

STATE OF CALIFORNIA

SEP 13 1998

OFFICE OF ADMINISTRATIVE LAW

In re:) 1998 OAL Determination No. 35
)
 Request for Regulatory) [Docket No. 95-001]
 Determination filed by STEVE)
 M. CASTILLO regarding the) November 13, 1998
 DEPARTMENT OF)
 CORRECTIONS rules) Determination Pursuant to
 governing the debriefing) Government Code Section
 process¹) 11340.5; Title 1, California
) Code of Regulations,
) Chapter 1, Article 3

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
 DAVID POTTER, Senior Staff Counsel
 Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law ("OAL") was requested to determine whether the following Department of Corrections rules are "regulations," and therefore are without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA"): (1) a presumption that all gang-affiliated inmates will, if released from security housing, severely endanger the safety of others or institutional security; and (2) a policy that gang-affiliated inmates in security housing shall not be released into the general population unless they complete a debriefing process that verifies that they are no longer in any way affiliated with a prison gang.

OAL has concluded that the challenged rules are "regulations." The Department may exercise its discretion to adopt regulations on this topic pursuant to the APA, either as regular or emergency adoptions.

ISSUE

The issue presented to the Office of Administrative Law (“OAL”) is whether the following Department of Corrections’ rules are “regulations” required to be adopted pursuant to the APA:²

- (1) A presumption that a gang member in a Security Housing Unit will engage in conduct which will severely endanger the safety of others or the security of the institution, if he is released from the Security Housing Unit.
- (2) A policy that requires debriefing prior to reclassification and release from the Security Housing Unit.

BACKGROUND

Since May 18, 1980, the Department of Corrections has had regulations broadly defining the process for the classification of prisoners.³ It has also supplemented the codified regulations in administrative bulletins and in the Classification Manual. In *Stoneham v. Rushen I* (1982)⁴ a prisoner and the Prison Law Office challenged an administrative bulletin issued with new classification forms which changed the classification system. The Court of Appeal found that “uniform substantive proposals contained in the administrative bulletins designed to implement the classification system must be promulgated in compliance with the [Administrative Procedure] Act.” The Department responded by amending the regulation and updating the classification forms, but the regulation was still quite general. In *Stoneham v. Rushen II* (1984)⁵ the Court of Appeal observed:

“It is undisputed that the regulation provides only broad outlines of the classification scheme itself. Details of the point scoring system bearing upon custody placement decisions have been relegated to administrative bulletins contained in the classification manual without independent review under the APA.”

In this second case, the Court of Appeal found that since:

“the novel scoring scheme represents a rule of general application, it

likewise fits within the all-inclusive statutory description requiring satisfactory APA compliance before its use or enforcement.”⁶

Since 1984, the portion of the classification scheme codified in accordance with the APA has grown. In 1987 OAL Determination No. 3, OAL determined that the Classification Manual contained “regulations” which should have been adopted pursuant to the APA. The Department’s classification system implements Penal Code section 5068, last amended in 1989, which provides, in part:

“The Director of Corrections shall cause each person who is newly committed to a state prison to be examined and studied. This includes the investigation of all pertinent circumstances of the person’s life such as the existence of any strong community and family ties, the maintenance of which may aid in the person’s rehabilitation, and the antecedents of the violation of law because of which he or she has been committed to prison. Any person may be reexamined to determine whether existing orders and dispositions should be modified or continued in force.

“Upon the basis of the examination and study, the Director of Corrections shall classify prisoners and when reasonable, the director shall assign a prisoner to the institution of the appropriate security level and gender population nearest the prisoner’s home, unless other classification factors make such a placement unreasonable.”

THIS REQUEST FOR DETERMINATION

Steve Castillo is an inmate at Pelican Bay State Prison who is housed in a segregated housing unit, which he has referred to as “segregation lock up.” OAL received his request for determination concerning the alleged underground regulations that require and govern the “debriefing process” on June 18, 1993. In his request, he states that the Department of Corrections has a policy of placing inmates who are gang members in segregated housing, and a policy of keeping them there “until they parole, debrief, or die.”⁷ He says that, in order to be reclassified and released from the Security Housing Unit, an inmate who is a gang member must undergo a debriefing “process [that] requires prisoners to incriminate themselves and others” He alleges that this debriefing

requirement is an underground⁸ regulation of the Department of Corrections' administration of the prison system.

