

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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In re:)
 Request for Regulatory) 1998 OAL Determination No. 31
 Determination filed by LOUIS)
 R. FRESQUEZ regarding a) [Docket No. 93-006]
 memo issued by the)
 DEPARTMENT OF) October 30, 1998
 CORRECTIONS, CALIFORNIA)
 STATE PRISON AT FOLSOM,) Determination Pursuant to
 limiting items which inmates) Government Code Section
 may purchase from vendors) 11340.5; Title 1, California
 and requiring inmates to) Code of Regulations,
 consent to disposition of) Chapter 1, Article 3
 unauthorized items¹)

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
 CINDY PARKER, Administrative Law Judge
 on Special Assignment
 TAMARA PIERSON, 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 the Department of Corrections, California State Prison at Folsom (1) limiting the items which inmates may order from vendors and (2) requiring inmates to consent to the disposition 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 portion of the challenged policy which limits the items an inmate may order from a vendor, is not a "regulation"; thus, it is not subject to the APA. However, OAL has concluded that the portion of the challenged policy requiring inmates to consent to the disposition of unauthorized items is a "regulation" which is invalid until it has been adopted in compliance with the APA.

ISSUE

OAL has been requested to determine whether a policy of the Department of Corrections, California State Prison at Folsom ("Folsom") which (1) limits items that inmates may order from vendors and (2) which requires inmates to consent, on a package address label, to the disposition of unauthorized items, is a "regulation" which must be adopted pursuant to the APA.²

ANALYSIS

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

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

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations *shall be promulgated and filed pursuant to [the APA]. . . .* [Emphasis added.]"

Clearly, the APA generally applies to the Department's quasi-legislative enactments.³ 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*,⁴ the California Court of Appeal upheld OAL's two-part test⁵ 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, we must conclude that it is "regulation" and subject to the APA. In applying the two-part test, however, OAL is guided by the principle stated by the court in *Grier*:

"... 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.]"⁶

Background of the Challenged Rule

Rules concerning personal property of inmates have been litigated on numerous occasions.⁷ 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 valuable property shall send their 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.⁸ 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:⁹

“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

On August 2, 1992, Mr. Fresquez, while an inmate at California State Prison at Folsom (“Folsom”), requested a determination concerning whether the “Approved Vendor Purchase Items” list issued by Folsom was an underground regulation. He also challenged a one-page form which contains “Purchasing and Shipping Instructions” at the top and an address label at the bottom, which authorized Folsom to confiscate unauthorized items. The form shows that it was revised on August 5, 1991.

The Approved Vendor Purchase Items list is included in a memorandum from R. G. Borg, Warden, with the heading of Folsom State Prison.¹⁰ It lists the following items which inmates may purchase from vendors and the specifications for each: televisions, radios, tape players, headsets, cassette tapes, watches, typewriter and dress shoes. The specifications include limitations on the size, type and value of each item.

The shipping instructions explain that:

“Folsom State Prison assumes no responsibility for any warranties or product sent to inmates.”

“Failure of the inmate or sender to comply with the instructions of this form will result in the package being either confiscated or returned to the point of origin.”

The name and title of "R.G. Borg, Warden, Folsom State Prison" follows the purchasing and shipping instructions. The address label contains the following agreement:

"I authorize the Receiving and Release Sergeant to confiscate any or all items, at the inmate's expense, that do not meet the requirements described on this form. The Receiving and Release Sergeant is released of all responsibility for items received in damaged condition. Items which are under warranty/guarantee will be returned for service or repairs to a recognized vendor or service center at the expense of the inmate."

There are signature lines for the sender and the inmate recipient. 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. He asserts that in August of 1992, when the request for determination was made, the practice was to remove and destroy television remote controls and antennas before notifying the inmates of the items' unacceptability.

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.¹¹

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.¹² In *American Friends Service Committee v. Procunier* (1973) (hereafter, "*Procunier*"),¹³ 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.)¹⁴

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.

(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 that it is called ‘resolutions,’ ‘guidelines,’ ‘rulings’ and the like.”¹⁵

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,¹⁶ 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).

The Department created DOM section 54030.15 (quoted above under “Background of the Challenged Rule”), which addresses the disposition of

unauthorized property of inmates. The Department considered this issue of sufficient importance to create a statewide rule. The disposition rule at issue in this determination significantly affects inmates by preventing them from opting to have unauthorized property (such as remote control devices and antennas) mailed to friends and family to retain for the inmate to use after the inmate has been released.

Excessive use of the local rule exception is inconsistent with legislative intent to limit the use of “local rules” to circumstances which are unique to a particular prison. 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.¹⁷

The agency response states: “The Department contends that the [challenged rule] is a *local rule* and not subject to the APA” (Emphasis added.)¹⁸

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.)^{19,20} 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.)²¹

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!’”²²

This local rule responded to “practical limitations of space.”²³ I.e., unique circumstances at San Quentin involving the size of the room housing the library.

