

STATE OF CALIFORNIA

Bill Jones  
SECRETARY OF STATE

OFFICE OF ADMINISTRATIVE LAW

In re:	)	
Request for Regulatory	)	1999 OAL Determination No. 27
Determination filed by CARL	)	
D. MCQUILLION concerning	)	Docket No. 99-001
alleged unwritten policies	)	
and practices of the BOARD	)	November 30, 1999
OF PRISON TERMS denying	)	
parole release to life	)	Determination pursuant to
prisoners <sup>1</sup>	)	Government Code Section 11340.5;
	)	Title 1, California Code of
	)	Regulations, Chapter 1, Article 3

Determination by: CHARLENE G. MATHIAS, Deputy Director

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SYNOPSIS

The Office of Administrative Law concludes that general policies or practices, if they exist, allegedly used by the Board of Prison Terms to deny parole to life inmates are "regulations" which are invalid because they should have been, but were not, adopted pursuant to the Administrative Procedure Act.

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## DECISION <sup>2, 3, 4, 5, 6</sup>

The Office of Administrative Law (“OAL”) has been requested to determine whether the following unwritten policies and practices of the Board of Prison Terms (“Board”) are “regulations” which must be adopted pursuant to the Administrative Procedure Act (“APA”):<sup>7</sup>

(1) denying parole release to all ISL<sup>8</sup> life prisoners and almost all DSL<sup>9</sup> life prisoners by applying extremely strong presumptions that such prisoners are unsuitable for parole and that any parole dates previously granted to such prisoners were improvidently granted, thereby denying parole suitability and systematically rescinding previously granted parole dates (challenged rule no. 1); and

(2) failing to set new parole dates for life prisoners whose offenses occurred prior to the 1985 amendment to Penal Code section 3041.5(b)(4) and whose parole date has been rescinded, and applying an all but irrebuttable presumption in rescheduling the hearing that it is not reasonable to expect that parole would be granted to such prisoners if a hearing were held during the following year(s) (challenged rule no. 2).

OAL has concluded that:

(1) if the Board has implemented an unwritten policy or practice of denying parole release to all ISL life prisoners and almost all DSL life prisoners by applying extremely strong presumptions that such prisoners are unsuitable for parole and that any parole dates previously granted to such prisoners were improvidently granted, thereby denying parole suitability and systematically rescinding previously granted parole dates, such a policy or practice would constitute a “regulation” which is invalid unless adopted pursuant to the APA; and

(2) if the Board has implemented an unwritten policy or practice of failing to set new parole dates for life prisoners whose offenses occurred prior to the 1985 amendment to Penal Code section 3041.5(b)(4) and whose parole date has been rescinded, and applying an all but irrebuttable presumption in rescheduling the hearing that it is not reasonable to expect that parole would

be granted to such prisoners if a hearing were held during the following year(s), such a policy or practice would constitute a "regulation" which is invalid unless adopted pursuant to the APA.

*OAL makes no finding as to the existence or non-existence of the alleged unwritten policies and practices.* OAL is legally mandated to determine whether the challenged agency policies and practices, if they exist, constitute "regulations" which are without legal effect unless adopted pursuant to the APA.

There is no question that the Board has the authority to deny suitability or rescind the parole date of any individual life prisoner, sentenced under either ISL or DSL law, on a case by case basis, for reasons of public safety or good cause, respectively. If the Board wishes to exercise its discretion to utilize general policies consistent with statute governing suitability, rescission, or resetting parole dates or hearings, however, it must adopt regulations pursuant to the APA.

## DISCUSSION

### **I. AGENCY, REQUEST FOR DETERMINATION**

In 1944 the Legislature created the Adult Authority and the California Women's Board of Terms and Paroles to consider the granting and revocation of parole and the fixing of sentences for prisoners in California prisons.<sup>10</sup> On July 1, 1977, the Community Release Board succeeded the Adult Authority and the California Women's Board of Terms and Paroles, which were abolished.<sup>11</sup> On January 1, 1980, the Community Release Board was renamed the "Board of Prison Terms."<sup>12</sup> The Board of Prison Terms meets periodically concerning parole matters at each prison.<sup>13</sup>

The requester is a life prisoner whose commitment offense occurred prior to July 1, 1977 and who was sentenced under the Indeterminate Sentencing Law ("ISL").<sup>14</sup> Effective July 1, 1977, the ISL was replaced by the Uniform Determinate Sentencing Act (Determinate Sentencing Law or "DSL").<sup>15</sup> The DSL reflected a substantial change in the statutory scheme governing imprisonment in California. The Legislature declared that the purpose of imprisonment was now punishment rather than social rehabilitation. Whereas the length of sentences served before parole had previously been based upon the Adult Authority's judgment of the adjustment and social rehabilitation of the individual under the ISL, after July 1, 1977 the length of time served prior to parole would be based

upon a framework of uniform terms for similar offenses. The Board of Prison Terms (as the Adult Authority's successor) was authorized to establish guidelines for the setting of parole release dates with less discretion to deviate from the guidelines than existed under the ISL.