In its response, the Department contends that it has promulgated regulations regarding the:

“process whereby critical case information regarding gang membership, affiliation, or safety concerns will be retained in an inmate’s central file, on a specific form designed for that purpose. The fact that there will be a debriefing process, the staff who will accomplish it, and the forms to be used to document the process, are established in regulations.”⁹

The response describes the debriefing process as an opportunity for “inmates who sincerely desire to withdraw from gang membership” to do so. In the Department’s view, “the (debriefing) process necessarily involves obtaining information about the gang, including its membership and activities.”¹⁰

Four commenters¹¹ submitted written comments on this request for determination during the public comment period provided by law.¹² All of the commenters urged that:

“the debriefing policy should be deemed an illegal underground regulation that may not be enforced unless and until it is legally promulgated in compliance with the Administrative Procedure Act.”¹³

With these disparate views in mind, OAL now proceeds to describe and analyze the challenged rules regarding debriefing. From the time of their arrival in the prison system, and at regular intervals throughout the time of their confinement, prisoners are classified and reclassified in accordance with a classification system and procedure.¹⁴ The assigned classifications are influenced by a large number of factors, including, for example, term of commitment to prison, commitment offense, behavior in prison,¹⁵ and escape history. The classification process yields a numerical classification score which is used to assign prisoners to institutions which afford an appropriate level of security.

In addition to the numerical score, an inmate’s classification may include up to three ratings known as administrative determinants, indicated on the score sheet

by three letter codes. In accordance with CCR, Title 15, section 3375.2, subsection (a), an inmate assigned an administrative determinant may be housed in a facility with a classification level “which is not consistent with the inmate’s classification score.” Subsection (b) of this section goes on to identify the “administrative determinants which may be imposed by departmental officials to override the placement of an inmate at a facility according to their classification score.” Among the listed administrative determinants is the code “GAN,” to be used when “[d]ocumentation establishes that the inmate’s gang membership or association requires special attention or placement consideration.”

Within prisons there exists special housing for administrative segregation.¹⁶ Its purpose is clearly set forth in CCR, Title 15, section 3335, subsection (a) (last amended in 1988), which provides:

“When an inmate’s presence in an institution’s general inmate population presents *an immediate threat to the safety of the inmate or others, endangers institution security or jeopardizes the integrity of an investigation of an alleged serious misconduct or criminal activity*, the inmate shall be immediately removed from general population and be placed in administrative segregation.” [Emphasis added.]

CCR, Title 15, section 3341.5, identifies three types of segregated program housing units. They are (1) protective housing units, (2) psychiatric management units and (3) security housing units (“SHU”).

To summarize briefly, the regulations of the Department provide for the assignment of prisoners to particular prisons and housing units in accordance with a classification system that includes consideration of gang affiliation.¹⁷ The requester, Steve Castillo, is a prisoner who was classified as a gang member and therefore confined in the SHU at Pelican Bay State Prison. Confinement of gang members and associates in a SHU based upon their affiliation is considered to be administrative segregation¹⁸ rather than disciplinary detention.¹⁹ The length of time a prisoner is confined in a SHU is described in CCR, Title 15, section 3341.5, subsection (c), which provides, in part:

“(2) Length of SHU Confinement. Assignment to a SHU may be for an indeterminate or a fixed period of time.

“(A) Indeterminate SHU Segregation. An inmate assigned to a security housing unit on an indeterminate SHU term shall be reviewed by a classification committee at least every 180 days for consideration of release to the general inmate population.

“(B) Determinate SHU Segregation.

1. A determinate period of confinement in SHU may be established for an inmate found guilty of a serious offense listed in section 3315 of these regulations.”

The Department’s practice has been to assign gang affiliates to administrative segregation in a SHU for indeterminate terms.²⁰

Release of a prisoner from administrative segregation is subject to the general standard identified in CCR, Title 15, section 3339, subsection (a), which provides:

“Release: Release from segregation status shall occur at the earliest possible time in keeping with the circumstances and reasons for the inmate’s initial placement in administrative segregation.”

The requester is confined in a SHU, and is interested in the rules relating to release from that type of segregated housing. Section 3341.5, subsection (c)(3), provides:

“Release from SHU. An inmate shall not be retained in SHU beyond the expiration of a determinate term or beyond 11 months, unless the classification committee has determined before such time that continuance in the SHU is required for one of the following reasons:

“(A) The inmate has an unexpired MERD (minimum eligible release date) from SHU.

