

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

In re: )  
 ) 1998 OAL Determination No. 38  
 )  
Request for Regulatory ) [Docket No. 96-005]  
Determination filed by JOHN )  
STINSON regarding a rule ) November 24, 1998  
issued by the DEPARTMENT OF )  
CORRECTIONS which ) Determination Pursuant to  
prohibits inmates from ) Government Code Section  
receiving or possessing hard ) 11340.5; Title 1, California  
cover books<sup>1</sup> ) Code of Regulations,  
 ) Chapter 1, Article 3

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Determination by: EDWARD G. HEIDIG, Director

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

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether the rule of the Department of Corrections (1) prohibiting hard cover books from being sent to inmates and (2) prohibiting possession of hard cover books by inmates, is a "regulation" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

OAL has concluded that the challenged policy prohibiting inmates from receiving or possessing hard cover books is a “regulation,” and thus must be adopted in compliance with the APA. The Department may exercise its discretion to adopt regulations on this topic pursuant to the APA, either as regular or emergency adoptions.

## ISSUE

OAL has been requested to determine whether the California Department of Corrections (“Department” or “CDC”) rule which prohibits inmates from receiving or possessing hard cover books, is a "regulation" required to be adopted pursuant to the APA.<sup>2</sup>

## ANALYSIS

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

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

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

Clearly, the APA generally applies to the Department's quasi-legislative enactments.<sup>3</sup> 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*,<sup>4</sup> the California Court of Appeal upheld OAL's two-part test<sup>5</sup> as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule 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 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.]"<sup>6</sup>

### **Background of the Challenged Rule**

Rules concerning personal property of inmates have been litigated on numerous occasions.<sup>7</sup> 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.

In 1991, in *Tooma v. Rowland*, the California Court of Appeal ordered the Department to cease enforcement of the regulatory portions of DOM.<sup>8</sup> 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:<sup>9</sup>

"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 section 54030 (“Inmate Personal Property”) was not listed in the Administrative Bulletin. Therefore, according to the Administrative Bulletin, DOM section 54030 was not to be enforced, instead, local procedures were to be implemented.

In the agency response, in this matter, the Department states:

“The DOM section requester references [section 54030], is not a departmentally approved section and therefore is not to be implemented (refer to Exhibit “A,” AB 97/8). However, the procedure/policy enforced at PBSP is a local procedure and is acceptable.”

A reasonable inference to be drawn from the agency response is that the Department is conceding that the prohibition on hard cover books appeared in DOM section 54030, but still has not been replaced with a regulation duly adopted pursuant to the APA. OAL’s review of the current version of DOM section 54030 found no specific prohibition on all hard cover books. Hard cover address books and padded photograph albums are specifically prohibited, and books received by mail require prior staff approval.

The subject of this request for determination is a rule that the requester states was issued by the Department of Corrections, and enforced by the warden of PBSP, which appeared in the PBSP Operations Manual section regarding inmate personal property (section 54030). It states:

“. . . Books and periodicals must be obtained through vendor, via special purchase. . . . Requirements are paperback only, no hard back or used books.”

The agency response states:

*“The CDC establishes a process for the acquisition, possession and disposition of inmate personal property while ensuring that contraband is not introduced into the system or secreted in personal property. Thereby, maintaining the safety and security of the staff, inmates and the public. (Secretion of contraband is accomplished easily in the spine, front and back cover of a hard cover book. As an example, weapon stock, syringes and drugs, to name a few, can easily be concealed in the aforementioned areas. Additionally, it is easy to fashion a ‘spear head’ from a hard cover book by affixing a weapon head to the spine of the book.)”* [Emphasis added.]

Nowhere in the agency response does it state that the prohibition on hard cover books is limited to PBSP, nor does it state any circumstances which are unique to PBSP which would support a conclusion that the rule is needed only at that particular institution. The response is also devoid of any reference to an institution which *does* allow inmates to receive or possess hardcover books.

**A. IS THE CHALLENGED RULE 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.<sup>10</sup>

The agency response makes it clear that the prohibition of hard cover books is necessary for the safety and security of the staff, inmates and the public. What is unclear from the Department response is whether the policy of prohibiting hard cover books is a policy of the *entire* Department or is required by some unique circumstance at PBSP. The requester seems to assert that it is a department-wide rule.