In 1982, the California Supreme Court in *In re Stanworth* held that ex post facto principles required that a prisoner, who had been sentenced to a "life" imprisonment under the ISL, was entitled to have his *parole release date* determined under both the ISL and DSL and was entitled to the earlier release date of the two standards.<sup>16</sup> However, in 1983, the California Court of Appeal in *In re Seabock* held that the application of DSL guidelines for determining *parole suitability* to a life prisoner whose commitment offense occurred prior to July 1, 1977 did not violate the constitutional ex post facto prohibition.<sup>17</sup>

The requester is a life prisoner whose crime occurred prior to July 1, 1977 under the ISL. When the DSL became effective, the requester's sentence remained indeterminate life term. His 1994 parole date was rescinded by the Board.<sup>18</sup> The requester alleges that the Board has implemented an unwritten policy and practice over the last five years of denying or rescinding the parole grants of all ISL life prisoners and that the requester's 1994 parole date was rescinded pursuant to that policy and practice.<sup>19</sup> The requester alleges that this is accomplished by the Board uniformly denying parole suitability to these prisoners and by systematically rescinding previously granted parole dates by applying extremely strong presumptions that such prisoners are unsuitable for parole and that any parole dates previously granted to such prisoners were improvidently granted.<sup>20</sup>

The requester also alleges that this policy is inconsistent with sections 3041(a), 3041.5(b)(4) and 1170.2(e) of the Penal Code and "... violates the requester's and members of his class' constitutional rights under the due process and equal protection clauses, and violates ex post facto law."<sup>21</sup> The requester added that the "... post - 1977 Board regulations . . . are inconsistent with the enabling statute and must be invalidated, in particular, 15 CCR §§ 2280-2282."<sup>22</sup> The requester also alleges that the failure to adopt a regulation consistent with subdivision 3041.5(b)(4) of the Penal Code (Stats. 1976, ch. 1139) violates sections 5076.2 and 3052 of the Penal Code.<sup>23</sup> Lastly, the requester alleges that the Board has implemented an underground regulation by refusing to set new parole dates for life prisoners whose offenses occurred prior to the 1985 amendment to subdivision 3041.5(b)(4) of the Penal Code and whose parole dates were rescinded, and applying an all but irrebuttable presumption in rescheduling the hearing that it is

not reasonable to expect that parole would be granted to such prisoners if a hearing were held during the following year(s).<sup>24</sup>

With respect to the allegations that the challenged unwritten policies of practice of the Board are inconsistent with statute or violate the California or United States Constitution, OAL has no authority to make such a finding in the determination context. The same is true as to the allegation that duly adopted regulations of the Board are inconsistent with the enabling statute and must be invalidated.

Government Code section 11340.5 provides in subdivision (b):

“If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, and agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, *the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation* as defined in subdivision (g) of Section 11342.” (Emphasis added.)

An OAL determination issued pursuant to Government Code section 11340.5 addresses whether the challenged rule is a “regulation” required to be adopted pursuant to the APA. In other words, OAL’s authority is limited to determining whether an uncodified state agency rule has been issued in violation of Government Code section 11340.5. OAL’s authority here does not extend to other issues such as whether the challenged rule, or a related regulation adopted by the Board, is consistent with statutory law or is constitutional. However, OAL does have the authority to address such issues if a proposed regulation is submitted to OAL at the conclusion of a rulemaking proceeding conducted pursuant to the APA.<sup>25</sup>

With respect to the remaining allegations of the requester that certain unwritten policies and practices of the Board (challenged rules nos. 1 and 2) are “regulations” that should have been adopted pursuant to the APA, the Board responds that these are not issues within OAL’s regulatory jurisdiction.<sup>26</sup>

“The Board of Prison Terms contends that the issue presented in Determination Request Number 1 is not an issue within OAL’s regulatory jurisdiction. The Board has current regulations containing the suitability

criteria that are considered by the Board when conducting all life prisoner parole consideration hearings. These regulations are very clearly cited by the inmate in his determination request. Furthermore, the courts have consistently upheld the Board's authority to conduct parole consideration hearings using the criteria contained within the California Code of Regulations, title 15, division 2, as it pertains to life prisoners sentenced under both the ISL and the DSL. The Board's authority is clearly defined both in case law and in the California statutory law."<sup>27</sup>

"It is the Board's assertion that the issue presented in [challenged rule no. 2] is not an issue within OAL's regulatory jurisdiction. Furthermore, the authority for the Board to implement regulations pertaining to rescission is both statutory and governed by case law. The Board's regulations containing provisions for rescission of parole grants and subsequent scheduling of parole consideration hearings is clearly stated in California Code of Regulations, title 15."<sup>28</sup>

The issue before OAL is not whether the Board has authority to deny suitability, rescind previously granted parole dates, or fail to reset new parole dates on a case by case basis. The issue before OAL is whether alleged general policies and practices of the Board, if they exist, which supplement or embellish upon existing regulations and affect the outcome of those processes, are, in themselves, "regulations" which must be adopted pursuant to the APA. Clearly OAL has the authority under the APA to issue a determination in this regard. Government Code section 11340.5 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 this chapter."

