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STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

Bill Jones
BILL JONES
SECRETARY OF STATE

In re:)	1997 OAL Determination No. 3
Request for Regulatory)	
Determination filed by FRANK)	[Docket No. 90-036]
W. SNYDER regarding the)	
DEPARTMENT OF)	January 24, 1997
CORRECTIONS' policy)	
designating additional gangs)	Determination Pursuant to
beyond those listed in Title)	Government Code Section
15, section 3378 of the)	11340.5; Title 1, California
California Code of)	Code of Regulations,
Regulations ¹)	Chapter 1, Article 3
_____)	

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' policy designating additional gangs, beyond the ones specifically listed in the California Code of Regulations, is a "regulation" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

OAL has concluded that up to the time the Department amended its regulation, the challenged policy was a "regulation".

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THE ISSUE PRESENTED

OAL has been requested to determine whether or not the Department of Corrections' policy designating additional gangs beyond the ones listed in section 3378 of Title 15 of the California Code of Regulations 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 amended Title 15, section 3378, the policy 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' policy 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.²

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*,³ 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.]"⁴

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.⁵ 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. 13,⁶ of this "narrow standard":

"In *Stoneham v. Rushen I* (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*."⁸

Challenged Rule

At the time of the request, Title 15, California Code of Regulations, section 3378 was entitled "Critical Case Information." Subsection (c)(1) read:

"CDC Form 812-A shall be completed if an inmate or parolee has been designated as a member, affiliate or defector of the Nuestra Familia, Mexican Mafia, Texas Syndicate, Black Guerilla Family, or Aryan Brotherhood."

Such information was to be placed in the prisoner's central file, and used in consideration of his/her "transfer, placement, and case supervision." (subsection (a)(1))

The requester alleges that the Department also identified the following entities as gangs in addition to the ones listed in section 3378(c)(1): "New Structure," "Northern Structure," and "Nuestra Raza." As evidence of the rule's enforcement, the requester submitted a copy of his CDC Form 812-A (with "State of California" printed at the top), "Notice of Critical Information - Prison Gang Identification," which noted his affiliation with the "Northern Structure (NS)" gang. This form states:

"This notice is to alert staff to information in subject's case record that is verification of his involvement in prison gang activity. References *must be considered in classification, placement, transfer, assignment, and supervision of inmate.*" [Emphasis added.]

This notice demonstrates that the Department had identified an additional gang not listed in section 3378(c)(1). It also demonstrates that a prisoner's affiliation with such a gang affected his status in prison. That the information was listed on a Department form and not a specific institution form would suggest general application and not just a local rule.⁹

Since the original request, section 3378 has been amended and expanded:

On May 14, 1993,¹⁰ the Department published a Notice of Proposed Regulatory action amending section 3378. In its Informative Digest, the Department stated that:

"[t]his action adopts a regulation *implementing current policy* to avoid possible forced interruption of the established protections." [Emphasis added.]

It appears from the proposed notice that the Department sought to codify

its policy on gang affiliation. Section 3378(c)(1), approved by OAL in 1994,¹¹ now reads:

"CDC Form 812-A or B shall be completed if an inmate/parolee has been verified as a member, associate, or dropout of a gang (prison gang or disruptive group) as defined in section 3000, or has safety concerns relating to gangs."

"Gang," as defined in Title 15, section 3000 of the CCR, now means:

"[A]ny ongoing formal or informal organization, association or group of three or more persons which has a common name or identifying sign or symbol whose members and/or associates, individually or collectively, engage or have engaged, on behalf of that organization, association or group, in two or more acts which include, planning, organizing, threatening, financing, soliciting, or committing unlawful acts or acts of misconduct"

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]"

Managing prisoners involved in gangs is related to the supervision, management, and control of 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.¹² Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.¹³

We find no exception from the APA covering designation of prison gangs.

CONCLUSION

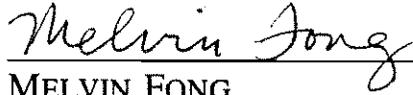
For the reasons set forth above, OAL finds that

- (1) the Departments's quasi-legislative enactments are generally required to be adopted pursuant to the APA;
- (2) Up to the time the Department amended its regulation, the designation of additional gangs 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' policy designating additional gangs beyond those listed in section 3378, Title 15 was in effect, it violated Government code section 11340.5, subdivision (a).

DATE: January 24, 1997



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ENDNOTES

1. This Request for Determination was filed by Frank W. Snyder, D-92107, P.O. Box 7500, C-6-E-119, Crescent City, CA 95531. We have no record of a response from the Department of Corrections. The Department's address is 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 "45" 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. California Regulatory Notice Register 93, No. 20-Z, p. 527.
11. Filed with the Secretary of State on June 17, 1994.
12. Government Code section 11346.
13. 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 1991 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.)

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