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CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

In re:) 1990 OAL Determination No. 14
Request for Regulatory)
Determination filed by) [Docket No. 89-021]
Paul W. Comiskey,)
concerning the Department) November 2, 1990
of Corrections' policy)
concerning the transfer)
of parole location [as) Determination Pursuant to
defined in "Parole and) Government Code Section
Community Services) 11347.5; Title 1, California
Division Manual" Sections) Code of Regulations,
1000, 1010, 1020, 1050) Chapter 1, Article 3
and 1051 and "Case)
Records Manual" Sections)
4405, 4406 and 4407]¹)
_____)

Determination by:



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SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not specified sections of two Department of Corrections manuals concerning transfer of the location of parole are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that these manual sections are, in part, "regulations" required to be adopted in compliance with the Administrative Procedure Act and, in part, are non-regulatory, restate existing statutes, regulations, or case law, or are exempt under the internal management exception.

6

THE ISSUE PRESENTED ²

The Office of Administrative Law ("OAL") has been requested to determine³ whether or not sections 1000, 1010, 1020, 1050, and 1051 of the Department of Corrections' ("Department") Parole and Community Services Division ("PCSD") Manual and sections 4405, 4406, and 4407 of the Case Records Manual regarding the determination of the county of parole are "regulations" required to be adopted pursuant to the Administrative Procedure Act ("APA").

THE DECISION ^{4, 5, 6, 7, 8}

OAL finds that:

- (1) the Department's rules are generally required to be adopted pursuant to the APA;
- (2) portions of section 1000, and sections 1010.1, 1010.4, 1020, and 1051 of the Parole and Community Services ("PCSD") Manual, portions of sections 4405 and 4406, and section 4407 of the Case Records Manual each constitute a "regulation" as defined by the key provisions of Government Code section 11342, subdivision (b);
- (3) the introduction to and portions of section 1000, and sections 1010.2, 1010.3, and 1050 of the PCSD Manual, and portions of section 4405 of the Case Records Manual restate existing law and therefore do not fall within the definition of a "regulation";
- (4) sections 1020 and 1051, subdivision (a), of the PCSD Manual and section 4405, subdivision (a), section 4406, subdivisions (a), (b), and (e), and section 4407, subdivisions (a) and (c), fall within the internal management exception to the requirements of the APA; and
- (5) a portion of section 1000, and sections 1010.1, 1010.4, and 1051 of the PCSD Manual, and sections 4405, subdivisions (b), (c), (d), and (e), and 4407, subdivision (b), of the Case Records Manual violate Government Code section 11347.5, subdivision (a).⁹

R E A S O N S F O R D E C I S I O N

I. AGENCY; AUTHORITY; BACKGROUND

Agency

California's first, and for many years only, prison was located at San Quentin on San Francisco Bay. As the decades passed, the state established additional institutions, leading to an increased need for uniform statewide rules. Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.¹⁰ The Legislature has entrusted the Director of Corrections with a "difficult and sensitive job,"¹¹ namely:

"[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"¹²

Authority ¹³

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.]

Background: The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal described the APA and OAL's role in that statute's enforcement as follows:

"The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) Its provisions are applicable to the exercise of any quasi-legislative power conferred by statute. (Section 11346.) The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in

substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).

"In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.]¹⁴

In 1982, upon recognizing that state agencies were for various reasons bypassing APA requirements, the Legislature enacted Government Code section 11347.5. Section 11347.5, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

Agency Background: The Department's Three Tier Regulatory Scheme

The Department of Corrections was traditionally considered exempt from codifying any of its rules and regulations in the California Code of Regulations. This policy has changed dramatically in the past 15 years, in part reflecting a broader trend in which legislative bodies have addressed "deep seated problems of agency accountability and responsiveness"¹⁵ by generally requiring administrative agencies to follow certain procedures, notably public notice and hearing, prior to adopting administrative regulations.

"The procedural requirements of the APA," the California Court of Appeal has pointed out, "are designed to promote fulfillment of its dual objectives--meaningful public participation and effective judicial review."¹⁶ Some legislatively mandated requirements reflect a concern that regulatory enactments be supported by a complete rulemaking record, and thus be more likely to withstand judicial scrutiny.¹⁷

The Department has for many years used a three-tier regulatory scheme to carry out its duties under the California Penal Code. The first tier consists of the "Director's Rules," a relatively brief collection of

statewide "general principles," which were adopted pursuant to the APA and are currently contained in about 180 CCR pages. The Director's Rules were placed in the CCR in response to a 1976 legislative mandate which explicitly directed the Department to adopt its rules as regulations pursuant to the APA.

For many years, the second tier consisted of the "family of manuals," a group of six "procedural" manuals containing additional statewide rules supplementing the Director's Rules.¹⁸ The manuals are the Classification Manual, the Departmental Administrative Manual, the Business Administration Manual, the Narcotic Outpatient Program Manual, the Parole Procedures Manual-Felon, and the Case Records Manual. In 1987, a completely revised Parole and Community Services Division ("PCSD") Operations Manual replaced both the Parole Procedures Manual-Felon and the Narcotic Addict Outpatient Program Manual. The Department is currently in the process of reviewing all existing procedural manuals and operations plans, with the objective of transferring all regulatory material from manuals into the CCR, and combining all six existing manuals into a single, more concise "CDC Operations Manual." So far, Volumes I, II, III, V, VI, VII, and VIII of the new "CDC [California Department of Corrections] Operations Manual" have been issued.

Manuals are updated by "Administrative Bulletins," which often include replacement pages for modified manual provisions. Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, Division 3, Title 15 of the CCR states in part:

"Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures."

Court decisions have struck down portions of the second tier--the Classification Manual¹⁹ and parts of the Administrative Manual²⁰ (and unincorporated "Administrative Bulletins"²¹)--for failure to comply with APA requirements.²² OAL regulatory determinations have found the Classification Manual,²³ several portions of the Administrative Manual,²⁴ and several portions of the Case Records Manual²⁵ to violate Government Code section 11347.5.²⁶

The third tier of the regulatory scheme consists of hundreds (perhaps thousands) of "operations plans," drafted by individual wardens and superintendents and approved by the Director.²⁷ These plans often repeat parts of statutes,

Director's Rules (i.e., codified regulations), and procedural manuals.²⁸

Agency Background: Legislative and Judicial Actions

In the 1970's, efforts were made to require the Department to follow APA procedures in adopting its regulations. The first effort to attain this goal through the legislative process passed the Assembly in 1971, but failed to obtain the approval of the Senate Finance Committee.²⁹ A two-pronged effort followed. Another bill was introduced;³⁰ the Sacramento Superior Court was asked to order the Department to follow APA procedures. Both efforts initially succeeded. The court ordered the Department to comply with the APA; both houses of the Legislature passed the bill. However, while the bill was on Governor Reagan's desk in 1973, the California Court of Appeal overturned the trial court decision.³¹ Shortly after the appellate decision, the Governor vetoed the bill.

