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CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

MARCH FONG EU
SECRETARY OF STATE
OF CALIFORNIA

In re:)	1991 OAL Determination No. 5
Request for Regulatory)	
Determination filed by)	[Docket No. 90-007]
Paul W. Comiskey,)	
concerning Department of)	June 3, 1991
Corrections' procedures)	
followed in the event of)	Determination Pursuant to
a prisoner's death)	Government Code Section
[Departmental)	11347.5; Title 1, California
Administrative Manual)	Code of Regulations,
sections 6203(j)-(m);)	Chapter 1, Article 3
6204; 6206; 6207; 6208;)	
6209(a)-(c); 6212(h)] ¹)	
)	
)	

Determination by: JOHN D. SMITH, Deputy Director

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Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not specified sections of a Department of Corrections' Manual² concerning procedures to follow in the event of a prisoner's death are "regulations," and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that these Manual sections are (1) in part, "regulations" required to be adopted in compliance with the Administrative Procedure Act and, (2) in part, mere restatements of existing statutes or regulations, or otherwise exempt under the internal management exception.

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THE ISSUE PRESENTED ³

The Office of Administrative Law ("OAL") has been requested to determine⁴ whether or not sections 6203(j)-(m), 6204, 6206, 6207, 6208, 6209(a)-(c) and 6212(h) of the Department of Corrections' ("Department") Administrative Manual concerning the procedures to follow in the event of a prisoner's death are "regulations" required to be adopted pursuant to the Administrative Procedure Act ("APA").

THE DECISION ^{5, 6, 7, 8, 9}

OAL finds that:

- (1) the Department's rules are generally required to be adopted pursuant to the APA;
- (2) subdivisions (a) and (b) of section 6209 of the Department's Administrative Manual restate existing law and therefore do not fall within the definition of a "regulation";
- (3) all or portions of section 6203, 6204, 6206, 6207, 6208, 6209 and 6212 each constitute a "regulation" as defined by the key provision of Government Code section 11342, subdivision (b);
- (4) section 6206 and subdivision (a) of section 6207 fall within the internal management exception to the requirements of the APA;
- (5) those portions of the challenged provisions which constitute "regulations" and which are not exempt from the requirements of the APA violate Government Code section 11347.5, subdivision (a).¹⁰

REASONS FOR DECISION

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 1944.¹¹ The Legislature has entrusted the Director of Corrections with a "difficult and sensitive job,"¹² 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"¹³

Authority¹⁴

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

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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, 11340.1,¹⁵ 11340.2)." [Footnote omitted; emphasis added.]

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.

General 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 ("CCR"). 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"¹⁶ 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."¹⁷ 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.¹⁸

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

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statewide "general principles," which were adopted pursuant to the APA and are currently contained in about 190 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.¹⁹ The manuals were the Classification Manual, the Departmental Administrative Manual, the Business Administration Manual, the Narcotic Addict 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 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 Manual²⁰ and parts of the Administrative Manual²¹ (and unincorporated "Administrative Bulletins"²²)--for failure to comply with APA requirements.²³ OAL regulatory determinations have found the Classification Manual,²⁴ several portions of the Administrative Manual,²⁵ several portions of the Parole and Community Services Manual,²⁶ and several portions of the Case Records Manual²⁷ to violate Government Code section 11347.5.²⁸

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.²⁹ These plans often repeat parts of statutes,

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Director's Rules (i.e., codified regulations), and procedural manuals.³⁰

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.³¹ A two-pronged effort followed. Another bill was introduced;³² 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.³³ Shortly after the appellate decision, the Governor vetoed the bill.

In 1975, a third bill³⁴ passed the Legislature and was approved by Governor Brown.³⁵ 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.]³⁶

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 Administrative Manual³⁷, 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 statutes, regulations, manual provisions and procedural history.

Statutes

Sections 7100 to 7117, Chapter 3, Division 7 of the Health and Safety Code, establish the rights to custody of human remains and impose the duty and liability for interment. Section 7100 of that chapter sets forth the order of devolution of the right to control the disposition of the remains of a deceased person.³⁸

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Chapter 4, Division 7 of the Health and Safety Code establishes the rights and obligations regarding the disposal of the unclaimed dead. Section 7200 of Chapter 4 requires a governmental entity to use "due diligence" to notify relatives of the decedent. Section 7200 provides as follows:

"Notice to relatives or state department.

"Every head of a public institution, city or county undertaker, or state, county, or city officer having charge or control of remains to be interred at public expense, shall use due diligence to notify the relatives of the decedent. In the absence of any known relative of decedent desiring to direct the disposition of the remains in a manner other than in this Chapter provided, and upon written request of the State department [Department of Health Services] that such notices are required for a definite period specified in the request, such officer shall notify the State Department [Department of Health Services] by telegraph collect, immediately after the lapse of 24 hours after death, stating, whenever possible the name, age, sex, and cause of death of the decedent. [Emphasis added.]

