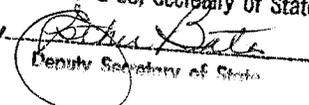


**FILED**  
In the office of the Secretary of State  
of the State of California

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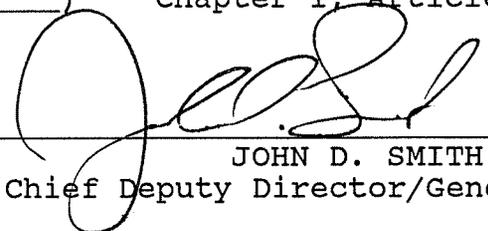
At 4:25 o'clock P.M.

CALIFORNIA OFFICE OF ADMINISTRATIVE  
SACRAMENTO, CALIFORNIA

LAMARCH FONG EU, Secretary of State  
By:   
Deputy Secretary of State

In re: ) 1987 OAL Determination No. 15  
Request for Regulatory )  
Determination filed ) [Docket No. 87-004]  
by Michael Williamson, )  
concerning sections ) November 19, 1987  
7810 through 7817 of )  
the Department of )  
Corrections' Departmental )  
Administrative Manual<sup>1</sup> )  
Determination Pursuant to  
Government Code Section  
11347.5; Title 1,  
California Administrative Code  
Chapter 1, Article 2

Determination by:

  
JOHN D. SMITH  
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney  
Shirley S. Alexander, Staff Counsel  
Rulemaking and Regulatory  
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law was whether the portions of the California Department of Corrections' Departmental Administrative Manual governing prison law libraries are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the Department of Corrections has unlawfully established rules and procedures that interpret or supplement statutory, regulatory, or case law. The Office of Administrative Law further concludes, however, that the majority of the challenged material is either (1) non-regulatory or (2) simply a restatement of a court order or of duly adopted California Administrative Code provisions.

THE ISSUE PRESENTED <sup>2</sup>

The Office of Administrative Law ("OAL") has been requested to determine whether sections 7810 through 7817 of the California Department of Corrections' ("Department") Departmental Administrative Manual ("Administrative Manual") are "regulations" as defined in Government Code section 11342, subdivision (b), and are therefore invalid and unenforceable<sup>3</sup> unless adopted as regulations and filed with the Secretary of State in accordance with the Administrative Procedure Act ("APA").

THE DECISION <sup>4,5,6,7</sup>

The Office of Administrative Law finds that:

- I. Sections 7811(b), (b)(1) & (2), and (c); 7816 (second sentence); and 7817 are (1) subject to the requirements of the APA, are (2) "regulations" as defined in the APA, and are (3) therefore invalid and unenforceable unless adopted as regulations and filed with the Secretary of State in accordance with the APA.<sup>8</sup>
  - II. Sections 7810, 7811(a), (b)(3), (d) and (e), 7812, 7813, 7814, and 7815 either are non-regulatory or are simply restatements of a court order or of duly adopted California Administrative Code ("CAC") provisions and are thus not subject to APA requirements.
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I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.<sup>9</sup> The Director of Corrections is charged with a "difficult and sensitive job",<sup>10</sup>

"[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein . . . ." <sup>11</sup>

Authority<sup>12</sup>

Penal Code section 5058, subdivision (a) provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA applies to all state agencies, except those "in the judicial or legislative departments."<sup>13</sup> Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.<sup>14</sup>

In 1975, the Legislature overruled a 1973 court case<sup>15</sup> (which had found the Department exempt from the APA) by specifically providing that prison administration rules are to be adopted pursuant to the APA.

This 1975 enactment amended Penal Code section 5058, subdivision (a), which now provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. Such rules and regulations shall be promulgated and filed pursuant to [the APA] . . . ." [Emphasis added.]<sup>16</sup>

Background

The following undisputed facts and circumstances have given rise to the present determination.

A Request for Determination was filed with OAL on March 13, 1987, by Michael Williamson. This Request concerns the Department of Corrections' Administrative Manual sections

7810 through 7817. The Administrative Manual is a 1474-page document, divided into sections 1 through 8006.<sup>17</sup> (In 1985, Chapter 4600 of this Manual was invalidated by the California Court of Appeal for failure to comply with the APA.<sup>18,19</sup>) Sections 7810 through 7817 are seven pages in length. Sections 7810 through 7817 contain the Department's policies concerning the law libraries established in each state prison, inmates' access to these law libraries, purchasing procedures, circulating law library description and procedures, inspection of public records by inmates, and use of law libraries by inmates with court deadlines. The requester alleges that sections 7810 through 7817 implement the inmates' fundamental constitutional right of access to the courts, which requires prison authorities to provide inmates with adequate law libraries or adequate assistance from persons trained in the law.

On October 13, 1987, the Department filed a Response to the Request with OAL. In this Response, the Department asserted that the Administrative Manual sections in question were either (1) a reiteration of court orders, statutes or regulations or (2) rules relating to internal management of the state agency.