In 1975, a third bill³² passed the Legislature and was approved by Governor Brown.³³ In passing this third bill, the Legislature set a deadline for the Department to place its regulations in the APA:

"It is the intent of the Legislature that any rules and regulations adopted by the Department of Corrections . . . prior to the effective date of this act [January 1, 1976], shall be reconsidered pursuant to the provisions of the Administrative Procedure Act before July 1, 1976." [Emphasis added.]³⁴

Prior to the July 1, 1976 deadline, the Department adopted the Director's Rules, the first tier of the regulatory scheme, into the CCR. In this determination, we are concerned only with segments from the Department's second tier--provisions of the PCSD and Case Records Manuals, and, specifically, the sections challenged by the Requester.

Background: This Request for Determination

To facilitate understanding of the issues presented in this Determination, we set forth the following relevant statute, Manual provisions, and procedural history.

Section 3003 of the Penal Code provides for determining the appropriate location for the parole of an inmate of the California state prisons as follows:

"(a) An inmate who is released on parole shall be returned to the county from which he or she was committed.

"For purposes of this subdivision, 'county from which he or she was committed' means the county where the crime for which the inmate was convicted occurred.

"(b) Notwithstanding subdivision (a), an inmate may be returned to another county in a case where that would be in the best interests of the public and of the parolee. If the Board of Prison Terms setting the conditions of parole for inmates sentenced pursuant to subdivision (b) of Section 1168 or the Department of Corrections setting the conditions of parole for inmates sentenced pursuant to Section 1170 decides on a return to another county, it shall place its reasons in writing in the parolee's permanent record. In making its decision, the authority may consider, among others, the following factors:

"(1) The need to protect the life or safety of a victim, the parolee, a witness or any other person.

"(2) Public concern that would reduce the chance that the inmate's parole would be successfully completed.

"(3) The verified existence of a work offer, or an educational or vocational training program.

"(4) The last legal residence of an inmate having been in another county.

"(5) The existence of family in another county with whom the inmate has maintained strong ties and whose support would increase the chance that the inmate's parole would be successfully completed.

"(6) The lack of necessary outpatient treatment programs for parolees receiving treatment pursuant to Section 2960.

"(c) Notwithstanding any other provision of law, an inmate who is released on parole shall not be returned to within 20 miles of the actual residence of a victim of, or a witness to, a violent felony as defined in subdivision (c) of Section 667.5, if the Board of Prison Terms or the Department of Corrections finds that there is a need to protect the life, safety, or well-being of a victim or witness.

"(d) An inmate may be paroled to another state pursuant to any other provision of law."

On November 7, 1989, Paul W. Comiskey, Attorney at Law, submitted to OAL a Request for Determination challenging several provisions of the PCSD and Case Records Manuals. These sections are "second-tier" materials which contain the Department's policies and procedures governing an inmate's release on parole, including the criteria used to determine the location of parole.

In brief overview, by section number, the challenged provisions of the two manuals are as follows:

Parole and Community Services Division ("PCSD") Manual

Chapter 1000, Section 1000: Sets out policy regarding release on parole, including factors to consider in determining the location for release on parole.

Section 1010: Defines terms relevant to release on parole.

Section 1020: States procedure for referral of cases to parole region, including expedited procedures to use when parole is imminent.

Section 1050: Restates exceptions to presumption that release on parole shall be to county of commitment.

Section 1051: Specifies procedures including Department staff duties regarding parole to a county other than that of commitment.

Case Records Manual

Section 4405: Details procedures and standards for Department staff to use in determining appropriate location of parole, including purpose of policy, criteria, definitions, and specific factors to consider, as well as an appeal process.

Section 4406: Specifies requirements for information-gathering and dissemination, recordkeeping, notification of changes in an inmate's status, and special requirements for persons attending the psychiatric parole outpatient clinic, or participating in work furlough or community correctional programs.

Section 4407: Sets out procedures for re-entry referral for "direct discharge cases."

On April 27, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,³⁵ along with a notice inviting public comment.

On June 11, 1990, OAL received the Department's Response to the Request for Determination ("Response"). The Department argues that: (1) portions of the challenged rules repeat or paraphrase statutes or regulations and therefore do not meet the definition of a "regulation"; (2) other challenged provisions, although regulatory, fall within the "internal management" exception and need not be formally adopted under the APA; and, finally, (3) some provisions contain definitions which are non-regulatory.

We agree with the Department that certain portions of the challenged rules merely restate statute or regulation. Therefore, these provisions of the challenged rules are nonregulatory. We will analyze the challenged provisions section by section, identifying the non-regulatory material and evaluating the remainder of each provision under the APA.

II. ISSUES

There are three main issues before us:³⁶

- (1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (3) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

The APA generally applies to all state agencies, except those in the "judicial or legislative departments."³⁷ Since the Department is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.³⁸

In addition, 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. The rules and regulations shall be promulgated and filed pursuant to [the APA]" [Emphasis added.]

We are aware of no specific statutory exemption which would permit the Department to conduct rulemaking without complying with the APA.

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

In 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:

"(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 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 [the APA]" [Emphasis added.]

In Grier v. Kizer,³⁹ the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision Government Code section 11342, subdivision (b):

First, is the challenged rule either

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

Second, has the challenged rule been adopted by the agency to either

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

A. Part One - Do the Challenged Provisions of the PCSD and Case Records Manuals Establish Rules or Standards of

General Application or Modify or Supplement Such A Rule?

The answer to the first part of the inquiry is "yes." The Department clearly intends that the challenged rules apply to all determinations of the appropriate location of parole.

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.⁴⁰ It has been judicially held that "rules significantly affecting the male prison population" are of general application.⁴¹

The provisions challenged are intended to apply to all members of a class, specifically, all inmates seeking parole to a county other than that of commitment, as well as those inmates the Department seeks to parole to a different county. In its Response, the Department does not argue that the challenged provisions are not meant to or do not have general application. Having established that the challenged rules are standards of general application, we now proceed with a rule by rule analysis of whether they have been adopted to implement, interpret, or make specific the law enforced or administered by the Department.

B. Part Two - Do the Challenged Provisions Establish Rules Which Interpret, Implement, or Make Specific the Law Enforced or Administered by the Agency or Which Govern the Agency's Procedure?

Parole and Community Services Division ("PCSD") Manual

Chapter 1000, Section 1000:

The introductory text to Section 1000 describes the mission and goals of a parole agent. This provision does not interpret, implement, or make specific the law enforced or administered by the Department; it is mainly explanatory.

The Department contends that:

"Several of the challenged rules merely repeat or paraphrase, without adding anything of substance to, existing statutes or regulations. For example, PCSD § 1000 repeats Penal Code (PC) § 3003."

The first paragraph of section 1000, "Release on Parole Policy," restates Penal Code section 3003 almost verbatim, with one important exception: the introductory sentence to the second paragraph ("The following factors shall be considered . . ."). Likewise, the list of factors to be considered are nearly identical to those in section 3003 of the Penal Code, except for the third and sixth factors

(listed as "3" and "6" in section 1000). These three items do more than simply "repeat[] Penal Code (PC) § 3003."

Challenged section 1000 states in part:

"The following factors shall be considered in determining if parole to another county is justified:
. . . ." [Emphasis added.]

