

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

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In re:	)	1998 OAL Determination No. 13
	)	
Request for Regulatory	)	[Docket No. 91-010]
Determination filed by	)	
LAWRENCE BITTAKER	)	August 11, 1998
regarding various sections	)	
of the DEPARTMENT OF	)	Determination Pursuant to
CORRECTIONS'	)	Government Code Section
Operations Manual <sup>1</sup>	)	11340.5; Title 1, California
_____	)	Code of Regulations,
	)	Chapter 1, Article 3

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney  
CINDY PARKER, Administrative Law Judge  
on Special Assignment  
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether certain sections of the Department of Corrections' Operations Manual contain "regulations" and are therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA"). The challenged sections concern inmate marriages, inmate activity groups, inmate access to general and law library services, inmate recreational programs, inmate handicraft programs, inmate mail, inmate visiting and inmate property.

**12**

OAL has concluded that the manual sections contain some policies which are "regulations," some policies which restate statutory and regulatory provisions, and some policies which fall within the internal management and forms exceptions to the APA. Many of the policies which are "regulations" were adopted pursuant to the APA after the request was filed.

### ISSUE

OAL has been requested to determine whether certain sections (within subchapters 53000 and 54000) of the Department of Corrections' Operations Manual contain "regulations" required to be adopted pursuant to the APA.<sup>2</sup> Lawrence Bittaker filed this request as an inmate at San Quentin. The Department concedes that some of the challenged policies should have been adopted pursuant to the APA.

### 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 [the APA]* . . . . [Emphasis added.]"

Clearly, the APA generally applies to the Department's quasi-legislative enactments.<sup>3, 4</sup>

#### **II. DO THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?**

The key provision in 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 agency rules are "regulations," and thus subject to APA adoption requirements, 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*,<sup>5</sup> the California Court of Appeal upheld OAL's two-part test<sup>6</sup> 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>7</sup>

### Background of the challenged rule

For many years, the Department of Corrections maintained a "family of manuals," including the Classification Manual and the Administrative Manual. These manuals contained most of the statewide rules governing prison administration. In 1990, these individually titled manuals were replaced by a nine-volume compendium entitled the "Department of Corrections Operations Manual" (also known as the Department Operations Manual or most commonly by the acronym "DOM"). The requester<sup>8</sup> and the Department<sup>9</sup> agree that material previously found in the Administrative Manual may now be found in DOM.<sup>10</sup>

A number of judicial decisions and OAL determinations have found that various manuals and manual provisions violated the statutory prohibition against agency use of "underground regulations," Government Code section 11340.5. In 1982, the California Court of Appeal struck down Forms 839 and 840, which had been issued as part of an administrative bulletin for inclusion in the Classification Manual.<sup>11</sup> In 1986, OAL determined that the Classification Manual violated Government Code section 11340.5. In 1988, OAL determined that part of the Administrative Manual violated Government Code section 11340.5.<sup>12</sup> In 1991, the California Court of Appeal ordered the Department to cease enforcement of the regulatory portions of DOM.<sup>13</sup> In this latter case, the Department had conceded that "much" of DOM violated the APA; the court found that "a substantial part" was regulatory.

Following these judicial decisions and OAL determinations, the Department formally adopted pursuant to the APA and printed in the California Code of Regulations, many rules that had previously been found solely in manuals.

This request concerns numerous sections of DOM Volume 5, "Custody/Security Operations."

**A. ARE THE CHALLENGED RULES “STANDARDS OF GENERAL APPLICATION?”**

The challenged rules are included in the Department Operations Manual, (“DOM”) or (“Manual”), which “contains policy and procedures for *uniform* operation of the Department,” (Section 12010.6, emphasis added). Therefore, these requirements appear to be standards of general application.

Public comments were received from two inmates who indicated that the challenged rules in general and specific portions of the challenged rules were being utilized at the California Medical Facility in Vacaville and at San Quentin.<sup>14</sup>

The August 30, 1991 memo from the Department of Corrections submitted with one of the public comments clearly treats the DOM as the governing policy resource on quarterly mail packages which may be received by inmates. We infer from the memo that section 54030 of the DOM had been issued and was being used statewide as of October 1, 1991.

