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Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Re: CTU2008-0314-01

June 25, 2008

I, Michael St. Martin, submit the following response to The California Department of Mental Health's submission to the petition I filed on the Coalinga State Hospital (CSH) Administrative Directive 818.

Issue

On March 14, 2008, the Office of Administrative Law received a petition by me, Michael St. Martin, alleging that the Department of Mental Health (DMH) has issued, used, enforced, or attempted to enforce underground regulations. The alleged underground regulation is CSH Administrative Directive 818.

Proposed Determination

CSH Administrative Directive 818 is a regulation subject to the Administrative Procedures Act (APA).

Background

Coalinga State Hospital was completed in 2005 at a cost of $388 Million. It was designed to house the rapidly growing population of civilly detained sex-offenders who had completed their prison sentences but remained incarcerated as *Sexually Violent Predators*. Current resident population stands at approximately 750. State officials claim that the hospital provides treatment and does not constitute punishment.

Ms. Lee stated in her response:

> "Every state hospital is unique and as a result the administrative directives provide guidance for the unique situations that may occur at each location."

Welfare & Institution Code
§ 4000 "Department"

"There is in the Health and Welfare Agency a State Department of Mental Health."

Welfare & Institution Code
§ 4001 "Definitions"

(a) "Department" means State Department of Mental Health;
(b) "Director" means the Director of Mental Health;
(c) "State Hospital" means any hospital specified in section 4100

Welfare & Institution Code
§ 5400 "Director; Administrative duties; Rules and Regulations"

Welfare & Institution Code
§ 5750 "Promulgation of Rules and Regulations"

§ 5750 (c) (2) "The department **shall** continue during the period to involve the conference in the development of **all** regulations which affect local Mental Health programs, prior to the promulgation of those regulations pursuant to the Administrative Procedures Act.

In preparation for opening the facility several hospital police officers were hired, including many former Department of Corrections (CDCR) officers. They were given instruction to inspect the facility and remove all contraband prior to the hospital being occupied by patients. Guided by the experience and training they had received in CDCR they removed items they deemed to be a "threat to the safety and security of the institution," items they knew would never pass muster under prison regulations. They were then informed by administrative staff to return the items they had taken; they were integral to the structure of the buildings and were not contraband (e.g., metal wire in the rubber stripping in all the doors, Plexiglas window display cases, items that could easily be made into weapons stock, etc.)

Among the tasks placed on the initial officers was to write all of the Administrative Directives (ADs) for the institution. They informed hospital administrators that they had no experience writing directives, neither did they know what to write. They were told to "wing it." The officers contacted other state hospitals and requested copies of their ADs. It was from this pool that the Coalinga State Hospital Administrative Directives were assembled: the cut-and-paste method. It is *ad hoc:* hardly the careful, unique, and specific method claimed by Ms. Lee.

ADMINISTRATIVE DIRECTIVE 818 EXCEEDS ITS PROVISIONS FOR "SAFETY AND SECURITY""

Ms. Lee states in her submission:

> "Contraband items do not need to be denied for good cause. The contraband items are items that are illegal, such as illegal drugs. Also, weapons that inflict bodily harm are prevented and many metal combs cannot be brought to the secured areas, where the potential for safety and security is higher. The individual cannot possess items that may be a threat to the safety and

security such as letter openers, and items that may hide certain possessions, resulting in clear bottles."

This typical DMH *one-size-fits-all* practice and policy has led to some fairly absurd items being declared contraband. Items that do not meet the threshold of "safety and security" therefore must meet the "good cause" criteria. The following partial list shows the ambiguity of items the hospital has declared to be dangerous (please see original petition for submission of AD 818).

Chewing gum	Fountain Pens	Balloons
Excess clothing	Gym bags	Fanny packs
Herbal teas	Make-up	Mirrors
Mirrored sunglasses	Rubber bands	Styrofoam
Telephone directories	Thermal cups	Battery chargers
Musical greeting cards	Spices	Loose shoelaces
Reinforced envelopes	Cardboard	Satellite radios
Dental floss	Ink	Chalk
Pastels	Safety scissors	Gloves
Glue	Paints	Calligraphy pens
Pencils	Beading needles	Denture cleaner
Dice	Musical instruments	Shoe polish
Tape of any kind	Fingernail clippers	Metal pronged fasteners
Collectable trading cards	Correction fluid	Adhesive mailing labels
Bottles of any size or material	Metal foil	CD or DVD jewel cases
Sunglasses worn indoors	Desktop computers of any type	Eating/cooking utensils
Telephone calling cards	Toothbrushes exceeding 4"	Plastic bags not provided
Maps of Fresno County	Maps of Kings County	Maps of Monterey Co.
Literature of area landmarks	Local city/County newspapers	Local magazines
Paper clips	Loose staples	Pens exceeding 3.5"
Any "new technology" devices	Handkerchiefs not plain white	Electronic gear or parts

The Legislature did not take, deny, or abridge our rights to Due Process or Equal Protection Under the Law. Additionally, our right to be held in the least restrictive manner has been established under law. No Administrative Directive on its own can deny these rights, since ADs are written by an agency within the Executive branch of the government. AD 818 is regulatory in nature, and is therefore subject to the APA.