“(B) Release of the inmate would *severely endanger the lives of inmates or staff, the security of the institution, or the integrity of an investigation into suspected criminal activity or serious misconduct.*

“(C) The inmate has voluntarily requested continued

retention in segregation.” [Emphasis added.]

In practice, the Department has retained gang-affiliated prisoners in segregated housing longer than 11 months, based upon its determination that their release would severely endanger lives or security. Since July 18, 1994,²¹ CCR, Title 15, section 3378, subsection (c)(2), has required formal debriefing. It provides, in part:

“The verification of an inmate / parolee identified as a gang dropout shall require a formal debriefing conducted or supervised by a gang coordinator / investigator.”

CHALLENGED RULES²²

Requester believes that the rules requiring and governing formal debriefing as a condition of release from the SHU are underground regulations. In order to perform an analysis, the rules must be identified. OAL has examined the requester’s description of the Department’s policies; comments submitted concerning this request for determination; the Department’s response to the request for determination; and the regulations of the Department codified in CCR, Title 15. It is clear that the Department is utilizing, as standards, the following:

- (1) A presumption that a gang member in a SHU will engage in conduct which will severely endanger the safety of others or the security of the institution, if he is released from the SHU.
- (2) In order for a gang member housed in the SHU to be released, the inmate must show that his presence in the general inmate population does *not* present an immediate threat to the safety of the inmate or others or endangers institution security pursuant to 15 CCR sec. 3335 (last amended 1988), by undergoing a debriefing that verifies that the inmate is a gang dropout, and is no longer a gang member.

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.²³

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

The key provision of 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*,²⁴ the California Court of Appeal upheld OAL's two-part test²⁵ 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 a "regulation" and subject to the APA. In applying the two-part test, OAL is 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.]²⁶

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

The challenged rules relate to the release of gang-affiliated prisoners from one particular type of prison housing unit. Although they clearly do not apply to all prisoners, it appears that they do apply uniformly to all prisoners who are housed in the security housing units located within various prisons and who are, or have been, affiliated with a prison gang. When a challenged rule applies to all members of a class, kind or order, it constitutes a standard of general application within the meaning of the APA.²⁷

OAL thus concludes that the challenged rules are standards of general application because they apply generally to gang-affiliated prisoners housed in the various prisons' security housing units.

Having established that the challenged rules are standards of general application, the next question is whether they satisfy the second part of two-part "regulation"

test.

B. 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:

“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:

“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]”

First Challenged Rule: presumption that a gang member in a SHU will engage in conduct which will severely endanger the safety of others or the security of the institution, if he is released from the SHU.

The first challenged rule is a presumption. According to the California Court of Appeal, an informal rule which creates a presumption is a “regulation.”²⁸ It is apparent from the information in the request, the existing regulations, and the Department’s rationale for its policies, that the Department presumes a gang member housed in a SHU will engage in conduct which will severely endanger the safety of others or the security of the institution--if he is released from the SHU. Attorney Graham Noyes, who represents the requester, and submitted a public comment concerning this request for determination, wrote:

“The debriefing policy effectively defines anyone who does *not* satisfactorily debrief as a threat to the institution without regard to whether the individual is an actual threat.” (Emphasis added.)²⁹

However, when discussing the Department’s practices at the Pelican Bay Prison, the United States District Court for the Northern District of California, in *Madrid*

v. *Gomez*, apparently found the rationale quite reasonable.³⁰ The policy reflected in this presumption effectively bars gang members from being released from the SHU and returned to the general population. The 1994 amendment to Title 15 which alluded to debriefing (section 3378) did not, however, include a statement of this presumption.

Because this presumption makes CCR, Title 15, section 3339, subsection (a), "Release from Segregation" and section 3341.5, subsection (c)(3)(B), "Release from SHU," more specific, OAL concludes that the first challenged rule is a "regulation." The Department may exercise its discretion to adopt regulations on this topic pursuant to the APA, as either a regular or an emergency adoption.

Second Challenged Rule: the Department requires a gang-affiliated prisoner housed in a SHU to terminate his affiliation by debriefing before he can be reclassified as a gang dropout and released from the SHU.

At the time this request for determination was received by OAL, the debriefing policy implemented Penal Code section 5054 by specifying procedures directly related to the *custody* and *treatment* of prisoners. The second challenged rule also interpreted Penal Code section 5068 by prescribing a precondition for reclassification. Finally, the second challenged rule made CCR, Title 15, section 3339, subsection (a), "Release from Segregation" and section 3341.5, subsection (c)(3)(B), "Release from SHU," more specific. The policy was therefore a "regulation," required to be adopted pursuant to the APA.³¹

After the filing of this request for determination, the Department amended CCR, Title 15, section 3378, introducing references to debriefing as part of the classification scheme. Section 3378 identifies forms and procedures to be used for the documentation of "Critical Case Information." In subsection (c), it provides generally, that:

"[g]ang involvement allegations shall be investigated by a gang coordinator / investigator or [his or her] designee."

