

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

Bill Jones
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SECRETARY OF STATE

In re:)	1997 OAL Determination No. 7
Request for Regulatory)	
Determination filed by)	[Docket No. 90-043]
ROBERT J. HYLTON regarding)	
the PELICAN BAY STATE)	September 15, 1997
PRISON'S Substance Abuse)	
Program (as outlined in a)	Determination Pursuant to
memo), which includes)	Government Code Section
mandatory testing of inmates)	11340.5; Title 1, California
as a condition of)	Code of Regulations,
participating in)	Chapter 1, Article 3
work/training assignments¹)	
)	
)	

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 a Pelican Bay State Prison program involving mandatory drug testing of inmates as a condition of participating in work/training assignments, is a "regulation" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

OAL has concluded that the challenged rule is not a "regulation."

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THE ISSUE PRESENTED

OAL has been requested to determine whether or not the Pelican Bay State Prison's Substance Abuse Program, as outlined in a memo, which includes mandatory testing of inmates as a condition of participating in work/training assignments, is a "regulation" required to be adopted pursuant to the APA.

BACKGROUND

Robert James Hylton, an inmate at Pelican Bay State Prison ("Prison"), submitted a one-page request for determination (dated August 27, 1990) challenging the Prison's Substance Abuse Program, which is outlined in an undated memo. The program requires inmates to be drug free as a condition of participating in work/training assignments and also includes mandatory testing of inmates.

A summary of the request, along with an invitation for public comment, was published in the California Regulatory Notice Register in August 27, 1993.²

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] 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" 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*,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

- 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.]"⁵

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 asks "why...Level One inmates [are] forced to comply with a directive...designated for Level Four inmates?" (In the first two lines of the first paragraph of the memo, there is a reference to Level Four inmates. The inmate is a Level One inmate.) We note, however, that the memo is addressed "To: All General Population Inmates Facilities A and B." The heading of page 2 also reads "All General Population Inmates." We will treat the memo as addressed to the general population of inmates in those facilities.

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 was issued from "Department of Corrections, Pelican Bay State Prison, P.O. Box 7000, Crescent City, CA 95531-7000." It was signed by Charles D. Marshall, Warden.

The Substance Abuse Program, as outlined in the memo, requires inmates to "remain drug free as a condition of employment for all work, education, vocation and waiting list assignments." The program also requires mandatory testing as a condition of employment for all assignments. Any inmate who tests positive or refuses to test would have his work and privilege group status changed.

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.⁷ The following is

a discussion, quoted from 1988 OAL Determination No. 13,⁸ of this "narrow standard":

"In *Stoneham v. Rushen I*⁹ (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*."¹⁰

In addition, California courts have long distinguished between (1) statewide rules and (2) rules applying solely to one prison.¹¹ In *American Friends Service Committee v. Procnier* (1973),¹² 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.]¹³

Procnier 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.¹⁴ 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,¹⁵ departmental decisions on statewide matters often have major fiscal and policy consequences, local administrative decisions are, for the most part,¹⁶ 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.

On October 13, 1993, the Department of Corrections submitted a response to this

request. It "generally denies each and every conclusion and opinion stated in the Requestor's 'Request for Determination.'"¹⁷ The Department maintains that "Pelican Bay's local rule affected Pelican Bay and not the prison system generally, and it was adopted by Warden Marshall and not the Director of the Department" ¹⁸ The Prison's memorandum is "an individually tailored solution addressing local security concerns present at Pelican Bay, not statewide."¹⁹

The Requester has not submitted any evidence to the contrary.

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.

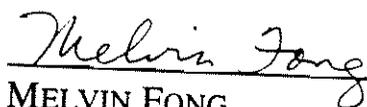
CONCLUSION

For the reasons set forth above, OAL finds that Pelican Bay State Prison's Substance Abuse Program is not a "regulation" within the meaning of the APA, and thus does not violate Government Code Section 11340.5.

DATE: September 15, 1997


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ENDNOTES

1. This Request for Determination was filed by Robert J. Hylton, D-47618, Pelican Bay State Prison, P.O. Box 7500, Crescent City, CA 95531. The agency's response was submitted by Marc D. Remis, Staff Counsel, Legal Affairs Division, Department of Corrections, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001, (916) 327-4540.

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 "100" 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. 35-Z, p. 1056.
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* (9th Cir.1983) 720 F.2d 1132. 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." [note 2, 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.

17. Agency Response, p. 1.
18. Id., at p. 2.
19. Id., at p. 3.