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STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

*Bill Jones*  
BILL JONES  
SECRETARY OF STATE

|  |   |                                     |
|--|---|-------------------------------------|
| <b>In re:</b>                                  | ) | <b>1997 OAL Determination No. 2</b> |
| <b>Request for Regulatory</b>                  | ) |                                     |
| <b>Determination filed by PAUL</b>             | ) | <b>[Docket No. 90-035]</b>          |
| <b>LEE JONES regarding the</b>                 | ) |                                     |
| <b>DEPARTMENT OF</b>                           | ) | <b>January 15, 1997</b>             |
| <b>CORRECTIONS' Operations</b>                 | ) |                                     |
| <b>Manual section 54020.27--</b>               | ) | <b>Determination Pursuant to</b>    |
| <b>requiring urinalysis of</b>                 | ) | <b>Government Code Section</b>      |
| <b>inmates who participate in</b>              | ) | <b>11340.5; Title 1, California</b> |
| <b>the family visiting program<sup>1</sup></b> | ) | <b>Code of Regulations,</b>         |
|  |   | <b>Chapter 1, Article 3</b>         |

**Determination by: JOHN D. SMITH, Director**

HERBERT F. BOLZ, Supervising Attorney  
MELVIN FONG, Legal Assistant

**SYNOPSIS**

The issue presented to the Office of Administrative Law ("OAL") is whether or not the Department of Corrections' rule requiring urinalysis of inmates who participate in the family visiting program, is a "regulation" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

Though expressing no opinion as to whether the challenged rule is in accord with other applicable law, OAL has concluded that up to the time the Department issued its memo rescinding it, the challenged rule was a "regulation".

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## **THE ISSUE PRESENTED**

OAL has been requested to determine whether or not the Department of Corrections' Operations Manual ("DOM") section 54020.27, requiring urinalysis of inmates who participate in the family visiting program, is a "regulation" required to be adopted pursuant to the APA.

## **THE DECISION**

The Office of Administrative Law finds that:

- (1) the Department's quasi-legislative enactments are generally required to be adopted pursuant to the APA;
- (2) Up to the time the Department issued its memo rescinding the rule, Operations Manual section 54020.27 was 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 during which Department of Corrections' Operations Manual section 54020.27 was in effect, it violated Government code section 11340.5, subdivision (a).

## 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.<sup>2</sup>

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

Government Code section 11342, subdivision (g), 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 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 [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*,<sup>3</sup> 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.]"<sup>4</sup>

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

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.<sup>5</sup> 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,<sup>6</sup> of this "narrow standard":

"In *Stoneham v. Rushen I*<sup>7</sup> (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*."<sup>8</sup>

**Background**

Title 15, California Code of Regulations, section 3174, outlines the Family Visiting program for inmates. Family visiting is distinguished from "personal contact visits," according to the CCR, section 3174, subsection (d). Family visiting is deemed "a privilege" and allows for inmates and families to have extended and overnight visiting time together "commensurate with institution security . . . ." (Section 3174, subsection (a).)

### Challenged Rule

Section 54020.27 of the Operations Manual ("Urinalysis") states that:

"Inmates who request to participate in the family visiting program *shall agree in writing, to voluntarily submit* to a urinalysis test prior to and upon completion of the visit, if requested." (Emphasis added.)

As a part of the Department Operations Manual, which "contains policy and procedures for *uniform* operation of the Department," (Section 12010.6 of the DOM, emphasis added) this urinalysis requirement is a standard of general application.<sup>9</sup>

As evidence of the rule's enforcement, the requester submitted a memorandum dated April 29, 1990 from the California Medical Facility, Vacaville on the subject of Family Visiting. The memo states that

"[e]ffective immediately, ALL inmates participating in the Family Visiting Program will be required to submit to a urinalysis each time they receive a family visit. Failure to do so will result in a CDC-115 [rules violation report] and removal from the Family Visiting Program."

This memo demonstrates that the challenged rule was implemented and that the requirement was mandatory.

- 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] . . . ."

Up until 1994<sup>10</sup>, Penal Code section 2601(d) stated that prisoners had the right

"to...personal visits; provided that the department may provide such restrictions as are necessary for the reasonable security of the institution."

