

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW



In re:)
 Request for Regulatory) 1998 OAL Determination No. 19
 Determination filed by)
 JOHN R. WITMYER) [Docket No. 91-019]
 regarding the DEPARTMENT)
 OF CORRECTIONS,) August 31, 1998
 CALIFORNIA)
 CORRECTIONAL CENTER-) Determination Pursuant to
 NORTHERN/ COASTAL) Government Code Section
 CAMPS Operational) 11340.5; Title 1, California
 Procedure No. 800¹) 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 the Department of Corrections, *California Correctional Center--Northern/Coastal Camps "Operational Procedure No. 800 - Inmate Medical Services"* contains "regulations" which are without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

This document will be referred to as "Operational Procedure No. 800" or "the Operational Procedure."

OAL has concluded that parts of Operational Procedure No. 800:

- (1) insofar as applied solely to the main prison complex of the California Correctional Center located near Susanville (in contrast to the Northern/Coastal Camps, e.g., the Parlin Fork Camp at Ft. Bragg), are *not* "regulations" because they are "local rules" which apply solely to one particular prison.
- (2) as applied to the Northern/Coastal Camps, are restatements of existing law which need not be adopted pursuant to the APA. Some of the policies which were restatements of duly adopted regulations at the time of the request ceased to be restatements when the duly adopted regulations were later revised.²
- (3) as applied to the Northern/Coastal Camps, are "regulations," because they are not restatements of existing law and it is not clear, after reviewing the Penal Code together with the record of this proceeding, that they are "local rules" applying to one particular prison--because they apply to 16 camp facilities widely dispersed across Northern California.

ISSUE

OAL has been requested to determine whether Operational Procedure No. 800 of the Department of Corrections ("Department") contains "regulations" required to be adopted pursuant to the APA.³ John R. Witmyer filed this request as an inmate at the California Correctional Center at Susanville, in Lassen County.

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.⁴

II. DO THE CHALLENGED RULES CONSTITUTE "REGULATIONS" 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 **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*,⁵ the California Court of Appeal upheld OAL's two-part test⁶ 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.]"⁷

A. ARE THE CHALLENGED RULES "STANDARDS OF GENERAL APPLICATION?"

Background

In the late 1950's and early 1960's, the Legislature amended the Penal Code to establish the California Conservation Center. The purpose of the Center was to facilitate inmate work on the following:

"public conservation projects, including, but not limited to, forest fire prevention and control, forest and watershed management, recreational area development, fish and game management, soil conservation or forest watershed revegetation." (Emphasis added.)⁸

It appears that the original legislation supplied the name and location of the first (or one of the first) conservation centers, "the California Conservation Center at

Lassen.”” A legal treatise published in 1969 shows three conservation centers: (1) the [California] Conservation Center, Susanville, Lassen County; (2) the Sierra Conservation Center, Jamestown, Tuolumne County; and (3) the Southern Conservation Center, Chino, San Bernardino County.¹⁰ (Presumably, the former California *Conservation* Center at Susanville was referred to in practice as “CCC.”) In 1977, Penal Code section 6200 was amended to provide:

“There are hereby established, under the jurisdiction of the Director of Corrections, the Sierra Conservation Center, *the North Coast Conservation Center* and the Southern Conservation Center, hereafter referred to collectively as the ‘conservation centers.’” (Emphasis added.)

In 1977, Penal Code section 6203 was amended to provide in part:

“The Sierra Conservation Center shall be located in the Tuolumne area of California. *The North Coast Conservation Center shall be located in the North Coast area of California.* The Southern Conservation Center shall be located on the grounds of the California Institution for Men at Chino.” (Emphasis added.)

Also, in 1977, section 2043 was added to the Penal Code to authorize the Director of Corrections to establish a men’s prison “to be known as the California *Correctional* Center at *Susanville.*” (Emphasis added.) (The Departmental Operations Manual refers to the California *Correctional* Center as “CCC.”)¹¹ Whereas code sections establishing conservation centers are located in Chapter 9 (“Conservation Centers”) of Title 7 of Part 3 of the Penal Code, the statute which established the Correctional Center at Susanville is located in Chapter 1 (“Establishment of State Prisons”) of Title 1 of Part 3. The California Correctional Center at Susanville is not listed in Penal Code section 6200, the statute formally establishing the three “conservation centers.”