Penal Code section 5061 governs the disposition of personal property of a deceased inmate.³⁹

Regulations

A pertinent Departmental regulation is contained in Article 8 of the Department's regulations in Title 15 of the California Code of Regulations ("CCR"), which is entitled "Medical Services".

Title 15, CCR, section 3357 establishes procedures to follow in the event of an inmate's death. CCR section 3357 provides as follows:

"(a) If a medical officer is not present at the time an inmate is thought to be dead, the highest ranking staff member present will immediately contact the institution's Chief Medical Officer, Staff Medical Officer, Medical Duty Officer, or, if the apparent death occurs at a location remote from an institution, the nearest available private physician to determine and pronounce death.

- "(b) The County Coroner will be immediately notified of the death of any inmate. If the circumstances or cause of death constitutes a coroner's case, as described in section 27491 of the Government Code, the coroner or a deputy coroner will personally sign the certificate of death.
- "(c) An effort will be made to personally contact and notify the deceased inmate's next of kin of the death. Telephone notification will be used when personal contact is not possible. In all cases a tactfully worded telegram notification will be sent to the next of kin informing them of the name and address of the undertaker to whom the remains have been released as well as the name and telephone number of department staff to contact for additional information.
- (d) Specific instructions for designated staff to follow in carrying out their duties and responsibilities relating to the death of an inmate under varying circumstances are set forth in departmental procedures. Wardens, superintendents, medical staff, business managers, chaplains, records and property officers, must be thoroughly familiar with those procedures." [Emphasis added.]

Challenged Provisions

In brief, the challenged provisions of the Department's Administrative Manual set forth specific duties of the institution head, correctional counselor, property officer, business manager and chaplain in the event of a prisoner's death.

Procedural History

On September 14, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register⁴⁰ along with a notice inviting public comment.

On October 29, 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 and/or regulations and therefore do not meet the definition of a "regulation"; and (2) other challenged provisions, although regulatory, fall within the "internal management exception" and need not be formally adopted under the APA.

We agree with the Department that certain portions of the challenged rules merely restate parts of a statute or regulation. Therefore, these provisions of the challenged rules are, for purposes of this determination, not "regulations". 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:⁴¹

- (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 THOSE PORTIONS OF THE CHALLENGED RULES WHICH ARE "REGULATIONS" 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 Department is a "state agency" as that term is defined in Government Code section 11000.⁴² Government Code section 11342, subdivision (b), clearly indicates that, for purposes of the APA, the term "state agency" applies to all state agencies, except those in the "judicial or legislative departments."⁴³ 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.⁴⁴

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 specific⁴⁵ 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,⁴⁶ 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 of Government Code section 11342, subdivision (b):

First, is the challenged rule of the state agency 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?

If an uncodified agency rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." [Emphasis added.]⁴⁷

A. Part One - Do the Challenged Provisions Establish Rules or Standards of General Application or Modify or Supplement Such Rules?

The answer to the first part of the inquiry is "Yes." The Department clearly intends that the challenged rules be complied with in the event of a prisoner's death.

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.⁴⁸ It has been judicially held that "rules significantly affecting the male prison population" are of general application.⁴⁹

The provisions challenged here are intended to apply to all members of a class, specifically, all persons who are prisoners at the time of their death as well as those persons who have rights and duties with respect to such prisoners' remains. 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 Governs the Agency's Procedure?

1. Section 6203⁵⁰

Section 6203 sets out duties of the institution head or administrative officer-of-the-day.

Subdivision (j)

This subdivision requires notification of the next of kin by telegram offering consolation, providing the name and address of the undertaker in

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possession of the prisoner's remains and requesting burial instructions.

The Department contends that, "Section 6203(j) repeats [the] requirement of 15 CCR section 3357(c)." We disagree.

Section 3357, subdivision (c), requires an effort to personally contact and notify a deceased inmate's next of kin of the death. Subdivision (c) requires telephone notification when personal contact is not possible. In addition, a "tactfully" worded telegram must be sent in all cases to notify the next of kin and to inform the next of kin of the name and address of the undertaker and the name and telephone number of the Department staff to contact for additional information.

The provisions of subdivision (j) of section 6203 of the Department's Administrative Manual differ from those of the formally adopted subdivision (c) of 15 CCR 3357. Subdivision (j), the rule in question, contains additional requirements. Subdivision (j) requires the telegram to contain: (1) an offer of consolation, (2) a request for further instructions for burial and (3) a specific statement regarding disposal -- i.e., that disposal must be made as provided by law if the remains are not claimed within 48 hours. Therefore, the provisions of subdivision (j) exceed the requirements of 15 CCR 3357. Consequently, the Department's argument is without merit. This rule implements, interprets and makes specific the law administered by the Department.

Subdivision (k)

Subdivision (k) authorizes the warden in specific instances to offer the prisoner's remains to friends of the deceased or private agencies for interment at private expense or with the deceased inmate's funds. The Department contends that subdivision (k) "paraphrases without changing [the] substance of Penal Code section 5061."