The Department submitted with its Response a copy of the court order issued in Gilmore v. Lynch<sup>20</sup>. In Gilmore, the court had found that prisoners' rights of reasonable access to the courts were seriously infringed by the highly restricted nature of the book list then set forth in California prison rules. The Gilmore Court advised the Department that it could either expand the list of materials available or adopt some other method of satisfying the prisoners' right of access to the courts. After its decision was affirmed by the U.S. Supreme Court, and after the Department elected to enlarge its law libraries, the trial court then issued an unpublished order concerning prison law library holdings and procedures. This unpublished order is set out in part in note 21.<sup>21</sup>

In its Response to the Request for Determination, the Department asserts that pursuant to the court order in Gilmore v. Lynch<sup>22</sup>, the Department adopted rules in the Administrative Manual<sup>23</sup> setting forth a required list of law books and other required procedures for the operation of prison law libraries. The Department included in the Response as Exhibits A and B the Gilmore stipulation and order and the amended stipulation and order dated October 13, 1972, and November 28, 1972, respectively. The Department states this amended "Stipulation and Order" was adopted verbatim by the Department in its Administrative Manual section 330.041, later renumbered to sections 2400 et seq., and now located at sections 7810 through 7817. Other material has been added over time to these sections in order to collect pertinent statutes, regulations and more recent

court orders, as well as, the Department alleges, to add internal management directives to employees to aid performance of their duties.

## II. DISPOSITIVE ISSUES

There are two main issues before us:<sup>24</sup>

- (1) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In pertinent part, Government Code section 11342, subdivision (b) defines "regulation" as:

". . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such 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 . . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, does the informal rule either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

#### ANALYSIS OF AGENCY POSITION

The Department advances several arguments to support the proposition that the challenged Administrative Manual sections (7810 through 7817) are not "regulations" as defined in Government Code section 11342, subdivision (b). We will discuss the following arguments: (1) that much of sections 7810 through 7817 simply restates court cases, and (2) that parts of sections 7810 through 7817 restate CAC provisions and statute. After analyzing these arguments, we will discuss whether or not the remaining challenged Administrative Manual provisions are "regulations."

#### Argument Number 1--Restatement of Court Cases

##### Part A: Gilmore v. Lynch [7811(b)(3), 7812, 7813, and 7815(a) through (j)]

The Department states that, pursuant to the unpublished order in Gilmore v. Lynch, the Department adopted rules in the Administrative Manual setting forth a required list of law books and other required procedures for operation of prison law libraries.

The question presented here is whether the Department's adoption of rules in the Administrative Manual as specifically ordered by the Gilmore decision is subject to APA requirements. We conclude that to the extent that Administrative Manual sections 7810-7817 are a restatement of the Gilmore order and the Department has not changed or added to the court order, but merely informed interested parties of the decision and its application, these sections are not subject to APA requirements. The sections which directly reflect the express terms of the court order do not implement, interpret or make specific the court order within the meaning of Government Code section 11342, subdivision (b). These mandated sections--like a self-executing statute--need not be restated in a regulation in order to be enforced or issued by an agency.

We find that Administrative Manual sections 7811(b)(3), 7812, 7813 and 7815(a) through (j) are restatements of the Gilmore order.

Part B: Stewart v. Gates, Wetmore v. Fields [Sections 7811(e), 7817(a) and (b)]

The Department further argues that it need not comply with the APA insofar as it is conforming its procedures to two additional federal court cases. Specifically, the Department argues as follows. Stewart v. Gates<sup>25</sup> provides a specific procedure whereby restricted inmates are delivered legal materials, as set forth in Administrative Manual subsection 7811(e).<sup>26</sup> Similarly, Wetmore v. Fields<sup>27</sup> provides a specific procedure giving restricted inmates who have court deadlines a priority in delivery of legal materials, as set forth in Administrative Manual subsection 7817(b).<sup>28</sup> General prison population inmates with court deadlines also have (per Wetmore) priority in library access; this policy is set forth in Administrative Manual section 7817(a).<sup>29</sup>

In the two cited federal district court cases, the Department was not--in contrast to Gilmore--a party to the proceedings and thus is not bound by the district court holdings. For the Department to voluntarily follow the rulings of courts in cases concerning the Fourteenth Amendment right of access to the courts would seem to be a prudent means of avoiding future legal problems.<sup>30</sup> However, the fact that a state agency rule may arguably be excellent policy does not render it immune from APA requirements.

As we noted in 1987 OAL Determination No. 10,<sup>31</sup> the source of the informal rule is not the determinative factor in deciding whether the rule is a "regulation." If a rule, regulation, order, or standard of general application is adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, then it is a "regulation" as defined by the APA.

Based on the above discussion, we conclude that subsections 7817(a)-(b) are regulations. As discussed below, subsection 7811(e) is duplicative of a CAC provision and as such, was adopted pursuant to APA requirements, and therefore, is not violative of Government Code section 11347.5.