In contrast, Penal Code section 3003, governing location of parole, states:

"(b) . . . In making its decision, the authority may consider, among others, the following factors . . . "
[Emphasis added.]

The challenged rule interprets and goes beyond the statutory requirement by requiring consideration of the six enumerated factors while the statute simply permits their consideration.⁴² The statute also clearly permits other factors to be considered ("among others") in deciding the location of parole, but the challenged rule may be interpreted to limit the factors to be considered to the six specifically enumerated ones. This mandate to consider the six specified factors, rather than permitting consideration of some or all of these factors, among others, meets the APA definition of a "regulation."

Challenged section 1000 lists as the third factor to consider: "[t]he verified existence of an appropriate work offer, or an educational or vocational training program." (Emphasis added). Penal Code section 3003, subdivision (b)(3), refers to "[t]he verified existence of a work offer" The added word "appropriate" makes explicit what is implicit in any statute, that the law will be applied in good faith and in a reasonable fashion. For this reason, the language of the third factor simply restates the statute and does not meet the definition of a "regulation."

The challenged rule lists as the sixth factor to consider: "[t]he lack (in the county of commitment) of necessary outpatient treatment programs for the parolee," while subdivision (b)(6) of Penal Code section 3003 refers to: "[t]he lack of necessary outpatient treatment programs for parolees receiving treatment pursuant to Section 2960." (Emphasis added.) Penal Code section 2960 expresses the Legislature's intent that the Department "should evaluate each prisoner for treatable, severe mental disorders . . . and that severely mentally disordered prisoners should be provided with an appropriate level of mental health treatment . . . when returned to the community." The sixth factor in challenged section 1000 goes far beyond the statute, without specifying whether the phrase "necessary outpatient treatment programs" includes outpatient treatment

programs for physical ailments, for drug or various psychological problems or only for the severe mental disorders to which section 2960 of the Penal Code refers. The sixth factor interprets and gives specific additional meaning to Penal Code section 3003, subdivision (b), and therefore meets the definition of a "regulation."

Section 1010

Section 1010 contains definitions related to release on parole.⁴³ Section 1010.1 defines "release on parole" as "[t]he actual transfer of an inmate incarcerated in a California Department of Corrections (CDC) institution, re-entry facility or housed temporarily in a county or city jail, to the supervision of the Parole and Community Services Division (P&CSD) on a date established by operation of law (1170 PC) or by the Board of Prison Terms (1168 PC)."

In its Response, the Department maintains: "This definition adds nothing of consequence to the definition of 'parole,' set forth on page 1006 of Black's Law Dictionary, 5th ed. (1979)." ⁴⁴

The Department does not mention section 2000(b)(74), Title 15, CCR, which defines "parolee" as "[a] felon released from confinement in state prison to supervision in the community." This regulation follows the Black's Law Dictionary definition quite closely. Section 1010.1 further interprets this definition, extending it to specify "re-entry facilities" as a previously unmentioned type of confinement, and adding the date of release as part of the definition. These additions add to and do not simply restate either the common legal definition of "parole," or the existing Department regulation, section 2000, subdivision (b)(74). Thus, section 1010.1 meets the definition of a "regulation."

Section 1010.2

This section defines three types of release dates. First, section 1010.2.1 defines the "Indeterminate Sentence Law (ISL) release date" by paraphrasing the first sentence of the definition from regulation section 2000(b)(57), Title 15, CCR.⁴⁵

Second, section 1010.2.2 defines the "Determinate Sentence Law (DSL) release date" as "[t]he date a prisoner sentenced under 1170 PC is released to parole or discharged; also the date a prisoner sentenced prior to July 1, 1977, and recalculated by the BPT under the provisions of 1170.2 PC is released to parole or discharged." As the Department points out in its Response, section 2000(b)(2), Title 15, CCR, defines "DSL Prisoner" using similar language.

Third, section 1010.2.3 purports to define "Life Prisoner ISL release date" by repeating the precise language of the first two sentences of the regulatory definition of "Life Prisoner" found at section 2000(b)(3), Title 15, CCR. This provision simply repeats existing law, although it defines "life prisoner" rather than "Life Prisoner ISL release date." (Emphasis added.)

Section 1010.3 defines the "Release Program Study Form (CDC 611)" as a document which specifies certain information regarding an inmate being evaluated for parole. This provision by itself has no regulatory effect.⁴⁶

Section 1010.4 defines "Inmates Housed in California Youth Authority (CYA) facilities" by referring to the Welfare and Institutions Code section which authorizes a Superior Court to order certain youthful offenders who are committed to prison to be "housed and programmed" in CYA institutions. In its Response, the Department argues that "para 2.4, in part, repeats Welfare and Institution Code (WIC) § 1731.5(c)." Challenged section 1010.4 extends beyond the language of the statute which provides, in relevant part:

"(c) . . . The transfer shall be solely for the purposes of housing the inmate, allowing participation in the programs available at the institution by the inmate, and allowing Youth Authority parole supervision of the inmate, who, in all other aspects[,] shall be deemed to be committed to the Department of Corrections and shall remain subject to the jurisdiction of the Director of Corrections and the Board of Prison Terms."⁴⁷ [Emphasis added.]

In contrast, the challenged Manual rule states:

"Release on parole and parole supervision are provided by P&CSD per policies and procedures included in the Field Agent Guide." [Emphasis added.]

The Department of Corrections rather than the Department of the Youth Authority issues the "Field Agent Guide," Part I of the six parts of the PCSD Manual. This Manual contains the challenged provisions as well as the other "policies and procedures included in the Field Agent Guide" to which the language emphasized above refers. The challenged rule interprets and makes specific the statute. It imposes the procedures of the Department of Corrections on the Department of the Youth Authority, the agency the Legislature has designated by statute to supervise parole for the particular inmates transferred to the Department under Welfare and Institutions Code section 1731.5.

Section 1020

Section 1020, "Imminent Release Policy," sets out the timelines for referring cases to the Regional Re-Entry Coordinator for re-entry screening and arrangement of release procedures.⁴⁸ The first sentence of section 1020 states:

"The Penal Code requires all cases to be referred to the parole region of the inmate's county of commitment for re-entry screening."

In its Response, the Department claims that the first sentence of PCSD Manual section 1020 "repeats PC § 3003." Penal Code section 3003, however, provides that an inmate released on parole is to be returned to the county of commitment unless it is in the best interests of the public and of the parolee to return the inmate to another county. Penal Code section 3003 does not contain procedures or requirements which mandate who (or which county or parole region) must conduct "re-entry screening" for incipient parolees, even when parole to a county other than that of commitment is being considered. The statute does clearly contemplate that it is the Board of Prison Terms (for inmates sentenced under Penal Code section 1168(b)) or the Department (for inmates sentenced under Penal Code section 1170) which must determine the appropriate county of parole and document that choice in the inmate's permanent record.

The first sentence of section 1020 both interprets and implements the provisions of Penal Code section 3003, and establishes a procedure for the Department to follow.