The requester asserted that the Department was “utilizing, enforcing, or attempting to enforce” the rules contained in the challenged sections of the DOM.<sup>15</sup> The Department contends that subsections 53010.1-53010.8, 54010.1-54010.36, 54020.1-54020.41 and 54030.1-54030.22 are no longer being used and are therefore not applied to inmates statewide. The Department does not contend that as of the date of the request, March 31, 1991, the DOM sections were not being applied statewide. Considering this fact and the presumption that the APA applies if there is any doubt, we conclude that the challenged rules are standards of general application that apply (or applied) statewide to all inmates.

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

OAL will examine some examples of challenged rules contained in three subchapters of the Department Operations Manual. Statutes and regulations which are relevant to these policies follow.

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] . . . ."

Until 1994<sup>16</sup>, Penal Code section 2600 provided that prisoners could be deprived of only such rights necessary "to provide for the reasonable security of the institution" and "for the reasonable protection of the public."

In its May 20, 1998 response to the request for determination, the Department states:

"The Department contends that the following DOM sections have been cleared for use in that regulatory aspects of these sections have gone through the APA process, been approved by the Office of Administrative Law (OAL), and incorporated into the CCR."<sup>17</sup>

Subsections 53020.1 - 53020.11 regarding inmate activity groups, 53060.1 - 53060.18, regarding inmate access to library services, 53070.1 - 53070.12, regarding inmate vocational programs, and 53080.1 - 53080.7.4.1 regarding inmate handicrafts are listed as having been incorporated into the CCR.

### **DOM sections currently used by the Department statewide**

As an example, we will examine whether the DOM provisions regarding termination of inmate leisure activity groups have been fully incorporated into the CCR.

Section 3234 of Title 15, California Code of Regulations provides for formation of inmate leisure activity groups with the approval of the institution head.

Section 3235, Title 15, CCR<sup>18</sup> provides, in part, that the activities of such a group may be temporarily suspended or terminated if:

- “(1) The group’s activities threaten facility security or the safety of staff, inmates or the public.
- (2) The group is violating these regulations, local procedures, or its approved bylaws.”

Section 53020.1 of the Department Operations Manual provides for the formation of inmate leisure time activity groups which do not violate the law or rules and regulations of the Director of Corrections. It further provides that the Warden has the authority to disband any previously approved activity group when reasonable cause exists, including, but not limited to, noncompliance with Director’s rules, institution-approved bylaws for the group, etc.

Section 53020.1 of the DOM interprets section 3235 of the Title 15 of the CCR by broadening the criteria for suspending or terminating an activity group to include reasonable cause rather than merely restating the criteria in section 3235 of threat to facility security or the safety of staff, inmates or the public. It also omits noncompliance with the regulations as a basis for terminating an activity group. Those portions of the DOM section which broaden and omit criteria in section 3235 are “regulations.” That portion of the DOM section which merely reiterates that the warden has the authority to disband activity groups for noncompliance with the Director’s rules or approved bylaws of the group is not a “regulation” because this provision has already been adopted pursuant to the APA.

Despite the Department’s statement that the subchapter containing DOM section 53020.1 has been “cleared for use” and adopted as a regulation, that subchapter in fact contains “regulations” which have *not* been adopted pursuant to the APA, such as the provisions regarding termination of inmate leisure activity groups. The other subsections cited by the Department as having been fully incorporated into the CCR also contain language which implements, interprets or makes specific statutes, regulations or case law and which, therefore, constitute “regulations.”

## DOM sections not currently used by the Department statewide

In its response to the request for determination, the Department states:

“If any part of a section of the DOM contains regulatory language and is not covered in the CCR, the entire section is *precluded from being used*.”  
[Emphasis added.]<sup>19</sup>

The following DOM subsections were identified by the Department as not having been “cleared for use”: 53010.1-53010.8 regarding inmate marriages, 54010.1-54010.36 regarding inmate mail, 54020.1-54020.41 regarding inmate visiting, and 54030.1-54030.22 regarding inmate property. In the absence of any other evidence, OAL concludes that this is a tacit admission that each of the subsections contains at least one “regulation.”