Argument Number 2--Restatement of CAC [Administrative Manual Sections 7810; 7811(a), (b)(1), (2) & (3), (d), and (e); 7816(second sentence)]

The Department argues that several of the challenged portions of the Administrative Manual merely repeat or paraphrase without adding anything of substance to existing statute or regulation. The Department alleges, for example, that sections 3120 and 3121 of Title 15 of the CAC are paraphrased in sections 7810 and 7811(a), (b)(2), (d), (e) and the second sentence of section 7816. Penal Code section 2600 is allegedly paraphrased in Administrative Manual section 7811(b)(3). These provisions are set out below.

Section 3120 of Title 15 of the CAC provides:

"Each institution will maintain a library for the benefit of all inmates. An institution's approved plan of library operation shall reflect provisions for the access to library services for all inmates regardless of their housing status or level of custody. Inmates who violate institution library procedures may be denied access to institution library services." [Emphasis added.]

Section 3121 of Title 15 of the CAC provides:

"Each institution will designate a suitable area as the inmate law library. Such area will contain space to accommodate state-owned law books and to allow individual study of the available books. Law books are defined to include constitutions, codes, court reports, legal texts, and law dictionaries. An institution's approved plan of library operation shall contain provisions for the access to law library services for all inmates regardless of their housing status or level of custody." [Emphasis added.]

Administrative Manual section 7810 provides:

"There shall be established in each institution an inmate law library. Each institution will designate a suitable area as the inmate law library. Such areas will contain space to accommodate state-owned books and to allow individual study of the available books. Law books are defined to include constitutions, codes, court reports, legal texts, and law dictionaries."

Administrative Manual subsection 7811(a) provides:

"(a) All interested inmates will have access to the inmate law books in accordance with institutional procedures."

Administrative Manual subsections 7811(b) and (b)(2) provide:

"(b) Each institution head shall formulate an operational plan for the inmate law library. These plans will include the regulations and procedures governing access to each law library and the days/hours of library operation. [Emphasis added.]

. . . . .

"(b)(2) These regulations and procedures governing access to each law library will take into consideration the needs of inmates assigned to security, segregation and other restricted housing units."

Administrative Manual subsection 7811(d) provides:

"(d) Inmates confined in restricted housing units including security, segregation, and other restricted housing status may possess and have access to any legal resource material available to the general inmate population."

Administrative Manual section 7811(e) provides:

"(e) Arrangements will be made to deliver requested and available law material to the quarters of any inmate whose housing restricts him from going to the law library."

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Administrative Manual section 7816 provides:

"Chapter 200 of this manual sets forth departmental policy concerning the inspection of policy and procedural manuals and paroling [sic] board directives by inmates. A copy of all revisions to the Director's Rules and Regulations is to be placed in the inmate law library."

Title 15, CAC, subsection 3164(c) provides:

"(c) Inmates who are housed in any restricted unit and who are not serving a period of disciplinary detention may possess and have access to any legal resource material available to the general population and may assist each other in their legal work to the extent compatible with institution security. For the purpose of this subsection, restricted units include reception centers, institution reception or orientation units, controlled housing and security housing units."

Title 15, CAC, subsection 3164(d) provides:

"(d) If an inmate's housing prevents him from going to the inmate law library, arrangements will be made to deliver requested and available law library material to the inmate's quarters."

Section 7811(e)

Administrative Manual subsection 7811(e) essentially duplicates subsection 3164(d) of Title 15 of the CAC.

Section 7811(b)(3)

Contrary to the Department's assertion, Penal Code section 2600 is not paraphrased in Administrative Manual subsection 7811(b)(3).

Penal Code section 2600 provides:

"A person sentenced to imprisonment in a state prison may, during any such period of confinement, be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public." [Emphasis added.]

Administrative Manual subsection 7811(b)(3) provides:

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~~"The operational plans, regulations and procedures shall provide for maximum inmate access consistent with space limitations and institutional security needs." [Emphasis added.]~~

However, a provision in the Gilmore order does state:

"Each institution head shall formulate regulations governing access to each library and hours of library operation, these regulations shall provide for maximum inmate access consistent with space limitation and institutional security needs." [Emphasis added.]

Sections 7810, 7811, 7816

To the extent the Department has duplicated the provisions of the California Administrative Code, the provisions were adopted pursuant to APA requirements and are not violative of Government Code section 11347.5.

Administrative Manual section 7810 does indeed essentially duplicate section 3121 of Title 15 of the CAC. Also, Administrative Manual subsection 7811(a) is paraphrased at section 3120 of Title 15 of the CAC. And, though Administrative Manual section 7811(d) is not duplicated at

section 3120 or 3121 of Title 15 of the CAC (as stated by the Department), it does appear to duplicate section 3164(c) of Title 15 of the CAC.