The designation “North Coast Conservation Center” does not appear among the prisons listed in the Departmental Operations Manual (“DOM”).¹² Reviewing the Departmental Operations Manual description of the Susanville facility, however, it appears that the conservation center functions previously operated under the statutory name “California *Conservation* Center at Susanville [or at Lassen]” continue under the statutory name “California *Correctional* Center at Susanville.” (Emphases added.) Operational Procedure No. 800 uses the terms “North/Coastal

"Camps" to refer to what appear to be the same series of camps--located from Suisun to Ft. Bragg--formerly operated under the auspices of the "Conservation" Center at Susanville.¹³

Section 62110.4.6 of the DOM states that 16 camps are under the supervision and direction of the California Correctional Center, Camp Associate Warden. These camps are situated in locations as dispersed as Suisun, Ft. Bragg and Klamath. For purposes of this discussion, we assume that "Northern/Coastal Camps" is a reference to the 16 camps supervised and directed by the California Correctional Center.

The typical prison is physically located in one place. For instance, San Quentin State Prison is located on San Francisco Bay in Marin County, near the city of San Rafael. By contrast, the statute creating conservation centers envisioned a more dispersed multiple-location design for these centers. Penal Code section 6203 provides in part that:

"The Director of Corrections shall . . . construct and provide equipment for suitable buildings, structures, and facilities for the conservation centers, *branches thereof, and permanent, temporary, and mobile camps operated therefrom.* . . . The director may establish such *branches* of the conservation centers as may be necessary." (Emphasis added.)¹⁴

OAL concludes that the Correctional Center at Susanville, though apparently performing functions assigned in Chapter 9 (Penal Code sections 6200-6208) to the North Coast Conservation Center, has not been designated by statute as a "conservation center." Because (1) the California Correctional Center is not established by statute as a conservation center, and OAL finds no other legal authority for the California Correctional Center to act in that capacity; (2) Penal Code 2603 section unequivocally states that "the North Coast Conservation Center shall be located *in the North Coast area* of California," and (3) the Correctional Center at Susanville is located far from the "Coast" near the Nevada border, OAL cannot reasonably conclude that this Susanville institution is the "North Coast Conservation Center" provided for in Penal Code sections 6200 and 6203.

The Challenged Rule

The challenged rule is California Correctional Center--Northern/Coastal Camps Operational Procedure No. 800 - Inmate Medical Services ("Operational Procedure No. 800").

Operational Procedure No. 800 is a four-page document bearing a 9/90 revision date, attached to a memo dated Feb. 21, 1991, signed by Warden W.A. Merkle. The cover memo is addressed to "All DOM Holders." W.A. Merkle was the Warden of the California Correctional Center at Susanville, in Lassen County. We infer from the request, from Operational Procedure No. 800, and from the agency response, that the memo was in fact addressed *not* to all DOM holders in California, but rather to all DOM holders under Warden Merkle's supervision, including not only those at the main Susanville complex, but also those at the North/Coastal Camps.

The first page is headed "California Correctional Center - Northern/Coastal Camps." It contains a "Purpose and Objective" section which describes the level of medical care to be provided to inmates and persons authorized to provide it. The remainder of the page assigns responsibility for the operation and revision of Operational Procedure No. 800. For "methods" and "resource supplements," the reader is referred to Infirmary Medical Memo No. 601, which is attached.

The second, third and fourth pages of Operational Procedure No. 800 consist of "Infirmary Medical Memo No. 601" ("Medical Memo No. 601"), which bears the heading "CCC Lassen, Medical Memo # 601, Medical Division, Inmate Medical Services."

Medical Memo No. 601 consists of four sections:

- (1) "Purpose and Objective," which restates word-for-word the Purpose and Objective section of the immediately prior page headed "Operational Procedure,"
- (2) "A. Clinic Hours," which states medical clinic, pharmacy and treatment hours at "CCC Lassen,"
- (3) "B. Treatment At Times Other Than Regular Clinic Hours," which

addresses treatment during non-clinic hours, emergency health care, and the consequences of abusing it, and

(4) "C. Medically Excused From Assignment," which covers procedures when an inmate has a medical excuse for not participating in his or her assignment.

