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OFFICE OF ADMINISTRATIVE LAW

*Richard Pittman*  
*12/10/98*

<p><b>In re:</b></p> <p><b>Request for Regulatory</b></p> <p><b>Determination filed by</b></p> <p><b>RICHARD PITTMAN</b></p> <p><b>concerning the policy of the</b></p> <p><b>CALIFORNIA DEPARTMENT OF</b></p> <p><b>CORRECTIONS of stamping all</b></p> <p><b>outgoing prisoner mail with</b></p> <p><b>the words "state prison"<sup>1</sup></b></p> <hr/>	<p>)</p>	<p><b>1998 OAL Determination No. 43</b></p> <p><b>[Docket No. 96-011]</b></p> <p><b>December 10, 1998</b></p> <p><b>Determination Pursuant to</b></p> <p><b>Government Code Section</b></p> <p><b>11340.5; Title 1, California</b></p> <p><b>Code of Regulations,</b></p> <p><b>Chapter 1, Article 3</b></p>
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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") in November of 1993, was whether the policy of the California Department of Corrections, of stamping all outgoing prisoner mail with the words "state prison" constituted a "regulation" and was, therefore, without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

*OAL has concluded this policy was a "regulation" which needed to be adopted in compliance with the APA. In June of 1994, the Department did adopt a duly promulgated regulation to cover this policy. However, that did not render this request for determination moot because OAL has found previously, that subsequent laws or actions (e.g., rescission of the policy) by an agency do not change the obligation of OAL under its own statutes and regulations to issue a determination based upon the law and facts, at the time the request was filed.*

## **ISSUE**

OAL has been requested to determine whether the policy of the California Department of Corrections of stamping all out-going prisoner mail with the words "state prison" was a "regulation" which must 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> 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*,<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, we must conclude that it is a "regulation" and subject to the APA. In applying the two-part test, however, we are 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>

### **This Request for Determination**

On November 17, 1993, Mr. Pittman, while an inmate at California State Prison, Soledad ("Soledad"), requested a determination whether the policy of the prison of stamping all out-going prisoner mail with the words "state prison" was an underground regulation. He also challenged a one-page Administrative Bulletin, issued by the Department of Corrections, the subject of which was "Identification of state prison on all out-going correspondence," issued in July 1993.

The Administrative Bulletin stated:

"Effective immediately all outgoing correspondence from institutions including, but not limited to, letters, packages, and parcels are to be clearly identified as originating from a California State Prison facility.

PLEASE ENSURE THAT EACH OUTGOING ARTICLE OF CORRESPONDENCE WHETHER SENT BY STAFF OR AN INMATE IS CLEARLY LABELED OR STAMPED WITH THE WORDS STATE PRISON ON THE FACE OF THE ENVELOPE OR PACKAGE.

"The purpose of this identification is to alert the recipient that the correspondence was mailed from within a correctional setting since the institution's name may not specify that it is a California State Prison. . . ."

The Administrative Bulletin was directed to all institutions by the Chief Deputy

Director of the Department of Corrections.

At approximately the same time Mr. Pittman filed his request for determination, OAL also received requests by an inmate at Chuckawalla Valley State Prison and the mother of an inmate at Northern California Women's Facility, concerning the practice of stamping all outgoing correspondence from those institutions with the words "state prison." OAL regulations require a supporting declaration, signed under penalty of perjury, to be submitted with a request for determination.<sup>7</sup> Mr. Pittman was the first to submit the required declaration, therefore, he shall be considered the "requester" of this determination. A declaration was subsequently received from the inmate at Chuckawalla Valley State Prison, so his letter will be considered as public comment. However, no declaration was ever received from the mother of the inmate in the Northern California Women's Facility, so her letter may not be considered at this time.<sup>8</sup>

#### **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>9</sup>

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.<sup>10</sup> In *American Friends Service Committee v. Procunier* (1973) (hereafter, "*Procunier*"),<sup>11</sup> 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.)<sup>12</sup>

In the Agency response the Department does not argue that this was a "local rule." It is apparent from the Administrative Bulletin that the rule requiring the stamping of all outgoing mail with the words "state prison" was to apply to all mail sent

from all institutions, whether sent from an inmate or a staff member. *The "challenged rule" applied to the inmates of all the institutions and to all staff members, so it is a standard of general application.*

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

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

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 1994<sup>13</sup>, 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."

