

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW



In re:)
 Request for Regulatory) 1998 OAL Determination No. 27
 Determination filed by LOUIS)
 R. FRESQUEZ regarding a) [Docket No. 92-002]
 memo issued by the)
 DEPARTMENT OF) October 20, 1998
 CORRECTIONS, CALIFORNIA)
 STATE PRISON AT FOLSOM,) Determination Pursuant to
 limiting items which may be) Government Code Section
 sent to inmates, and) 11340.5; Title 1, California
 requiring inmates and their) Code of Regulations,
 family and friends to consent) Chapter 1, Article 3
 to the destruction of)
 unauthorized items¹)
 _____)

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
CINDY PARKER,² Administrative Law Judge
on Special Assignment
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether a policy issued by California State Prison at Folsom (1) listing items which may be sent to inmates in quarterly packages and (2) requiring destruction of unauthorized items sent, is a "regulation" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

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OAL has concluded that the part of the challenged policy listing which items may be sent is not a "regulation" subject to the APA. OAL has concluded that the part of the challenged policy requiring destruction of unauthorized items, which requires not only inmates, but also their family and friends to consent to confiscation and destruction of personal property, is a "regulation" and thus must be adopted in compliance with the APA.

ISSUE

OAL has been requested to determine whether a memorandum³ issued by California State Prison at Folsom ("Folsom") which (1) lists items that may be sent to inmates and (2) requires inmates and their family and friends to consent on Form VGA 413 (rev. 9/91) to the confiscation and destruction of unauthorized property is a "regulation" required to be adopted pursuant to the APA.⁴

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. After this request was filed, Penal Code section 5058 was amended to include several express exemptions from APA rulemaking requirements (subdivisions (c) and (d)). The applicability of these exemptions will be discussed below.

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 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 meets both parts of the two-part test, OAL must conclude that it is "regulation" and subject to the APA. In applying the two-part test, OAL is mindful of the principle stated by the *Grier* court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, [1978]. 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

Background of the Challenged Rule

Rules concerning personal property of inmates have been litigated on numerous occasions.⁸ Rules initially appeared in 1982 in the Department's Administrative Manual, chapter 4600.

In 1990, the Department's various manuals, including the Administrative Manual, were replaced by a nine-volume compendium entitled the Department Operations Manual ("DOM"). Inmate property is covered in DOM section 54030, which is divided into several dozen subsections.

DOM Subsection 54030.15 ("Processing of Disapproved Property") provides:

"The processing of property that inmates are not permitted to retain in their possession during incarceration shall be accomplished as follows:

- The institution shall not store inmate valuable property.
- Inmates who possess unauthorized property shall send the property home or donate it to any organization or person other than inmates or staff.
- Inmates shall sign appropriate statements, indicating their choice of disposition and agreement to the method for dispensing of their valuable property.

"Any personal property items which do not meet the criteria as established in this procedure, shall be disposed of in one of the following manners:

- Return to sender.
- Mailed out of the institution at the inmate's expense.

- Donated to a charitable organization.
- Donated to the institution.
- Render the item useless and dispose of per DOM Section 52051 ["Disposition of Contraband"]."

In 1991, in *Tooma v. Rowland*, the California Court of Appeal ordered the Department to cease enforcement of the regulatory portions of DOM.⁹ In this case, the Department had conceded that "much" of DOM violated the APA; the court found that "a substantial part" was regulatory.

The Department responded to *Tooma* by issuing a bulletin stating that parts of DOM could not be used until adopted pursuant to the APA.

Administrative Bulletin Number 92/2, issued January 7, 1992, provided in part:¹⁰

"The purpose of this bulletin is to notify staff and inmates that the Department Operations Manual (DOM) is still in effect. However, as the result of a recent court decision, some sections of DOM may not be used until they are processed pursuant to the Administrative Procedure Act (APA).

"Attached is a list of those DOM sections which the Department may use at this time. As the unlisted DOM sections are processed pursuant to the APA, they shall be added to the list and the updated list will be distributed. *It is anticipated that processing of all the unlisted DOM sections will be completed by June 1993.*

"Until the unlisted DOM sections are processed, each institution and parole region shall independently implement local procedures in accordance with all applicable laws and regulations to govern those policies and procedures which are not covered by a listed DOM section."
(Emphasis added.)

DOM Subsection 54030.15 ("Processing of Disapproved Property") was not listed in the Administrative Bulletin.