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with Secretary of State pursuant to this chapter, *the office may issue a determination* as to whether the

guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (g) of Section 11342.” (Emphasis added.)

In fact, OAL has already issued a determination on an alleged unwritten policy of the Board in a related matter. OAL was asked to determine whether an unwritten policy of the Board which: (1) applies an irrebuttable presumption that a fundamental error had occurred in the granting of all parole dates to life prisoners under the ISL, then (2) schedules parole rescission hearings for all ISL life prisoners who had previously been granted a parole date, resulting in the rescission of those parole dates, constitutes a “regulation” which is without legal effect unless adopted pursuant to the APA. In 1998 OAL Determination No. 41, OAL concluded that if the Board of Prison Terms has such a policy, such a policy would constitute an “underground regulation.”<sup>29</sup>

## II. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE BOARD?

Government Code section 11000 states:

“As used in this title [Title 2. “Government of the State of California” (which title encompasses the APA)], ‘state agency’ includes every state office, officer, department, division, bureau, board, and commission.”

The APA narrows the definition of “state agency” from that in section 11000 by specifically excluding “an agency in the judicial or legislative departments of the state government.”<sup>30</sup> The Board is in neither the judicial nor legislative branch of state government. There is no specific statutory exemption which would permit the Board to conduct rulemaking without complying with the APA at this time.

Penal Code section 5076.2, subdivision (a), also provides in part:

“Any rules and regulations, including any resolutions and **policy statements**, promulgated by the Board of Prison Terms, *shall be promulgated and filed pursuant to* [the APA] . . .” (Emphasis added.)

OAL, therefore, concludes that APA rulemaking requirements generally apply to the Board.<sup>31</sup>

### III. DO THE CHALLENGED RULES CONTAIN “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*,<sup>32</sup> the California Court of Appeal upheld OAL’s two-part test<sup>33</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*
- 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” subject to the APA. In applying the two-part test, we are mindful of the admonition of the *Grier* court:

“ . . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, . . . 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.*<sup>34</sup> [Emphasis added.]”

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. . . .”<sup>35</sup> 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. . . .”<sup>36</sup>

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)<sup>37</sup> 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.<sup>38</sup> 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.]”<sup>39</sup>

### **Challenged Rule No. 1**

The requester has alleged that the Board has an unwritten policy and practice of denying parole release to all ISL life prisoners and almost all (99.97%) DSL prisoners by applying extremely strong presumptions that such prisoners are unsuitable for parole and that any parole dates previously granted to such prisoners were improvidently granted, thereby denying parole suitability and systematically rescinding previously granted parole dates. The Board takes the position that it is performing its function pursuant to the procedures authorized in statute and duly adopted regulations, and that, therefore, there can be no underground regulation.

“The Board of Prison Terms, as the parole authority for the State of California, is not required by statutory law to set parole dates for life prisoners sentenced under the Indeterminate Sentencing Law until after there has been a finding of parole suitability. Inmate McQuillion’s original request for determination, as well as his submitted comments to the determination, alleges that the Board of Prison Terms must set parole dates for all life prisoners whose commitment offense occurred prior to July 1, 1977. This allegation is legally incorrect.”

“As has been previously discussed, the Board conducts parole suitability hearings for life prisoners sentenced with the possibility of parole. In 1977, when California passed the DSL, certain crimes remained punishable by a term of life imprisonment. These life terms **were not** restructured as determinate sentences but remained indeterminate. An indeterminate inmate is not entitled to have his parole date set until after a finding of parole suitability. Furthermore, Penal Code section 3041, subsections (a) and (b), clearly states that the Board of Prison Terms shall make a recommendation of suitability for any prisoner who is not sentenced pursuant to Penal Code section 1170 (determinate prisoners) **unless** the panel or Board determines that public safety considerations require a lengthier period of incarceration.”

“Similarly, the Board’s current regulations contain suitability criteria for all life prisoners, including those whose commitment offense occurred prior to July 1, 1977. California Code of Regulations, title 15, sections 2280 through 2281, contain the suitability criteria that the Board panel may consider during a parole consideration hearing for an ISL prisoner, as well as certain DSL prisoners. However, the term setting matrix located in 15 CCR, section 2282, is not applicable to these prisoners until **after** there has been a finding of parole suitability. Until a finding of suitability, the panel does not fix a parole date for an ISL prisoner. This procedure complies with statutory law as stated in Penal Code section 3041, subsection (a) and (b).”

“The Board does not have an underground regulation or policy preventing ISL prisoners from receiving a set parole date. ISL prisoners are not **entitled** to receive a set parole date. The Board must **first** find an ISL prisoner suitable for parole, based upon public safety considerations and suitability criteria, before a parole date can be set. The Board consistently follows the state law when determining parole suitability for these prisoners and this law is implemented by the Board’s regulations.” (Emphasis in original.)

...

