

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

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Bill Jones
SECRETARY OF STATE

In re:) **1995 OAL Determination No. 3**
Request for Regulatory)
Determination filed by L.) **[Docket No. 90-026]**
AUSTIN EDMONDSON)
regarding the) **April 26, 1995**
DEPARTMENT OF)
CORRECTIONS' Opera-) **Determination Pursuant to**
tions Manual section) **Government Code Section**
54030.4.3.2 restricting) **11340.5; Title 1, California Code**
inmate property to non-) **of Regulations,**
electric typewriters¹) **Chapter 1, Article 3**
_____)

Determination by: **JOHN D. SMITH, Director**
HERBERT F. BOLZ, Supervising Attorney
BARBARA ECKARD, Staff Counsel

SYNOPSIS

The issue presented is whether or not a Department of Corrections' rule prohibiting inmates from possessing electric typewriters is a "regulation" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

The Office of Administrative Law ("OAL") has concluded that the challenged rule was a "regulation" during the period it was in effect. After the matter was brought to its attention, however, the Department promptly rescinded the rule.

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ISSUE

OAL has been requested to determine whether or not the Department of Corrections' Operations Manual ("DOM") section 54030.4.3.2 restricting inmates' property to non-electric typewriters--thereby prohibiting inmates from possessing electric typewriters--is a "regulation" required to be adopted pursuant to the APA.

On March 19, 1992, after the filing of this Request for Determination, the Department of Corrections ("Department") notified OAL that as of January 7, 1992 it had rescinded the language in section 54030.4.3.2 and instructed all staff to

". . . cease using all sections of DOM (including 54030) which were determined to be regulatory and not yet adopted as a regulation."²

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF CORRECTIONS' QUASI-LEGISLATIVE ENACTMENTS?

Penal Code section 5058, subdivision (a) declares that:

"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 Chapter 3.5 . . . of the Government Code [the APA]. . . .*"
(Emphasis added.)

Clearly, the APA applies to the Department's quasi-legislative enactments.³

II. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision(g), defines "regulation" in part as:

". . .every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]"

Government Code section 11340.5, 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 (g) 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 [the APA] [Emphasis added.]*"

In *Grier v. Kizer*,⁴ 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 (g):

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?

If an uncodified 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 the 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.]"⁵

A. IS THE CHALLENGED RULE A RULE OR STANDARD OF GENERAL APPLICATION OR SUPPLEMENT TO SUCH A RULE OR STANDARD?

Section 54030.4.3.2 ("Inmate Property") states that

"Typewriters shall be portable non-electric and shall not exceed \$200.00 value. *Wardens* may make exceptions to allow an electric typewriter, without memory capability, on an individual basis. [Emphasis added.]"

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.⁶ In the context of rules applying to prisoners, the courts have articulated a narrower standard. The following is a discussion, quoted from **1988 OAL Determination No. 13**,⁷ of this "narrower standard":

"In *Stoneham v. Rushen* I⁸ (1982), the California Court of Appeal held that a '*comprehensive*' inmate classification scheme constituted 'a rule of *general* application significantly affecting the male prison population in the custody of the Department [in California].' [Emphasis added.] Three other published opinions have followed *Stoneham* I."⁹

The requirement that inmates within *all* California prisons are generally limited to portable non-electric typewriters clearly establishes that the challenged rule is a standard of general application. The use of the plural "wardens" does not transform the regulation into an "institutional" or "local rule"¹⁰ that applies only

at one particular prison, e.g., Old Folsom Prison. The "wardens" at individual prisons may only make exceptions to the rule, but the rule applies generally to all prisons *unless* a warden decides otherwise.

B. DOES THE CHALLENGED RULE INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

Penal Code section 5058, subdivision (a), declares that "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons"

Penal Code section 5054 declares that

"The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director [of the Department of Corrections]"

A rule which specifies *which* items of personal property inmates may possess clearly implements, interprets and makes specific the Department's authority to supervise, manage and control the state prisons.