The remainder of section 1020 states that:

"CDC policy requires referrals to be forwarded to the Regional Re-Entry Coordinator 210 days prior to the earliest possible release date (EPRD).

"However, in those cases where recalculation of the EPRD indicates release on parole must occur in the immediate future, it is the Classification and Parole Representative's (C&PR) responsibility to make immediate telephone contact with the appropriate parole unit to arrange release procedures."

Just as the first sentence does, these provisions clearly set out procedures for the Department to follow in arranging parole. Accordingly, section 1020 meets both prongs of the definition of a "regulation." As discussed below, however, this conclusion does not end the analysis of whether each provision must be adopted in accordance with the requirements of the APA.

Section 1050

Section 1050, "Exception to Parole to County of Commitment," provides that: (1) an inmate shall be paroled to the county of commitment; (2) notwithstanding this policy, an inmate may be paroled elsewhere when this would be in the best interest of the public and the parolee; and (3) if the parole is to be to another county, then "the reasons shall be specified in writing." The Department's Response correctly states that this section repeats Penal Code section 3003, although the challenged rule does not specify who is to document the reasons for choosing to parole an inmate to a county other than that of commitment.⁴⁹ Thus, section 1050, which restates the statute, is not a "regulation."

Section 1051

Section 1051 sets out the procedures which department staff must follow when an inmate has requested release on parole to a county other than that of commitment.⁵⁰ These procedures include: (1) application of the criteria (for exception to the parole-to-county-of-commitment policy) to the facts of an individual parolee's case; (2) documenting the reasons for granting (or denying) a request for a change in location of parole; (3) routing information between counties and among staff; and (4) the process for resolving differences of opinion as to whether a particular case meets the transfer criteria.

First, the parole agent in the county of commitment must review the case with the unit supervisor to determine whether "it meets an exception to the county of commitment policy." This provision calls for the application of the criteria set out in challenged section 1000 to an individual's case. Section 1000 interprets and implements Penal Code section 3003 by mandating consideration of a specified list of factors and redefining some of those factors to be considered. Therefore, section 1051 further implements the statute governing location of parole when it applies the criteria of section 1000.

Secondly, the provisions which call for documenting and routing information clearly establish procedures intended to be followed by the Department. Likewise, the provisions for resolution of disagreements about individual cases establish departmental procedures. Accordingly, these requirements satisfy both prongs of the definition of a "regulation." As discussed below, however, this conclusion does not end our analysis of this provision.

Case Records Manual

Section 4405

Section 4405, "Determining Location for Referral," begins: "(a) All preparole cases are to be referred to the county of commitment for placement." Although this statement is not identical to the prefatory language of section 1020 discussed above, it is very similar and likewise interprets, makes specific and implements Penal Code section 3003.

Subdivision (b) of section 4405 requires that, when a preparole case is sent back to the initial county "contrary to the inmate's expressed desires," the correctional counselor must include "detailed information in the release program study (CDC Form 611) as to the inmate's alternative release program." This provision both implements Penal Code section 3003, specifying additional requirements to those in the statute, and guides the Department's procedures.

Subdivision (b)(1) states that:

"The purpose of this policy is to achieve an equitable sharing by the counties of the correctional caseload in proportion to their commitment rate to CDC [California Department of Corrections]. This policy will ensure to the greatest extent possible that the county of commitment will be dealing with its own correctional problems and not those of another county."

Subdivision (b)(1) restates the policy set out in Prison Law Office v. Koenig⁵¹ and, to the extent it only restates and does not interpret existing case law, is non-regulatory.

Subdivision (c) provides:

"(c) Exceptions to placement in the county of commitment in paragraphs (a) and (b) above, [sic] may be permitted in very unusual cases by the parole division staff, but must meet the criteria below and be justified in writing via an attached addendum to the RPS [Release Program Study], approved and signed by both unit supervisor and the district administrator." [Emphasis added.]

This provision interprets and implements section 3003 of the Penal Code and also sets out a procedure for Department staff to follow. It also embodies the policy described in subdivision (b)(1), making clear that "this policy" is one of limiting changes in the location of parole to "very unusual cases."

Subdivision (d) states that:

"(d) The following exceptions (not all inclusive) to placement in the county of commitment may be permitted in very unusual cases by the parole division staff where:" [Emphasis added.]

This provision then lists five of the six factors set out in Penal Code section 3003 as relevant to consideration of the appropriate location of parole.⁵² All but one ("last legal residence . . . in a county other than the county of commitment") contain much greater specificity than appears in either the statute or section 1000 of the PCSD Manual.⁵³ For example, factor "(1)" of subdivision (b) of the statute is "the need to protect the life or safety of a victim, the parolee, a witness or any other person." Case Records Manual section 4405, subdivision (d), further describes the factor as follows:

"(1) There is the expressed and substantial fear of a victim or victim's relatives because of injuries or threats inflicted by the parolee during the commission of the commitment offense or during subsequent imprisonment, has threatened [sic] the victim or the victim's relatives; . . . "

This interpretation has added the elements of "expressed and substantial fear" and the requirement that the "injuries or threats" must have occurred or arisen during commission of the commitment offense or while the offender was in prison for that offense. On the other hand, subdivision (d)(1) of the challenged rule omits mention of the need to protect the life or safety of the parolee, a witness, or "any other person" as suggested by the statute. This provision clearly implements, interprets, and makes specific the statute governing the location of parole.

The second and final example of the way in which section 4405 further interprets, implements, or makes specific the statute appears in subdivision (d)(4). This subdivision interprets the factor found in Penal Code section 3003, subdivision (b)(5), regarding the existence of family in another county. The statute refers to family with whom the inmate has maintained strong ties and whose support would increase the chance of a successful parole. Section 4405, subdivision (d)(4), repeats these two statutory elements, then goes on to define in great detail the persons and relationships which constitute "immediate family," a term not used in the statute. Additional subdivisions add examples of situations which would or would not support a determination that a change in the location of parole would be appropriate.

Following the list of factors, subdivision (d)(6) of section 4405 provides that, after the investigation is complete and the study document is returned to the institution, and

" . . . if the inmate is not satisfied with the parole decision to release to a county other than that preferred by the inmate, [then] the inmate may appeal that decision through P&CSD's appeal procedures. (Parole Procedures Manual-Felon, Chapter XIV, Article 1.)"

As discussed above, the Parole Procedures Manual-Felon was replaced by the Parole and Community Services Division or "PCSD" Operations Manual in 1987.⁵⁴ This provision clearly implements, interprets, and makes specific Penal Code section 3003, setting out a procedure intended for the Department staff as well as inmates to follow.

Subdivision (e) creates the procedure in case there is an impasse, including two levels of review. Once more, this provision sets out a procedure for the Department to follow in implementing the parole location statute.

Section 4406

Section 4406 concerns the material to be forwarded to the PCSD regional office. Subdivision (a) lists the forms, photographs, documentation of job and residence offers, other file materials, and "other pertinent data" to be gathered and sent at the time of referral for parole placement. This provision does not require the creation of any forms or documentation, but sets out procedures to guide departmental action. Subdivision (b) prescribes the additional necessary records for cases which require attendance at a psychiatric parole outpatient clinic.