We conclude that section 7810 and subsections 7811(a), (b)(3), (d) and (e) paraphrase or duplicate provisions of title 15 of the CAC or the Gilmore order.

However, as is discussed below at page 15, we reject the Department's argument concerning section 7816 and the remaining provisions of sections 7811, and conclude that the Department has issued rules which implement, interpret, or make specific the holding and order of Gilmore and are thus regulatory.

Remainder of Administrative Manual section 7811 (subsections (b), (b)(1) and (2), and (c)).

Section 7811(b) provides:

"(b) Each institution head shall formulate an operational plan for the inmate law library. These plans will include the regulations and procedures governing access to each law library and the days/hours of library operation." [Emphasis added.]

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.<sup>32</sup> The provisions of Administrative Manual section 7811 are such rules. Any prison inmate seeking access to the institution's law library will be governed by the provisions of section 7811. Section 7811 sets forth the policies and procedures which each State penal institution will follow in formulating an operational plan for the inmate law library.

Section 7811 implements, interprets, or makes specific three separate and distinct provisions of law: (1) published appellate opinions delineating the contours of the Fourteenth Amendment right of access to the courts, such as Gilmore and Bounds v. Smith,<sup>33</sup> (2) the unpublished Gilmore order, and (3) Title 15, CAC, sections 3120 and 3121. We will focus on three provisions from section 7811, as examples of the regulatory provisions within this section.

Example No. 1 -- Subsection 7811(b)(1), (2) and (c)

Subsection 7811(b)(1) states that:

"(1) The operational plans in determining the actual days/hours of operation, will take into consideration the needs of inmates assigned to day work, training, or academic education."

Subsection 7811(b)(2) states:

"(2) These regulations and procedures governing access to each law library will take into consideration the needs of inmates assigned to security, segregation and other restricted housing units."

Subsection 7811(c) provides:

"(c) The operational plan will be reviewed and approved by each institution head and forwarded to the Coordinator, Policy Documentation for annual review by the director."

The Gilmore court held that the Department of Corrections could decide whether to expand the present list of basic codes and references of legal materials in the manner suggested by that opinion, or adopt some new method of satisfying the legal needs of its charges. The Department chose to expand its law library holdings. The court order thus contained an expanded list of law books and procedures for the operation of the prison law libraries. The court order provided:

"Each institution head shall formulate regulations governing access to each law library and hours of library operation, [sic] these regulations shall provide for maximum inmate access consistent with space and institutional security needs."<sup>34</sup>

We find subsections 7811(b), (b)(1) & (2) and (c) further implement, interpret and make specific how operational plans will be formulated and what provisions these plans shall include; these provisions make specific the unpublished Gilmore order and are thus regulatory.<sup>35</sup>

Example No. 2 -- Section 7817

Section 7817 interprets Gilmore. The Department has issued a rule designed to ensure that prisoners are afforded access to the courts. Section 7817 provides:

"(a) General population inmates with established court deadlines will be given priority for passes to the inmate law library. If there is a waiting list for legal books these inmates will be given priority over non-court deadline requests.

"(b) Inmates in restricted housing units with established court deadlines will be given priority in

submitting requests for law materials and in the delivery and pick-up of these materials to and from the unit."

"(c) Verification of established court deadlines will be made by a correctional counselor."

These provisions set forth a rule ensuring access to the courts in that prisoners with established court deadlines will be given priority passes.

Faunce v. Denton<sup>36</sup> held that the APA required that specific examples of allowable types of inmate personal property be listed in the CAC rather than merely in the Administrative Manual. We also found in an earlier Determination that in some instances, "examples" provided greater specificity and interpreted existing statutes or regulations, and therefore were underground regulations.<sup>37</sup>

WE CONCLUDE THAT (1) ADMINISTRATIVE MANUAL SECTIONS 7811(b), (b)(1) & (2), 7816<sup>38</sup> AND 7817 ARE "REGULATIONS" AS DEFINED IN GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.<sup>39</sup>

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INTERNAL MANAGEMENT EXCEPTION--GOVERNMENT CODE SECTION 11342, SUBDIVISION (b)

The Department argues that Administrative Manual sections 7811(c), 7814, 7815(k), and 7816 (first sentence) fall within the "internal management" exception to APA requirements. We concur as to sections 7814 and 7815(k); we reject this argument as it applies to sections 7811(c) and 7816.

Government Code section 11342, subdivision (b) provides in pertinent part:

"'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such 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, except one which relates only to the "internal management" of the state agency." [Emphasis added.]

The Department states:

"The fact that case law on this 'internal management' exception (Armistead v. State Personnel Board, (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, Poschman v. Dumke (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, and City of San Marcos v. California Highway Commission, Department of Transportation (1976) 60 Cal.App.3d 383, Cal.Rptr. 804) has most often failed to find that the facts of a controversy were sufficient to invoke the exception (except see City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 375, 88 Cal.Rptr. 12) does not eviscerate it.