Penal Code section 5061 concerns burial expenses, procedures for dealing with a deceased prisoner's will and the disposition of personal property. Penal Code section 5061 does not address the issue of the warden/superintendent's authority to offer the prisoner's remains to other persons or entities for interment. Therefore, the Department's argument is without merit.

Subdivision (1)

This subdivision defines the term "unclaimed dead body" for application of the provisions of Division 7, Chapter 4 of the Health and Safety Code. Subdivision (1) states as follows:

"If, after due diligence to find a claimant has been exercised, there is still no one to direct disposition, it shall be considered an unclaimed dead body and subject to the provisions of Division 7, Chapter 4, Health and Safety Code, if a written request of the State Department of Health [Services] has been received." [Emphasis added.]

The Department argues that subdivision (1) quoted above, repeats the requirements of Health and Safety Code section 7200. It does not.

Health and Safety Code section 7200 states as follows:

"Every head of a public institution, city or county undertaker, or state, county, or city officer having charge or control of remains to be interred at public expense, shall use due diligence to notify the relatives of the decedent. In the absence of any known relative of decedent desiring to direct the disposition of the remains in a manner other than in this chapter provided, and upon written request of the State Department of Health Services that such notices are required for a definite period specified in the request, such officer shall notify the State Department by telegraph collect, immediately after the lapse of 24 hours after death, stating, whenever possible, the name, age, sex, and cause of death of the decedent." [Emphasis added.]

Health and Safety Code section 7200 states specific notice requirements. One requirement is to use due diligence to notify relatives of the decedent and the other requirement is to notify the State Department [State Department of Health Services] within a particular period of time and to provide specific information. Health and Safety Code 7200 does not define the term

"unclaimed dead body". Again, the Department's argument is without merit.

Subdivision (m)

Subdivision (m) provides as follows:

"If the body is not claimed for burial, it shall be interred in the prison cemetery, cremated, or buried by a licensed undertaker in accordance with the previously approved service contract. For details of custody and duty of interment, including oral or written instructions of the deceased, refer to Division 7, Chapter 3, Health and Safety Code."

The Department argues that subdivision (m) merely provides "instructions to staff for following provisions of Health and Safety Code Division 7, Chapter 3." In fact, subdivision (m) does more. Subdivision (m) provides for the interment in the prison cemetery, cremation, or burial by a licensed undertaker in accordance with a service contract. Chapter 3 does not require this action, nor does it require such action to be done in accordance with an approved service contract. Therefore, the provisions of subdivision (m) exceed those of the Health and Safety Code section relied upon by the Department.

2. Section 6204⁵¹

The Department argues that section 6204 "merely provides instructions to staff as to where the next of kin information is located and the manner with which to report the information to the warden." Section 6204 does indeed provide instructions to staff. It requires staff to prepare written reports. It requires these reports to be based on examination of very specific documents and other property. It requires that the warden/superintendent be provided with specific information in a very specific form. In sum, it outlines a procedure to be followed once a prisoner has died. Section 6204, by the Department's own admission, implements, interprets and makes specific the law enforced and administered by the Department.

3. Section 6206⁵²

This section outlines the duties of the property officer in the event of a prisoner's death. Section 6206 requires the officer to take possession of the

prisoner's personal property, prepare and sign a complete inventory of the property and send the list to the designated persons.

The Department argues that section 6206 "merely provides instructions to staff as to the manner with which they shall report to the warden assets of the deceased." Section 6206 does indeed instruct or require the property officer to perform specific duties and in doing so, the challenged rule implements, interprets and makes specific the law enforced and administered by the Department.

4. Section 6207⁵³

Section 6207 specifies the duties of the business manager when notified of an inmate's death. Subdivision (a) requires a statement of funds and other resources held in trust to be prepared and forwarded to the warden.

Subdivision (a) of section 6207 is similar to section 6206 in that subdivision (a) requires the preparation of a report and the forwarding of that report to designated persons. Again, the Department argues as in section 6206, that subdivision (a) of section 6207, merely provides instructions as to the manner with which staff must report the decedent's assets to the warden. As in section 6204, the provisions of subdivision (a) of section 6207 implement, interpret and make specific the law enforced and administered by the Department.

Subdivision (b) requires the business manager to make proper distribution of the decedent's funds and personal property. Subdivision (c) requires each institution to have a service agreement with local mortuaries to provide for specific services in connection with the disposal of the remains of the decedent. Subdivision (d) establishes the method for disposing of the decedent's bonds or securities.

The Department argues that subdivisions (b), (c) and (d) of section 6207 merely repeat the requirements of Penal Code section 5061 and of Chapters 3 and 4 of Division 7 of the Health and Safety Code. Again, we disagree.

Subdivision (b) is very vague in that it requires the "proper" distribution of property in accordance with the Department's Business Administration Manual.⁵⁴ Because subdivision (b) is so vague, it is impossible to determine whether or not subdivision (b) is even consistent with Penal Code section 5061, which

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establishes procedures for the disposition of a deceased prisoner's personal property.