OAL will examine two sets of DOM provisions which the Department asserts are no longer being used to determine whether they contain “regulations.” The first set of provisions relates to inmate visitation.

Until 1994<sup>20</sup>, Penal Code section 2601, subdivision (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.”

Prior to 1994, section 3170, Title 22, CCR was silent as to the degree and type of physical contact permitted between inmates and visitors.

Section 54020.4 of the DOM provides, in part: “An inmate and their visitor may embrace, including a kiss, at the beginning and end of each visit. No other personal body contact is permitted.” The section further states that visitors, except children under the age of ten, shall not sit on an inmate’s lap.

In 1998 OAL Determination No. 3, OAL found that section 54020.4 of the DOM was a regulation because it implemented, interpreted and made specific the Department’s authority to restrict visitation for security reasons.<sup>21</sup> It further found that the DOM section was being used as a standard throughout the Department of Corrections.

A 1994 amendment to section 3170, Title 15, CCR cured this problem by adopting the relevant language of the DOM section.

Another regulation regarding inmate visitation, section 3173, Title 15, CCR provides in subsection (e):

“Any person coming onto the grounds of an institution, their vehicle and the articles of property in their possession are subject to inspection to whatever degree is consistent with the institution’s security needs.”

Subsection 54020.9 of the DOM restates this language. However, it also refers to unclothed body searches, searches of minors, and the circumstances under which both shall be conducted. These provisions of the subsection interpret section 3173, Title 15, CCR and are therefore “regulations,” as are any other similar provisions which interpret, implement or make specific the Department’s authority to limit inmate visitation.

We will next examine some DOM provisions regarding inmate property.

Penal Code section 2601 provides, in part, that inmates of state prisons shall have the right to own personal property.

Section 3190, Title 15, CCR provides that the combined volume of an inmate’s state-issued and allowable personal property items shall not exceed six cubic feet. In addition, institutions may allow any two of the following items: one television receiver, one musical instrument, one radio, one recorded tape/disk playback unit, one typewriter.

Section 54030.4 of the DOM restates these provisions, which restatement is not a “regulation.” However, the following sections designate what is considered non-expendable property to be tracked, what type of inmate clothing is permissible and what type of property is permissible. These are far more specific than the CCR provisions and clearly interpret the Department’s authority to limit inmate property.

One of the limitations contained in section 54030.4.3.2 states:

“Typewriters shall be portable non-electric and shall not exceed \$200 value.

Wardens may make exceptions to allow an electric typewriter, without memory capability, on an individual basis.”

1995 OAL Determination No. 3 found that the typewriter restriction was a “regulation,” but that the Department had rescinded the rule as of the date the determination issued.<sup>22</sup>

We note that the Department asserts that subsections 53010.1-53010.8 regarding inmate marriages, 54010.1-54010.36 regarding inmate mail, 54020.1-54020.41 regarding inmate visiting, and 54030.1-54030.22 are precluded from use as staff has been instructed to use local rules instead of these subsections.<sup>23</sup>

### **III. DO THE CHALLENGED RULES FOUND TO BE “REGULATIONS” FALL WITHIN ANY *SPECIAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?**

After this request was filed, the Department’s enabling act was amended to include several express exemptions from APA rulemaking requirements (Penal Code section 5058, subdivisions (c) and (d)).<sup>24</sup> OAL is obliged to consider both the state of the law at the time the request was filed,<sup>25</sup> and the state of the law as of the date this determination is issued.<sup>26</sup>

In its response, the Department does not contend that any of these special exemptions applies. OAL concurs. None of these special exemptions applies here.

### **IV. DO THE CHALLENGED RULES FOUND TO BE “REGULATIONS” FALL WITHIN ANY *GENERAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?**

Generally, all “regulations” issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.<sup>27</sup> Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.<sup>28</sup> OAL will examine whether selected examples of the challenged rules fall within the general exception concerning “internal management” or the general exception concerning forms.

