

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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In re:)	1998 OAL Determination No. 44
Request for Regulatory)	
Determination filed by)	[Docket No. 96-012]
MICHAEL TURNER concerning)	
the PELICAN BAY STATE)	December 11, 1998
PRISON, security housing unit)	
kitchen rules and policies for)	Determination Pursuant to
inmate workers, and the)	Government Code Section
policy of inmate credit)	11340.5; Title 1, California
forfeiture of up to 181 days)	Code of Regulations,
for possession of a razor)	Chapter 1, Article 3
blade ¹)	
_____)	

Determination by: EDWARD G. HEIDIG, Director

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

SYNOPSIS

The issues presented to the Office of Administrative Law ("OAL") are whether: (1) the security housing unit kitchen rules and policies for inmate workers, and (2) the credit forfeiture by inmates of up to 181 days for possession of a razor blade, at Pelican Bay State Prison, are "regulations" and are, therefore, without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").



OAL has concluded that the *rules and policies governing inmate workers in the security housing unit kitchen* are "local rules," not "regulations;" thus, not subject to the APA. OAL has concluded that the challenged policy of *credit forfeiture for possession of a razor blade* is merely a restatement of existing law and is not a "regulation" which must be adopted in compliance with the APA.

ISSUE

OAL has been requested to determine whether:

- (1) the security housing unit ("SHU") kitchen rules and policies at Pelican Bay State Prison ("PBSP") for inmate workers (dated August 19, 1993) are "regulations" which must be adopted pursuant to the APA; and
- (2) the policy of PBSP of credit forfeiture of up to 181 days for a finding of guilt by an inmate for possession of a razor blade is a "regulation" which must be adopted pursuant to the APA.²

ANALYSIS

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

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

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

Clearly, the APA generally applies to the Department's quasi-legislative enactments.³ After this request was filed, Penal Code section 5058 was amended to include several express exemptions from APA rulemaking requirements [subdivisions (c) and (d)]. The applicability of these exemptions will be discussed below.

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

Government Code section 11342, subdivision (g), defines "regulation" as:

". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,⁴ the California Court of Appeal upheld OAL's two-part test⁵ as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

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

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

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

If an uncodified rule meets both parts of the two-part test, we must conclude that it is 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.]"⁶

This Request for Determination

On November 22, 1993, Mr. Turner, while an inmate at Pelican Bay State Prison, requested a determination whether the "Security Housing Unit Kitchen Rules and Policies for Inmate Workers," dated August 19, 1993, were "regulations," which had not been adopted pursuant to the APA, and were, therefore, invalid. He also challenged the policy providing for credit forfeiture of up to 181 days for a finding of guilt that the inmate had been in possession of a razor blade, *as is*, as an underground regulation.

Mr. Turner made no allegation that the SHU kitchen rules and policies for inmate workers were being applied at any institution other than PBSP. Some examples of these rules and policies were:

" . . . You may be asked to perform duties not specifically related to your actual assigned position. For instance, if you are assigned to the sack lunch crew, and we do not have sufficient workers to cover shipping and receiving, you may be asked to perform those duties and vice versa Effective immediately, inmate workers assigned to the dining room clean-up position after breakfast each day will be required to maintain the coat room each day. . . . When storing carts in the dining room, make sure they are not lined up in front of the window to the office. . . . When you are

on a break and you are on the dock you are to remain on the dock. If you are on the black asphalt you are out-of-bounds and subject to be cited.”

Mr. Turner alleged that PBSP provided for the loss of credit for a finding of guilt for being in possession or control of one razor blade, *as is*. Mr. Turner apparently believed that unless the razor blade *was altered* (e.g., a handle added to the razor blade) it would not constitute a weapon, possession of which could subject an inmate to credit forfeiture.

A. ARE THE CHALLENGED RULES “STANDARDS OF GENERAL APPLICATION?”

The issue presented is whether the challenged rules are “local rules,” which are not subject to the APA because they do not constitute standards 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.⁷

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.⁸ In *American Friends Service Committee v. Procunier* (1973) (hereafter, “*Procunier*”),⁹ 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.)¹⁰

Procunier is especially significant because it was this case which the Legislature in essence abrogated by adopting the 1975 amendment to Penal Code section 5058 which specifically made the Department subject to the APA. The controversy was whether the statewide Director's Rules, the rules “promulgated *by the Director*”

(emphasis added), were subject to APA requirements.¹¹ The Director's rules were expressly distinguished in *Procunier* from "institutional rules enacted by each warden"

OAL has consistently taken the position, based on *Procunier*, that local prison rules are not subject to the APA. Since this request was filed, the Legislature has confirmed that "local" institutional rules are not subject to the APA. Since January 1, 1995, Penal Code section 5058, subdivision (c), has declared, in part, that:

"(c) The following are deemed *not* to be 'regulations' as defined in subdivision (b) [now subdivision (g)] of Section 11342 of the Government Code:

(1) *Rules* issued by the director or by the director's designee *applying solely to a particular prison or other correctional facility*, provided that the following conditions are met:

(A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public ."
[Emphasis added.]