“The Board’s regulations pertaining to parole suitability for DSL prisoners are contained within the California Code of Regulations, title 15, sections 2280 through 2281 and 2400 through 2402. Title 15, sections 2280-2281, are applicable to life prisoners who committed murder before November 8, 1978, life prisoners who committed attempted murder before January 1, 1987, and all other life prisoners. Sections 2400 through 2402 are applicable to life prisoners who committed murder on or after November 8, 1978, and life prisoners who committed attempted first degree murder on or after January 1, 1987. The matrices contained within 15 CCR, section 2282 and 2403, are not applicable to a DSL prisoner until after there has been a finding of parole suitability. A DSL prisoner will not be found suitable for parole if the consideration of public safety requires that there be a lengthier period of incarceration. The applicable regulations are contained within title 15 and reference the criteria that may be considered by the Board hearing panel when determining parole suitability.”

“The Board does not have an underground regulation or policy preventing ‘most’ DSL prisoners from receiving a set parole date. DSL prisoners are not entitled to receive a set parole date until there has been a finding of suitability. The Board must first find a DSL prisoner suitable for parole, based upon public safety considerations and suitability criteria, before a parole date can be set. As was stated above, the Board has found 55 life prisoners suitable for parole during the past two years, subject to the Governor’s right to review. The Board consistently follows state law when determining parole suitability for DSL prisoners and this law is implemented by the Board’s regulations.”<sup>40</sup>

However, the requester has alleged that the Board implements the duly adopted regulation by uniformly applying extremely strong presumptions that such prisoners do not meet the standard for parole suitability and that any previously granted parole date was improvidently granted and should be rescinded.

“Thus, the Board, in implementing the unwritten policy and practice of 100% denials of the ISL life prisoner class, and its 99.97% denials of DSL life offenders, since 1992, by denials of *suitability* and systematic *rescissions*, does so pursuant to its regulations, CCR, tit. 15, sec. 2280, 2281 (suitability), and sections 2450-2451(c) (rescission). The authority for those regulations derives from Penal Code sections 3041(a) and 3041.5(b)(4). But the unwritten policy and practice of 100% and 99.97% denials constitute an ‘underground’ amendment to these regulations and, as such fall within the purview [sic] of the OAL. The question is whether the Board can evade APA requirements of notice and hearing when effecting substantive changes by simply *performing* the actions without *officially* acknowledging them or amending the governing regulations.”<sup>41</sup> (Emphasis in original.)

It has been recognized in case law that the fact that required parole hearings were held does not preclude the possibility of a general policy affecting the outcome of those hearings.

In *In re Minnis*<sup>42</sup> the petition alleged that:

“... although the Authority evaluated his application for parole in accordance with its usual procedures, *it refused to fix his term at less than maximum or to grant him parole on the basis of a ‘policy’ that prisoners*

*who have sold drugs or narcotics 'purely for profit' should be retained in prison for the maximum term permissible.* He argues that the failure of the Authority to consider the individual circumstances of each prisoner, including his conduct in prison and his disposition toward reform, is contrary to the purposes of the Indeterminate Sentence Law and the parole system. It is urged, therefore, that the Authority abused its discretion by subsuming petitioner's case under a blanket rule."<sup>43</sup> (Emphasis added.)

The California Supreme Court found that:

"Many factors are to be considered by the Authority in deciding whether to fix a sentence at less than maximum and whether to grant parole. Although good conduct while incarcerated and potential for reform are not the only relevant factors, this court has acknowledged their significance. (*In re Schoengarth* (1967) 66 Cal.2d 295, 300, 57 Cal.Rptr. 600, 425 P.2d 200; *Roberts v. Duffy*, supra, 167 Cal. 629, 640, 140 P. 260.) Furthermore, the Authority has declared that these factors are among those of 'paramount importance.' (Cal. Adult Authority, Principles, Policies and Program (1952) pp. 8-9; see also Adult Authority Policy Statement No. 11 (June 27, 1966).) Any official or board vested with discretion is under an obligation to consider all relevant factors (cf. *People v. Wade* (1959) 53 Cal.2d 322, 338-339, 1 Cal.Rptr. 683, 348 P.2d 116), and the Authority cannot, consistently with its obligation, ignore postconviction factors unless directed to do so by the Legislature."<sup>44</sup>

"... If every offender in a like legal category receives identical punishment, prisoners do not receive individualized consideration. Such a policy violates the spirit and frustrates the purposes of the Indeterminate Sentence Law and the parole system."<sup>45</sup>

"... An administrative policy of rejecting parole applications solely on the basis of the type of offense with the result that the term of imprisonment is automatically fixed at maximum, although the Authority action includes a *pro forma hearing* and review of the cumulative case summary, does not satisfy the requirements of individualized treatment and 'due consideration.'"<sup>46</sup> (Emphasis added.)

In *In re Seabock*,<sup>47</sup> the Court of Appeal, First District, discussed this issue with respect to parole suitability hearings conducted under the DSL. In discussing *In re Minnis* and other ISL cases the *Seabock* court stated that:

“These cases do not prohibit the Adult Authority from denying parole on the basis of the nature of the underlying offense but prohibit a blind, automatic, categorical exclusion from parole without consideration of other factors. They require the Adult Authority to exercise its discretion after looking at all of the factors relevant to a particular prisoner on an individual basis. . . .”