As amended, subsection (c)(2) provides, in part:

"The verification of an inmate / parolee identified as a gang dropout shall require a formal *debriefing* conducted or supervised by a gang

coordinator / investigator.” [Emphasis added.]

It has been noted that a prisoner’s housing depends upon his classification score and administrative determinants. A gang member housed in a SHU would have the gang member “GAN” administrative determinant as part of his classification score. Because reclassification under the Department’s regulations requires verified information, a prisoner classified as a gang member or associate and confined in a SHU cannot obtain reclassification as a “gang dropout” without submitting to the debriefing required by section 3378, subsection (c)(2). Although section 3378 mentions debriefing, there is no clear statement in that regulation of the departmental policy that inmates housed in a SHU must rebut the presumption reflected in the *first* challenged rule. If the underlying presumption is a “regulation,” it is difficult to avoid the conclusion that the rule prescribing how to rebut the presumption is similarly a “regulation.”

CCR, Title 15, section 3341.5, subsection (c)(3), sets forth the rule for release from a SHU. It provides, in part:

“Release from SHU. An inmate shall not be retained in SHU beyond the expiration of a determinate term or beyond 11 months, unless the classification committee has determined before such time that continuance in the SHU is required for one of the following reasons:

“(A)

“(B) Release of the inmate would *severely endanger the lives of inmates or staff, the security of the institution, or the integrity of an investigation into suspected criminal activity or serious misconduct.*”

The second challenged rule continues to be a “regulation”(after adoption of Title 15, CCR, section 3378) because the rule interprets section 3341.5 by adding the requirement that, in order for a gang member housed in the SHU to be released, the inmate must show that his presence in the general inmate population does *not* (1) present an immediate threat to the safety of the inmate or others or (2) endanger institution security, by undergoing a debriefing that verifies that the inmate is a gang dropout, and is no longer a gang member.

In summary, OAL concludes that both challenged rules are “regulations,” which must be adopted pursuant to the APA in order to be valid. The Department may exercise its discretion to adopt regulations on this topic pursuant to the APA, either as regular or emergency adoptions.

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

Generally, all “regulations” issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.³² Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.³³

OAL now will consider whether the internal management exception applies to the challenged rules. 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 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. . . .

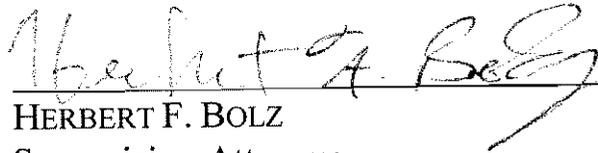
"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception. . . ." ³⁵

In the words of the judicial opinion just quoted: the challenged rules "extend well beyond matters relating solely to the management of the internal affairs of the agency itself" and significantly affect the ability of prisoners housed in security housing units throughout the California prison system to obtain release to the general prison population. Therefore, the internal management exception does not apply. The challenged rules do not fall within any general express statutory exemption from the APA.

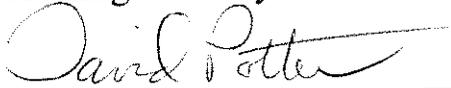
CONCLUSION

For the reasons set forth above, OAL concludes that the first challenged rule (presumption of severe endangerment) and the second challenged rule (debriefing required for reclassification) are "regulations," that should have been, but were not, adopted pursuant to the APA.