> **PC § 3041 (a).** administration agency may not vary or enlarge the terms of legislation, i.e., its rules and regulations must come within the scope of the authority conferred upon it in order for the rule or regulation to be valid. (Gov. C. § 11342.1, *Credit Ins Gen Agents Assn. v. Payne* (1976) 16 Cal. 3d 651, 656-657))
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> Administrative regulation that alter or amend a statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike

down such regulations' (Moony, Supra); (*Cooper v. Swoap*, 11 Cal. 3d 856, 864 (1974); *Morris v. Williams*, 67 Cal.2d. 733, 748 (1967))

Ms. Lee states: "This would be a burdensome task on DMH to constantly promulgate regulations to ensure the safety and security of individuals." This is not sufficient grounds to allow DMH to circumvent APA regulations. It is in fact the function for which the people of the State of California continue to pay Ms. Lee and her colleagues. Should the people who are least able to defend themselves be afforded less due process?

Furthermore;

> 'Administrative Directives **were not** within 'internal management' exceptions, hence, were invalid because [they were] not adopted as required by the Act." ([See e.g.] *Stoneham v. Rushen* 1982, First Appellate District) 137 Cal. App. 3d 729, 188 Cal. Rptr. 3d 130.)
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> *Motion Picture Studio Teachers and Welfare Workers v. Millan* (1996) 51 CA. 4th 1190 (Mandamus 187.9 (1)) "Arbitrary and Capricious" – adoption, amendment and vacation of rules and regulations are considered quasi-legislative acts. "The interpretation of a regulation, like the interpretation of a statute, present questions of law." [citation] (Id.pg.1196)

COALINGA HOSPITAL CONTRAVENES ITS OWN POLICIES BY INSTITUTING AND VACATING ADS IT HAS WRITTEN

Coalinga State Hospital administration unceasingly issue or change ADs for reasons of convenience to themselves rather than for legitimate safety and security concerns. This "process" can happen very rapidly, sometimes within a day or two, by their issuance of a new Administrative Directive. At the same time, it takes months or years for hospital administrators to reluctantly purge acknowledged illegal or outmoded ADs. Since there is no effective oversight in this process, from the first glimmer of an idea to the final publishing of the AD, they not only contain rules that violate case law (e.g. "least restrictive"), but they tend to accumulate in size. This bloating is further exacerbated by administration's practice and policy of adding ADs because of *perceived* safety issues. Among many examples is the addition of chalk to the contraband list—because one truly mentally disordered person ate chalk until he became ill. Now, chalk is contraband to all patients.

In another incident a patient in another facility was thought to have ingested some "blue colored" liquid cleaning product. Subsequently, the DMH banned all patients from using any cleaning supplies. This action resulted in patient workers being allowed to use only water when cleaning, which led to an epidemic flu outbreak that infected over half of the staff and patents. This is a good example of why the DMH must follow the APA and codify its policies and procedures.

In many cases Coalinga State Hospital does not modify the ADs. Instead, they write memos that circumvent the Administrative Directives, APA, and Due Process. They are often e-mailed to the units with no name appended: accountability is therefore impossible. These rules are frequently carried forward from other institutions which cater to other types of patients entirely, and like many other instances, are wholly inappropriate to our class.

As an example of "legislation by memo," computers were allowed into the institution through AD 654. Many residents obtained them, but Coalinga Administration decided to suspend their purchase on March 1, 2007 through a "moratorium" effected entirely by a Memorandum. To

date, the AD that allows the purchase of computers remains on the books, but computers cannot be purchased.

In their enduring and guiding principle of 'delay, deny, and divert,' the department still refuses to promulgate any of its policies or procedures. When AD 626 was challenged under APA regulations the Department decided to withdraw it. As of this date, DMH has not submitted this, or any other AD to the OAL for promulgation. Even though the Department withdrew AD 626 it continues to enforce AD 626 in direct violation of the agreement reached with the OAL. (Please see submissions A, B, C, D.)The Department of Mental Health has hundreds of rules and regulations that govern the daily lives of its patients. None have ever been submitted to the AOL for promulgation. Left to it's own accord the department will *never* follow the law.

ADMINISTRATIVE DIRECTIVE 818 IS A REGULATION

The California Government Code, section 11340.5(a) reads:

> "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 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 this chapter."

The California Government Code section 11342.600 reads:

> "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, 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."

