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Kenneth J. Pogue
Director

Date: November 7, 2023

To: Keith Avery

From: Chapter Two Compliance Unit

Subject: 2023 OAL DETERMINATION NUMBER 2(S) (CTU2023-0911-02)

Summary Disposition issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 270, sub. (f)

Petition challenging as underground regulations Cal. Code Regs., tit. 15, sec. 3315, sub. (f)(5)(Q)1. through 3., Loss of Family Visiting (Overnight) Program, and Cal. Code Regs., tit. 15, sec. 3006, subs. (a) and (c)(20), Contraband, issued by the California Department of Corrections and Rehabilitation

On September 11, 2023, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether the loss of family visiting (overnight) program provisions promulgated by the California Department of Corrections and Rehabilitation (Department) in California Code of Regulations, title 15, section 3315, subsection (f)(5)(Q)1. through 3., and the contraband provisions that pertain to wireless communication devices promulgated by the Department in California Code of Regulations, title 15, section 3006, subsections (a) and (c)(20), constitute underground regulations. The challenged rules are attached hereto as Exhibits A, B, and C.

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). Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment.

[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.

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

> (a)(1) "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.]

Section 3315(f)(5)(Q)1. through 3.

The loss of family visiting (overnight) program provisions set forth in California Code of Regulations, title 15, section 3315, subsection (f)(5)(Q)1. through 3., read:

> (f) Disposition. Upon completion of the fact-finding portion of the disciplinary hearing, the inmate may be found:
> […]
> (5) The disposition may or when mandated shall include assessment of one or more of the following:
> […]
> (Q) Violation of Subsection 3006(a) or 3006(c)(20) shall result in:
> 1. Loss of family visiting (overnight) program for one year for first offense.
> 2. Loss of family visiting (overnight) program for three years for second offense.
> 3. Loss of family visiting (overnight) program for five years for third offense.

Pursuant to Penal Code section 5058, the Department adopted section 3315, subsection (f)(5)(Q)1. through 3., in a regular rulemaking action (OAL file number 2018-1130-07S). The notice of proposed action was published in the California Regulatory Notice Register on December 29, 2017 (OAL file number Z2017-1219-03). On November 30, 2018, the Department timely submitted the rulemaking action to OAL for review. The action was reviewed and approved by OAL. The regulations were filed with the Secretary of State on January 15, 2019, and became effective the same day. Therefore, California Code of Regulations, title 15, section 3315, subsection (f)(5)(Q)1. through 3., was duly adopted pursuant to

the APA. A regulation that is duly adopted pursuant to the APA is not an underground regulation.

Section 3006(a) and (c)(20)

The contraband provisions that pertain to wireless communication devices set forth in California Code of Regulations, title 15, section 3006, subsections (a) and (c)(20), read:

> (a) Dangerous Property. Inmates shall not possess or have under their control or constructive possession any weapons, explosives, explosive making material, poisons or any destructive devices, nor shall they possess or assist in circulating any writing or voice recording which describes the making of any weapons, explosives, poisons, or destructive devices. Inmates shall not possess wireless communication devices capable of making or receiving wireless communications, except as expressly authorized by the Secretary, pursuant to subsection 3190(k)(8).
> […]
> (c) Except as authorized by the institution head, inmates shall not possess or have under their control any matter which contains or concerns any of the following:
> […]
> (20) Any wireless communication device accessory and component including, but not limited to, a Subscriber Identity Module (SIM) card, memory storage device, battery, wired or wireless headset, and charger, except as expressly authorized by the Secretary, pursuant to subsection 3190(k)(8).

Pursuant to Penal Code section 5058, the Department amended section 3006, subsections (a) and (c)(20), in a regular rulemaking action to adopt contraband provisions that pertain to wireless communication devices (OAL file number 2016-0713-04S). The notice of proposed action was published in the California Regulatory Notice Register on April 15, 2016 (OAL file number Z2016-0328-03). On July 13, 2016, the Department timely submitted the rulemaking action to OAL for review. The action was reviewed and approved by OAL. The regulations were filed with the Secretary of State on August 17, 2016, and became effective the same day.

The Department subsequently amended section 3006, subsections (a) and (c)(20), through the emergency rulemaking process pursuant to Penal Code section 5058.3 (OAL file numbers 2020-0706-02EON, 2021-0408-03EON, and 2021-1129-01C), as more specifically described below.

On July 6, 2020, the Department submitted an emergency rulemaking action by operational necessity pursuant to Penal Code section 5058.3 to OAL for review (OAL file number 2020-0706-02EON). The action was reviewed and approved by OAL. The regulations were filed with the Secretary of State on August 23, 2020, and became effective the same day.

On April 8, 2021, the Department submitted a second emergency rulemaking action by operational necessity to OAL in order to readopt the underlying emergency changes previously approved in OAL file number 2020-0706-02EON (OAL file number 2021-0408-03EON). The action was reviewed and approved by OAL. The regulations were filed with the Secretary of State on April 27, 2021, and became effective on April 30, 2021.

An emergency rulemaking by operational necessity expires by operation of law unless the Department timely submits a certificate of compliance in accordance with Government Code section 11346.1, subdivision (e).

The notice of proposed action for the certificate of compliance was published in the California Regulatory Notice Register on August 28, 2020 (OAL file number Z2020-0818-05). The Department timely filed a certificate of compliance for the emergency regulations with OAL on November 29, 2021(OAL file number 2021-1129-01C). The certificate of compliance certified that the Department complied with Government Code sections 11346.2 to 11347.3, inclusive. The action was reviewed and approved by OAL. The regulations were filed with the Secretary of State on December 20, 2021, and became effective the same day.

Therefore, California Code of Regulations, title 15, section 3006, subsections (a) and (c)(20), were duly adopted pursuant to the APA. A regulation that is duly adopted pursuant to the APA is not an underground regulation.

For the reasons discussed above, we find that the rules challenged by your petition are not underground regulations.[2]

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[2] The rules challenged by your petition are the proper subject of a summary disposition pursuant to California Code of Regulations, title 1, section 270. Subsection (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 challenged rule is not an underground regulation, OAL may issue a summary disposition stating that conclusion. A summary disposition may not be issued to conclude that a challenged rule is an underground regulation.
> (2) Circumstances in which facts demonstrate that the challenged rule is not an underground regulation include, but are not limited to, the following:
> (A) The challenged rule is contained in a California statute.
> ***(B) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.***

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.

November 7, 2023

/s/
Lindsey McNeill
Attorney III

Copy: Jeffrey Macomber, Secretary, CDCR
Renee Rodriguez, CDCR

(C) The challenged rule is statutorily exempt from the rulemaking provisions of the APA. [Emphasis added.]