This statutory language confirms that the Legislature intends for *local* prison rules to be exempt from APA adoption procedures, provided certain conditions are met.

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

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

“[i]f the action is *not only of local concern, but of statewide importance*, it qualifies as a regulation despite the fact it is called ‘resolutions,’ ‘guidelines,’ ‘rulings’ and the like.”¹²

The agency response states: “[t]he Department contends that the challenged rules are *local rules . . . which address the unique needs of that particular institution/facility.*” (Emphasis added.)¹³

OAL infers that the Department, as in earlier matters, contends essentially that the PBSP rules cannot be a standard of general application because they address “*unique*” circumstances at PBSP and do not apply statewide to all prisoners. The Department developed this argument at length in its agency response in 1988 OAL Determination No. 13, which concerned so-called “local rules” of the California Medical Facility (“CMF”). In this CMF matter, the Department argued that “[t]he issue now to be decided is whether certain operational procedures *unique* [to] CMF are rules of ‘general application.’” (Emphasis added.)^{14, 15} In 1988, OAL was informed by the Department that it was:

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

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

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

“[Rule] 14. At maximum capacity, we can only accommodate 50 men at one time; after this amount the rule is ‘ONE MAN IN, AND ONE MAN OUT!’ ”¹⁶

This local rule responded to “practical limitations of space,”¹⁷ i.e., unique circumstances at San Quentin involving the size of the room housing the library.

The rules and policies governing the inmate workers in the kitchen of the SHU at PBSP delineate the job description and responsibilities of the inmate workers. These duties will naturally vary from institution to institution, depending upon the design of the facilities, the activities that must be performed to provide the inmate meals and the cleanup thereafter, and the location for inmate “smoke breaks.” Hence, these rules concern matters “unique” to PBSP. They do not constitute rules or standards of general application, and are thus not “regulations.” Since these rules do not meet the first part of OAL’s two-part test, it is not necessary to address the second part of the test.

For the reasons listed below, however, OAL concludes that the *second* portion of the request for determination, the portion dealing with the forfeiture of credit time when found guilty of possession of an unaltered razor blade, is a standard of general application.

The danger created by possession of a razor blade, whether it has been altered or is unaltered, by an inmate to other inmates and staff of an institution exists in *all* institutions. It is a matter of statewide concern and is not limited to any unique circumstances at PBSP. *Therefore, a rule governing the forfeiture of credit time for possession of an unaltered razor blade is a matter of statewide concern and does constitute a standard of general application.*

B. DOES THE RULE CONCERNING FORFEITURE OF CREDIT TIME BY INMATES FOUND GUILTY OF POSSESSION OF AN UNALTERED RAZOR BLADE INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE DEPARTMENT OR GOVERN THE DEPARTMENT'S PROCEDURE?

Since the rule providing for forfeiture of credit time by inmates found guilty of possession of a razor blade constitutes a standard of general application, OAL must determine whether it also satisfies the second part of the two-part "regulation" test.

Penal Code section 5058, subdivision (a), declared 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 declared 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]"

Penal Code section 4502, subdivision (a), stated in 1993¹⁸:

"Every person who, while confined in any penal institution, . . . possesses or carries upon his or her person or has under his or her custody or control any instrument or weapon of the kind commonly known as . . . any dirk or dagger or *sharp instrument*, . . . is guilty of a felony . . ." [Emphasis added.]

Title 15, CCR, section 3323 stated, in part, in 1993¹⁹:

"(a) Upon a finding of guilt of a serious rule violation, a credit forfeiture against any determinate term of imprisonment or any minimum eligible parole date for an inmate sentenced to a term of either 15 or 25-years-to-life shall be assessed within the ranges specified in (b) through (h) below:

"(b) Division "A-1" offenses; credit forfeiture of 181-360 days. . . .

"(8) Possession . . . of a deadly weapon

"(i) Nothing in this section shall prevent the department from seeking criminal prosecution for any conduct constituting a violation of the law or from imposing one or more of the authorized punitive, preventative, or

control measures described in these regulations, in addition to forfeiture of credits. . .”