“. . . Forbidden are determinations not based in fact upon an entire picture, *refusals in advance*, or *pro forma hearings* which completely disregard the individual prisoner’s conduct in prison and his disposition toward reform.”<sup>48</sup> (Emphasis added.)

...

“. . . Thus nothing in the ISL, or in the decisions interpreting that law or its implementation, prohibited the Authority after a full hearing from denying parole on the basis of the nature of the commitment offense in an individual case. To the contrary, the Adult Authority was vested with broad discretion under the ISL to determine suitability for parole, and it was proper for the Authority to consider the nature and particular circumstances of the offense. *What was not proper was a ‘blanket rule’ denying parole based on the nature of the offense without individual consideration of the facts of the parole applicant. . . .*” (Emphasis added.)<sup>49</sup>

The *Seabock* court went on to address the issue under the DSL:

“. . . When the *DSL* came into effect on July 1, 1977, the Legislature, in an exercise it had not engaged in under the ISL, set forth by statute guidelines for determining whether to set release dates for life prisoners. (§ 3041) The Community Release Board (now the Board of Prison Terms) was explicitly empowered to ‘establish criteria for the setting of parole release dates’ and was told that in doing so it ‘shall consider the number of victims of the crime for which the prisoner was sentenced and other factors in mitigation or aggravation of the crime.’ (§ 3041, subd. (a); see also § 3052.) The Legislature further instructed the Board to ‘set a release date unless it determines that the gravity of the current convicted offense or offenses, or

the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.’ (§ 3041, subd. (b).)”

.....

“Our reading of the statute does not disclose any legislative intention to set aside the case authority which requires the parole setting body to consider all of the relevant facts prior to making a determination with respect to a prisoner’s suitability for parole. Instead, *the statute continues to demand what the case law required under the ISL: a weighing process, an exercise of discretion based upon all of the relevant factors.*”

“This interpretation of the statute is exactly the reading that the Board gave in drafting its regulations (Cal.Admin. Code, tit. 15, §2281) thereunder which in plain English call for a ‘judgment of the panel’ whether ‘the prisoner will pose an unreasonable risk of danger to society if released from prison.’ (Id., subd. (a).) That judgment is to be made after the Board considers ‘[a]ll relevant, reliable information’. . . (Id., subds. (b), (c), and (d).)”<sup>50</sup> (Emphasis added.)

The requester has alleged that the Board has implemented an unwritten policy and practice of denying parole release to all ISL life prisoners and almost all (99.97%) DSL life prisoners by applying extremely strong presumptions that such prisoners are unsuitable for parole and that any parole dates previously granted to such prisoners were improvidently granted, thereby denying parole suitability and systematically rescinding previously granted parole dates. The Board did not challenge the requester’s statistics in its response, but rather stated that it denied parole suitability and rescinded parole under its authority pursuant to existing statutes and duly adopted regulations. There is no question that the Board has the authority to deny parole suitability or rescind the parole date of an individual life prisoner on a case by case basis for reasons of public safety or good cause, respectively. However, the Board’s response clearly does not foreclose the possibility of the existence of an overriding general policy as alleged by the requester. In this regard, subdivision (a) of Penal Code section 5076.2 specifically provides that “. . . *policy statements, promulgated by the Board of Prison Terms, shall be promulgated and filed pursuant to [the APA] . . .*” (Emphasis added.)

## **Challenged Rule No. 2**

The requester has alleged that the Board has an unwritten policy and practice of failing to set new parole dates for life prisoners whose offenses occurred prior to the 1985 amendment to Penal Code section 3041.5, subdivision (b)(4), and whose parole date has been rescinded, and applying an all but irrebuttable presumption in rescheduling the hearing that it is not reasonable to expect that parole would be granted to such prisoners if a hearing were held during the following year(s). The Board takes the position it was not required pursuant to existing statutes and regulations to set new parole dates for those prisoners and, apparently, for this reason there can be no underground regulation involved. As discussed at length with respect to challenged rule no. 1, if an unwritten general policy or practice exists governing whether a new parole date is set for these prisoners or when a hearing is rescheduled, such a policy or practice may then be found by OAL to be a "regulation."

### **A. DO THE CHALLENGED RULES CONSTITUTE "STANDARDS OF GENERAL APPLICATION"?**

For an agency policy to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to members of a class, kind, or order.<sup>51</sup>

For the reasons previously discussed, OAL will assume for purposes of the determination that the challenged policies and practices exist. Challenged rule no. 1 as alleged applies extremely strong presumptions to all ISL and DSL life prisoners in California and, therefore, is a standard of general application. Challenged rule no. 2 as alleged applies to all life prisoners in California whose offenses occurred prior to the 1985 amendment to Penal Code section 3041.5, subdivision (b)(4), and whose parole date was rescinded and, therefore, also is a standard of general application.