This Request for Determination

The subject of this request for determination is a memorandum issued by California State Prison at Folsom. The memorandum is addressed to "All Concerned," from Warden R.G. Borg, regarding "Quarterly and Annual Packages." Other parts of the memo make clear that the phrase "All Concerned" is intended to encompass family and friends of inmates, inmates, and staff. At the top of the memo is the name and mailing address of California State Prison at Folsom ("Folsom"). The first sentence states: "[a]ny and all packages addressed to inmates of Folsom State Prison must be in compliance with these *regulations*." (Emphasis added.)

In nine numbered paragraphs, the memo prescribes acceptable numbers, sizes, methods of delivery, and contents of packages sent to inmates by family and friends. Paragraph 2 provides:

"Packages will only be accepted using the special packaging address label. The address label must appear on the outside of the package or it will be refused. Both the inmate and the sender must sign the address label indicating that they have read and agree to the requirements stated thereon." (Emphasis added.)

The Department's response to the request for determination states that:

"Inmates and their correspondents were informed of the policy that any items not in compliance with the guidelines and listing on the form would be confiscated and disposed of per Receiving and Release Procedures." (Emphasis added.)¹¹

On the reverse side of the memo is a list of authorized items which may be mailed to inmates. At the bottom of the list of items is a 1991 address label to place on a package to an inmate. It states:

"No Exception Agreement: I authorize the R & R [Receiving and Release] Sergeant to confiscate and dispose of any and all items which are not on or meet the specifications of the approved list. I understand that all written correspondence, material and photographs are not on the approved list and will be confiscated and destroyed. I accept full responsibility for the contents of this package." (Emphasis added.)

There are signature lines for not only the inmate recipient, but also the sender. The requester contends that inmates should not be required to sign the "No Exception Agreement" in order to receive packages, and that inmates should be given a choice as to what is done with unauthorized items such as returning them to the sender or donating them to charity.

A. IS THE CHALLENGED RULE A "STANDARD OF GENERAL APPLICATION?"

The issue presented is whether the challenged policy is a "local rule" which is not subject to the APA because it does not constitute a standard of general application.

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.¹²

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.¹³ In *American Friends Service Committee v. Procunier* (1973) (hereafter, "*Procunier*"),¹⁴ 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.)¹⁵

Procunier 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 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. The Director's rules were expressly distinguished in *Procunier* from "institutional rules enacted by each warden"

OAL has consistently taken the position, based on *Procunier*, 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 [the APA].

(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.

In determining whether a "local rule" of the Department of Corrections is a standard of general application, OAL determines whether the rule, though officially designated as addressing a matter of only local concern, in reality addresses an issue of statewide importance.

Being labeled a "local rule" by the issuing agency is not dispositive. Whether a state agency rule constitutes a standard of general application does not depend solely on the official designation of the agency action. According to the California Court of Appeal:

"[i]f the action is *not only of local concern, but of statewide importance*, it qualifies as a regulation despite the fact it is called 'resolutions,' 'guidelines,' 'rulings' and the like."¹⁶

One indication of whether a particular matter should be deemed to be “of statewide importance” is whether the Department, *itself*, considered the matter of statewide importance by issuing pertinent *statewide* rules, in the California Code of Regulations, the DOM, another manual such as the Administrative Manual, or an administrative bulletin.

As noted above, under “Background of the Challenged Rule,” following the 1991 judicial decision striking down all regulatory portions of the DOM, the Department instructed individual institutions to “implement local procedures” on the topics covered in the invalidated DOM provisions. The Department stated that the invalidated DOM provisions were to be adopted pursuant to the APA *by June 1993*. As of the date this determination is issued in 1998, a significant number of important DOM provisions that were invalidated in 1991 have yet to be adopted pursuant to the APA,¹⁷ including section 54030.15--which is one of several dozen sections governing inmate property. Other important DOM provisions that have not yet been brought into compliance with the APA include mail (section 54010), visiting (section 54020), inmate funds (section 83050), and medical services (section 83080).

It appears at this point in time that the Department is mandating continued, expansive, statewide use of “local rules”--in lieu of adopting the invalidated DOM provisions pursuant to the APA. Such widespread use of the local rule exception is inconsistent with legislative intent to limit the use of “local rules” to specified circumstances. To allow the unlimited use of “local rules” to regulate matters of “statewide importance” would allow the “local rules exception” to swallow the rule requiring compliance with the APA.¹⁸

The agency response states: “[t]he Department contends that the [challenged rule] was a *local rule* enacted by the . . . Warden in compliance with the CCR.” (Emphasis added.)¹⁹

