDPF FAQ), stating that "the FAQs may be shared with staff and the inmate population." The NDPF FAQ contains information regarding general NDPF policies, long term plans for NDPFs, and procedures for placing inmates at NDPFs.

The MSF Non-Designated Programming Facilities Conversion Schedule, also a part of Exhibit A, provides a schedule for multiple facilities to transfer inmates into NDPFs throughout May, June, and July of 2018.

Exhibit B, the Amended Non-Designated Programming Facility Expansions for 2018/19 Memorandum, dated September 10, 2018, was sent to adult institutional staff to provide an updated schedule for thirteen facilities scheduled to transition into NDPFs in late 2018 and early 2019.

Collectively, the Memoranda concern the implementation of non-designated programming in facilities under the jurisdiction of the Department and indicate that the Department is converting multiple, existing facilities into NDPFs. As provided in the NDPF FAQ, NDPFs will "serve to provide greater access to programs for inmates that demonstrate positive programming, regardless of prior Sensitive Needs Yard (SNY) or General Population (GP) designation." The September 10, 2018 memorandum states that "NDPFs (i.e., facilities that do not identify as [SNY] or [GP]) will allow for greater access to programming opportunities and enhanced privileges."

According to the NDPF FAQ, "[a]s of February 2018, multiple facilities and health care programs have already converted to non-designated status." The September 10, 2018 memorandum adds that "[i]t is CDCR's goal to slowly transition all Level I, Level II, and select Level III housing facilities into NDPFs, as they currently house a large population of programming inmates."

California Code of Regulations, title 15, section 3377 provides that there are four levels of facilities, called "security levels," and that each facility is "designated at a security level based on its physical security and housing capability." (Cal. Code Regs., tit. 15, § 3377.) Following a detailed classification process, each inmate is given a placement score that is used by the Department to determine the proper level of facility for inmate placement. (See, Cal. Code Regs., tit. 15, § 3375 et seq.) Pursuant to section 3375.1,

> Except as provided in section 3375.2, each inmate shall be assigned to a facility with a security level which corresponds to the following placement score ranges:
>
> (1) An inmate with a placement score of 0 through 18 shall be placed in a Level I facility.

> (2) An inmate with a placement score of 19 through 35 shall be placed in a Level II facility.
> (3) An inmate with a placement score of 36 through 59 shall be placed in a Level III facility.
> (4) An inmate with a placement score of 60 and above shall be placed in a Level IV facility. (Cal. Code Regs., tit. 15, sec. 3375.1.)

According to the Memoranda, Level I, Level II, and select Level III facilities will convert into NDPFs and implement a new programming model that "serve[s] to provide greater access to programs for inmates that demonstrate positive programming." In addition, the Memoranda establish NDPF placement for certain inmates pursuant to specific criteria and specify procedures for how and when to assign NDPF placement. California Code of Regulations, title 15, article 10 ("Classification") governs procedures for classifying, placing, and transferring inmates, as well as establishes the four facility security levels. A search of title 15 of the California Code of Regulations did not reveal regulations establishing this new facility type or regulations detailing NDPF procedures as established in the Memoranda.

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, the agency creates an underground regulation as defined in California Code of Regulations, title 1, section 250.

OAL may issue a determination as to whether 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, § 11340, subd. (b)). An OAL determination 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).)[3]

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.[4]

The Memoranda affect inmates who may be transferred to NDPFs and those already housed in NDPFs, as well as those who might wish to be housed at an NDPF. By the express terms of the September 10, 2018 memorandum, "NDPFs (i.e., facilities that do not identify as Sensitive Needs Yard [SNY] or General Population) will allow for greater access to programming opportunities and enhanced privileges. It is CDCR's goal to slowly transition all Level I, Level II, and select Level III housing facilities into NDPFs." The Memoranda also specify criteria for placing inmates into NDPFs, as well as procedures for how Department staff

[3] Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.
[4] See also *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 14, 19; 167 Cal.Rptr. 552, 557.

are to notify inmates pending transfer to an NDPF. The Memoranda apply generally to all inmates at, in the process of transferring to, or who would like to be house at NDPFs; therefore, 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 specifically provides that the care and custody of inmates, as well as the management and control of state prisons, is vested in the Secretary of the Department. It states:

> 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 5068 requires that the Secretary of the Department classify and assign inmates and states in relevant part:

> . . . the Director of Corrections shall classify prisoners; and when reasonable, the director shall assign a prisoner to the institution of the appropriate security level and gender population nearest the prisoner's home, unless other classification factors make such a placement unreasonable.

The departmental policy establishing NDPFs and procedures for placing inmates at NDPFs directly affect the "care, custody, treatment, training, discipline and employment of persons" in correctional institutions that have converted into NDPFs. Therefore, the Memoranda implement, interpret, and make specific Penal Code sections 5054 and 5068.

In addition, by specifying that Level I, Level II, and select Level III facilities will convert into NDPFs, a new type of facility, and establishing programming expectations specific to NDPFs, the Memoranda further implement, interpret, and make specific the Department's existing housing and facility level regulations set forth in title 15 of the California Code of Regulations, including but not limited to, sections 3375, 3375.1, and 3377. Therefore, the second element in *Tidewater* is met.

The challenged Memoranda, therefore, meet 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 challenged Memoranda, nor did OAL find such an exemption.

CONCLUSION

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

Date: June 8, 2020

/s/
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/s/
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For: Kenneth J. Pogue
Director

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