Subdivisions (c) and (d) require cases for work furlough participation and community correctional centers to be handled "in accordance with the classification manual." Neither the Requester nor the Department has submitted or identified those provisions of the "Classification Manual" intended by these references, and we cannot determine what sections of the Classification Manual might be included by the references. Therefore, we cannot determine whether the specific Classification Manual sections and subdivisions (c) and (d) which incorporate them meet the definition of a "regulation" or not.

Subdivision (e) requires that institutional correctional case records managers must advise the PCSD of any changes in a parolee's status after a release referral, again clearly a procedure the Department intends staff to follow.

Each of the provisions other than subdivisions (c) and (d), the content of which we cannot adequately identify, is a "regulation." The additional question as to whether these

provisions must be adopted pursuant to the requirements of the APA will be analyzed below.

Section 4407

Section 4407, "Reentry Referral of Direct Discharge Cases," sets out procedures for identifying inmates whose parole has been waived and for completing the appropriate paperwork to assure that these persons are distinguished from "preparole" referrals. This provision generally requires the same procedures, forms, recordkeeping, and routing of documents for inmates about to be discharged directly as for parole inmates, except that direct discharge cases are not to be referred to field parole units. Section 4407 itself contains procedures meant to be followed by the Department and also incorporates by specific reference the procedures set out elsewhere for referral to the parole division, use of the "Release Program Study" form (611) and attachments, regional reentry screening and institution notification. Thus, the provisions of section 4407 are "regulations." We will analyze below whether they are "regulations" required to be adopted under the APA or whether they fall under any exception to the requirements of the APA.

WE THUS CONCLUDE THAT PORTIONS OF SECTION 1000, AND SECTIONS 1010.1, 1010.4, 1020, AND 1051 OF THE PCSD MANUAL, PORTIONS OF SECTIONS 4405 AND 4406, AND SECTION 4407 OF THE CASE RECORDS MANUAL EACH CONSTITUTE A "REGULATION" AS DEFINED BY THE KEY PROVISIONS OF GOVERNMENT CODE SECTION 11342, SUBDIVISION (b). THE INTRODUCTION TO AND PORTIONS OF SECTION 1000, SECTIONS 1010.2, 1010.3, AND 1050 OF THE PCSD MANUAL, AND PORTIONS OF SECTION 4405 OF THE CASE RECORDS MANUAL RESTATE EXISTING LAW AND THEREFORE DO NOT FALL WITHIN THE DEFINITION OF A "REGULATION."

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULES IDENTIFIED AS "REGULATIONS" FALL WITHIN ANY ESTABLISHED GENERAL EXCEPTIONS TO THE APA REQUIREMENTS.

Rules concerning certain activities of state agencies are not subject to the procedural requirements of the APA.⁵⁵ Government Code section 11342, subdivision (b), contains the following specific exception to APA requirements:

"'Regulation' means every rule, regulation, order, or standard of general application . . . 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 cases which have interpreted the "internal management" exception have uniformly limited the exception to a very

narrow class of rules.⁵⁶ A brief review of relevant case law demonstrates that the "internal management" exception applies if the "regulation" under review (1) affects only the employees of the issuing agency^{57, 58} and (2) does not address a matter of serious consequence involving an important public interest.^{59, 60} For example, a rule which specified the security classification of inmates was held to be too important to be exempt from the APA as a rule of internal management. The application of the rule on classification to all male prisoners in the custody of the Department of Corrections "extended well beyond matters relating solely to the management of the internal affairs of the agency itself."⁶¹

In determining whether a manual section issued by the Department of Corrections falls within the "internal management" exception, the rule can be easily stated. The Third District Court of Appeal, in Faunce v. Denton,⁶² indicated that the appropriate standard to apply in evaluating whether or not portions of the Department's Administrative Manual fell within the "internal management" exception was whether or not the challenged portions represented a "rule of general application significantly affecting the male prison population in the custody of the Department."⁶³

The Department, in its Response to the instant Request for Determination, states that the "procedures and instructions [in the PCSD and Case Records Manuals] are either useful but non-regulatory, or matters of 'internal management.'" The Department adds:

"The greatest portion of the challenged rules involve internal procedures by which some of the department's employees interact with other of its employees in regard to correctional case records for the purpose of optimizing inmate placement on parole. For example, PCSD § 1010-3 describes a form which each Correctional Counselor uses to gather information during the pre-parole interview with an inmate as well as to give an opinion on the inmate's socialization."

Sections 1000 and 1010. Applying the appropriate test, we find first that the portions of sections 1000 and 1010 which do not simply restate existing law do significantly affect the male prison population, do not fall within the internal management exception, and are therefore required to meet the procedural requirements of the APA.

Section 1020. With respect to challenged section 1020, the Department states that:

"PCSD § 1020 gives a due date for institutional staff to have completed and forwarded parole referrals to the Parole Regional Re-Entry Coordinator; this date is solely for administrative convenience and does not affect the date or type of parole which a given inmate receives. Similarly, this rule allows for expediting paperwork on inmates with imminent parole dates, again this rule merely sets the priority of employee work and does not directly affect inmates."

The Department maintains that the rule does not affect the date or type of parole an inmate receives. Assuming there is no other, unanticipated effect on the rights of inmates, the internal management exception applies, and section 1020 is not subject to the APA requirements.

Section 1051. With respect to section 1051, the Department argues, in part:

"PCSD § 1051 sets procedures for the step by step, employee by employee, work flow in cases where a parolee has made a request for a transfer of parole to a county other than the county of commitment. . . . The internal work flow (discussions, investigations and reports) resulting from the parolee's request for transfer are not matters which directly or significantly affect the parolee."

Challenged section 1051 is intended to govern the application of the criteria set out in Penal Code section 3003 and interpreted by section 1000 of the PCSD Manual and section 4405 of the Case Records Manual. For example, section 1051 begins by requiring the parole agent to "review[] [the] case with the unit supervisor to determine if it meets an exception to the county of commitment policy." The process of determining whether an individual case meets the transfer criteria--applying the cited criteria--has a very significant impact on inmates and is precisely the type of rule upon which affected persons would want to comment.

Secondly, section 1051 requires preparation of a form ("CDC 1551") specifying the criteria relied upon to grant or deny parole to the requested location, along with reasons supporting a denial, if appropriate.⁶⁴

Finally, this challenged rule governs the dispute resolution mechanism, which cannot be said to affect only employees of the Department or not to be of significant interest to the prison population affected by the decision-making process the rule creates.

The routing of documents, specification of copies and assignment of responsibility for drafting memoranda are

subject to the internal management exception. However, section 1051 as a whole governs the application of criteria defined in statute and interpreted by rules which are legally required to be adopted under the APA as well as a process for resolving disputes as to the propriety of the inmate/parolee's request for transfer. Thus, the internal management exception to the procedural requirements of the APA does not apply to section 1051.

Section 4405. Subdivision (a), requiring referral of pre-parole cases to the county of commitment for placement, is a rule of general application interpreting Penal Code section 3003. However, the internal management exception applies in that the rule does not have a significant effect on the prison population.