Subdivision (c) clearly does not repeat Penal Code section 5061. Penal Code section 5061 contains no requirement for a service agreement with a local mortuary for services in connection with the disposition of the decedent's remains. Therefore, the provisions of subdivision (c) exceed those of the statute which the Department states is being repeated.

Subdivision (d) does not repeat Penal Code section 5061. Penal Code section 5061 does permit funds not exceeding \$300.00 to be applied to the payment of the prisoner's burial expenses and related charges. Section 5061 further permits deeds, contracts or assignments to be filed with the Public Administrator of the county of commitment of the decedent. However, such filing is not permitted within a year of the prisoner's death. Unlike subdivision (d), Penal Code section 5061 does not require liquidation and remittance of the decedent's securities through the Office of the Public Administrator to the extent that the institution is entitled to recover costs in connection with the death. Therefore, subdivision (d) also exceeds the scope of the statute which the Department states is merely being repeated.

In addition, subdivisions (b), (c) and (d) do not repeat (as the Department argues) the provisions of Chapters 3 and 4 of Division 7 of the Health and Safety Code. Chapter 3 of the Health and Safety Code deals with the custody and duty of interment. Chapter 4 of the Health and Safety Code deals with the disposal of unclaimed dead. Neither chapter contains the substance of the provisions contained in the above challenged rules.

Subdivision (e) requires that burial clothing be supplied and subdivision (f) requires the manager to make the necessary arrangements if state materials or services are needed. These provisions also implement, interpret and make specific the law enforced and administered by the Department. Indeed, the Department does not even suggest that these provisions repeat the requirements of any specific statute. Yet, the challenged rule is designed to govern the staff's conduct.

5. Section 6208⁵⁵

This section specifies the duties of the chaplain when notified of an inmate's death. The Department does not argue that section 6208 fails to implement, interpret

or make specific the law enforced and administered by the Department. Instead, the Department argues that this challenged rule falls within an established general exception to the APA requirements. The Department argues that this challenged rule constitutes a rule which relates only to the internal management of the agency. We reserve discussion of this issue until later.

6. Section 6209⁵⁶

This section concerns post-mortem examinations. The provisions of subdivisions (a), (b) and (c) are challenged in this determination proceeding. The Department argues that the provisions of these subdivisions merely repeat the requirements of Chapter 4 of Division 7 of the Health and Safety Code.

Subdivision (a) encourages the securing of permission to perform an autopsy and states reasons why post-mortem examinations are desirable, and recommends attendance at the autopsy by the institution's physicians. This subdivision neither directs nor prohibits action by any party. The language of the provision is goal-oriented and informational. Subdivision (a) does not fall within the definition of a "regulation."

Subdivision (b) states that section 7113 of the Health and Safety Code requires receipt of written authorization from specific persons. This subdivision merely repeats or duplicates Health and Safety Code section 7113. Therefore, it is not a "regulation."

Subdivision (c) states that any request for authorization of an autopsy must be at the discretion of and in the wording of and manner prescribed by the Chief Medical Officer. Its provisions permit the use of a specific departmental form in requesting an autopsy. Chapter 4 of Division 7 of the Health and Safety Code contains no provision granting the Chief Medical Officer sole authority to request an autopsy or to prescribe the wording and manner of such a request. Nor does any provision of Chapter 4 authorize the use of the departmental form 223 in requesting an autopsy. The provisions of subdivision (c) clearly implement, interpret and make specific the law enforced and administered by the Department. Subdivision (c) does not duplicate the provisions contained in Chapter 4 of Division 7 of the Health and Safety Code.

7. Section 6212⁵⁷

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Section 6212 concerns the death of inmates occurring at a place remote from the institution. The challenged provision is contained in subdivision (h). Subdivision (h) requires the departmental officer to make arrangements to have the decedent transported to the institution for burial or "other proper disposition." The Department does not argue that the provision fails to implement, interpret and make specific the law enforced and administered by the Department. Instead, the Department argues that the provisions of subdivision (h) need not be adopted in compliance with the APA because the challenged rule constitutes a rule which relates only to the internal management of the Department. The Department admits that subdivision (h) instructs staff as to when a prisoner's body must be returned to the institution for disposition.

WE THUS CONCLUDE THAT PORTIONS OF SECTION 6203, 6207, 6209 AND 6212 AND SECTIONS 6204, 6206, AND 6208 EACH CONSTITUTE A "REGULATION" AS DEFINED BY THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342, SUBDIVISION (b). PORTIONS OF SECTION 6209 MERELY RESTATE EXISTING LAW AND THEREFORE DO NOT FALL WITHIN THE DEFINITION OF A "REGULATION".

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULES THAT HAVE BEEN 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.⁵⁸ 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 . . . , except one which relates only to the 'internal management' of the state agency." [Emphasis added.]