An inmate’s ability to possess a television (or other appliances), as well as the size and number of the appliances, depends upon the type of cell in which the inmate is housed, accessibility to electrical outlets, etc. By its nature, this may vary not only from institution to institution, but from unit to unit. Therefore, requirements governing an inmate’s ability to order and possess appliances are properly the subject of local rules.

Thus, OAL concludes that the part of the challenged rule which limit appliances which inmates may order from vendors 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 the 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 is a standard of general application.

This disposition rule does not apply solely to one prison. In 1998 OAL Determination No. 23, the requester attacked a similar 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."²⁴

Thus, it was established that the disposition 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 disposition rule was in use at Folsom. The rule at Folsom differs only slightly from the Pelican Bay rule in that it also mentions return to the vendor as an alternative to confiscation.

Therefore, OAL concludes that the portion of the rule mandating inmates to consent to disposition of unauthorized items was in use at two prisons, Pelican Bay and Folsom. Since the disposition 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 rule regarding disposition of unauthorized items is a standard of general application.*

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

Because the disposition 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 1994²⁵, 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. An exception is made if 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 disposition 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 confiscation or return to the vendor, rather than allowing the alternative methods prescribed in those sections.²⁶

Consequently, OAL concludes that the portion of *the challenged rule concerning the disposition 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 DISPOSITION RULE , WHICH HAS BEEN FOUND TO BE A "REGULATION," FALL WITHIN ANY *SPECIAL* ²⁷ 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, including Penal Code section 5058, subdivision (c),²⁸ quoted in Section II.B. of this determination. OAL is obliged to consider both the state of the law at the time the request was filed, and the state of the law as of the date this determination is issued.²⁹

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 already concluded that the disposition rule was not a local rule under pre-1995 law. For the reasons set forth in Section II.B. of this determination, OAL further concludes that the disposition rule does not fall within the local rule exception of Penal Code section 5058.

IV. DOES THE DISPOSITION 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.³⁰ Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.³¹

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.][³²]

"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. . . ."³³

The disposition rule does not relate solely to the management of the internal affairs of the Department as it affects inmate property interests. Therefore, OAL concludes that the disposition rule does not fall within the internal management exception to the APA.

Since the disposition rule is a "regulation" within the meaning of the APA, and does not fall within any express statutory exemption,³⁴ OAL concludes that it is without validity until adopted in compliance with the APA.

CONCLUSION

For the reasons set forth above, OAL concludes that:

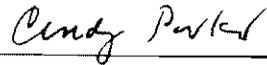
- (1) the portion of the challenged policy limiting the items which may be ordered from vendors by inmates is not a "regulation" subject to the APA; but,

- (2) the portion of the challenged policy requiring inmates to consent to the disposition of unauthorized items is a "regulation" which is invalid until it has been adopted in compliance with the APA.

DATE: October 30, 1998



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ENDNOTES

1. This Request for Determination was filed while an inmate at Folsom Prison by Louis R. Fresquez, now at E-26812; 23-V-5L, P.O. Box 4000, Vacaville, CA 95696-4000. The agency's response was submitted by Pamela L. Smith-Steward, Deputy Director of the Legal Affairs Division of the Department of Corrections, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001. (916) 485-0495.

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.]

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.

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. (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* case 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*.

5. 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.

6. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

7. 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.

8. *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).

9. 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.

10. The requester did not submit a copy of the memo containing the Approved Vendor Purchase Items list. However, a comment was submitted by another inmate at Folsom which included the memo.

11. *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).

12. 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.)
13. (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
14. *Id.*, 33 Cal.App.3d at 258, 109 Cal.Rptr. at 25.
15. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.
16. Administrative Bulletin 97/8 (May 19, 1997) includes a list of 26 DOM provisions which "may not be used."
17. See 1998 OAL Determination No. 19, p. 10, CRNR, 98, No. 37-Z, p. 19
18. Agency response, page 6.
19. Page 4.
20. 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.
21. 1988 OAL Determination No. 13, note 23.
22. *In re Harrell* (1970) 2 Cal.3d 675, 695 n. 16, 87 Cal.Rptr. 504, 516 n. 16.
23. *Id.*, p. 516.
24. 1998 OAL Determination No. 23, note 14
25. 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.
26. 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 fair and consistent with existing statutes. The only one of these issues which OAL has jurisdiction to address in the determinations context is whether the policy is a "regulation" which has no legal effect unless adopted pursuant to the APA.

27. 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 Departments of 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.
28. See endnote 4.
29. **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. 1400.
30. Government Code section 11346.
31. 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.

32. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, n. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
33. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.
34. 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 disposition rule does more than simply restate existing law in the context of an operational form.