"Despite Armistead court's proclamation that 'A major aim of the APA was to provide a procedure whereby people to be affected may be heard,' (22 Cal.3d at 204) there are times where the effect of a rule on 'a public' is indirect and non-consequential. By the language of Government Code section 11342(b), it is evident that the Legislature contemplated the existence of some aspects of agency operation which would not be of the type to benefit from public hearing or comment.

"The greatest portion of the challenged rules, not yet discussed in detail, involve internal procedures by which some of the Department's employees interact with other of its employees for the purpose of managing prison law libraries, an indirect benefit to prison inmates. For example, [Administrative Manual] section 7811(c) states who will review and approve prison law library 'operational plans' (these plans are expressly provided for in 15 CAC 3120-3121); [Administrative Manual] section 7814 states procurement and accounting procedures between each institution's employees and the Department's central office employees; [Administrative Manual] section 7815(k) merely states the location of the circulating law library (a mail order library in addition to the one or more law libraries physically present at each institution). In addition, the first sentence of . . . section 7816 regarding the location of information regarding certain public records is itself merely informational and does not give rights or impose duties on anyone.

"Therefore, the Armistead court's vision of the APA's public hearing and comment component would not be offended by, and must accomodate, the Department's rules regarding the relationship and duties among the Department's own employees whose effect on inmates is small and indirect. Thus, the above discussed rules within the 'internal management' exception to the definition of a 'regulation', and are not required to be adopted as regulations."<sup>40</sup>

As recognized in the Department's analysis of the internal management exception, we do not write on a clean slate when construing this exception. At least seven published appellate opinions have applied this exception to various factual situations.<sup>41</sup> In all but one opinion, the court found that this exception did not apply to the case at hand.<sup>42</sup> We are bound by the interpretation of statute articulated in these decisions.

We are fortunate in that one prior appellate case involved facts strikingly similar to those in this Request. Faunce v. Denton involved a challenge on APA grounds to a different chapter of the Administrative Manual (chapter 4600, concerning inmate personal property). Citing Stoneham v. Rushen I and Stoneham v. Rushen II,<sup>43</sup> the Faunce court held that the appropriate standard to apply in evaluating a Department claim that the challenged rule fell under the internal management exception was whether or not it was a "rule of general application significantly affecting the male prison population in the custody of the Department". This standard, of course, only comes into play if the challenged rule initially satisfies both prongs of the definition of "regulation."

Here, we need to apply this test to each Manual provision assertedly covered by the internal management exception.

#### Section 7811(c)

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This section is quoted and discussed above, at page 12.

Title 15, CAC, sections 3120 and 3121 require each institution (i.e., prison) to include certain provisions in an "approved plan of library operations" (emphasis added). Administrative Manual section 7811(c) interprets, implements and makes specific the regulatory term "approved" by specifying that proposed library operational plans are to be approved by the institution head (warden or superintendent) and the Director of Corrections. The approval mechanism for such operational plans significantly affects the male prison population in that once approved, the library operational plans govern the operation of the institution law libraries. A portion of the library operational plan for the California Medical Facility, Vacaville (CMF) was submitted to OAL by a commenter in this proceeding. This plan includes rules of concern to inmates, e.g., "Only those inmates engaged in litigation with a court-imposed deadline of thirty days or less will be permitted access to the Law Library during a lock-down situation."<sup>44</sup>

We express no opinion on whether the above or any other operational plan is itself subject to APA requirements.<sup>45</sup> No such plan was duly submitted for review in this Request

for Determination. We note, however, that CMF Operational Plan No. 126 was subsequently submitted by Donald W. Crisp in a separate Request (OAL Docket No. 87-022) on November 6, 1987.

Sections 7814, 7815(k), and 7816

We agree with the Department that (1) Administrative Manual section 7814, which outlines procurement and accounting procedures, and (2) Administrative Manual subsection 7815(k), which states the location of the circulating law library, fall within the "internal management" exception to the definition of regulation. We reject the Department's argument that section 7816 falls within this exception.

Section 7816 provides:

"Chapter 200 of this manual sets forth departmental policy concerning the inspection of policy and procedural manuals and paroling [sic] board directives by inmates. A copy of all revisions to the Director's Rules and Regulations is to be placed in the inmate law library."

In this Request, OAL has not been asked to determine the character of the provisions in chapter 200. However, the reference to section 7816 incorporates chapter 200. To find that section 7816 is non-regulatory (as the Department urges) could result in OAL's sanctioning other manual sections not properly before us at this time. Since a copy of chapter 200 was not appended to the Request as required by OAL regulations,<sup>46</sup> we decline at this time to determine whether or not chapter 200 is regulatory. Further, section 7816 (second sentence) supplements the Gilmore order by listing additional materials to be placed in the law library.

We agree with the Department that Administrative Manual sections 7814 and 7815(k) fall within the "internal management" exception to the definition of "regulation." However, we conclude that sections 7811(c) and 7816 (second sentence) are not within the internal management exception. We decline to rule upon section 7816 (first sentence) at this time because the incorporated material (chapter 200) was not submitted to us.

