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STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

Bill Jones
BILL JONES
SECRETARY OF STATE

In re:)	1999 OAL Determination No. 14
Request for Regulatory)	
Determination filed by)	[Docket No. 97-019]
DAVID RICHARDS regarding)	
rules restricting programs)	May 7, 1999
and activities for prisoners)	
designated as Close B)	Determination Pursuant to
custody level at)	Government Code Section
CALIFORNIA STATE PRISON,)	11340.5; Title 1, California
SOLANO¹)	Code of Regulations,
)	Chapter 1, Article 3

Determination by: CHARLENE G. MATHIAS, Deputy Director

HERBERT F. BOLZ, Supervising Attorney
CRAIG S. TARPENNING, Senior Counsel
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law ("OAL") has been requested to determine whether rules at one particular state prison (concerning restrictions on programs and activities for prisoners designated as Close B custody) are "regulations," and are, therefore, invalid unless adopted in compliance with the Administrative Procedure Act ("APA"). OAL has concluded that these rules are not "regulations" for purposes of the APA because they apply solely to inmates at one particular prison; thus, they need not be adopted pursuant to the APA.

DECISION^{2,3,4}

The issue presented to the Office of Administrative Law ("OAL") is whether the following supplemental rules⁵ of the California State Prison, Solano ("SOL" or "Solano"), are "regulations" required to be adopted pursuant to the APA:⁶

- (1) "Inmates with Close 'B' custody will not be placed in work, or program assignments or permitted any activities during evening hours (after 1800 hours)." (SOL Operations Manual section 62010.7.3 C2.)
- (2) "Inmates with Close 'B' custody will only be placed in work or program assignments during daylight hours. Such assignments are restricted to the secure perimeter of each facility. This allows for assignments in Academic Education, Center Complex, Housing Units, or the yard areas only." (SOL Operations Manual section 62010.7.3 C3.)⁷

OAL concludes that the supplemental rules challenged by Mr. Richards are not "regulations" within the meaning of the APA because they are not rules or standards of *general* application; that is, they do not apply to inmates statewide. They are "local" rules applying solely to one particular prison.

DISCUSSION

David Richards is an inmate at the California State Prison, Solano. On November 14, 1997, he requested OAL to determine whether the rules enumerated above are invalid since they were not adopted in compliance with the APA. Mr. Richards contends that these Solano supplemental rules are more restrictive than subsection (a)(5) of section 3377.1 of title 15 of the California Code of Regulations⁸ and that these supplemental rules are regulatory in nature.

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

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.⁹ Effective January 1, 1995,¹⁰ Penal Code section 5058 was amended to include several express exemptions from APA rulemaking requirements. [See section 5058, subdivisions (c)¹¹ and (d)]. The applicability of one of these exemptions will be discussed below.

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*,¹² the California Court of Appeal upheld OAL's two-part test¹³ 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 satisfies 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 *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.]"¹⁴

Three California Court of Appeal cases provide additional guidance on the proper approach to take when determining whether an agency rule is subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in "a statutory scheme which the Legislature has [already] established. . . ." ¹⁵ But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . ." ¹⁶

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon" in administrative bulletins. For example, *Union of American Physicians and Dentists v. Kizer* (1990)¹⁷ held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation.¹⁸ Statutes may legally be

amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993), made clear that reviewing authorities are to focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

" . . . the . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.* . . . [Emphasis added.]"¹⁹

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

Standard of General Application--Rules Applying to Prisoners

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.²⁰

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.²¹ In *American Friends Service Committee v. Procunier* (1973) (hereafter, "*Procunier*"),²² 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.]"²³

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 specifically making 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.²⁴ 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. The Legislature has recently 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.

The challenged rules do not apply statewide

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.” (Emphasis added.)²⁵

The Department contends that the challenged rules cannot be standards of general application because they address unique circumstances at Solano and do not apply statewide to other prisoners.

“The documents at issue are “local rules” published by SOL. They are not intended to apply to all inmates in similar situations, but only to those in one particular institution, based upon that institution’s physical design as it affects security.”²⁶

...

The Warden at SOL has determined the appropriate activities and schedule for Close B inmates based upon the physical characteristics of that prison. Because these inmates are assigned to early work hours, their ‘evening’ starts after work, to allow showers, haircuts and phone calls before the evening meal. Other prisons may schedule work assignments to start later and may extend evening activities to a later time. . . .”²⁷

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. 13²⁸.

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!’”