III. DOES THE CHALLENGED RULE FALL WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.¹¹ Rules concerning certain specified activities of state agencies, however, are not subject to the procedural requirements of the APA.¹² None of these general exceptions apply here. Further, none of the specific exceptions contained in recently amended Penal Code section 5058 apply.¹³

The Department originally contended in its July 19, 1991, "Reply to Request for Determination" that the Requester was challenging "California State Prison at Folsom, Operational Procedure #2," rather than challenging DOM section

54030.4.3.2. The Department's argument was that Operational Procedure #2 was a "local rule" limited only to Folsom Prison and is therefore non-regulatory.

We disagree. Although the Requester's June 15, 1990 cover letter referred to "Operational Procedure #2," the Requester enclosed *both* "Operational Procedure #2" *and* DOM section 54030.4.3.2. "Operational Procedure #2" permits only one typewriter, maximum value \$200, "portable manual only" and is a restatement and implementation of the statewide DOM section 54030.4.3.2. The Old Folsom Prison warden did not make an exception to section 54030.4.3.2 and thereby create a local rule, but chose instead to follow the statewide rule of general application.

On March 19, 1992, OAL received a letter from Chief Deputy Denninger of the Department which withdrew the original response and conceded that section 54030.4.3.2 was a regulation.¹⁴

CONCLUSION

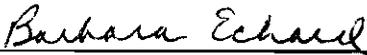
For the reasons set forth above, OAL finds that

- (1) the Departments's quasi-legislative enactments are generally required to be adopted pursuant to the APA;
- (2) Department of Corrections' Operations Manual section 54030.4.3.2 is a "regulation" as defined in Government Code section 11342, subdivision (g);
- (3) no exceptions to the APA requirements apply; and
- (4) for the time period that Department of Corrections' Operations Manual section 54030.4.3.2 was in effect, it violated Government code section 11340.5, subdivision (a).

DATE:

April 26, 1995


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ENDNOTES

1. This Request for Determination was filed by L. Austin Edmondson, who at the time of filing the request, was an inmate at Old Folsom Prison, Folsom, California.
2. The March 19, 1992 letter from Mr. Denninger, Chief Deputy Director for the Department, stated

"It has been brought to my attention that the Office of Administrative Law (OAL) is in the process of completing an active consideration in the request for determination on behalf of Edmondson v. Department Operations Manual (DOM) Section 54030.4.3.2.

"As a result of an order of the Court in *Tooma v. Rowland*, the Department of Corrections may not enforce any provisions of our DOM that is regulatory and has not yet been adopted pursuant to the Administrative Procedure Act. This DOM section has not been promulgated as a regulation, is not used by the Department, and has, in effect, been rescinded. We will not be pursuing this as a regulation and will rescind the language in DOM Section 54030.4.3.2.

"For your information, I have issued Administrative Bulletin Number 92/2 (copy attached) dated January 7, 1992 and distributed it to all staff directing them to cease using all sections of DOM (including 54030) which were determined to be regulatory and not yet adopted as a regulation."

3. For a detailed description of the APA and the Department of Corrections' history and three-tier regulatory scheme and the line of demarcation between statewide and institutional, e.g., "local rules," see **1992 OAL Determination No. 2** (Department of Corrections), California Regulatory Notice Register 92, No. 13-Z, March 27, 1992, p. 40.
4. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
5. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
6. *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).
7. **1988 OAL Determination No. 13** (Department of Corrections), typewritten p. 7, California Regulatory Notice Register 88, No. 38-Z, September 16, 1988, p. 2944.
8. *Stoneham v. Rushen I* (1982) 137 Cal.App.3d 729, 735, 188 Cal.Rptr. 130, 135.