## INTERNAL MANAGEMENT

Section 53060.9 of the DOM provides:

*"A CDC Form 400, Quarterly Library Operations Report, (Exhibit A) shall be completed and submitted with the quarterly Education Report in October, January, April and July of each year. The reports shall be submitted no later than the fifteenth day of each designated month for the previous quarter and shall be sent to the Chief of Education."* (Emphasis added.)

This form is attached to this determination as Appendix "A," following the endnotes. Though the text of the DOM section refers to the form as the "quarterly report," the form itself bears the heading "monthly" report. We will refer to it as the Monthly Library Operations Report.

We will consider whether this DOM provision falls within the internal management exception to the APA.

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

*"'Regulation' means 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, except one that relates only to the internal management of the state agency."* (Emphasis added.)

*Grier v. Kizer* provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (b), the *Grier* court states:

*"Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements

[a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes. . . .*' [Fn. omitted.] . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.][<sup>29</sup>]

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,] and embodied 'a rule of general application significantly affecting the male prison population' in its custody. . . .

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception. . . ."<sup>30</sup>

The form surveys library books and periodicals, circulation, expenditures, hours of operation, number of inmate workers, number of inmate appeals and special library activities or services provided. It facilitates the collection of information about the institution libraries and is completed by staff for the use of other staff. The collection of this data facilitates the informed purchase and replacement of library stock and provides a vehicle for monitoring library use and services in general. There is no indication that the requirement of the collection of this data has any significant effect upon inmates. Therefore, it is concluded that Section

15060.9 of the DOM mandates an information collection procedure which relates only to the internal management of the Department.

## FORMS

OAL will next consider whether the form used for the Monthly Library Operations Report falls within the form exemption to the APA.

Government Code section 11342, subdivision (g), provides in part:

“‘Regulation’ does not mean . . . *any form* prescribed by a state agency or any instructions relating to the use of the form, *but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.*” [Emphasis added.]<sup>31</sup>

This statutory provision contains a significant restriction on the use of the “form” exception. The limits to the “form” exception have been covered in a previous determination:

“According to the leading case, *Stoneham v. Rushen*, the language quoted directly above creates a ‘statutory exemption relating to *operational forms.*’ (Emphasis added.)<sup>32</sup> An example of an operational form would be as follows: a form which simply provides an operationally convenient space in which, for example, applicants for licenses can write down information that existing provisions of law already require them to furnish to the agency, such as the name of the applicant.”

“By contrast, if an agency form goes beyond *existing legal requirements*, then, under Government Code section 11342, subdivision (b), a formal regulation is ‘*needed to implement the law under which the form is issued.*’ For example, a hypothetical licensing agency form might require applicants to fill in marital status, race, and religion--when none of these items of information was required by existing law. The hypothetical licensing agency would be making new law: i.e., ‘no application for a license will be approved unless the applicant completes our application form, i.e., furnishes his or her name, marital status, race, and religion.’ [Emphasis added.]”

"In other words, according to the *Stoneham* Court, if a form contains 'uniform substantive' rules which are used to implement a statute, those rules must be promulgated in compliance with the APA. On the other hand, a 'regulation is *not* needed to implement the law under which the form is issued' (emphasis added) insofar as the form in question is a simple operational form limited in scope to *existing* legal requirements."

"In sharp contrast, the Agency Response reads section 11342 as exempting from the APA 'any' form prescribed by a state agency. This reading of section 11342 is too broad."<sup>33</sup>

An interpretation of the forms language in section 11342 which permits agencies to avoid APA rulemaking requirements by the simple expedient of typing regulatory material into a form would result in the exception swallowing the rule. There would be no limit to the degree to which agencies would be able to avoid public notice and comment, OAL review, and publication in the California Code of Regulations. Read in context, and in light of the authoritative interpretation rendered by the *Stoneham* Court, section 11342 cannot be reasonably interpreted in such a way as to free agencies from all APA compliance responsibilities.