The Memo also instructs supervisors to send an inmate to the infirmary immediately if the supervisor believes that medical evaluation should not be delayed until the next sick call. The Memo continues:

"Be aware that if the physician finds that the inmate [sent by the supervisor] is malingering, or not deemed an emergency, the inmate will receive a 128B. Continued abuse of emergency services will result in a CDC115."

1998 OAL Determination No. 8 reviewed a provision in a departmental manual instructing staff to report inmate behavior, relationships, cleanliness, attitude and personality on CDC Form 128-B (General Chron), concluding that the provision violated the statutory prohibition on agency use of underground regulations (Government Code section 11342, subdivision (g)), insofar as it significantly affected inmates.

Before reaching the dispositive issues of this determination, OAL first clarifies the scope of review. When a request for determination is properly submitted pursuant to Government Code section 11340.5, OAL is required to provide a written determination concerning whether the rule challenged by the requester is a "regulation," as defined under the APA.

In the context of a request for determination, OAL's authority is limited to answering the question of whether the state agency has improperly issued a rule without first putting it through notice and comment and the other procedures mandated by the APA. If the agency later elects to adopt the rule pursuant to the APA, OAL must apply the six legal standards at that point. Those issues cannot be prejudged in the determination context.¹⁵

Standard of General Application--Rules Applying to Prisoners

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.¹⁶

However, a different approach is taken in the case of rules applying to prisoners. California courts have long distinguished between: (1) statewide rules and (2) rules applying solely to one prison.¹⁷ In *American Friends Service Committee v. Procurier* (1973) (hereafter, "*Procurier*"),¹⁸ a 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.]¹⁹

Procurier is especially significant because the Legislature in essence abrogated its primary holding by adopting the 1975 amendment to Penal Code section 5058 which specifically made the Department subject to the APA. The controversy was whether the statewide Director's Rules, the rules "*promulgated by the Director*" (emphasis added), were subject to APA requirements.²⁰ The Director's rules were expressly distinguished in *Procurier* from "*institutional rules enacted by each warden*"

OAL has consistently taken the position, based on the part of *Procurier* that remains authoritative, that local prison rules are not subject to the APA. Since this request was filed, the Legislature has confirmed that "local" institutional rules are not subject to the APA. Since January 1, 1995, Penal Code section 5058, subdivision (c), has declared, 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 statutory language confirms that the Legislature intends for *local* prison rules to be exempt from APA adoption procedures, provided certain conditions are met. While departmental decisions on statewide matters often have major fiscal and policy consequences, purely local administrative decisions are, for the most part, less significant. Requiring full-bore compliance with APA procedures for these many decisions would seriously undercut the individual warden's administrative ability to carry out his or her legal duties. Clearly, however, the Legislature intends that all statewide rules are to be adopted through the APA notice and comment process. It would be inconsistent with legislative intent to permit the exception to swallow the rule, for instance, for the Department to repeal all statewide regulations, while at the same time dividing the state into three geographical regions each of which would be informally encouraged to re-issue as purported "local" rules the same provisions formerly printed in the CCR.

The Department's response to this request for determination does not distinguish between Operational Procedure No. 800 (1) as applied solely to the main Correctional Center complex at Susanville and (2) as applied to the Northern/Coastal Camps, but rather merely contends that the Operational Procedure is a local rule intended to apply to only one particular institution while the relevant section of the Department Operations Manual ("DOM") was being revised. The cover memo for Operational Procedure No. 800 states that it "will remain in effect until DOM Section 14040, Medical Administration is received, and implemented." As of the date of this determination, that DOM section had not been revised. The cover memo is addressed to all DOM holders, which OAL understands to mean all DOM holders within the jurisdiction of the Warden of the

California Correctional Center, including not only the main Correctional Center complex at Susanville, but also the camps.