OAL infers that the Department, as in earlier matters, contends essentially that the Folsom rule cannot be a standard of general application because it addresses “*unique*” circumstances at Folsom and does not apply statewide to all prisoners. The Department developed this argument at length in its agency response in 1988 OAL Determination No. 13, which concerned so-called “local rules” of the California Medical Facility (“CMF”). In this CMF matter, the Department argued that “[t]he issue now to be decided is whether certain operational procedures *unique* [to] CMF are rules of ‘general application.’ ” (Emphasis added.)^{20, 21} In

1988, OAL was informed by the Department that it was:

“currently in the process of reviewing all existing procedural manuals and operations plans, with the objective of (1) transferring all regulatory material from manuals into the CCR, (2) combining all six existing manuals into a single more concise ‘Operations Manual,’ and (3) eliminating the duplicative material in the local ‘operations plans,’ while retaining in these plans material concerning *unique* local conditions.” (Emphasis added.)²² (n. 23)

OAL agrees that certain “local rules” concern matters *unique* to particular prisons, and that these “unique” matters should not be deemed to constitute rules of “general” application for reasons stated in 1988 OAL Determination No. 13.

For an example of a unique local rule, OAL turns to the San Quentin prison library rule cited by a 1970 California Supreme Court case:

“[Rule] 14. At maximum capacity, we can only accommodate 50 men at one time; after this amount the rule is ‘ONE MAN IN, AND ONE MAN OUT!!’ ”²³

This local rule responded to “practical limitations of space,”²⁴ i.e., unique circumstances at San Quentin involving the size of the room housing the library.

The requester has submitted two other forms from California State Prison, Solano (“Solano”)²⁵ and Avenal State Prison (“Avenal”). He contends that these forms demonstrate that the policy in the Folsom memo is not a local rule because it applies to more than one prison.

The form from Solano does not list items which may be sent to inmates. The form from Avenal State Prison was revised on March 14, 1997 and was effective from October 1, 1997 through December 31, 1997. The authorized items and quantities allowed differ from the Folsom list. For example, Folsom allowed up to six cartons of cigarettes, while Avenal allowed only five cartons. Folsom allowed up to five pounds of tobacco, while Avenal allowed 48 one-ounce containers. Tennis shoes at Folsom had to be predominantly white with white laces, while at Avenal they could be grey, white or black or a combination thereof.

Though the differences are minor, the Avenal list of authorized items is

sufficiently different from the Folsom list to support the conclusion that the Folsom policy was a local one.²⁶ More importantly, the portion of the rule listing items allowable in quarterly packages represents a response to unique local circumstances, such as the practical limitations of space.²⁷ Thus, OAL concludes that the part of the challenged rule listing items which may be sent to inmates in quarterly packages is not a standard of general application, and is thus not a “regulation.” Since this part of the rule does not meet the first part of OAL’s two-part test, it is not necessary to address the second part of the test.

For the reasons listed below, however, OAL concludes that the *second* portion of the rule, the portion dealing with disposition of unauthorized property (i.e., confiscation and destruction as the only option) is a standard of general application.

This confiscation rule does not apply solely to one prison. In 1998 OAL Determination No. 23, the requester attacked the same rule. This earlier request stated:

“ . . . This policy is in total violation of the D.O.M. section 54030.15, which clearly states that an inmate has several options including but not limited to sending the property home. Pelican Bay State Prison [PBSP] ignores this section of the D.O.M. (*Also other prisons such as Calif. Correctional Center*). They force the inmate to sign an agreement stating that they allow the R&R Sgt. to confiscate personal property that they feel is not allowed in their prison.” [Emphasis added.]

In this earlier determination, OAL responded:

“Mr. Allen [the requester] believes other prisons are using this same rule regarding confiscation of an inmate’s personal property. However, all of the documentation submitted with his request for determination came from PBSP. He provided nothing to substantiate that this is anything other than a local rule of PBSP.”²⁸

Thus, it was established that the confiscation policy was in use at Pelican Bay State Prison. The requester went on to allege that it was in use in other facilities such as the California Correctional Center, but could not substantiate that allegation. In the request now under review, inmate Fresquez has established that the confiscation rule was in use at Folsom.

Therefore, OAL concludes that the portion of the rule mandating confiscation as the only option was in use at two prisons, Pelican Bay and Folsom. Since the confiscation rule (1) was in use in at least two prisons, (2) was not limited to the unique circumstances of one institution, and (3) involves a topic covered by a statewide DOM provision, it is apparent that this rule is not only of local concern but of statewide importance. *Therefore, the confiscation rule is a standard of general application.*

B. DOES THE CONFISCATION RULE INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE DEPARTMENT OR GOVERN THE DEPARTMENT'S PROCEDURE?

Because the confiscation rule constitutes a standard of general application, OAL must determine whether it also satisfies the second part of the two-part "regulation" test.