9. *Hillery v. Rushen* (9th Cir. 1983) 720 F.2d 1132; *Stoneham v. Rushen II* (1984) 156 Cal.App 3d 302, 309, 203 Cal.Rptr. 20, 24; *Faunce v Denton* (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125.
10. For a thorough discussion of "local rules" and why they are not "regulations" see **1992 OAL Determination No. 4** (Department of Corrections), California Regulatory Notice Register 92, No. 14-Z, April 3, 1992, p. 441.
11. Government Code section 11346.
12. 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. (g).)
 - 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. (g).)
 - c. Rules that "[establish] or [fix] *rates, prices, or tariffs.*" (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)
 - f. There is weak 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). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, CRNR, 91, No. 43-Z, p. 1451, 1458, 1461; typewritten version, pp. 175-177. Like *Grier v. Kizer*, **1991 OAL Determination No. 6** rejected the idea that *City of San Joaquin* (cited above in this note) was still good law.

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 annual Determinations Index 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: Melvin Fong), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814-4602, (916) 323-6225, CALNET 8-473-6225. The price of the latest version of the Index is available upon request. Three indexes are currently available for the following calendar years: (1) 1986-88, (2) 1989-1990, and (3) 1991-1992. Also, regulatory determinations are published in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$162.

Though the 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.

13. At the time the Determination Request was filed there were no specific statutory exemptions from the APA for the Department of Corrections. Effective January 1, 1995 Penal Code section 5058, subdivisions (c) and (d) declare that

"(c) The following are deemed not to be 'regulations' as defined in subdivision (b) of Section 11342 of the Government Code:

(1) Rules issued by the director or by the director's designee applying solely to a particular prison or other correctional facility, provided that the following conditions are met:

(A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public.

(2) Short-term criteria for the placement of inmates in a new prison or other correctional facility, or subunit thereof, during its first six months of operation, or in a prison or other correctional facility, or subunit thereof, planned for closing during its last six months of operation, provided that the criteria are made available to the public and that an estimate of fiscal impact is completed pursuant to Section 6055 and following, of the State Administrative Manual dated July 1986.

(3) Rules issued by the director or director's designee that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code.

(d) The following regulations are exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code under the conditions specified:

(1) Regulations adopted by the director or the director's designee applying to any legislatively mandated or authorized pilot program or a departmentally authorized pilot program, provided that an estimate of fiscal impact is completed pursuant to Section 6055, and following, of the State Administrative Manual dated July 1986, and that the following conditions are met:

(A) A pilot program affecting male inmates only shall affect no more than 10 percent of the total state male inmate population; a pilot program affecting female inmates only shall affect no more than 10 percent of the total state female inmate population; and a pilot program affecting male and female inmates shall affect no more than 10 percent of the total state inmate population.

(B) The director certifies in writing that the regulations apply to a pilot program that qualifies for exemption under this subdivision.

(C) The certification and regulations are filed with the Office of Administrative Law and the regulations are made available to the public by publication pursuant to subparagraph (F) of paragraph (2) of subdivision (b) of Section 6 of Title 1 of the California Code of Regulations.

The regulations shall become effective immediately upon filing with the

Secretary of State and shall lapse by operation of law two years after the date of the director's certification unless formally adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(2) Action or actions, or policies implementing them, taken by the department and based upon a determination of imminent danger by the director or the director's designee that there is a compelling need for immediate action, and that unless that action is taken, serious injury, illness, or death is likely to result. The action or actions, or policies implementing them, may be taken provided that the following conditions shall subsequently be met:

(A) A written determination of imminent danger shall be issued describing the compelling need and why the specific action or actions must be taken to address the compelling need.

(B) The written determination of imminent danger shall be mailed within 10 working days to every person who has filed a request for notice of regulatory actions with the department and to the Chief Clerk of the Assembly and the Secretary of the Senate for referral to the appropriate policy committees.

Any policy in effect pursuant to a determination of imminent danger shall lapse by operation of law 15 calendar days after the date of the written determination of imminent danger unless an emergency regulation is filed with the Office of Administrative Law pursuant to subdivision (e). This section shall in no way exempt the department from compliance with other provisions of law related to fiscal matters of the state." (Stats. 1994, ch.692, sec. 1 (AB 3563)).

14. See Note 2, *supra*.