Title 15, CCR, section 3147 provides for the definition and disposition of mail. At the time this request for determination was made it did not contain any provision stating that all out-going mail would be stamped with the words "state prison."

Requiring all out-going mail to be stamped with the words "state prison" may be characterized as an infringement upon an inmate's rights (and the rights of the correspondent), but the Director of the Department of Corrections could impose

such a requirement if the Director found it to be necessary for the "reasonable protection of the public," pursuant to the laws referenced above.

Therefore, a rule requiring the stamping of all out-going mail with the words "state prison" would implement the law enforced by the Department. *Since the challenged rule meets both parts of the two-part test, it is a "regulation" within the meaning of the APA.*

### **C. IS THE ISSUE MOOT?**

OAL has found previously,<sup>14</sup> that subsequent laws or actions (e.g., rescission of the policy) by an agency do not change the obligation of OAL under its own statutes and regulations to issue a determination based upon the law and facts at the time the request was filed.

In this case, the Department did codify the challenged rule in Title 15, CCR, section 3147, subsection (a)(2), on June 17, 1994. The subsequent codification does not change the fact that the challenged rule was an "underground regulation" at the time the rule was enacted because it had not been adopted pursuant to the APA. However, since June 17, 1994, the regulation has been properly adopted in compliance with the APA.

### **III. DOES THE CHALLENGED RULE, WHICH HAS BEEN FOUND TO BE A "REGULATION," FALL WITHIN ANY *SPECIAL*<sup>15</sup> 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 [Penal Code section 5058, subdivisions (c)<sup>16</sup> and (d)].<sup>17</sup> 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.<sup>18</sup>

In its response, the Department does not contend that any of the special exemptions applies. OAL concurs. *None of the special exemptions applies to the*

*challenged rule.*

#### IV. DOES THE CHALLENGED 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.<sup>19</sup> Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.<sup>20</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>21</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>22</sup>

The challenged rule significantly affects inmates and their correspondents by requiring that out-going mail from inmates at all institutions be stamped with the words “state prison.” The rule does not relate solely to the management of the internal affairs of the Department, but rather constitutes a rule of general application of significant import to all prisoners and their correspondents. Therefore, OAL concludes that the challenged rule does not fall within the internal management exception to the APA.

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

## CONCLUSION

For the reasons set forth above, OAL concludes that:

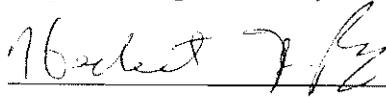
- (1) at the time the request for determination was made, *the rule* requiring all out-going mail from the institutions sent by inmates or staff be stamped with the words "state prison" *was a "regulation" which was invalid* because it had not been adopted pursuant to the APA; however,
- (2) the rule was properly adopted in compliance with the APA in June 1994; therefore, it is no longer invalid.

DATE: December 10, 1998



HERBERT F. BOLZ

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for TAMARA PIERSON, Administrative Law Judge  
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## ENDNOTES

1. This Request for Determination was filed by Richard Pittman, E-97278, RB 236, Box 705, Soledad, CA 93960-0705. 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. 401.
4. (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. 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 after *Grier*, 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. Title 1, CCR, section 122, subsection (b).

8. Title 1, CCR, section 124, subsection (b).

9. *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).

10. 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.)

11. (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.

12. *Id.*, 33 Cal.App.3d at 258, 109 Cal.Rptr. at 25.

13. 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.

14. **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; *Memorial, Inc. v.*

*Harris* (9th Cir. 1980) 655 F.2d 905, 910, n. 14. Also see Title 1, CCR, section 126. OAL must respond to the request pursuant to its own regulations.

15. 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.
16. Penal Code section 5058, subdivision (c), codified case law regarding the local rule exception.
17. 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.
18. **1998 OAL Determination No. 7** (Department of Social Services, Docket No. 91-011, June 18, 1998), typewritten version, p. 9, California Regulatory Notice Register 98, No. 30-Z, July 24, 1998, p. 1400.
19. Government Code section 11346.
20. 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.
21. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, n. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
22. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.