Subdivision (b) significantly affects the prison population by attempting to establish in the location-of-parole determination process a strong preference for parole to the county of commitment. Thus, subdivision (b) fails to fall within the internal management exception.

Subdivision (c), as discussed above, interprets the statute, adding the standard that exceptions are to be permitted only in "very unusual circumstances." Subdivision (c) is not only a rule of general application, but also one which significantly affects prisoners seeking exceptions to the location of parole policy. Thus, this provision is not exempt from APA requirements as falling within the internal management exception.

The internal management exception does not apply to subdivision (d), which fleshes out in great detail the parole location exception criteria and provides for appeal procedures.

Subdivision (e) expands on the appeal procedure and, like the previous subdivision, significantly affects the rights of inmates seeking transfer of parole under the Penal Code. As with the preceding subdivision, the internal management exception does not apply to subdivision (e).

Section 4406. The Department describes the provisions of section 4406 in its Response at page 4, apparently mistakenly referring to it as "CRM § 4405,"⁶⁵ and concludes:

"The methods and type of transfer of existing case information from one staff unit to another are not matters which directly or significantly affect the parolee or the general public."

We agree with the Department with respect to subdivisions (a) and (b), and find that the internal management exception does apply to these provisions. As discussed above, we lack

sufficient information to make a determination with respect to subdivisions (c) and (d).

Subdivision (e) requires that specified case records managers keep the PCSD advised of any changes in an inmate's status after a release referral. The Department describes this section as providing that the information on the forms involved in the referral "should be updated by significant events prior to an inmate's actual release on parole." Absent any reason to believe that this requirement has a significant effect on those prisoners about to be paroled, we conclude that the internal management exception applies to this provision, and it is exempt from the requirements of the APA.

Section 4407. Finally, in its Response addressing challenged section 4407, the Department states:

"§ 4407(a) and (c) provide for transmitting information in order that files in a parole region be completed in cases where a released inmate has not been required to serve additional time on parole. The internal management of paperwork, involving closing or opening parolee files are not matters which affect parolee rights or duties, nor are they matters affecting a significant public interest."

As these provisions do not affect parolee rights or duties, or the rights and duties of those inmates about to be released without a parole requirement, they are exempt from the requirements of the APA under the internal management exception.

Subdivision (b) provides that:

"Inmates with direct discharge dates may request re-entry consideration. Direct discharge cases will be referred to the parole division in the same manner as pre-parole referrals. (Refer to Section 4404(a) of this manual.)"

These provisions affect the rights of inmates approaching re-entry. Section 4404 of "this manual" concerns institutional time limits for pre-release referrals. It, in turn, refers the user to "Chapter 5000, Article 4, of the Classification Manual." We cannot adequately determine what

additional provisions may be included by these cross-references. Based on the apparent impact of the provision of section 4407, we find that the internal management exception does not apply.

Finally, it should be noted that we do not reach the question of whether or not the rules are consistent with Title 15, CCR, or the applicable provisions of the Penal Code.

III. CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) the Department's rules are generally required to be adopted pursuant to the APA;
- (2) portions of section 1000, and sections 1010.1, 1010.4, 1020, and 1051 of the Parole and Community Services Division ("PCSD") Manual, portions of sections 4405 and 4406, and section 4407 of the Case Records Manual each constitute a "regulation" as defined by Government Code section 11342, subdivision (b);
- (3) the introduction to and portions of section 1000, sections 1010.2, 1010.3, and 1050 of the PCSD manual, and portions of section 4405 of the Case Records Manual restate existing law and therefore do not fall within the definition of a "regulation";
- (4) section 1020 and section 1051, subdivision (a), of the PCSD Manual and section 4405, subdivision (a), section 4406, subdivisions (a), (b), and (e), and section 4407, subdivisions (a) and (c), fall within the internal management exception to the requirements of the APA; and

November 2, 1990

(5) a portion of section 1000, and sections 1010.1, 1010.4, and 1051 of the PCSD Manual, and sections 4405, subdivisions (b), (c), (d), and (e), and 4407, subdivision (b), of the Case Records Manual violate Government Code section 11347.5, subdivision (a).

DATE: November 2, 1990

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1. This Request for Determination was filed by Paul W. Comiskey, Attorney at Law, 1909 Sixth Street, Sacramento, CA 95814, (916) 325-2701. The Department of Corrections was represented by Jerold A. Prod, Deputy Director, and Marc D. Remis, Staff Counsel, Legal Affairs Division, P. O. Box 942883, Sacramento, CA 94283-0001, (916) 445-0495.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "406" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

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. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a third survey of governing case law was published in 1990 OAL Determination No. 13 (Department of Finance, November 2, 1990, Docket No. 89-019), California Regulatory Notice Register 90, No. ___-Z, page ___, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) the comparison of two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), section 121, subsection (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, subdivision (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 [APA]."
[Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method

based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" 219 Cal.App.3d at p.____, 268 Cal.Rptr. at p. 251.

Concerning the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." [Id.; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." (Emphasis added.)

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

5. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." 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.

No public comments were submitted in this proceeding.

The Department of Correction's Response to the Request for Determination was received by OAL on June 11, 1990 and was considered in this proceeding.

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
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.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Center for \$3.00.

9. Government Code section 11347.5 provides:

"(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 subdivision (b) of Section 11342, 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.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order,

standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application,

or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Penal Code section 5000.
11. Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778, 781.
12. Penal Code section 5054.
13. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 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 Code of Regulations, 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. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such

public 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.)

14. Grier v. Kizer, (1990) 219 Cal.App.3d 422, ___, 268 Cal.Rptr. 244, 249.
15. California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.
16. Id.
17. For instance, Government Code section 11346.7, subdivision (b) requires a "final statement of reasons" for each regulatory action.
18. Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, titled "Rules and Regulations of the Director of Corrections" (Title 15, Division 3, of the CCR), states in part:

"Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures."
[Emphasis added.]

[This language first appeared in the CCR in May of 1976. (California Administrative Notice Register 76, No. 19, May 8, 1976, p. 401.) The Preface, and the quotation, were printed in the CCR in response to the legislative requirement stated in section 3 of Statutes of 1975, chapter 1160, page 2876 (the uncodified statutory language accompanying the 1976 amendment to Penal Code section 5058). As shown by the dates, this language was added to the CCR prior to the decision in Armistead v. State Personnel Board ((1978) 22 Cal.3d 198, 149 Cal.Rptr. 1) and subsequent case law, prior to the creation of OAL, and prior to the enactment of Government Code section 11347.5.]

The Departmental Administrative Manual makes clear in general that local institutions are expected to strictly adhere to the supplementary rules appearing in departmental procedural manuals, and specifically requires that local operations plans are to be consistent with the statewide procedural manuals.

According to section 102(a) of the Administrative Manual:

"[i]t is the policy of the Director of Corrections that all institutions . . . under the jurisdiction of the Department . . . shall . . . observe and follow established departmental goals and procedures as reflected in departmental manuals" [Emphasis added.]