OAL agrees in part with the Department's contention that the challenged rule falls within the local rule exception. *Insofar as applied solely to the main prison complex of the California Correctional Center located near Susanville (in contrast to the Northern/Coastal Camps, e.g., the Parlin Fork Camp at Ft. Bragg), Operational Procedure No. 800 is not a standard of general application because it is a "local rule" which apply solely to one particular prison.* Since it is not a standard of general application, it is not "regulation" subject to the APA.²¹ No further analysis of this aspect of the request for determination is needed.

The next issue to be discussed is whether Operational Procedure as applied to the Northern/Coastal Camps is a "local rule." Penal Code sections 6200 and 6303 establish a series of three conservation centers. One of the three, the North Coast Conservation Center, does not exist. Although DOM section 62111.4.6 states that the northern and coastal camps are under the supervision of the Correctional Center at Susanville, OAL can find no legal authority for Susanville standing in for the Conservation Center that *is* authorized by statute to have branches, the North Coast Conservation Center.

Penal Code 6082 provides that the word "prisons" refers to:

"all facilities, *camps*, hospitals and institutions for the confinement, treatment, employment, training and discipline of persons in the legal custody of the Department of Corrections."(Emphasis added.)²²

Thus, for some purposes, each "camp" is deemed to be a "prison."

On the other hand, as discussed above under "Background," the Penal Code clearly envisions that the "conservation centers" listed in section 6200 will have "branches thereof" and "camps operated therefrom." Thus, it seems reasonable to conclude that the Legislature intended that each "conservation center," together with its associated camps, should be deemed to constitute "a particular prison or other correctional facility." The problem is that the institution issuing Operational Procedure No. 800, California Correctional Center at Susanville, is *not* among those listed in Penal Code section 6200 as being authorized to have branches. OAL cannot rewrite the statute.

Thus, the issue remains: whether for the purposes of the exemption in Penal Code section 5058, subdivision (c), camps under the supervision and direction of the Warden of the California Correctional Center are to be considered, along with the California Correctional Center, as one institution.

If a court were to address this issue, it might consider the following factors in determining whether the local rule exception applies to Operational Procedure No. 800: the population of the 16 camps at issue in relation to the population of CCC, the degree of geographic dispersion of the camps, the seasonal or year-round nature of the camps, whether the camps and CCC are administered centrally, whether medical care for the camps and CCC is available only at one location, and whether inmate records are maintained in one location. All of these could be relevant to findings of fact that a court would make in deciding this issue. However, the charge of OAL is not to find facts or resolve factual issues, but to determine whether challenged agency policies are “regulations” which must be adopted pursuant to the APA.

We have found no indication that the Legislature intended the local rule exemption to be extended beyond a single correctional facility or prison. The wording of Section 5058, subdivision (c), of the Penal Code limits the exemption to those rules “applying solely to *a particular prison or other correctional facility*” (Emphasis added).

In the absence of a full factual record, OAL will apply the presumption stated in *Grier v. Kizer*,²³ “. . . any doubt as to the applicability of the APA’s requirements should be resolved in favor of the APA.”

Therefore, absent any statutory authority which defines the camps as branches of any conservation center authorized by Penal Code section 6003 to have branches, OAL must conclude that each camp is a separate prison as defined in Penal Code section 6082. Consequently, OAL concludes that to the extent that Operational Procedure No. 800 applies to the camps, it contains standards of general application. Thus, the first part of the two-part test has been satisfied. Next, OAL will consider the second part of the test.

3. DO THE CHALLENGED RULES 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]" (Emphasis added.)

The "Purpose and Objective" section of the Operational Procedure states:

"The Medical Department will provide every reasonable medical, surgical, *psychiatric*, and dental *treatment*, and will maintain *adequate equipment*, facilities and staff to provide such services." (Emphasis added.)

Except for the reference to "psychiatric . . . treatment" and maintaining "adequate equipment," this policy restates part of the 1991 version of section 3350, Title 15, California Code of Regulations. As a restatement, it does not interpret, implement or make specific the law enforced by the Department except for the references to psychiatric treatment and maintaining adequate equipment.

The same section of the composite memo also states:

"Only employees who are members of the medical staff, including paid consultants, are authorized to diagnose illness, and prescribe treatment."