The "internal management" exception has been judicially determined to be narrow in scope.⁵⁹ 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^{60, 61} and (2) does not address a matter of serious consequence involving an important public interest.^{62, 63} 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."⁶⁴

In determining whether a "guideline" or "rule" issued by the Department of Corrections falls within the "internal management" exception, the rule can be more easily stated. The Third District Court of Appeal, in Faunce v. Denton,⁶⁵ indicated that the appropriate standard to apply in evaluating whether or not portions of the Department's Administrative Manual fall within the "internal management" exception was whether or not the challenged portions represent a "rule of general application significantly affecting the male prison population in the custody of the Department."⁶⁶

The Department, in its Response to the instant Request for Determination states that the challenged ". . . sections need not be adopted as regulations pursuant to the APA. The sections are nonregulatory since they merely repeat existing law and regulations or are clearly nonregulatory instructions to staff."

Sections 6203 and 6204.

Applying the appropriate tests, we first find that the portions of section 6203 and section 6204, which do not simply state existing law, do significantly affect the prison population. Accordingly, those provisions do not fall within the internal management exception, and are therefore required to meet the procedural requirements of the APA.

Section 6206.

The Department states that section 6206 merely provides instructions to staff as to the manner with which they shall report assets of the deceased to the Warden. Section 6206 requires the Property Officer to take possession of the deceased prisoner's personal property and to prepare and sign an inventory which is to be sent to other institutional personnel. Assuming there is no other unanticipated effect on the rights of the inmates, the internal management exception applies, and section 6206 is not subject to the APA requirements.

Section 6207.

As with section 6206, the Department argues that subdivision (a) of section 6207 merely provides instruction to staff as to the manner in which they shall report assets of the deceased to the warden. Subdivision (a) requires the preparation of a report of funds and other resources held in trust for the deceased and the forwarding of that information to the Warden/Superintendent. Assuming there is no other unanticipated effect on the rights of inmates, the internal management exception applies, and subdivision (a) of section 6207 is not subject to the APA requirements.

The remaining portions of section 6207 which do not simply restate existing law, do significantly affect the prison population. Thus, those provisions do not fall within the internal management exception.

Section 6208.

The Department argues that section 6208 is clearly internal management, providing instruction to staff as to how and when the Warden shall be consulted. However, this section also requires the Chaplain to perform ceremonies over the deceased inmate, arrange for services and assist in determining whether or not relatives will be permitted to attend such services. Such a rule has a very significant impact on inmates and their relatives. It is precisely the type of rule upon which affected persons would want to comment. Applying the appropriate tests, we find that each subdivision significantly affects the prison population and surviving relatives of prisoners. Therefore section 6208 does not fall within the internal management exception.

Section 6209(a) through (c).

Applying the appropriate tests, we first find that subdivision (c), that portion of section 6209 which does not simply restate existing law, does significantly affect the prison population. Consequently, we find the subdivision (c) of section 6209 does not fall within the internal management exception. In addition, the Department does not argue that any of the challenged portions of section 6209 fall within the internal management exception to the APA.

Section 6212(h).

With respect to challenged section 6212, the Department states that subdivision (h) is clearly internal management in that it provides "instructions to staff as to when an unclaimed body away from an institution shall be returned for disposition." We agree with the Department as to what subdivision (h) provides. However, we do not agree that this requirement constitutes a rule of internal management. The disposition of human remains, whether those remains are claimed or unclaimed by relatives, is a matter of great significance, not only to the prison population but to our society as well. It involves more than the mere shuffling of bureaucratic papers. It has a profound impact upon those values which our society holds dear. In sum, this rule is precisely the type of rule upon which affected persons would want to comment. It cannot be said to affect only employees of the Department or not to be of significant interest to the population affected by its consequences. Therefore, the internal management exception does not apply.

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Rules not falling under the internal management exception are subject to the APA. We conclude in the above analysis that section 6206 and subdivision (a) of section 6207 are rules of internal management. On the other hand, the remaining rules analyzed above (e.g., 6203, 6204, 6208, subdivision (c) of section 6209 and subdivision (h) of section 6212) do not fall within the internal management exception and are therefore required to meet the procedural requirements of the APA.

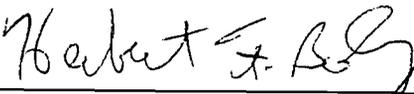
III. CONCLUSION

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) subdivisions (a) and (b) of section 6209 of the Department's Administrative Manual restate existing law and therefore do not fall within the definition of a "regulation";
- (3) all or portions of section 6203, 6204, 6206, 6207, 6208, 6209 and 6212 each constitute a "regulation" as defined by the key provision of Government Code section 11342, subdivision (b);
- (4) section 6206 and subdivision (a) of section 6207 fall within the internal management exception to the requirements of the APA;
- (5) those portions of the challenged provisions which constitute "regulations" and which are not exempt from the requirements of the APA violate Government Code section 11347.5, subdivision (a).