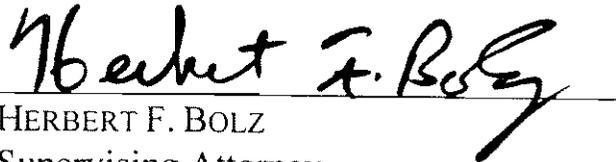
The form at issue in the matter at hand is a general survey form which does not require a regulation to implement the law under which the form is issued. The form has no significant effect upon inmates. Therefore, it is concluded that the Monthly Library Operations Report form is exempt under the forms exemption to the APA.

## CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) The challenged policies in subchapters 53000 and 54000 of the Department Operations Manual contain "regulations," which are without legal effect unless adopted in compliance with the Administrative Procedure Act.
- (2) The challenged policies also contain restatements of existing statutes, regulations or case law, which restatements need not be adopted pursuant to the APA.
- (3) Some of the "regulations" fall within the internal management exception to the APA, such as the Monthly Library Operations Report form.
- (4) Some of the "regulations" fall within the forms exception to the APA, such as the Monthly Library Operations Report form.

DATE: August 11, 1998



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## ENDNOTES

1. This Request for Determination was filed by Lawrence Bittaker, who, at the time of filing, was incarcerated at San Quentin. The Department of Corrections was represented by Peggy McHenry of the Regulations and Policy Management Branch, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001, (916) 327-4270.
2. According to Government Code section 11370:

*"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act."* [Emphasis added.]

*We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.*
3. For a detailed description of the APA and the Department of Corrections' history, three-tier regulatory scheme, and the line of demarcation between (1) statewide and (2) 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. The APA would apply to the Department's rulemaking even if Penal Code section 5058 did not expressly so provide. The APA applies generally to state agencies, as defined in Government Code section 11000, in the executive branch of Government, as prescribed in Government Code section 11342, subdivision (a).
5. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 667, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a

distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

*Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

6. The *Grier* Court stated:

"The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was belatedly published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

7. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

8. Request, pp. 1-2.

9. Agency response, p. 1.

10. Volume seven of DOM concerns "General Administration."

11. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.

12. **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, p. 1682 (inmate/parolee appeal procedure).

13. *Tooma v. Rowland* (Sep. 9, 1991) California Court of Appeal, Fifth Appellate District, FO15383 (granting writ of mandate ordering Director of Corrections "to cease enforcement of those portions of the Department Operations Manual that require compliance with the Administrative Procedure Act pending proof of satisfactory compliance with the provisions of the Act," typed opinion, pp. 3-4).

14. An inmate of San Quentin alleged generally that the Department was enforcing the Department Operations Manual and, specifically, section 54030.15 of that manual. An inmate housed at the California Medical Facility South questioned the authority of the Department of Corrections to implement section 34030 (sic) with an August 31, 1991

memo attached which revised section 54030 of the Department Operations Manual regarding the property items which may be received in packages by inmates.

15. Request for Determination. p.2
16. Penal Code section 2600 was amended to provide that prisoners in state prisons may only be deprived of rights reasonably related to legitimate penological interests.
17. Agency response. pp. 2-3.
18. As amended in 1994.
19. Agency response. p.3
20. Penal Code section 2601, subdivision (d), was amended by Stats. 1994, c. 555 (SB 1260), and again amended in 1996.
21. **1998 OAL Determination No. 3** (Department of Corrections. Docket No. 90-048, May 8, 1998) CRNR 98. No. 21-Z, May 22, 1998, p. 1015
22. **1995 OAL Determination No. 3** (Department of Corrections. April 26, 1995, Docket No. 90-026) CRNR 95. No. 41-Z, October 13, 1995, p.1715.
23. This rule and others which have not been adopted pursuant to the APA nonetheless remain in the DOM. Through Administrative Bulletins the Department instructs its staff not to use these sections. The Department has not addressed the issue of whether these rules violate section 11340.5 in that they have been issued and not removed from the DOM. We note that the Department has not submitted any evidence of the local rules which it asserts are used in lieu of the prohibited DOM sections.
24. All state agency "regulations" are subject to the APA unless expressly exempted by statute. Government Code section 11346. Express statutory APA exemptions may be divided into two categories: special and general. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120,126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself). *Special* express statutory exemptions, such as Penal Code section 5058, subdivision (d)(1), which exempts Corrections' pilot programs under specified conditions, typically: (1) apply only to a portion of one agency's "regulations" and (2) are found in that agency's enabling act. *General* express statutory exemptions, such as Government Code section 11342, subdivision (g), part of which exempts internal management regulations from the APA, typically apply across the board to all state agencies and are found in the APA.
25. Penal Code section 5058, subdivision (c), codified case law regarding the local rule exception.

