

Memorandum

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*Bill Jones*  
BILL JONES  
SECRETARY OF STATE

To: Secretary of State/  
State Archives

Date: August 11, 1997

From: Melvin Fong, Legal Assistant  
OFFICE OF ADMINISTRATIVE LAW

Subject: Corrected Filing to  
(1997 OAL Determination No. 4 (Docket No. 90-039), Filed w/  
Secretary of State on August 4, 1997)

Please include the attached document--1997 OAL Determination No. 5 (OAL Docket No. 90-039)--as a correction to the above-referenced filing. There is already another determination with the same number (previously filed on January 29, 1997). In addition, we have made other editorial changes to this refiled document.

Thank you.

Attachment

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STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

In re: ) 1997 OAL Determination No. 5  
)  
) [Docket No. 90-039]  
)  
Request for Regulatory )  
Determination filed by ) August 4, 1997  
STEVEN GEORGE BROWN )  
regarding the PELICAN BAY ) Determination Pursuant to  
STATE PRISON'S ) Government Code Section  
Memorandum dated May 30, ) 11340.5; Title 1, California  
1990 concerning mail ) Code of Regulations,  
supplies<sup>1</sup> ) Chapter 1, Article 3  
)  
)

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Determination by: JOHN D. SMITH, Director

HERBERT F. BOLZ, Supervising Attorney  
SHERRY AKRAWI, Staff Counsel

**SYNOPSIS**

The issue presented to the Office of Administrative Law ("OAL") is whether or not a Pelican Bay State Prison Memorandum concerning mail supplies allowed for indigent inmates 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 either sound policy or in accordance with other applicable law, OAL has concluded that the challenged rule is not a "regulation."

## THE ISSUE PRESENTED

OAL has been requested to determine whether or not the Pelican Bay State Prison's Memorandum dated May 30, 1990, concerning mail supplies allowed for indigent inmates, is a "regulation" required to be adopted pursuant to the APA.

## BACKGROUND

On July 25, 1990, Steven George Brown, an inmate at Pelican Bay State Prison, submitted this request for determination challenging the Prison's use of the memorandum dated May 30, 1990 on the subject of indigent mail which states: "It is institution policy to issue writing paper, envelopes and minimum postage for up to eight letters a month upon the inmate's request."

A summary of the request, along with an invitation for public comment, was published in the California Regulatory Notice Register in July 1993.<sup>2</sup>

## ANALYSIS

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

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

"the director [of the Department of Corrections "Department"] 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>3</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>4</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

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

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

- implement, interpret, or make specific the law enforced or administered by the agency, or
- 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>5</sup>

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

**Challenged Rule**

The requester states that [spelling and grammar same as original]:

"On July 11, 1990 I and all other Inmates at Pelican Bay State Prison received attached Memorandum dated May 30, 1990.

....

"#7. I wrote a inmate appeal for request for metered envelopes I was being denied, on 7-8-90 Lt. William stated "no retro active envelopes period". #8. The unit does not have blank white envelopes to mail out legal mail and the Law Library officers refuse to issue manilla or

white envelopes unless you are mailing them from the Law Library and then only to the courts. Officer Healey told me no more envelopes for attorneys will be sent to your cell. This is severely restricting my access to the courts in which I have a current case going. This is severely affecting my correspondence with my friends and relatives creating problems because I cannot communicate, its a choice of writing the court or family forced upon me by Pelican Bay State Prison. Access to the Law Library is between 10-15 days apart.  
.....

"Upon asking there is no directors bulletin regarding these 8 envelopes per month for only Pelican State Prison inmates, Pelican Bay State Prison does not have the legal right to change, alter or refuse to implement a "State Mandated Law" in effect that's what is happening under the words (up to five.)"

The memorandum dated May 30, 1990, which requester attached as Exhibit A to his declaration, contains the following statements:

"It is institution policy to issue writing paper, envelopes and the minimum postage for up to eight letters a month upon the inmate's request. It is the responsibility of the inmate's Correctional Counselor I to verify and inform the inmate of the indigent status. This should be done through the DDPS system."