June 3, 1991

DATE: June 3, 1991


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NOTES

1. This Request for Determination was filed by Paul W. Comiskey, 1909 Sixth Street, Sacramento, CA 95814 (916) 325-23701. The Department of Corrections was represented by Sara Bruce, Chief, Regulation and Policy Management, 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 "106" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.
2. The Request is for a Determination regarding specific "rules" contained in the Department of Corrections' Administrative Manual. Many of the department's rules previously contained in various departmental manuals have been consolidated in the Department's new Operations Manual. To the extent that rules contained in the Department's "old" Administrative Manual still exist in the "newer" Operations Manual, the rules in the Operations Manual are also at issue in this proceeding. In the instant case, portions of the challenged regulations are contained in section 51070 of the Department's Operations Manual.
3. 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. 12 (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) 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.

4. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

"'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(b), which is invalid and unenforceable unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 433, 268 Cal.Rptr. 244, 251, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (finding that Department of Health Services' audit method was invalid and unenforceable under Government Code section 11347.5 because it was an underground regulation which should be adopted pursuant to the APA); and 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").

5. 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.

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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. 434, 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 it was deemed] 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.

6. 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 in order to permit OAL to devote its resources to analysis of truly contested issues.

The only public comment submitted in this proceeding was by the Requester. The comment was given due consideration.

7. 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).
8. 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.
9. 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 \$3.50 (\$4.50, if mailed).

10. 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 gen-

eral 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.]

11. Penal Code section 5000.
12. Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778, 781.
13. Penal Code section 5054.
14. 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.)

15. Grier v. Kizer, (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249.
16. California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.
17. Id.
18. For instance, Government Code section 11346.7, subdivision (b), requires a "final statement of reasons" for each regulatory action.
19. 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.]

20. 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 Herships & Oldfield v. McCarthy (Super. Ct. Sacramento County, 1987, No. 350531, order issuing injunction regarding Classification Manual filed June 1, 1987).
21. Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.
22. "Stoneham I", supra, and "Stoneham II", supra.
23. 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. . . ."
24. 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.

25. 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).

26. 1990 OAL Determination No. 14 (Department of Corrections) November 2, 1990, Docket No. 89-021), Cal. Reg. Notice Register 90, No. 47-Z, November 23, 1990, p. 1733 (portions of section 1000 and sections 1010.1, 1010.4, 1020 and 1051, PCSD Manual). Portions of the above-noted sections were found not to be "regulations."
27. 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). 1990 OAL Determination No. 14 (Department of Corrections, November 2, 1990, Docket No. 89-021), Cal. Reg. Notice Register 90, No. 47-Z, November 23, 1990, p. 1733. (Portions of sections 4405 and 4406, and section 4407 of the Case Records Manual were found to be regulatory; other portions and sections were either non-regulatory by virtue of the internal management exception or by restating existing law.)

28. 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).
29. 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).)

30. 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.

31. AB 1270 (Sieroty/1971).
32. SB 1088 (Nejedly/1973).
33. American Friends Service Committee v. Proconier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
34. All three bills also concerned the Adult Authority (now the Board of Prison Terms). We will not discuss that facet of the legislation.
35. AB 1282 (Sieroty/1975).
36. Section 3 of Statutes of 1975, chapter 1160, page 2876.
37. See note 2 above.
38. Section 7100 provides as follows:

"Order of Devolution. The right to control the disposition of the remains of a deceased person, unless other directions have been given by the decedent, vest in, and the duty of interment and the liability for the reasonable cost of interment of such remains devolves upon the following in the order named:

- (a) the surviving spouse.
- (b) the surviving child or children of the decedent.
- (c) the surviving parent or parents of the decedent.
- (d) the person or persons respectively in the next degrees of kindred in the order named by the laws of California as entitled to succeed to the estate of the decedent.
- (e) the public administrator when the deceased has sufficient assets.

"Liability for cost of the interment. The liability for the reasonable cost of the interment devolves jointly and severally upon all kin of the decedent in the same degree of kindred and upon the estate of the decedent; provided that such a person accept the gift of an entire body under subdivision (a) of section 7155.5, such person, subject to the terms of the gift, shall be liable for the reasonable cost of interment of the decedent.

"Directions of decedent. A decedent, prior to his [sic] death, may direct the preparation for, type or place of interment of his [sic] remains, either by oral or written instructions, but a written contract for funeral services may only be modified in writing. The person or persons otherwise entitled to control the disposition of the remains under the provisions of this section shall faithfully carry out the directions of the decedent subject only to the provisions of this chapter with respect to the duties of the coroner.

"Instructions in will. If such instructions are contained in a will, they shall be immediately carried out, regardless of the validity of the will in other respects or of the fact that the will may not be offered for or admitted to probate until a later date.

"Administration and construction of section. This section shall be administered and construed to the end that such expressed instructions of any person shall be faithfully and promptly performed.

Immunity from liability. A funeral director or cemetery authority shall not be liable to any person or persons for carrying out such instructions of the decedent."

[Emphasis added.]