CONCLUSION

For the reasons set forth above, OAL finds that

- I. Administrative Manual sections 7811(b), (b)(1) & (2), (c), 7816 (second sentence), and 7817 (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA, and (3) are therefore invalid and unenforceable unless adopted as regulations and filed with the Secretary of State in accordance with the APA.
- II. Administrative Manual sections 7810; 7811(a), (b)(3), (d), and (e); 7812; 7813; 7814 and 7815 (1) are not regulations as defined in the APA, and (2) are not subject to the requirements of the APA.

DATE: November 19, 1987

  
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HERBERT F. BOLZ  
Coordinating Attorney

  
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SHIRLEY S. ALEXANDER  
Staff Counsel

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Rulemaking and Regulatory  
Determinations Unit

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- 1 This Request for Determination was filed by Michael Williamson, C-97413, Building 11-122-U, P.O. Box 4000, Vacaville, CA 95696-4000. The Department of Corrections was represented by Marc Remis, Staff Counsel, P.O. Box 942883, Sacramento, CA 94283-0001.
- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-011), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CAC). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396 n.5, 211 Cal.Rptr. 758, 764 n.5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems. In Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, \_\_\_, 236 Cal.Rptr. 853, 857, the court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute.

- 3 Title 1, CAC, section 121(a) provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342(b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the Act." [Emphasis

added.]

- 4 As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; type-written version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "The office's determination shall . . . be made available to . . . the courts." (Emphasis added.)
  
- 5 Public comments concerning this Request for Determination were received from Donald W. Crisp and from the Prison Law Office. The Department submitted a timely Response to the Request for Determination. Both comments and the Response were considered in making this Determination.
 

In general, in order to obtain full presentation of contrasting viewpoints, we encourage affected agencies to submit responses. If the affected agency concludes that part ~~or all of the challenged rule is in fact an underground~~ regulation, it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.
  
- 6 An OAL finding that a challenged rule is illegal unless adopted "as a regulation" does not of course exclude the possibility that the rule could be validated by subsequent incorporation in a statute.
  
- 7 Pursuant to Title 1, CAC, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State.
  
- 8 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.
  
- 9 Penal Code section 5000.

10 Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172  
Cal.Rptr. 778, 781.

11 Penal Code section 5054.

12 We discuss the affected agency's rulemaking authority (see Gov. Code, section 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Administrative Code, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of necessity, authority, clarity, consistency, reference, and nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

~~The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until~~ such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

13 Government Code section 11342, subdivision (a). See Government Code sections 11343; 11346. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).

14 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107

Cal.Rptr. 596, 609.

- 15 American Friends Service Committee v. Procunier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.

As noted in 1986 OAL Determination No.1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, page B-13; typewritten version, page 6, Procunier was to a significant degree further overruled by Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1.

- 16 Section 3 of Statutes of 1975, chapter 1160, page 2876 provided:

"It is the intent of the Legislature that any rules and regulations adopted by the Department of Corrections or the Adult Authority prior to the effective date of this act, shall be reconsidered pursuant to the provisions of the Administrative Procedure Act before July 1, 1976."

- 17 The Administrative Manual is updated periodically with "Administrative Bulletins." Administrative Manual section 235(c).

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- 18 Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.

- 19 According to Administrative Manual section 240(c):

"While the policies and procedures contained in the [Corrections'] procedural manuals [Administrative, Business Administration, Case Records, Classification, Narcotic Addict Outpatient Program, Parole Procedures Manual-Felon] are as mandatory as the Rules and Regulations of the Director of Corrections [CAC provisions], the directions given in a manual shall avoid use of the words 'rule(s)' or 'regulation(s)' except to refer to the Director's Rules or the rules and regulations of another governmental agency." [Emphasis added.]

- 20 Gilmore v. Lynch (N.D. Cal.) 319 F. Supp. 105, aff'd Younger v. Gilmore (1971) 404 U.S. 15.

- 21 The following quoted material combines pertinent portions of

the orders of October 13, 1972, and November 28, 1972, including handwritten passages. We rely upon the representation of the Department's Staff Counsel Marc Remis that the handwritten material (underlined in the following quotation) is a part of the order of the court. Both of the above noted orders were submitted by the Department as part of its Response.

". . . IT IS ORDERED that the defendants' proposed regulations, as modified by defendants, be approved for adoption as follows:

Department of Corrections Administrative Manual  
Paragraph 330.041 is amended to read:

'There shall be established in each institution a law library consisting of, but not necessarily limited to, one complete and current set of each of the following:

Either Deerings's California Codes Annotated (122 v.) or West's Annotated California Codes (125 v.).

Either California Jurisprudence 3d Series, McKinney's New California Digest Annotated (63 v.) or West's California Digest (77 v.).