A review of the *California Department of Corrections Operations Manual* reveals a section titled "54010.5 PAPER, ENVELOPES, AND STAMPS FOR INDIGENT INMATES"(revised Sept. 9., 1991). This section states:

"Writing paper, envelopes and the minimum postage required for first class domestic mail for up to five one-ounce letters per week shall be supplied to an indigent inmate, upon the inmate's request. An indigent inmate shall have free and unlimited mail to any court as described in subsection 54010.20.4. Foreign mail requiring postage in excess of the minimum required for first class domestic mail shall be limited to two of the five one-ounce letters. A charge shall not be

placed against future deposits to the inmate's trust account to recover the cost of materials and postage provided while the inmate was without funds.

- “• Indigent inmate means one who is totally without funds at the time last eligible for withdrawal of funds for canteen purposes.”

Except for the reference to subsection 54010.20.4, the above-quoted section is a restatement of the departmental regulation, section 3134 in Title 15 of the California Code of Regulations.

This determination is limited to the question of whether or not the Prison's rule is a "regulation." The questions the requester raises as to whether or not the policy in the Memorandum and the Prison's actions are a denial of his access to the courts will not be addressed. Nor will the question of whether the policy in the Memorandum is changing or altering the Department's duly adopted regulation be addressed. The requester also suggests a wording change to section 3134 of the California Code of Regulations. The appropriate method for such a recommendation would be a petition to the Department pursuant to Government Code section 11340.6.

The requester clearly states that the rule applies to inmates at Pelican Bay State Prison. He does not allege that the rule applies generally to all prisoners throughout California. The Memorandum dated May 30, 1990 states that it is "From: Pelican Bay State Prison, P.O. Box 7000, Crescent City, CA 95531-7000."

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>6</sup> In the context of rules applying to prisoners, the courts have articulated a narrower standard.<sup>7</sup> The following is a discussion, quoted from 1988 OAL Determination No. 13,<sup>8</sup> of this "narrow standard":

"In *Stoneham v. Rushen I*<sup>9</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>10</sup>

In addition, California courts have long distinguished between (1) statewide rules and (2) rules applying solely to one prison.<sup>11</sup> In *American Friends Service Committee v. Proconier* (1973),<sup>12</sup> the case which overturned a trial court order directing the *Director of the Department* to adopt *departmental* rules and regulations pursuant to the APA, the California Court of Appeal stated:

"The rules and regulations of the Department are promulgated by the Director and are *distinguished from the institutional rules* enacted by each warden of the particular institution affected." [Emphasis added.]<sup>13</sup>

*Proconier* is especially significant because it was this case which the Legislature in essence abrogated by adopting the 1975 amendment to Penal Code section 5058 which made the Department subject to the APA. The controversy was over whether or not the Director's Rules, the rules "promulgated *by the Director*" (emphasis added), were subject to APA requirements.<sup>14</sup> The Director's rules were expressly distinguished from "institutional rules enacted by each warden . . . ."

Requiring these local institutional rules to be adopted pursuant to the APA would have absurd consequences. Wardens would have to go through the public notice and comment process prior to, for instance, establishing or modifying rules setting hours during which meals are served! While, as noted in prior Determinations,<sup>15</sup> departmental decisions on statewide matters often have major fiscal and policy consequences, local administrative decisions are, for the most part,<sup>16</sup> much less significant. Requiring full-bore APA procedures for these myriad decisions would seriously undercut the individual warden's ability to carry out his or her legal duties. Requiring the Department to adopt statewide rules pursuant to the APA was a

controversial legislative policy decision, from which many legislators dissented. Had the members been informed that local rules would also be subject to APA adoption requirements, it is likely the bill would not have passed.