Section 240(c) of the Administrative Manual states:

"While the policies and procedures contained in the procedural manuals are as mandatory as the Rules and Regulations of the Director of Corrections, 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.]

19. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20; and Hershings & Oldfield v. McCarthy (Super. Ct. Sacramento County, 1987, No. 350531, order issuing injunction regarding Classification Manual filed June 1, 1987.)
20. Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.
21. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20.
22. These adverse decisions concerning regulatory "second tier" material have not been unexpected. The author of the successful 1975 bill rejected an amendment proposed by the Department which would have specifically excluded the statewide procedural manuals from the APA adoption requirement.

Later, a Youth and Adult Correctional Agency bill analysis dated May 5, 1981, unsuccessfully opposed AB 1013, the bill which resulted in the enactment of Government Code section 11347.5. This analysis contained a warning that the proposed legislation "could result in a great part of our [i.e., Department of Corrections'] procedural manuals going under the Administrative Procedure Act process"

23. 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-74.
24. 1987 OAL Determination No. 15 (Department of Corrections, November 19, 1987, Docket No. 87-004), California Administrative Notice Register 87, No. 49-Z, December 4, 1987, p. 872 (sections 7810-7817, Administrative Manual); 1988 OAL Determination No. 2 (Department of Corrections, February 23, 1988, Docket No. 87-008), California Regulatory Notice Register 88, No. 10-Z, March 4, 1988, p. 720 (chapters 2900 and 6500, section 6144, Administrative Manual); 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, p. 1682 (chapter 7300, Administrative Manual); 1989 OAL Determination No. 11 (Department of Corrections, July 25, 1989, Docket No. 88-014), California Regulatory Notice Register 89, No. 30-Z, August 11, 1989, p. 2563 (sections 510, 511 and 536-541, Administrative Manual). Portions of the above-noted chapters and sections were found not to be "regulations."

Compare with 1989 OAL Determination No. 9 (Department of Corrections, May 18, 1989, Docket No. 88-011), California Regulatory Notice Register 89, No. 22-Z, June 2, 1989, p. 1625 (section 2708, Administrative Manual -- held to be exempt from APA requirements).

25. 1988 OAL Determination No. 19 (Department of Corrections, November 18, 1988, Docket No. 87-026), California Regulatory Notice Register 88, No. 49-Z, December 2, 1988, p. 3850 (subsections 1002(b) and (c), and 1053(b) of the Case Records Manual were found to be regulatory; subsections 1002(a) and (d), and 1053(a) were found not to be regulatory). 1989 OAL Determination No. 3 (Department of Corrections, February 21, 1989, Docket No. 88-005), California Regulatory Notice Register 89, No. 9-Z, March 3, 1989, p. 556 (Chapters 100 through 1900, noninclusive, of the Case Records Manual were found to be regulatory except for those sections which were either nonregulatory or were restatements of existing statutes, regulations, or case law).

26. Other challenged rules which do not neatly fall within the Department's three-tiered regulatory scheme have also been the subject of OAL determinations. 1989 OAL Determination No. 5 (Department of Corrections, April 5, 1989, Docket No. 88-007), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, p. 1120 (memo issued by Department official held exempt from APA); 1989 OAL Determination No. 6 (Department of Corrections, April 19, 1989, Docket No. 88-008), California Regulatory Notice Register 89, No. 18-Z, May 5, 1989, p. 1293 (unwritten rule held to violate Government Code section 11347.5).
27. These operations plans are authorized in a duly-adopted regulation. Title 15, CCR, section 3380, subsection (c), specifically provides:

"Subject to the approval of the Director of Corrections, wardens, superintendents and parole region administrators will establish such operational plans and procedures as are required by the director for implementation of regulations and as may otherwise be required for their respective operations. Such procedures will apply only to the inmates, parolees and personnel under the administrator." [Emphasis added.]

Section 242 ("Local Operational Procedures") of the Administrative Manual provides in part:

"Each institution . . . shall operate in accordance with the departmental procedural manuals, and shall develop local policies and procedures consistent with departmental procedures and goals.

"(a) Each institution . . . shall establish local procedures for all major program operations.

". . . .

"(b) Procedures shall be consistent with laws, rules, and departmental administrative policy" [Emphasis added.]

These sets of rules issued by individual wardens or superintendents are known variously as "local operational procedures," "operations plans," "institutional procedures," and other similar designations. (See Administrative Manual section 242(d).) We simply refer to these documents as "operations plans."

28. The Department's current review process of its manuals includes eliminating the duplicative material in the local "operations plans," while retaining in these plans material concerning unique local conditions.
29. AB 1270 (Sieroty/1971).
30. SB 1088 (Nejedly/1973).
31. American Friends Service Committee v. Proconier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
32. All three bills also concerned the Adult Authority (now the Board of Prison Terms). We will not discuss that facet of the legislation.
33. AB 1282 (Sieroty/1975).
34. Section 3 of Statutes of 1975, chapter 1160, page 2876.
35. California Regulatory Notice Register 90, No. 17-Z, April 27, 1990, p. 89.
36. 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); and 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.
37. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

38. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
39. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
40. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
41. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 736 188 Cal.Rptr. 130, 135; Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132, 1135; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 309-310, 203 Cal.Rptr. 20, 24; Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125.
42. The newer Operations Manual section which generally repeats or paraphrases challenged rule 1000 is found at Chapter 80000, Parole Operations, within Volume VIII. Section 81010.1 repeats the introductory language regarding the role of parole and parole agents. Section 81010.2, entitled "Release on Parole Policy," combines portions of both section 1000 and Case Records Manual section 4405, subdivision (d). The list of factors has been reworded to repeat verbatim the language of the statute, Penal Code section 3003. The third factor no longer refers to an "appropriate" work offer, and the sixth factor refers to "treatment programs for parolees receiving treatment pursuant to Section 2960", the exact language of subdivision (b)(6) of the statute, rather than to "treatment programs for the parolee." (Emphasis added.)
43. Volume VIII of the newly issued CDC Operations Manual contains nearly identical language at section 81010.3, "Release on Parole Definitions." This provision is dated December 28, 1989. The two provisions differ only in that the newer one contains an additional definition for the term "county of commitment," the confusing second sentence to section 1010.4 has been deleted, and "from" replaces "on" in the definition of "ISL release date."
44. The definition of "parole" in Black's Law Dictionary is:

"Release from jail, prison or other confinement after actually serving part of the sentence. State v. Ludwig 218 Or. 483, 344 P.2d 764, 766. A conditional release of prisoner, generally under supervision of a parole officer, who has served part of the term for which he was sentenced to prison. Such may be revoked if he fails to observe the conditions provided in parole order."