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 1994²⁹, 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."

As of 1992, when the request for determination was filed, section 3147, Title 15, CCR provided that packages or enclosures in packages prohibited by the approved mail procedures for the facility could be disposed of, after prescribed notice to the inmate, in one of the following four ways: (1) returned to the sender, (2) mailed at the inmate's expense or the facility's expense to an outside correspondent, (3) placed in the inmate's unissued personal property; or (4) with the inmate's written

consent, either destroyed or donated to a charitable organization outside the facility. With regard to packages, section 3147 provided:

“Facilities will establish and make available to all inmates procedures for the receipt of packages by inmates from their correspondents in accordance with limits set for the assigned inmate work/training incentive group. Such procedures may require an inmate to obtain prior approval to receive a package. Facilities may refuse to accept packages addressed to an inmate if prior approval has not been obtained”

Section 3138, Title 15, CCR, subsection (b), now provides that all incoming packages and mail addressed to an inmate will be opened and inspected before delivery to the inmate. The above language from section 3147 is now incorporated into section 3138. Section 3147 now provides that unauthorized items in packages which are prohibited by facility mail procedures shall be destroyed unless the inmate designates who is to receive the disallowed items within 15 days of receiving notice of the disallowed mail and authorizes withdrawal from the inmate’s trust account to pay for the expense of mailing.

The “No Exception Agreement” requiring the inmate to consent to the destruction of unauthorized items mailed to the inmate *interprets* both the 1992 version of section 3147 and the current version of sections 3138 and 3147 by limiting the method of disposition of those items to destruction, rather than allowing the alternative methods prescribed in those sections.³⁰

Consequently, OAL concludes that the portion of the challenged rule concerning the destruction of unauthorized items is a “regulation” within the meaning of the APA because it not only (1) is a rule or standard of general application, but also (2) interprets provisions of the CCR. It is not a “local rule” applying solely to one particular prison, because it concerns a matter of statewide importance and it is not limited to the unique circumstances of one institution. In addition, this portion of the “challenged rule” interprets the law enforced by the Department. Since the confiscation rule meets both parts of the two-part test, it is a “regulation” within the meaning of the APA.

III. DOES THE CONFISCATION RULE , WHICH HAS BEEN FOUND TO BE A “REGULATION,” FALL WITHIN ANY *SPECIAL* ³¹ EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

OAL notes that Folsom stopped using the "No Exception Agreement" in question in 1994. Therefore, it is unnecessary to decide whether it falls within the APA exception set out in Penal Code section 5058, subdivision (c), quoted in Section II.B. of this determination.

Penal Code section 5058, subdivision (c), added in 1995, provides that rules applying solely to a particular prison are not subject to the APA provided that *all* rules which apply to prisons throughout the state are adopted pursuant to the APA. Essentially, section 5058, subdivision (c), advises the Department of the need to abide by the APA as one of two conditions to the use of the "local rule exception." OAL has concluded the confiscation rule portion of the "No Exception Agreement" formerly used by Folsom was not a local rule under pre-1995 law. Since this Folsom confiscation rule is no longer in effect, OAL does not reach the issue of whether the Department has satisfied section 5058's preconditions to use of the local rule exception.

IV. DOES THE CONFISCATION RULE FOUND TO BE A "REGULATION" 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.³² Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.³³

INTERNAL MANAGEMENT

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.][³⁴]

"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. . . ."³⁵

The confiscation rule significantly affects inmates by preventing them from opting to have unauthorized property mailed back to friends and family. The rule also

affects friends and family of inmates, who might well prefer to have such property returned to them. Further, family and friends are, under the confiscation rule, required to consent to destruction of unauthorized property as a condition of being able to mail quarterly packages to inmates. Because of these effects on both outside correspondents and inmates, OAL concludes that the confiscation rule does not fall within the internal management exception. The rule does not relate solely to the management of the internal affairs of the Department.

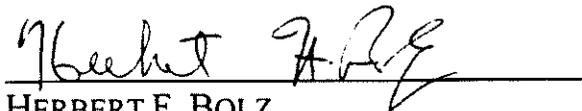
Since the confiscation rule is a "regulation" within the meaning of the APA, and does not fall within any express statutory exemption,³⁶ OAL concludes that it is without validity until adopted in compliance with the APA.