DATE: November 13, 1998



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ENDNOTES

1. This Request for Determination was filed by Steve M. Castillo, D-89028, P.O. Box 7500, D7-119, Crescent City, CA 95531. Mr. Castillo was represented by Graham Noyes, Attorney at Law, 368 Hayes Street, San Francisco, CA 94102 (415) 575-3223. The agency's response was submitted by Pamela L. Smith-Steward, Deputy Director of the Legal Affairs Division, 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. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 731, 188 Cal Rptr. 130, 132. CCR, Title 15, sections 3375-3376, (Register 80, No.16) filed 4/18/80, effective 5/18/80.
4. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.
5. *Stoneham v. Rushen* (1984) 156 Cal.App.3d 302, 308, 203 Cal.Rptr. 20, 23.
6. *Stoneham v. Rushen* (1984) 156 Cal.App.3d 302, 310, 203 Cal.Rptr. 20, 24.
7. Request for determination, p. 1.
8. The term "underground regulation" is used to identify a regulation which should have been adopted pursuant to the APA, but was issued or utilized by an agency without complying with the requirements of the APA. See *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.
9. Department of Corrections, Response to Request for Determination, pp. 1-2.
10. Department of Corrections, Response to Request for Determination, page 1.
11. Commenters include: Corey Weinstein on behalf of California Prison Focus; Graham Noyes, Attorney; Michael Snedeker, Attorney; and David J. Ritchie, Attorney.
12. CCR, Title 1, section 124.

13. Comments of Graham Noyes, September 14, 1998, page 9.
14. See CCR, Title 15, sections 3375 -3379.
15. In **1998 OAL Determination, No. 8** (Department of Corrections, Docket No. 91-003, July 27, 1998), CRNR 98, No. 32-Z, August 7, 1998, p. 1511, OAL reviewed a challenge to section 2008(c) of the Department's Case Records Manual. This regulation required housing officers to "report such items as the inmate's relationship with fellow inmates, his behavior, personal cleanliness, attitude and personality." It had been alleged, and not denied, that such information is used in support of "prison gang validation packages."
16. See CCR, Title 15, sections 3335 - 3345.
17. In this determination, the term "gang affiliation" refers to inmates who have become either members or associates of a prison gang pursuant to DOM section 55070.19.2 and .3. See also, *Madrid v. Gomez* (N.D. Cal. 1995) 889 F. Supp. 1146, 1241, footnote 185.
18. See CCR, Title 15, Division 3, Subchapter 4, Article 7, commencing with section 3335.
19. See CCR, Title 15, Division 3, Subchapter 4, Article 6, commencing with section 3330.
20. The United States District Court, in *Madrid v. Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146, 1241 observed "[a]ccordingly, once the CDC determines that an inmate is a member or associate of a prison gang, the inmate is routinely transferred to administrative segregation in the SHU."
21. Approximately one year after the date this request for determination was filed with OAL.
22. The Department argues that the:

"[s]pecific details of the debriefing process are appropriately delineated as training guides, in operational procedures, and as institutional operating procedures ('local rules.'). These details and assessment criteria are subject to frequent change and constitute investigative techniques; they cannot be divulged to inmates."

OAL does not reach the issue of whether "specific details" of the debriefing process should be deemed exempt from the APA on the grounds they are exempt from disclosure under the Public Records Act, Government Code section 6254, subdivision (f). The general debriefing rules challenged in this proceeding are in the public

domain, appearing in documents related to administrative or judicial proceedings, and are therefore not subject to Government Code section 6254, subdivision (f).

23. The APA would apply to the Department's rulemaking even if Penal Code section 5058 did not expressly so provide. The APA applies generally to state agencies, as defined in Government Code section 11000, in the executive branch of Government, as prescribed in Government Code section 11342, subdivision (a).

24. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes 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, 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. 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 200, 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*.

25. 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 after *Grier*, in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

26. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

27. *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).
28. In *Union of American Physicians and Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 500, 272 Cal.Rptr. 886, 892, the Court of Appeal considered whether an informal rule which created a rebuttable presumption and further prescribed how the presumption could be rebutted was a "regulation." The Court wrote "[w]e agree with the OAL that an informal rule which creates a presumption and then indicates how to rebut it is a regulation within the meaning of the APA."
29. Comments by Graham Noyes, September 14, 1998, page 6, line 23.
30. In *Madrid v. Gomez* (N.D. Cal. 1995) 889 F.Supp. 1146, 1278, the Court concluded "the record supports (the Department's) position that gang members and associates are threats to prison security, and that inmates who join such gangs join 'for life.'"
31. **1991 OAL Determination No. 4**, p.85 (Department of Corrections, April 1, 1991, Docket No. 90-006), CRNR 91, No. 27-Z, July 5, 1991, p. 910, concluded that subsequent laws or actions (e.g., adoption pursuant to the APA) by the agency do not alter the obligation of OAL under its own regulations (Title 1, CCR, sections 123 & 126) to issue a determination based upon the law and facts at the time the request was filed.
As any other state agency, OAL is bound to follow its own regulations. See *Memorial, Inc. V. Harris* (9th Cir.1980) 655 F.2d 905, 910, n.14.
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.