The challenged rule might have qualified for the "local rule exception" to the APA if, for instance, the Department had stated that (1) the rule was required by unique<sup>11</sup> circumstances at PBSP, (2) other institutions did not have the same rule, and (3) the rule did not concern an issue of statewide importance.

However, since the Department did not provide that information, OAL must conclude the prohibition on hard cover books *applies to the entire prison population; therefore, it is a standard of general application.*

**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 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] . . . ."

Title 15, California Code of Regulations, section 3006, subdivision (d), states:

"Anything in the possession of an inmate which is not contraband but will, if retained in possession of the inmate, present a serious threat to facility

security or the safety of inmates and staff, shall be controlled by staff to the degree necessary to eliminate the threat.”

The Department contends in its agency response that the rule prohibiting inmates from receiving or possessing hard cover books is necessary to maintain the safety and security of the staff.

In other words, the Department is defining a hard cover book as an item which, though not contraband, will pose “a serious threat to facility security or the safety of inmates and staff,” under this section of the CCR. The rule is “making specific” the CCR section, by concluding that hard cover books pose a serious security or safety threat.

The challenged rule is a rule or standard of general application. In addition the challenged rule “makes specific” the law enforced by the Department. Since the challenged rule meets both parts of OAL’s two-part test, *OAL concludes it is a “regulation” and is without validity until it is adopted in compliance with the APA.*

## **II. DOES THE CHALLENGED RULE , WHICH HAS BEEN FOUND TO BE A “REGULATION,” FALL WITHIN ANY *SPECIAL* <sup>12</sup> EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?**

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.”<sup>13</sup>

The agency response is incomplete and unclear; the Department has made none of the following arguments to show that the challenged rule falls within the local rule exception: that (1) the rule was required by unique circumstances at PBSP, (2) the rule applied solely to PBSP, (3) other institutions did not have the same rule,

or (4) the rule did not concern an issue of statewide importance. OAL thus concludes that the rule does not fall within any special express statutory exemption from the APA.

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

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.<sup>14</sup> Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.<sup>15</sup>

#### 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.][<sup>16</sup>]

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

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception. . . ." <sup>17</sup>

The challenged rule significantly affects the *entire* prison population's ability to possess or receive hard cover books. Not all information which is printed in hard cover books also appears in soft cover books. Even when it does, it often is not put in soft cover format for more than a year after it appears in hard cover. Consequently, barring hard cover books limits the information available to an inmate. Furthermore, it also prevents anyone outside the prison from sending a hard cover book to an inmate. This effect on non-prisoners, coupled with the effect of limiting the information available to the entire inmate population,

exceeds the scope of the internal management exception. Therefore, the challenged rule does not fall within the internal management exception to the APA.

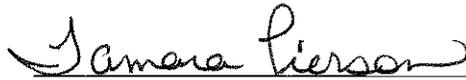
### CONCLUSION

For the reasons set forth above, OAL finds that the rule which prohibits inmates from receiving or possessing hard cover books is a "regulation" which has not been adopted in compliance with the APA requirements; therefore, it is without legal effect.

November 24, 1998



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## ENDNOTES

1. This request for determination was filed by John Stinson, while an inmate at PBSP, C-40154, P.O. Box 7500, D-10-109, Crescent City, CA 95532-7500. The agency response was filed by Pamela L. Smith-Steward, Deputy Director of Legal Affairs 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. The APA would apply to the Department's rulemaking even 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).

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* 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*.

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). Since OAL is not a court or a party, and OAL’s determinations are not actions or proceedings in a court of justice, Rule 977 does not apply to determinations by OAL.

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. *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).
11. In the 1988 Corrections determination proceeding that resulted in OAL recognizing the “local rule exception” for the first time, which contributed to the later codification of this exception in Penal Code section 5058, the Department contended essentially that the challenged rule could not be a standard of general application because it addressed “*unique*” circumstances at one particular prison and did 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”). (1988 OAL Determination No. 13, CRNR 88, 38-Z, p. 2944, Sep. 16, 1988.) 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.), In 1988, OAL was informed by the Department that the Department:

“is 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.) (1988 OAL Determination No. 13, note 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:

“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!’ ” (*In re Harrell* (1970) 2 Cal.3d 675, 695 n. 16, 87 Cal.Rptr. 504, 516 n. 16.)

12. 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.

13. In the agency response, the Department does not allege that it has satisfied the two preconditions spelled out in Penal Code section 5058, subdivision (c)(1) (A) & (B).
14. Government Code section 11346.
15. 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.

16. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, n. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
17. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.