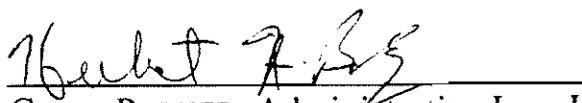
CONCLUSION

For the reasons set forth above, OAL concludes that:

- (1) the part of the challenged policy listing which items may be sent to inmates in quarterly packages is not a "regulation" subject to the APA.
- (2) the part of the challenged policy requiring destruction of unauthorized items (which requires not only inmates, but also their family and friends to consent to confiscation and destruction of personal property) is a "regulation" and thus must be adopted in compliance with the APA.

DATE: October 20, 1998


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ENDNOTES

1. This Request for Determination was filed by Louis R. Fresquez, E-26812; A-2-147-L, P.O. Box 5248, Corcoran, CA 93212-5248. The agency's response was submitted by Peggy McHenry, Chief, Regulation Management Unit, Department of Corrections, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001.
2. Tamara Pierson, Administrative Law Judge on Special Assignment, contributed substantially to this determination.
3. According to the Department, the current 1998 version of the Folsom quarterly package memorandum has been revised. This 1998 memorandum, which was attached to the Department's response, does not require the outside correspondent to sign indicating consent to the procedures. The 1998 memorandum also states that unauthorized items arriving in quarterly packages may at the inmate's option be returned to the sender at the inmate's expense or donated to charity, rather than being confiscated and destroyed.

Though it is helpful to be informed of the current version of the memorandum, the fact that it has been modified does not eliminate OAL's legal obligation to respond to the duly filed and accepted request for determination.

4. 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.]

OAL refers 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.

5. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. 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, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite on a particular point, cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr. 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.

The *Tidewater* court, 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 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. See, for instance, *Hillery v. Rushen* (9th Cir. 1983) 720 F.2d 1132. Additional cases are cited in 1988 OAL Determination No. 13, typewritten version, pp. 10-11, CRNR 88, 38-Z, p. 2952-2953, Sep. 16, 1988.

9. *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).

Although *Tooma* is an unpublished opinion of a court of appeal, OAL may refer to it for guidance because Rule 977 of the California Rules of Court does not apply to determinations by OAL. Rule 977 prohibits *a court or a party* from citing or relying upon an unpublished opinion of a court of appeal and applies to actions or proceedings *in a court of justice* (Code of Civil Procedure, sections 21 and 22).

10. A copy of this Administrative Bulletin is attached to the Agency response filed in **1998 OAL Determination 23**. The Bulletin is signed by the Chief Deputy Director of CDC.

11. Page 1.

12. *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).
13. 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.)
14. (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
15. *Id.*, 33 Cal.App.3d at 258, 109 Cal.Rptr. at 25.
16. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.
17. Administrative Bulletin 97/8 (May 19, 1997) includes a list of 26 DOM provisions which "may not be used."
18. See 1998 OAL Determination No. 19, p. 10, CRNR, 98, No. 37-Z, p. 19
19. Response, page 2.
20. Page 4.
21. See also 1988 OAL Determination No. 13, p. 14 (quoting agency response to the effect that CMF rules were needed to "meet the *unique* situation at CMF.")(Emphasis added.) CRNR 88, 38-Z, Sep. 18, 1988, p. 2957.
22. note 23.
23. *In re Harrell* (1970) 2 Cal.3d 675, 695 n. 16, 87 Cal.Rptr. 504, 516 n. 16.
24. *Id.*, p. 516.
25. The requester has submitted a copy he typed of the contents of the Solano form rather than the form itself.
26. OAL notes that some of the options for disposition of property advocated by the requester were incorporated into the Solano and Avenal agreements.

27. In this determination, OAL concludes that the list of authorized property is linked to unique local conditions, relying in part on statements in published appellate opinions and in the agency response in 1988 OAL Determination No. 13. The Department may, in the future, wish to argue that specific challenged rules are not subject to the APA because they represent departmental responses to unique local conditions. A factual description of the unique local condition or conditions, as well as an explanation of how the rule under review is needed to address the unique condition or conditions to give definition to local rules as established by Penal Code section 5058.
28. 1998 OAL Determination No. 23, note 14
29. 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.
30. In addition to questioning whether the policy in question must be adopted as a regulation, the requester has also questioned the wisdom and clarity of the policy, as well as questioning whether it is uniformly applied, fair, and consistent with existing statutes. The only one of these issues which OAL has jurisdiction to address in this process is whether the policy is a "regulation" which has no legal effect unless adopted pursuant to the APA.
31. 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.
32. Government Code section 11346.
33. 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.
34. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, n. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
35. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.
36. The "forms exception" language of Government Code section 11342, subdivision (g) does not apply here for the reasons discussed in 1998 OAL Determination No. 16, pp. 10-12: the confiscation rule does more than simply restate existing law in the context of an operational form.