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Either California Official Reports, 1960 to date (Volumes 175 through 276 of Cal.App.2d and continuing with Cal.App.3d and Volumes 53 through 71 of Cal.2d and continuing with Cal.3d) or West's California Reporter.

Witkin, California Crimes and California Procedure (3 v.) Continuing Education of the Bar, California Criminal Law Practice (2 v.)

Either United States Code Service (54 v.) or United States Code Annotated (160 v.).

Modern Federal Practice Digest (78 v.).

Either United States Reports, v. 269 (1949) to date, United States Supreme Court Reports, Lawyer's Edition v. 93 (1950) to date or Supreme Court Reporter v. 70 (1950) to date.

Federal Reporter, Second Series, v. 176 (1950) to date.

Federal Supplement, v. 180 to date.

United States Law Week, beginning with current volume.

Shepard's United States Citations.

Shepard's Federal Citations.

Shepard's California Citations.

Harvard Law Review Developments on Habeas Corpus.

Sokol, Handbook of Federal Habeas Corpus (2d ed.).

A recognized law dictionary, such as Black's or Ballantine's.

Each set of case reports and statutes shall be kept current. This means that lost, stolen, or missing volumes, or volumes that are damaged so that they are not fully usable, shall be replaced. This also means that a continuing subscription to advance sheets and new volumes shall be maintained for each set of reports of cases, and that supplements to each set of codes, statutes, and other reference works shall be obtained and added to each library as they become available.

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Law books not on the above list, but currently existing at various institutions, shall be retained in institutional law libraries, but need not be replaced in case of loss, theft, or mutilation.

Each institution head shall formulate regulations governing access to each law library and hours of library operation. These regulations shall provide for maximum inmate access within space limitations and institutional security needs.

Department of Corrections Administrative Manual  
Paragraph 330.042 is amended to read:

There shall be established in the Department a Circulating Law Library, the contents of which shall consist of, but not be limited to, the following sets of law books:

Federal Supplement, v. 1-179.  
Federal Reporter, v. 1-175.  
Either United States Reports, v. 1-238,  
Supreme Court Reporter, v. 1-69, or United States  
Supreme Court Reports, Lawyer's Edition, First  
Series, v. 1-179.

California Reports, First Series.  
California Reports, Second Series.  
California Appellate Reports, First Series.  
California Appellate Reports, Second Series.  
Federal Rules Decisions.  
Either American Jurisprudence 2d or Corpus Juris  
Secundum.  
California Jurisprudence 2d

The function of the Circulating Law Library will be to ship law books to institutional law libraries for the temporary use of the inmates of those institutions. Upon receiving a request from an inmate for a particular volume in the Circulating Law Library, an institutional librarian shall immediately order that volume from the librarian of the Circulating Law Library, who shall dispatch it to the requesting institutional librarian immediately upon receipt of the request, or notify the requesting librarian that the volume is on loan. When the volume is received at the institutional library, the librarian shall immediately notify the requesting inmate. The volume may remain at the institutional library up to three days, during which it shall be available for use by any inmate. If the requesting inmate demonstrates that he will be unable to use the volume during the three-day period, the institutional librarian may retain the volume for an additional four days. No volume shall be retained at any institutional law library for a longer period than seven days unless the librarian ascertains from the librarian of the Circulating Law Library that the volume is not on request by any other institutional library. The librarian of the Circulating Law Library may direct that any volume from that library on loan to an institutional law library be transhipped directly to another institutional law library in satisfaction of a loan request. No inmate may request more than five volumes from the Circulating Law Library during any one-week period, except at the discretion of the librarian of his institution and the librarian of the Circulating Law Library. It is the policy of the Department that the Circulating Law Library be operated in such a manner as to insure maximum access by all inmates to the volumes contained in said library.

"When possible, the circulating law library may send to the requesting library a duplicated copy of the requested material in lieu of the whole volume. Such copy may be retained indefinitely by the inmate requesting the material.

The CDC can contract with State Law Lib for Circulating

Lib Services.'"

22 See note 20, supra.

23 While the Department of Corrections was ordered by the Gilmore court to adopt "regulations" in the Administrative Manual (versus the CAC), this was consistent with judicial thinking in the early 1970's. For instance, in American Friends Service Committee v. Proconier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22, the court held that the Director of Corrections need not comply with provisions of the Administrative Procedure Act in the formulation and adoption of rules and regulations applicable to persons in custody.

As noted in note 15, supra, the Legislature overruled Proconier and amended Penal Code section 5058 to provide in pertinent part:

"The director [of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. Such rules and regulations shall be promulgated and filed pursuant to [the APA]. . . ."  
[Emphasis added.]

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As we noted in a past determination [1987 OAL Determination No. 3, (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, pages B-74--B-103], the Department has been put on notice of APA problems with its manuals by four published appellate decisions (Stoneham v. Rushen (Stoneham I) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132; Stoneham v. Rushen (Stoneham II) (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20; and Faunce v. Denton (167 Cal.App.3d 191, 213 Cal.Rptr. 122)).