Since this request was filed, the Legislature has acted to codify OAL's determination that "local" institutional rules are not subject to the APA. Effective January 1, 1995, Penal Code section 5058, subdivision (c) declares, in part, that

"(c) The following are deemed not to be 'regulations' as defined in subdivision (b) [now subdivision (g)] 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 . . . ." [Emphasis added.]

This new statutory language shows that the Legislature intends for local prison rules to be exempt from APA adoption procedures, provided certain conditions are met.

The Requester has not alleged that the challenged rule has application beyond the walls of Pelican Bay State Prison. By its terms, it clearly applies solely to Pelican Bay State Prison.

We, therefore, conclude that the challenged rule is not a "regulation" within the meaning of the APA, because it is not a rule or standard of general application. It is a "local" rule applying solely to one particular prison. Since the challenged rule does not meet the first part of the two-part test, it is not necessary to apply the second part of the test.

### CONCLUSION

For the reasons set forth above, OAL finds that Pelican Bay State Prison Memorandum dated May 30, 1990 concerning indigent mail is not a "regulation" within the meaning of the APA, and thus does not violate Government Code Section 11340.5.

DATE: August 4, 1997



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## ENDNOTES

1. This Request for Determination was filed by Steven George Brown, C-19766, P.O. Box 7000-B-7-202, Crescent City, CA 95531-7000. 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 "67" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. Reg. 93, No. 30-Z, p. 933.
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, March 2, 1992, Docket No. 90-011), 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. 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.
8. **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.
9. *Stoneham v. Rushen I* (1982) 137 Cal.App.3d 729, 735, 188 Cal.Rptr. 130, 135.
10. *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.

11. See *In re Allison* (1967) 66 Cal.2d 294, 292, 57 Cal.Rptr. 593, 597-98 (rules prescribed by Director include "D2601," Rules of the Warden, San Quentin State Prison include "Q2601"); *In re Harrell* (1970) 2 Cal.3d 675, 698, n.23, 87 Cal.Rptr. 504, 518, n.23 ("Director's Rule" supplemented by "local regulation"--Folsom Warden's Rule F 2402); *In re Boag* (1973) 35 Cal. App. 3d 866, 870, n. 1, 111 Cal.Rptr. 226, 227, n. 1 (contrasts "local" with "departmental" rules). See also *Department of Corrections*, 20 Ops.Cal.Atty.Gen. 259 (1952) ("the rules and regulations of the Department of Corrections *and* of the particular institution. . . ." Emphasis added.)
12. (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
13. *Id.*, 33 Cal.App.3d at 258, 109 Cal.Rptr. at 25.
14. A further discussion of the dichotomy between institutional and statewide rules continues to be reflected in more recent cases, such as *Hillery v. Enomoto* (1983) 720 F.2d 1132, 1135 note 2. The *Hillery* court, though forcefully rejecting arguments that Chapter 4600 of the Administrative Manual did not violate the APA, carefully noted:
 

"This case does not present the question whether the director may under certain circumstances delegate to the wardens and superintendents of individual institutions the power to *devise particular rules* applicable solely to those institutions. Nor does it present the question whether the wardens and superintendents may promulgate such rules without complying with the APA. Although some institutions were exempted from certain provisions of the guidelines involved here, the guidelines at issue were (1) adopted by the Director of the Department of Corrections and (2) are of *general applicability*." [Emphasis added.]
15. **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-82; typewritten version, p. 11 (how inmates are classified); **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, pp. 1685-1686; typewritten version, pp. 4-5 (internal administrative grievance procedure).
16. We recognized that the local rule banning installment contracts (at issue in **1988 OAL Determination No. 13**, Docket No. 87-019), implicated the public interest in inmate rehabilitation, in that the Requester was attempting to enroll in an accounting correspondence course on the installment plan. We also recognized that there appeared to be nothing "unique" to CMF indicating that such a rule was needed there, rather than statewide. These considerations, however, were not deemed sufficient to change our disposition of that matter.