Having concluded that the challenged rules are standards of general application, OAL must consider whether the challenged rules meet the second prong of the two-part test.

**B. DO THE CHALLENGED RULES IMPLEMENT, INTERPRET OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE BOARD OR GOVERN THE BOARD'S PROCEDURE?**

**Challenged Rule No. 1**

Penal Code section 3040 provides in part:

“The Board of Prison Terms shall have the power to allow prisoners imprisoned in the state prisons pursuant to subdivision (b) of Section 1168 to go upon parole outside the prison walls and enclosures.”

Penal Code section 3041 provides in part:

“(a) . . . One year prior to the inmate's minimum eligible parole release date a panel consisting of at least two commissioners of the Board of Prison Terms shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. . . .”

“(b) The panel or board shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.”

Section 2280 of title 15 of the California Code of Regulations provides in part:

“A life prisoner shall be considered for parole for the first time at the initial parole consideration hearing. At this hearing, a parole date shall be denied if the prisoner is found to be unsuitable for parole under § 2281(c). . . .”

Subdivision (c) of section 2281 provides:

“Circumstances Tending to Show Unsuitability. The following circumstances each tend to indicate unsuitability for release. These circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left

to the judgment of the panel. Circumstances tending to indicate unsuitability include:

(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include:

(A) Multiple victims were attacked, injured or killed in the same or separate incidents.

(B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder.

(C) The victim was abused, defiled or mutilated during or after the offense.

(D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.

(E) The motive for the crime is inexplicable or very trivial in relation to the offense.

(2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age.

(3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others.

(4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim.

(5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense.

(6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail.”

Sections 2401 and 2402 of title 15 apply to prisoners sentenced to prison for first and second degree murders committed after November 8, 1978 and attempted first degree murders where the perpetrator is sentenced for life under the provisions of Penal Code section 664 which was effective on January 1, 1987. The pertinent provisions in sections 2401 and 2402 are virtually identical to those quoted above from section 2280 and 2281.

Penal Code section 3060 provides:

“The parole authority shall have full power to suspend or revoke any parole, and to order returned to prison any prisoner upon parole. The written order of the parole authority shall be sufficient warrant for any peace or prison officer to return to actual custody any conditionally released or paroled prisoner.”

The Board states in its response to this request for determination that its authority to rescind previous grants of parole to any prisoner has been clarified in case law:

“ . . . *In re Fain*, (1976) 65 Cal.app.3d 376, held that the Adult Authority, now the Board of Prison Terms, has the authority to rescind a decision granting parole as an adjunct to the plenary power given to the Adult Authority (Board) in Penal Code section 3060.”<sup>52</sup>

In implementing its statutory authority to rescind parole dates for ISL prisoners, the Board has adopted regulations. Section 2450 of Title 15 of the California Code of Regulations states:

“The ISL parole date of an ISL prisoner or the parole date of a life or nonlife [Penal Code] 1168 prisoner *may* be postponed or *rescinded for good cause* at a rescission hearing. Rescission proceedings refer to any proceedings which may result in the postponement or rescission of a release date.” (Emphasis added.)

Section 2450 gives the Board the discretion to determine whether good cause exists to rescind the parole date of an ISL life prisoner. Good cause is not defined.

Section 2451 (“Reportable Information”) provides that the Board shall determine whether to initiate rescission proceedings and requires that the staff of the Department of Corrections report to the Board certain types of prisoner conduct

listed in that section (for instance, assault with a weapon or attempt to escape) which may result in rescission proceedings and also to report:

“(c) Other. Any new information which indicates that parole should not occur. Examples include: an inability to meet a special condition of parole, such as failure of another state to approve an interstate parole; information significant to the original grant of parole was fraudulently withheld from the board; or fundamental errors occurred resulting in the *improvident granting of a parole date.*” (Emphasis added.)

The Board states in its response that:

“Cause for rescission may exist if the Board reasonably determines, in its sole discretion that parole was improvidently granted under the circumstances that appeared at the time of the suitability hearing, or that may have appeared subsequent to the hearing.”<sup>53</sup>

As already discussed, OAL was previously asked to determine whether an unwritten policy of the Board which

- (1) applies an irrebuttable presumption that a fundamental error had occurred in the granting of all parole dates of life prisoners under the ISL, then
- (2) schedules parole rescission hearings for all ISL life prisoners who had previously been granted a parole date, resulting in the rescission of those parole dates, constitutes a “regulation.”

OAL concluded in 1998 OAL Determination No. 41<sup>54</sup> that if the Board had such a policy, that policy would constitute an “underground regulation.”

“The alleged policy is not that the Board decides to rescind ISL parole dates based upon subsequent conduct or other new information in each case, but that the Board presumes generally that parole has been improvidently granted to all ISL life prisoners and schedules rescission hearings for all of those life prisoners, resulting in the rescission of the ISL parole dates of those prisoners.”