The Department should not be permitted to ignore the consequences of its own actions:

> "We should not construe a statute establishing a government agency with broad quasi-legislative power to permit it ostrich-like to bury its head and refuse to consider the consequences of its own action." (*Western Oil and Gas Association v. Air Resources Board* (1994, Cal. Supreme Ct.)) 37 Cal. 3d 502, 530 208 Cal. Rptr. 850, 867

> "The APA is partly designed to eliminate the use of 'underground' regulations; rules which only the government knows about. If a policy or procedure falls within the definition of a 'regulation' within the meaning of the APA, the promulgating agency must comply with the procedures for formalizing such regulation, which include public notice and approval by the Office of Administrative Law (OAL), Failure to comply with the APA nullifies the rule." *(King's Rehabilitation Center, Inc. v. Premo* (1999, Third Appellate Dist.) 69 Cal. App. 4th 215, 217, 81 Cal. Rptr. 2d 406; [See also:] *Capen v. Shewry* (2007, Third Appellate Dist.) 147 Cal. App. 4th 680, 687, 54 Cal. Rptr. 3d 443, 447-448.)

Petitioner reiterates and re-affirms all of the arguments presented in the original petition as referenced and included herein.

The Department of Mental Health should be forbidden to continue to use, enforce, or attempt to enforce the AD 818, or any of their other underground regulations, even temporarily until valid regulations can be promulgated. To do so would merely allow the Department of Mental Health to continue business as usual with impunity.

The Department has had several months since this petition has been brought forward, yet the department did not attempt to submit AD 818 for consideration to the AOL to avoid significant disruption at Coalinga State Hospital and to insure the safety and security of the individuals and staff at Coalinga State Hospital.

Ms. Lee cites *Morning Star Co v. State Board of Equalization* (2006) 38 Cal.4th 341. in which the court ordered the proceedings stayed in order to avoid significant disruption. In this instance, the court was only talking about fees the state was collecting. Fees amounting to several hundred dollars in taxes in *Morning Star* cannot be compared to years of ongoing blatant denial of civil liberties by the Department of Mental Health in circumventing the Administrative Procedure Act.

The only way to assure that the Department of Mental health complies with the APA, is to take full action and rule that AD 818 is an **UNDERGROUND REGULATION**, sending a clear message to the department that they are not above the law.

HOSPITAL OR PRISON?

With marvelous logic Ms. Lee writes,

> "Coalinga State Hospital is situated in CDCRs premises and CDCRs exemption should (CDCRs 'local rule' that allows the Director to promulgate) apply."

Patients at Coalinga State Hospital under civil commitment are either under the jurisdiction of CDCR or DMH. Whose rules apply for making the rules? If CDCRs conventions pertain, the entire discussion between ourselves and anyone in the DMH, including Ms. Lee, is moot; we should be having this conversation with the Department of Corrections, and they should be writing the regulations rather than the bureaucrats of DMH.

If DMH wishes to borrow authority from CDCR, it implies they are under the jurisdiction of the entity from which they borrow that authority, since authority cannot be transferred from one agency to another. The Department of Mental Health has usurped powers not lawfully granted by stepping outside the bounds of its mandate.

The director does not work under the authority of the Pleasant Valley State Prison by virtue of the hospital's location thereon, and:

> "Administrative agencies have only the powers conferred on them, either expressly or impliedly by the Constitution or by Statute, and administrative action exceeding those powers are void." *(Terhune v. Superior Court (Whitley)* (1998, First Appellate Dist.) 65 Cal. App. 4th 864, 873, 76 Cal. Rptr. 2d 841, 846.)

Does Coalinga's physical presence on the property owned by CDCR abrogate volumes of statutory law and legal precedent differentiating prisoners from civil committees, or the terms of confinement and rules for formulation of regulations for civil detainees on the one hand, and penal commitments, with their almost opposite penological mission, on the other? DMH

maintain that the hospital's policies are neither punitive in intent or effect. But the CDCR is decidedly, unapologetically punitive in intent and effect.

Did the Legislature grant DMH the specific exemption authority it conferred to CDCR and that DMH yearns for? If the DMH wants the same exemption afforded CDCR it must simply go to the legislature and attempt to justify it. However, if DMHs past mistakes are indicative of what we may expect in the future (as they resolutely claim is true of us when seeking our recommitments), then getting *carte blanche* from the legislature seems doubtful. At any rate, the Office of Administrative Law is not the forum for this request.

CONCLUSION

By stepping outside the bounds of its fixed authority the Department of Mental Health has usurped powers it has not lawfully been granted. The arguments they proffer after the fact serve mainly as a contrivance to rationalize a policy run amok. The Department has become accustomed over the years to the exercise of raw unchecked power. Entitled, it is astonished at any lawful challenge. They have adversely affected hundreds of persons not capable of defending themselves by their departure from their fiduciary duty.

> "[T]he ultimate questions whether the agency decision was arbitrary, capricious or entirely lacking in evidentiary support, contrary to established public policy, or unlawful or procedurally unfair, are essentially questions of law."*(Jenkins v. City of Corona* (2006, Fourth Appellate Dist.) 140 Cal. App. 4th 261, 281, 44 Cal. Rptr. 3d 366, 381.)

Without codification, there is nothing to hold DMH accountable. AD 818 has received numerous changes without APA review, thus AD 818 must be codified properly to instruct, and inform, to set a uniform standard.

Respectfully submitted,

Michael George St.Martin

Detainee Spokesperson,

Friends and Family of,

California Civil Detainees

CC: Ms. Alice Lee, California Department of Mental Health