Although the courts have not specifically addressed the issue whether an unaltered razor blade constitutes a “dirk, dagger, or sharp instrument” under Penal Code section 4502, in *People v. Elguera*,²⁰ the prosecution of an inmate for possessing a sharp instrument while confined in state prison, centered on the issue whether the inmate knew that inside the paper packet was a razor blade. **There was no question as to whether the razor blade met the definition of a sharp instrument.**

The court in *Elguera* certainly implies that including a razor blade (as is) within the definition of a “sharp instrument” does not interpret or make specific Penal Code section 4502, but is the only reasonable interpretation of the phrase “sharp instrument.” Logic also mandates that a razor blade not only is a “sharp instrument,” but is also a “deadly weapon,” regardless of whether the razor blade has had a handle affixed to it. Accordingly, the PBSP rule that provided for the forfeiture of up to 181 days of credit for a finding of guilt for possession of a razor blade is not an embellishment upon Title 15, CCR, section 3323, which provided for forfeiture of 181-360 days of credit time for a finding of guilt for possession of a “deadly weapon.” Since the challenged rule is merely restating the law, and is not implementing, interpreting, or making the law specific, the rule does not satisfy the second part of OAL’s two-part test of a “regulation.”

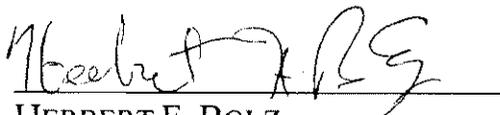
Consequently, OAL concludes that *the challenged rule concerning the forfeiture of credit time for inmates found guilty of possession of an unaltered razor blade is not a "regulation" within the meaning of the APA. The challenged rule is only the reasonable interpretation of an existing regulation, which was adopted pursuant to the APA, and codified in the Code of Regulations, which provides for the forfeiture of credit time for inmates found guilty of possession of a deadly weapon.*

CONCLUSION

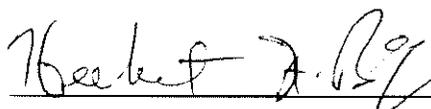
For the reasons set forth above, OAL concludes that:

- (1) the security housing unit ("SHU") kitchen rules and policies at Pelican Bay State Prison ("PBSP") for inmate workers (dated August 19, 1993) are **"local rules" not "regulations" which must be adopted pursuant to the APA;** and
- (2) the policy of PBSP of credit forfeiture of up to 181 days for a finding of guilt by an inmate for possession of a razor blade is not a "regulation" which must be adopted pursuant to the APA; but is merely a restatement of an existing regulation, which had been properly adopted pursuant to the APA.

DATE: December 11, 1998



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ENDNOTES

1. This request for determination was filed while an inmate at Pelican Bay State Prison by Michael Turner, 740 Amanda Drive, San Jose, CA 95136. (408) 264-4558. 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.]

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

3. For a detailed description of the APA and the Department of Corrections' history, three-tier regulatory scheme, and the line of demarcation between (1) statewide and (2) institutional, e.g., "local rules," see **1992 OAL Determination No. 2** (Department of Corrections, March 2, 1992, Docket No. 90-011), California Regulatory Notice Register 92, No. 13-Z, March 27, 1992, p. 40.
4. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. A 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite on a particular point, cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr. 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

The *Tidewater* case itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of*

American Physicians & Dentists v. Kizer (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

5. The *Grier* Court stated:

“The OAL’s analysis set forth a two-part test: ‘First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency’s procedure?’ (1987 OAL Determination No. 10, *supra*, slip op’n., at p. 8.)

OAL’s wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

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

7. *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).

8. 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.)

9. (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.

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

11. The dichotomy between institutional and statewide rules continues to be reflected in more recent cases, such as *Hillery v. Rushen* (9th Cir. 1983) 720 F.2d 1132, 1135. The *Hillery* court, though forcefully rejecting arguments that Chapter 4600 of the Administrative Manual did not violate the APA, carefully noted:

"This case does not present the question whether the director may under certain circumstances delegate to the wardens and superintendents of individual institutions the power to *devise particular rules* applicable solely to those institutions. Nor does

it present the question whether the wardens and superintendents may promulgate such rules without complying with the APA. Although some institutions were exempted from certain provisions of the guidelines involved here, the guidelines at issue (1) were adopted by the Director of the Department of Corrections and (2) are of *general* applicability." (Emphasis added.) (720 F.2d at 1135, n. 2.)

12. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.
13. Response, page 3.
14. Page 4.
15. See also 1988 OAL Determination No. 13, p. 14 (quoting agency response to the effect that CMF rules were needed to "meet the *unique* situation at CMF.") (Emphasis added.) CRNR 88, 38-Z. Sep. 18, 1988, p. 2957.
16. *In re Harrell* (1970) 2 Cal.3d 675, 695 n. 16, 87 Cal.Rptr. 504, 516 n. 16.
17. *Id.*, p. 516.
18. Although subdivision (a) of Penal Code section 4502 has been amended since 1993 the changes have been minor and do not change the cited language.
19. Title 15, CCR, section 3323 has been amended since 1993 but the amendments have not changed the language cited.
20. *People v. Elguera* (1992) 8 Cal.App.4th 1214, 10 Cal.Rptr.2d 910.