The urinalysis testing of inmates who participate in the family visiting program implements, interprets and makes specific the Department's authority to supervise, manage and control the state's prisons. The test also implements, interprets, and makes specific the Department's authority to restrict visitation for security reasons, since (according to the Vacaville memo) an inmate's family visitation privilege could be denied if he or she refused to take the test.

In addition, the rule placed inmates in a "Catch-22" situation. Section 54020.27 reads that a prisoner "*shall* agree in writing, to *voluntarily* submit to a urinalysis test prior to and upon completion of the visit, if requested." (Emphasis added.) The mandatory "shall" would seem to negate the "voluntary" aspect of the urinalysis testing.

Title 15 of the California Code of Regulations, sections 3170-3182 outline the Department's regulations on visitation. We have not found any regulations requiring urinalysis testing of inmates as a condition of

visitation.

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.<sup>11</sup> Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.<sup>12</sup>

We find no exception from the APA for the rule on urinalysis testing of inmates involved in the Family Visiting Program.

In its response dated July 2, 1993, the Department said that they had

"rescinded the departmentwide enforcement of any regulatory provisions of the Operations Manual (DOM) [including the rule challenged here] which had not been adopted pursuant to the [APA] and the institutions/parole regions were instructed to implement local procedures consistent with applicable laws and regulations."<sup>13</sup>

Thus, the agency tacitly acknowledged that the challenged statewide rule should have been adopted pursuant to the APA.

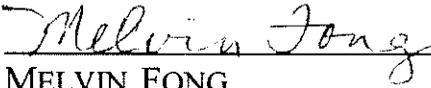
**CONCLUSION**

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) Up to the time the Department issued its memo rescinding the rule, Operations Manual section 54020.27 was 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 during which the Department of Corrections' Operations Manual section 54020.27 was in effect, it violated Government code section 11340.5, subdivision (a).

DATE: January 14, 1997

  
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HERBERT F. BOLZ  
Supervising Attorney

  
\_\_\_\_\_  
MELVIN FONG  
Legal Assistant

**Office of Administrative Law**  
555 Capitol Mall, Suite 1290  
Sacramento, California 95814  
**(916) 323-6225**, CALNET 8-473-6225  
Telecopier No. (916) 323-6826

1. This Request for Determination was filed by Paul Lee Jones, B-98000, California Medical Facility South, Facility III, P.O. Box 4000-14-E-5-U, Vacaville, California 95696-4000 . The Department of Corrections was represented by R.A. Spindler, Chief, Regulations and Policy Management Branch, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001, (916) 327-4270.

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 "32" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. 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, March 2, 1992, Docket No. 90011), California Regulatory Notice Register 92, No. 13-Z, March 27, 1992, p. 40.
3. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
4. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
5. *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).

6. 1988 OAL Determination No. 13 (Department of Corrections, August 31, 1988, Docket No. 87-019), California Regulatory Notice Register 88, No. 38-Z, September 16, 1988, p. 2944.
7. *Stoneham v. Rushen I* (1982) 137 Cal.App.3d 729, 735, 188 Cal.Rptr. 130, 135.
8. *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.
9. For a thorough discussion of "local rules" and why they are not "regulations" see 1992 OAL Determination No. 4 (Department of Corrections, March 25, 1992, Docket No. 90013), California Regulatory Notice Register 92, No. 14-Z, April 3, 1992, p. 441.
10. Penal Code section 2601(d) was amended by Stats. of 1994, c. 555 (SB 1260).
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. (b).)
  - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code,

sec.11342, subd. (b).)

- c. Rules that "[establish] or [fix, rates, prices, or tariffs]." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. 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 991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 1990 OAL Determination No. 6 (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496) rejected the idea that *City of San Joaquin* (cited above) 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 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:

Melvin Fong), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, CALNET 8-473-6225. The price of the latest version of the Index is available upon request. 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. In its response dated July 2, 1993, the Department of Corrections stated:

"As a result of an order of the Court in *Tooma v. Rowland*, the Department of Corrections rescinded the departmentwide enforcement of any regulatory provisions of the Operations Manual (DOM) which had not been adopted pursuant to the Administrative Procedure Act and the institutions/parole regions were instructed to implement local procedures consistent with applicable laws and regulations.

"The attached Administrative Bulletin Number 92/41, dated November 16, 1992 demonstrates that the regulatory provisions of DOM Section 54020 (including Section 54020.27) have not yet been adopted and are therefore rescinded making moot the issue to be decided."