This is essentially a restatement of a portion of the 1991 version of section 3354, subsection (a), Title 15, California Code of Regulations.

Following are examples of policies in the Purpose and Objective section of Operational Procedure No. 800 which are not mere restatements of law:

“First aid may be given by qualified employees only. Medical treatment will be given in accordance with prescribed Departmental and licensing standards.”

These policies vary slightly from the 1991 version of section 3354, Title 15, California Code of Regulations, which states:

“No other personnel nor inmates may [diagnose illness, prescribe medication or medical treatment for inmates], however, emergency first aid may be given in keeping with the nature and apparent seriousness of a person’s illness or injury. All medical treatment will be in accordance with sound principles of practice.”

Clearly, the related policies in the composite document interpret section 3354 and are therefore “regulations” without legal effect unless adopted pursuant to the APA.

After 1991, when the request was filed, section 3350, Title 15, California Code of Regulations, was revised to state:

“The Department shall only provide medical services for inmates which are based on medical necessity and supported by outcome data as effective medical care.”

When section 3350 was revised, the statement in the Operational Procedure was no longer a restatement of existing law; rather, it became a rule of general application that *interpreted* existing law.

The requester specifically questions the validity of the policy under section B of the composite document which states:

“Be aware that if the physician finds that the inmate is malingering, or not deemed an emergency, the inmate will receive a 128B. Continued abuse of emergency services will result in a CDC 115 [disciplinary violation].”²⁴

The Department responds that a form 128B is not a disciplinary document but an informational one and further asserts that continuing misuse of the process would be punishable as an administrative offense if it violated section 3314, Title 15, California Code of Regulations, which was in effect at the time of the request.²⁵

In other contexts, requirements that the form 128B be used have been adopted as regulations. For example, one regulation requires documentation on the form when denying a request that an inmate be released due to terminal illness.²⁶ At least a dozen regulations require use of the form.²⁷

Section 3314, Title 15, California Code of Regulations, provided as follows at the time of the request:

(a) Inmate misbehavior shall be classified as an administrative rule violation if the misconduct is of a minor nature, presenting no threat of physical injury, breach of institution security, introduction of dangerous contraband, or loss of property in excess of \$50. A felony offense shall not be classified as an ADMINISTRATIVE rule violation. ADMINISTRATIVE rule violations include but are not limited to:

- (1) Petty theft or unauthorized acquisition or exchange of personal or state property.
- (2) Destruction or misuse of state property valued at \$50 or less.
- (3) Possession of otherwise approved property, materials, items, or substances in excess of authorized limits.
- (4) Possession of property, materials, items, or substances not authorized by the institutions' approved property list presenting no threat to security, as described above.
- (5) Misuse of food
- (6) Tattooing

While it appears that misuse of emergency medical services could come within the definition of an administrative rule violation, it is not mentioned in section 3314. Therefore, the language in the composite document regarding such possible misuse and potential punishment interprets section 3314, is a "regulation," and is without legal effect unless adopted pursuant to the APA.

The remaining provisions in section B of the memo state policies directing that inmates who are suspected of substance abuse or are injured through the use of weapons or chemical agents, shall be brought to the clinic immediately. The circumstances of injuries are to be investigated immediately. These policies interpret and make specific the power given to the Director of the Corrections in Penal Code section 5054, to supervise the care, custody, and "treatment" of inmates.

Finally, section C contains policies regarding procedures that apply when an inmate is excused medically from his or her assignment. These policies also interpret and make specific the Director's power under Penal Code section 5054, to supervise the care, custody, and "treatment" of inmates.

If the Department wishes to exercise its discretion to issue rules on inmate medical services, it may adopt regulations through either the regular or the emergency rulemaking process.

III. DO THE COMPONENTS OF 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.²⁸ Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.²⁹

We conclude that none of these general exemptions applies here.

CONCLUSION

For the reasons set forth, OAL has concluded that parts of Operational Procedure No. 800:

- (1) insofar as applied solely to the main prison complex of the California Correctional Center located near Susanville (in contrast to the

Northern/Coastal Camps, e.g., the Parlin Fork Camp at Ft. Bragg), are not "regulations" because they are "local rules" which apply solely to one particular prison.