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

Except to the extent portions of the supplemental rules challenged in this request merely restate portions of section 3377.1 of title 15 of the California Code of

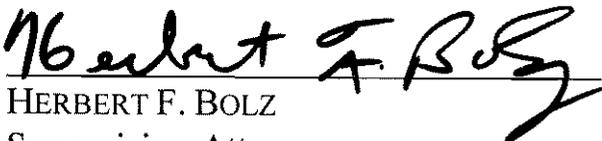
Regulations, the challenged supplemental rules represent the individual warden's response to the particular circumstances present at the California State Prison, Solano, and are limited in their application to that one facility.²⁹ Nowhere in the record of this request is there any indication that the challenged supplemental rules have any effect or significance outside of the California State Prison, Solano. Thus, OAL concludes that the challenged supplemental rules are not standards of general application and are therefore not "regulations" because they do not apply to inmates statewide but are rather "local" rules applying solely to one particular prison. Since the challenged supplemental rules do not meet the first part of the two part test, it is not necessary to address the second part of the test.

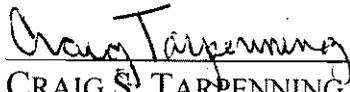
In his request for determination, Mr. Richards also contends the challenged supplemental rules are in conflict with subsection (a)(5)(B) of section 3377.1 of title 15 of the California Code of Regulations. OAL's authority here does not extend to determining whether the challenged rule is consistent with existing law. OAL's authority is limited to determining whether an uncodified state agency rule has been issued in violation of Government Code section 11340.5.³⁰

CONCLUSION

For the reasons set forth above, OAL finds that the challenged supplemental rules are not "regulations" within the meaning of the APA, and thus do not violate Government Code Section 11340.5.

DATE: May 7, 1999


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ENDNOTES

1. This Request for Determination was filed by David Richards, E-40024, CSP-Solano, 12-129U, P.O. Box 4000, Vacaville, CA 95696. 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) 445-0495.
2. This determination may be cited as "**1999 OAL Determination No. 14.**"

Pursuant to Title 1, CCR, section 127, this determination becomes effective on the 30th day after filing with the Secretary of State, which filing occurred on the date shown on the first page of this determination.

Government Code section 11340.5, subdivision (d), provides that:

"Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published [in the California Regulatory Notice Register]."

Determinations are ordinarily published in the Notice Register within two weeks of the date of filing with the Secretary of State.

3. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) An agency rule found to violate the APA could also simply be rescinded.
4. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121 (a), provides:

"'*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA. [Emphasis added.]”

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*"). We note 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 authoritative, except as specified by the *Tidewater* court. *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*.

5. DOM section 51020 establishes the process for facilities to "supplement" the existing DOM sections for local operational purposes.

6. 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.

7. As quoted by the requester in the Request for Determination, p.1.

8. Section 1377.1 of title 15 of the California Code of Regulations provides in part

“(a) The Department uses the following nine inmate custody designations to alert staff as to where an inmate may be housed and assigned, and the level of supervision required of the inmate.

(5) Close B

(A) Housing shall be in cells in secure areas designated by the facility for Close B custody.

(B) *Assignments and activities shall be within the facility perimeter during daylight hours only, except for limited evening activities such as bathing and haircuts within the housing unit.*

. . . . [Emphasis added.]”

9. 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).
10. 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.
11. Penal Code section 5058, subdivision (c), codified case law regarding the local rule exception.
12. (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. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite 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 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.

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*.

13. 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, . . . slip op'n., at p. 8.) [*Grier*, disapproved on other grounds in *Tidewater*]."

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 96, No. 8-Z, February 23, 1996, p. 292.

14. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253. The same point is made in *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 412, review denied.
15. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.
16. *Id.*
17. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.
18. *Id.*
19. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.
20. *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).
21. 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.)
22. (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.
23. *Id.*, 33 Cal.App.3d at 258, 109 Cal.Rptr. at 25.
24. 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 a particular chapter of the Department of Corrections' statewide 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 are 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.)

25. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal. Rptr. 744, 747.
26. Agency response, p.1
27. Agency response, p.3
28. CRNR 88, No. 38-Z, September 16, 1988, p. 2944.
29. Except to the extent the challenged supplemental rules restate subsection 3371(a)(5)(B) of title 15 of the California Code of Regulations, their content does not appear in section 62010.7.3 of the DOM. The challenged supplemental rules are also missing from section 62010.7.3 of the California Men's Colony ("CMC"), San Luis Obispo, supplement to the DOM received by OAL as part of two pending requests. (OAL Docket nos. 98-007 and 99-002.)
30. OAL does not review alleged underground regulations for compliance with the APA's six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. However, in the event regulations were proposed by the Department under the APA, OAL would review the *proposed* regulations for compliance with the six statutory criteria. (Government Code sections 11349 & 11349.1.)