39. Penal Code Section 5061 provides:

"Death of inmate; burial expenses; will; disposition of personal property

"Whenever any person confined in any state institution subject to the jurisdiction of the Director of Corrections dies, and any personal funds or property of that person remains in the hands of the Director of Corrections, the funds may be applied in an amount not exceeding three hundred dollars (\$300) to the payment of his or her burial expenses and charges related thereto. If no demand is made upon the director by the owner of the funds or property or his or her legally appointed representative, the director shall hold and dispose of those funds or property as follows:

"(a) If the decedent leaves a will, the director shall, within 30 days after the date of the death of the decedent, deliver the will to the clerk of the superior court having jurisdiction of the estate. If an executor is named in the will, the director shall

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furnish him or her written notice of the delivery of the will as provided in this section.

"(b) All money or other personal property of the decedent remaining in the custody or possession of the director shall be held by him or her for a period of one year from the date of death of the decedent, for the benefit of the heirs, legatees or successors in interest of that decedent.

"(c) Upon the expiration of the one-year period, any money remaining unclaimed in the custody or possession of the director shall be delivered by him or her to the Treasurer for deposit in the Unclaimed Property Fund under Article 1 (commencing with Section 1440) of Chapter 6 of Title 10 of Part 3 of the Code of Civil Procedure.

"(d) Upon the expiration of the one-year period, all personal property and documents of the decedent, other than cash, remaining unclaimed in the custody or possession of the director, shall be disposed of as follows:

"(1) All deeds, contracts, or assignments shall be filed by the director with the public administrator of the county of commitment of the decedent.

"(2) All other personal property shall be sold by the director at public auction, or upon a sealed-bid basis, and the proceeds of the sale delivered by him or her to the Treasurer in the same manner as is provided in this section with respect to unclaimed money of the decedent. If he or she deems it expedient to do so, the director may accumulate the property of several decedents and sell the property in such lots as he or she may determine, provided that he or she makes a determination as to each decedent's share of the proceeds.

"(3) If any personal property of the decedent is not salable at public auction, or upon sealed-bid basis, or if it has no intrinsic value, or if its value is not sufficient to justify the deposit of the property in the State Treasury, the director may order it destroyed.

"(4) All other unclaimed personal property of the decedent not disposed of as provided in paragraph (1), (2), or (3) shall be delivered by the director to the Controller for deposit in the State Treasury under Article 1 (commencing with

Section 1440) of Chapter 6 of Title 10 of Part 3
of the Code of Civil Procedure."

40. California Regulatory Notice Register 90, No. 37-Z,
September 14, 1990, p. 1411.
41. 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 3 to today's
Determination.
42. Government Code section 11000 states in part:

"As used in this title [Title 2. Government of the
State of California] 'state agency' includes every
state office, officer, department, division,
bureau, board, and commission."

Section 11000 is contained in Title 2, Division 3 (Executive
Department), Part 1 (State Department and Agencies), Chapter
1 (State Agencies) of the Government Code.
43. 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.
44. 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.
45. By "specific," we mean an exemption which pertains solely to
one specific program or to one specific agency, such as the
statute stating that the rule setting the California minimum
wage is exempt from APA requirements (Labor Code section
1185). A specific exemption contrasts with a "general"
exemption or exception, which applies across-the-board to
all agency enactments of a certain type, such as those
listed in note 63.

Legislative intent that APA exemptions, if any, must be specifically and expressly stated in subsequent legislation, not merely implied, is evident in Government Code section 11346, which provides:

"It is the purpose of this article to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly. . . ." [Emphasis added.]

46. (1990) 219 Cal.App.3d 422, 434-435, 268 Cal.Rptr. 244, 251.
47. Id., 219 Cal.App.3d at p.438, 268 Cal.Rptr. at p. 253.
48. 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).
49. Stoneham v. Rushen (1982) 137 Cal. App. 3d 729, 188 Cal. Rptr. 130; Faunce v. Denton (1985) 167 Cal. App. 3d 191, 213 Cal. Rptr. 122.
50. Section 6203 of the Administrative Manual. Duties of Institution Head or Administrative Officer-of-the-Day.

"(j) In all cases, notification by a telegram to the next-of-kin which is tactfully worded and offers consolation is to be sent. It should contain the name and address of the contract undertaker to whom the remains have been released; a request for further instructions for burial; a statement that disposition must be made as provided by law, if not claimed within 48 hours (sections 7100 and 7200, Health and Safety Code, 1969).

"(k) In the absence of any known relative of the decedent, or if not claimed by relatives the Warden/Superintendent may use his judgment in offering the body to friends of the deceased or interested private agencies for interment at private expense or with the deceased

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inmate's own funds (section 5061, Penal Code).

"(l) If, after due diligence to find a claimant has been exercised, there is still no one to direct disposition, it shall be considered an unclaimed dead body and subject to the provisions of Division 7, Chapter 4, Health and Safety Code, if a written request of the State Department of Health has been received.

"(m) If the body is not claimed for burial, it shall be interred in the prison cemetery, cremated, or buried by a licensed undertaker in accordance with a previously approved service contract. For details of custody and duty of interment, including oral or written instructions of the deceased, refer to Division 7, Chapter 3, Health and Safety Code."