“Sections 2450 and 2451 [Cal. Code Regs., tit. 15] state that the Board shall determine whether to initiate rescission proceedings, and that the parole date of an ISL life prisoner may be rescinded for good cause. This gives the Board the discretion to decide whether to initiate rescission proceedings and the discretion to determine whether good cause exists to rescind a parole date. There is no presumption expressed in either section 3060 of the Penal Code or sections 2450 and 2451 of the duly adopted regulations that a fundamental error occurred in the granting of all parole dates to ISL life prisoners. Nor do those sections contain a mandate that parole rescission hearings be scheduled for those prisoners, resulting in rescission of all parole dates established under the ISL.”

“Therefore, both portions of the alleged policy interpret not only Penal Code section 3060, but also section 2450 and subsection (c) of section 2451, of Title 15 of the California Code of Regulations. Since the alleged policy, if it exists, meets both parts of the statutory two-part test, OAL concludes that it is a ‘regulation’ and is without legal effect until it is adopted pursuant to the APA.”<sup>55</sup>

Similarly, an even more encompassing policy or practice of additionally denying parole release to almost all DSL life prisoners by denial of suitability and systematic rescission of previously granted parole dates by applying extremely strong presumptions that such prisoners are unsuitable for parole and that any parole dates previously granted to such prisoners were improvidently granted (challenged rule no. 1 in this determination) would interpret those same provisions as well as Penal Code section 3041 and would amend sections 2281 and 2402 of title 15 of the California Code of Regulations. Since the alleged policy, if it exists, meets both parts of the statutory two-part test, OAL concludes it is a “regulation.”

## **Challenged Rule No. 2**

Penal Code section 3041.5 currently provides in part in subdivision (b):

“(2) Within 20 days following any meeting where a parole date has not been set for the reasons stated in subdivision (b) of Section 3041, the board shall send the prisoner a written statement setting forth the reason or reasons for refusal to set a parole date, and suggest activities in which he or she might participate that will benefit him or her while he or she is incarcerated.

The board shall hear each case *annually* thereafter, *except* the board *may* schedule the next hearing no later than the following:

(A) Two years after any hearing at which parole is denied *if the board finds that it is not reasonable to expect that parole would be granted at a hearing during the following year* and states the bases for the finding.

(B) Up to five years after any hearing at which parole is denied if the prisoner has been convicted of murder, and the *board finds that it is not reasonable to expect that parole would be granted at a hearing during the following years* and states the bases for the finding in writing. If the board defers a hearing five years, the prisoner's central file shall be reviewed by a deputy commissioner within three years at which time the deputy commissioner may direct that a hearing be held within one year. The prisoner shall be notified in writing of the deputy commissioner's decision. The board shall adopt procedures that relate to the criteria for setting the hearing between two and five years.

(3) Within 10 days of any board action resulting in the postponement of a previously set parole date, the board shall send the prisoner a written statement setting forth a new date and the reason or reasons for that action and shall offer the prisoner an opportunity for review of that action.

(4) Within 10 days of any board action resulting in the rescinding of a previously set parole date, the board shall send the prisoner a written statement setting forth the reason or reasons for that action, and shall schedule the prisoner's next hearing within 12 months and in accordance with paragraph (2)." (Emphasis added.)

Section 2470 of title 15 of the California Code of Regulations provides:

"Within 10 days of any board action resulting in the rescission of a parole date, the board shall send the prisoner a written statement setting forth the reasons for the rescission. Life and nonlife 1168 prisoners shall also be notified that a parole consideration hearing will be held 12 months after rescission hearing."

The requester alleges that:

“In parole *consideration* matters, *Penal Code* section 3041, subd. (a), specified that a parole date ‘shall normally’ be set and subd. (b) specified the *exception* to this presumption of suitability as ‘unless the gravity of current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration . . .’ (Stats. 1976, ch. 1139) See, *In re Seabock* (1983) 140 Cal.App.3d 29, at 38, *rev. den’d* 4-20-1983. (Legislature’s primary command to the Board; forbidden are *pro forma*, preordained hearings & determinations); *In re Minnis* (1972) 7 Cal.3d 639, 647 (cited by *Seabock*) Board may not refuse parole in advance of hearing based upon nature of offense.”

“In parole *rescission* matters, *Penal Code* section 3041.5, subd. (b)(4) (Stats. 1976, ch. 1139), expressly provided that if a previous grant of a parole date is rescinded, a new parole date *shall* be set within six months at a subsequent hearing. See, *In re Fain* (1983) 139 Cal.App.3d 295, 303, 305. Although the 1985 amendment omitted the former requirement, it is significant to note three facts: One, the new language was proposed by the Board of Prison Terms; two, nowhere in the legislative record is found any acknowledgement of, discussion on, contemplation of, or vote on the omission; and, three, the legislative record clearly indicates that legislative *intent* was to *retain* the former requirement to set a new date within 12 months (instead of six months). The record shows the proposed amendment was a *post-rescission scheduling* issue only. See APPENDIX “B”, the legislative record.”

“The Board, however, has since interpreted the 1985 amendment, via CCR, tit. 15, Div. 2, sections 2450-2451(c) (‘improvident grant’ clause), as authorizing the Board to not set a new parole date at all, and to do so pursuant to the scheduling provisions for multi-year denials in the amended versions of subd. (b)(2).”<sup>56</sup> (Emphasis in original.)