45. In its Response, the Department states that "PCSD §1010 para 2.1 repeats 15 CCR § 2000(a)(57)." Except for the typographical error referring to subdivision (a) rather than subdivision (b), the Department is correct.
46. "CDC Form 611" appears in the PCSD Manual at section 1031, the provision which contains the requirement that the parole agent must fill the form out (at subdivision 1031.9). The form requires the application of standards and criteria to determine the inmate's "institutional adjustment and prognosis for parole adjustment," material which is regulatory in that it implements the parole statute. Thus, the Manual provisions which require the form to be filled out and used meet the definition of a "regulation;" the description alone does not appear to have any regulatory effect.
47. Chapter 354, Statutes of 1987, section 1, effective August 28, 1987, amended Welfare and Institutions Code section 1731.5 by making one of the purposes of the transfer allowing the Youth Authority to supervise the parole of an inmate so transferred. As noted, the complete PCSD Operations Manual was issued on March 9, 1987. There is no indication that section 1010 has been amended since then.
48. Volume VIII of the CDC's Operations Manual, newly issued on September 19, 1989, contains language identical to that of PCSD Manual section 1020 at section 81010.4, dated December 28, 1989.
49. Volume VIII of the CDC's newly issued Operations Manual contains language identical to that of PCSD Manual section 1050 at section 81010.11 on a revision page dated December 28, 1989.
50. Volume VIII of the CDC's newly issued Operations Manual contains essentially the same language as that of PCSD Manual section 1051 in section 81010.11.1, dated December 28, 1989. The only material change is that the Department has added a new form, "CDC Form 1681, Exception to County of Commitment" to the forms required, and has clarified that the required "preparole investigation" is to be a "preparole transfer investigation."

51. Prison Law Office v. Koenig (1986) 186 Cal.App.3d 560, 233 Cal.Rptr. 590, examines the constitutionality of Penal Code section 3003. In conducting its analysis, the Court, at p. 566 (p. 594, Cal.Rptr.), finds:

"The goal of equal distribution of parolees throughout the state is a legitimate, reasonable state goal. The conclusion that the Legislature appears to have drawn --that to release parolees to the county of commitment will spread the parolee population throughout the state --is also reasonable."

The court's language does not contain the strong policy stated in the challenged provisions that exceptions should be very limited.

52. Penal Code section 3003 was amended in 1985 (Statutes 1985, c. 1419, section 2, operative July 1, 1986) to include for consideration in determining the location of parole a sixth factor, the lack of necessary outpatient treatment for a specified mental disorder. Section 4405 of the Case Records Manual appears to have last been revised on 3-28-83, and does not include the lack of available treatment as an enumerated factor.
53. Most of the material contained in subdivision (d) of Case Records Manual section 4405 is repeated in section 81010.2, revision dated December 28, 1989, "Release on Parole Policy," of Volume VIII of the CDC Operations Manual issued in March 1989.
54. The 3-9-87 transmittal letter issued with the "Parole Operations Manual" ("PCSD Manual") directed the recipient Manual user to destroy the Parole Procedures Manual-Felon ("PPM-F") upon receipt of the PCSD Manual. A table included as Attachment 1 of the PCSD Manual, "Disposition of PPM-F Manual Sections," shows the disposition of each section of the PPM-F, including Chapter XIV. First are the sections entitled "Appeals," sections 1400 and 1401. Section 1400 has become section 7300 of the "Department Administrative Manual" ("DAM"), and section 1401 is shown as deleted. Next, entitled "Appeals to the Department," are sections 1410 through 1419. These have become sections 7302 through 7338 of the DAM. A series of sections regarding appeals to the Board of Prison Terms ("BPT") are shown as having been adopted as BPT regulations. Finally, under the heading "Reconsideration of Length and Conditions of Parole," sections 1431 through 1434 are shown as incorporated into DAM rule 7339, and section 1440 on Citizen Complaint Procedures has become DAM section 7343.

The DAM volume containing section 7300 contains material from as early as 1977. Chapter 7300, "Appeals," beginning

with Article 1, "Inmate/Parolee Appeal Procedure," sections 7300-7325, was last revised on 1-7-88, after the date of the table cited above. Section 7300, entitled "Purpose," states a number of goals and purposes for the appeal procedures which are provided in greater detail in sections 7301 through 7333.

Of particular note with respect to Chapter 7300 of the Department Administrative Manual is that it was the subject of 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012) California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, p. 1682, which concluded that:

" . . . Chapter 7300 (1) is subject to the requirements of the Administrative Procedure Act (APA), [footnote omitted] (2) is a 'regulation' as defined in the APA, and (3) therefore violates Government Code section 11347.5, subdivision (a), except for the small number of provisions that are either non-regulatory or are restatements of existing statutes, regulations, or case law."

To the extent that challenged section 4405 incorporates these provisions of Chapter 7300, it also meets the definition of a "regulation."

55. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

- 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. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- d. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- e. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

- f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. 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 Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); 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).

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis, and will thus assist interested parties in

determining whether or not other uncodified agency rules violate Government Code section 11347.5. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$138.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

56. See Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 206-207, 149 Cal.Rptr. 1; Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Poschman v. Dumke (1983) 31 Cal.App.3d 932, 942-943, 107 Cal.Rptr. 596; Grier v. Kizer (1990) 219 Cal.App.3d 422, 436, 440, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990; 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.
57. Id., Armistead, Stoneham I, Poschman, and Grier.
58. 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.

59. See Poschman v. Dumke (1983) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603; and Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 203-204, 149 Cal.Rptr. 1, 3-4.
60. 1988 OAL Determination No. 3 (State Board of Control, March 7, 1988, Docket No. 87-009) California Regulatory Notice Register 88, No. 12-Z, March 18, 1988, pp. 855, 864; typewritten version, p. 10.
61. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 736, 188 Cal.Rptr. 130. See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 252, analyzing the prior cases on internal management and quoting with approval this language from Stoneham I.
62. (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.
63. Id., 167 Cal.App.3d at p. 196, 213 Cal.Rptr. at p. 125, citing Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 736, 188 Cal.Rptr. 130, 135 and Stoneham v. Rushen (1984) 156 Cal.App.3d 302, 309-310, 203 Cal.Rptr. 20.
64. The form, the "CDC 1551," entitled "Transfer Investigation Request," is found at page 49.1, Chapter 1100, within section 1161, "Case Transfer Procedures," of the PCSD Manual. In addition to gathering straightforward factual and identifying information, the form asks for an evaluation of the inmate or parolee's "Adjustment to Date," "Reason for Request [for Transfer], and unspecified "Additional Information." The form also requests the "Risks & Needs Score," from the "Initial Risks Assessment," CDC Form 1650, page 4.1, PCSD Manual. This assessment form calls for the exercise of discretion and judgment with respect to a series of factors as part of the release program study procedures (Section 1031 of the PCSD Manual). Not only are the rules requiring the use of these forms rules of general application, but they have an indisputably significant impact on prisoners.
65. The text of the Case Records Manual sections supplied to OAL for determination bears a revision date of 3-28-83. The Department's description on the first and fourth pages of its Response refer to "CRM § 4405," but in each case describe accurately the provisions of Case Records Manual section 4406. As noted with respect to PCSD Manual section 1000, section 81010.2 of the recent comprehensive Operations Manual, dated December 28, 1989, contains those factors listed in Penal Code section 3003 to consider in determining the location of parole. The Operations Manual provisions

November 2, 1990

follow the statute more closely, but still interpret and make specific the terms of the statute.

66. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.