- (2) as applied to the Northern/Coastal Camps, are restatements of existing law which need not be adopted pursuant to the APA. Some of the policies which were restatements of duly adopted regulations at the time of the request ceased to be restatements when the duly adopted regulations were later revised.³⁰
- (3) as applied to the Northern/Coastal Camps, are "regulations," because they are not restatements of existing law and it is not clear, after reviewing the Penal Code together with the record of this proceeding, that they are "local rules" applying to one particular prison--because they apply to 16 camp facilities widely dispersed across Northern California.

DATE: August 31, 1998



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ENDNOTES

1. This Request for Determination was filed by John R. Witmyer, who, at the time of filing, was incarcerated at the California Correctional Center in Susanville, located in Lassen County. 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. If these provisions of the Operational Procedure are still in effect, they would need to be adopted pursuant to the APA.
3. 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.

4. 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.
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 677, 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. Penal Code section 6202, as amended by Statutes of 1963, chapter 1431, p. 2977, sec. 5.)
9. West's Annotated California Codes, historical note to Penal Code 6203 in main volume (1982). The reference to CCC Lassen was deleted in 1977.
10. California Continuing Education of the Bar, *California Criminal Law Practice II* (1969), front and back endpaper maps.
11. Page 62110.4 (revised May 23, 1989).
12. DOM. section 62110 (rev'd May 23, 1989).
13. A second prison is currently located near Susanville: High Desert State Prison. The request for determination appears to have no connection to this second institution.
14. Other Penal Code sections also contain similar language concerning "branches" and "camps operated therefrom." See sections 5067, 6202, 6206, and 6207.
15. The requester challenges Operational Procedure No. 800 not only as allegedly violating Government Code section 11340.5 (the statutory prohibition on agency use of underground regulations), but also on the grounds that it fails to satisfy the legal standards that apply to regulations proposed for inclusion in the California Code of Regulations (necessity, clarity, authority, non-duplication, reference and consistency). This determination does not address the specific contentions outlined in the request,

which relate to these six standards, such as the contentions that Operational Procedure No. 800 (1) is unclear and (2) is not consistent with sections 3350 and 3354 of Title 15, California Code of Regulations.

16. *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).
17. See *In re Allison* (1967) 66 Cal.2d 282, 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.)
18. (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
19. *Id.*, 33 Cal.App.3d at 258, 109 Cal.Rptr. at 25.
20. The dichotomy between institutional and statewide rules continues to be reflected in more recent cases, such as *Hillery v. Rushen* (9th Cir. 1983) 720 F.2d 1132, 1135. The *Hillery* court, though forcefully rejecting arguments that part of a statewide **manual** issued by the Department of Corrections 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 (1) were adopted by the Director of the Department of Corrections and (2) are of *general applicability*." (Emphasis added.) (720 F.2d at 1135, n. 2.)
21. As of the date the determination was requested, OAL concludes that the Operational Procedure fell within the case-law local rule exception to the APA. As of the date the Legislature codified existing law by enacting Penal Code section 5058, subdivision (c), OAL would conclude that the Operational Procedure is exempt from the APA pursuant to that statute.

22. The definition applies to titles 5 and 7 of the Penal Code. Title 7 is the part of Penal Code containing section 5058. Thus, the statutory definition applies to section 5058.
23. (1990) 219 Cal.App.3d 422,438;268 Cal.Rptr 244,253.
24. Request for determination.
25. Agency response, p.2.
26. Title 15, CCR, section 3076.2(a)(5).
27. Form 128-B is referred to in the following sections in Title 15 of the California Code of Regulations: 3040(e); 3041.2(d)(2); 3044(b)(1); 3075(d); 3076.2(a)(5) & (b)(3); 3084.7(f)(1)(A-B); 3162(b); 3317; 3326(b) & (d); 3378(b)(2); 3999.1.1 (p. 188.49 Attachment "E", p. 188.41, p. 188.42, p. 188.45 Attachment "C"); 3999.1.2 (p. 188.54).
28. Government Code section 11346.
29. 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.

30. If these provisions of the Operational Procedure are still in effect, they would **need to** be adopted pursuant to the APA.