26. **1998 OAL Determination No. 7** (Department of Social Services, Docket No. 91-001, June 18, 1998), typewritten version, p. 9, California Regulatory Notice Register 98, No. 30-Z, July 24, 1998, p. 1397, at 1400.
27. Government Code section 11346.
28. 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, 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.
29. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, fn. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
30. (1990) 219 Cal.App.3d 422 436, 268 Cal Rptr. 244, 252-253.
31. Government Code section 11342, subdivision (g).
32. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.

33. **1993 OAL Determination No. 5** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020). California Regulatory Notice Register 94, Volume 2-Z, January 14, 1994, p.61 at 105; typewritten version at p. 266.

MONTHLY LIBRARY OPERATIONS REPORT

Month Fiscal Year Date Submitted
Name of Institution

A. Collection

1. Total number of volumes in library at end of month:

Fiction Nonfiction Law Total

Types of materials not in total above:

Paperbacks Tapes Phono records Microfiche

2. Items missing or damaged at end of month (specify number and types)
Estimated value \$

3. Gifts: Number of volumes of books received this month
Number of issues of magazines received this month

4. New materials purchased this month:

Fiction Nonfiction Law Total

How many of the following did you buy this month:

Paperbacks Tapes Phono records

Microfiche Other (specify)

5. Number of subscriptions: Magazines Newspapers

6. Quantity of books withdrawn or discarded this month

8. Circulation (Defined as the loaning of library materials for any period of time)

1. Circulation from your collection this month:

Fiction Nonfiction Law\*

Note: Law circulation includes in-library use since most law material do not loan. Above figures should not include ILL since it will be counted elsewhere.

2. Your institutional population count as of the last day of this month

3. Interlibrary loans requested any library (total)

ILL's actually received (total)

\*Requests to State Law Library Circulation Collection

4. Service to Restricted Housing Units (describe or give quantity figures if available)

\*Note: These are totaled in ILL above but are to be shown separately also.

Appendix "A"

C. Library Use

1. Number of inmates using (entering) the library this month \_\_\_\_\_
2. Hours of library operation this month (explain) \_\_\_\_\_  
Days this library is open (circle appropriate ones)  
Mon., Tues., Wed., Thurs., Fri., Sat., Sun.  
What evenings are you open, and the hours? \_\_\_\_\_  
What are your weekend hours? \_\_\_\_\_

D. Information and Reference Inquiries (defined as assisting a user to locate information within those materials in the collection or by obtaining an ILL that would contain the information wanted.)

1. Number of these inquiries this month \_\_\_\_\_

E. Expenditures

1. Total dollar amount of purchase orders placed for publications or other types of library materials this month \$ \_\_\_\_\_

F. Inmate Workers

1. Total number of inmate workers in library \_\_\_\_\_
2. Number of paid inmate workers in library \_\_\_\_\_

G. Inmate Appeals/Grievances

1. Number of inmate appeals filed against library this month \_\_\_\_\_ Describe nature of appeal briefly.

H. Narrative

1. Describe briefly special activities or special library services this month. Include such things as listening centers, job information, special service for elderly and handicapped, etc. Attach additional pages if necessary.

\_\_\_\_\_  
Librarian Signature or Signature and Title of other person  
submitting information if not the librarian