51. Section 6204 of the Administrative Manual. Duties of Correctional Counselor or Case Worker.

Upon receiving information that an inmate has died, the Correctional Counselor or Caseworker will prepare the following written reports based on a careful examination of all available records including the Central file, mail, visiting records, and the inmate's property.

"(a) A list of names, relationships and addresses of relatives, friends, organizations or individuals who might be interested in burial of the deceased, without cost to the state. This will be sent to the Warden/Superintendent or his designated authority, for further messages following receipt of telegram from the next-of-kin if necessary.

"(b) A memorandum to the Warden/Superintendent or designated authority setting forth the following:

- (1) Is he a member of a fraternal order or lodge having burial insurance or death benefits?
- (2) Is he entitled to veteran's benefits?
- (3) Is the deceased entitled to social security benefits?
- (4) Is he receiving a pension of any type?
- (5) Does he have insurance payable at death?

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(6) Does he have resources of income not held in trust at this institution?"

52. Section 6206 of the Administrative Manual. Property Officer's Duties in Case of Death.

"When notified of a death the Property Room Officer will take action to obtain possession of all personal property of the deceased, will prepare and sign a complete inventory. This list will be sent to the Warden/Superintendent or designated authority, the Central file and the Business Manager."

53. Section 6207 of the Administrative Manual. Role of the Business Manager.

"When notified of a death, the Business Manager will:

"(a) Prepare a statement of funds and other resources held in trust for the deceased and forward a copy to the Warden/Superintendent or designated authority.

"(b) Make proper distribution of such funds and all personal property of the deceased (see Business Administration Manual).

"(c) Institutions shall have service agreements with local mortuaries to provide for such services as embalming, cremation, casket, transportation, burial and other related services in connection with the disposition of the remains of the deceased inmates (see Business Administration Manual).

"(d) In cases in which an institution holds U.S. Savings Bonds or other securities belonging to a deceased inmate and the institution is entitled to recover costs incurred in connection with the death of an inmate under section 5061 of the Penal Code, bonds or securities to the extent of costs incurred shall be liquidated through the office of the Public Administrator of the county. Funds so recovered shall be remitted as in the preceding paragraph, except that if the value recovered from the bonds or securities is in excess of the costs incurred, the excess amount shall be credited to the deceased inmate's trust account, to be otherwise disposed of in accordance with sections 5061 and 5062 of the Penal Code.

"(e) Supply burial clothing.

"(f) Make special arrangements when necessary if state materials or services are needed."

54. The Department's Business Administration Manual appears to have been superseded. If the Manual has not been superseded, it still would not constitute the official publication of the Department's regulations.

55. Section 6208 of the Administrative Manual. Chaplain's Duties in Case of Death.

"Upon notification of a death, the Chaplain of the faith professed by the inmate will perform such immediate ceremonies as required.

"(a) If no one assumes responsibility for burial without expense to the State, he will consult with the Warden/Superintendent or designated authority as to the desirability of holding funeral and burial services within the institution.

"(b) He will be responsible for all specific arrangements including time and place for such services and for conducting them.

"(c) The question of permitting relatives to attend such services when they have failed to claim the body will have to be decided on by the Superintendent and Chaplain in each case."

56. Section 6209 of the Administrative Manual. Post-Mortem Examinations.

"(a) Because of its importance in medico-legal problems, in settling compensation insurance, in determining familial diseases which may affect living relatives, in disclosing obscure diseases, and in improving scientific accuracy, every effort should be made to secure permission to perform an autopsy in every case possible. This is considered to be of such importance in the practice of scientific medicine that the percentage of autopsies is one of the criteria for accreditation of a hospital by the Joint Commission on Accreditation. Attendance by institution physicians at post-mortem examinations, whenever possible, is strongly recommended.

"(b) According to section 7113 of the Health and Safety Code, an autopsy may be performed upon the receipt of a written authorization from any of the following:

"(1) Surviving spouse;

"(2) Surviving child or parent;

"(3) Surviving brother or sister;

"(4) Any other kin or person who has acquired the right to control the disposition of the remains;

"(5) A coroner or any other duly authorized public officer.

"(c) The request for such authorization shall be at the discretion of and in the wording and manner prescribed by the Chief Medical Officer. CDC Form 223 may be used in some cases."

57. Section 6212 of the Administrative Manual. Deaths Occurring at a Place Remote from an Institution.

"If a death occurs in a camp, while fighting fires, or while in transit between institutions, the Department of Corrections' Officer in Charge will take the following actions; . . . (h) If the body remains unclaimed, arrangements will be made to have it transported to the institution for burial or other proper disposition. . . . "

58. 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 very 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 \$162.

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.

59. 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.
60. Id., Armistead, Stoneham I, and Poschman.
61. 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.
62. 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.
63. 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.

64. 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.
65. (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.
66. 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.
67. 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.