When amending Penal Code section 5058 in 1975, the Legislature stated:

"It is the intent of the Legislature that any rules and regulations adopted by the Department of Corrections or Adult Authority prior to the effective date of this shall be reconsidered pursuant to the provisions of the Administrative Procedure Act before July 1, 1976."  
[Emphasis added; section 3 of Statutes of 1975, chapter 1160, page 2876.]

24 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of

Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

25 (C.D. Cal. 1978) 450 F.Supp. 583, 589.

26 Section 7811(e) provides:

"Arrangements will be made to deliver requested and available law material to the quarters of any inmate whose housing restricts him\her from going to the law library."

27 (W.D.Wis. 1978) 458 F.Supp. 1131, 1143-44.

28 Administrative Manual subsections 7817(a) and (b) provide:

"(a) General population inmates with established court deadlines will be given priority for passes to the inmate law library. If there is a waiting list for legal books these inmates will be given priority over non-court deadline requests.

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"(b) Inmates in restricted housing units with established court deadlines will be given priority in submitting requests for law materials and in the delivery and pick-up of these materials to and from the unit."

29 Id.

30 See Debtor Reorganizer v. State Board of Equalization (1976) 58 Cal.App.3d 691, 696, 130 Cal.Rptr. 64 (Decisions of lower federal courts, even on federal questions, not binding on California courts).

31 See OAL Determination No. 10 (Department of Health Services, August 6, 1987, Docket No. 86-016), summary published in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 33).

32 Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

- 33 (1977) 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72. In Bounds, the Supreme Court held that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.
- 34 See note 21, supra.
- 35 The Department's argument that section 7811(c) is covered by the internal management exception is discussed in the text under the "INTERNAL MANAGEMENT EXCEPTION" heading, pages 13-16.
- 36 See note 18, supra, for case citation.
- 37 1987 OAL Determination No. 10 (Department of Health Services, August 6, 1987, Docket No. 86-016), summarized in California Administrative Notice Register 87, No. 34-Z, August 24, 1987; typewritten version, p. 13.
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- 38 Administrative Manual 7816 will be discussed under the "INTERNAL MANAGEMENT EXCEPTION" heading, beginning on page 13.
- 39 The following provisions of law may also permit agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:
- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
  - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
  - c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
  - d. Rules directed to a specifically named person or group of persons and which do not apply generally or throughout the state. (Gov. Code, sec. 11343,

- subd. (a)(3).)
- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

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The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning APA exceptions is contained in a number of previously issued OAL determinations. The Index of OAL Regulatory Determinations (available from OAL, (916) 323-6225) is a helpful guide for locating such information.

40 Agency's Response, p. 3.

41 Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 203-204, 149 Cal.Rptr. 1, 3-4; Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132, 1135; Faunce v. Denton (1985), 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125; Poschman v. Dumke (1973), 31 Cal.App.3d 932, 942-943, 107 Cal.Rptr. 596, 602-603; San Diego Nursery Company, Inc. v. Agricultural Labor Relations Board (1979) 100 Cal.App.3d 128, 142, 160 Cal.Rptr. 822, 830; Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 735, 188 Cal.Rptr. 130, 135; Stoneham v. Rushen (1984) 156 Cal.App.3d 302, 309, 203 Cal.Rptr. 20, 24.

The following determinations have discussed the "internal

management" exception":

1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, p. B-13, typewritten version, p. 6.

1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-99, n. 39, typewritten version, n. 39.

1987 OAL Determination No. 9 (Department of Corporations, June 30, 1987, Docket No. 86-015), California Administrative Notice Register 87, No. 29-Z, July 17, 1987, p. B-39--B-41, typewritten version pp. 12-15.

1987 OAL Determination No. 10 (Department of Health Services, August 6, 1987, Docket No. 86-016), typewritten version, pp. 25-28.

1987 OAL Determination No. 13 (Board of Prison Terms, September 30, 1987, Docket No. 87-002), California Administrative Notice Register 87, No. 42-Z, October 16, 1987, pp. 451-453, typewritten version pp. 7-9.

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42 In our opinion, the one case (City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 370, 88 Cal.Rptr 12, 20) which is regarded as having applied the exception to "save" an agency enactment cannot be reconciled with subsequent, controlling case law. See 1987 OAL Determination No. 10 (Department of Health Services, August 6, 1987, Docket No. 86-016), pp.25-28.

43 Both cases cited above in note 41.

44 Alternatively, we conclude that section 7811(c) is a rule governing the Department's "procedure" within the meaning of Government Code section 11342, subdivision (b). Section 7811(c) describes the "procedure" for approval of operational plans.

45 See Hillery v. Rushen, supra, note 41, 720 F.2d at 1135, n. 2 (avoids deciding whether operational plans are subject to APA).

46 See Title 1, CAC, section 122.