The Board responds that:

“The Board of Prison Terms’ policies and procedures subsequent to the rescission of previously set parole date for a life prisoner are in compliance with state law and statutory intent. Furthermore, the procedures and guidelines contained within 15 CCR, Chapter 4, Postponement or Rescission of Release, have been consistently upheld by the courts and the

legislature as consistent with the legislative intent behind the enabling statutes. Since the Board's policies and guidelines are stated within the proper context in title 15, it is both misguided and legally incorrect to state that the Board's policies on rescission constitute underground regulations."

...

"The prisoner initially claims that the Board was required, prior to the 1986 amendment to Penal Code section 3041.5(b)(4), to set a new parole release date for a life prisoner whose previously set parole date was rescinded within six months of the date of the rescission. In support of the prisoner's contention, he attaches numerous legislative reports from this period of time. However, none of the documents submitted to OAL contain a complete statement of the law pertaining to the rescission of a grant of parole to a life prisoner. A [sic] accurate reading of the 1985 Penal Code, sections 3041 and 3041.5, clearly shows that the prisoner's contention is incorrect."

"The 1985 Penal Code section 3041.5(b)(4) states:

'Within 10 days of any board action resulting in the rescinding of a previously set parole date, the board shall send the prisoner a written statement setting forth the reason or reasons for such action and shall, within six months, set the prisoner's parole release date in accord with the provisions of Penal Code Section 3041. . . .'"

"The 1985 Penal Code section 3041(b) states:

'The panel or board **shall set a release date unless it determines** that the gravity of the current convicted offense or offenses or the timing and gravity of current or past convicted offense or offenses, is such **that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.**'" (Emphasis in original.)

"The 1985 Penal Code section 3041.5(b)(4) clearly states that the Board was only required to set a new release date for a prisoner whose previously set parole date was rescinded if the Board determined that public safety did

not require a lengthier period of incarceration as stated in Penal Code section 3041(b). If it was determined that the prisoner was not suitable for parole based upon public safety considerations, then a new parole release date would not be scheduled. Both Penal Code section 3041.5 and Penal Code section 3041 must be taken into account, in their entirety, following the rescission of grant of parole to a life prisoner.”

“In 1985, the pertinent regulation dealing with these provisions of the Penal Code was contained within 15 CCR, section 2470.”

....

‘Within 10 days of any board action resulting in the rescission of a parole date, the board shall send the prisoner a written statement setting forth the reasons for the rescission...**prisoners shall also be notified that a parole consideration hearing will be held six months after the rescission hearing.**’” (Emphasis in original.)

“Section 2470 was in compliance with state law at the time of the amendment to Penal Code section 3041.5(b)(4). Since that time, the regulation has been amended to state that the prisoner shall receive a parole consideration hearing within 12 months following the rescission of a previously set parole date. Once again, the prisoner will not have a new parole release date set at this subsequent hearing unless the panel determines that the prisoner does not pose a risk to public safety as stated in 1999 Penal Code sections 3041(b) and 3041.5(b)(2)(B)(4). As has been previously discussed, the Board’s regulations regarding parole suitability criteria are contained in 15 CCR, sections 2280 through 2281 (ISL and DSL prisoners) and sections 2400 through 2402 (certain DSL prisoners).”

“Based upon this explanation, it is clear that the Board is not required to reset parole dates for life prisoners who have had a previously set parole date rescinded and this is not contrary to statutory law and is contained within the Board’s regulations at 15 CCR, section 2470. The law prior to the 1986 amendment to Penal Code section 3041.5 did not require the Board to reset a parole release date without first taking into account public safety considerations following the rescission of parole date for a life prisoner. The prisoner’s contention that the Board is mandated to set a new

parole release date following a rescission is clearly erroneous and unsupported by law.”<sup>57</sup>

As previously discussed in this determination, OAL has no authority in the determination arena to find whether alleged policies or practices of the Board, or duly adopted regulations of the Board, are inconsistent with statute and should be invalidated. The issue before OAL in this context is whether an unwritten policy and practice of the Board, if it exists, of failing to set new parole dates for life prisoners whose offenses occurred prior to the 1985 amendment to Penal Code section 3041.5(b)(4) and whose parole date has been rescinded, and applying an all but irrebuttable presumption in rescheduling the hearing that it is not reasonable to expect that parole would be granted to such prisoners if a hearing were held during the following year(s), is a “regulation.”

Clearly the alleged policy and practice, if it exists, interprets Penal Code sections 3041 and 3041.5. The Board has responded at length that it is not required to reset parole dates for life prisoners who have had a previously set parole date rescinded and that the Board actions are consistent with statutory law and duly adopted regulation (15 CCR 2470).<sup>58</sup> Consistency is not an issue here. However, the Board may be asserting, by making this statement, that its policy is the only legally tenable interpretation of the statutes and its duly adopted regulations and that, therefore, it is not required to adopt a regulation regarding the alleged policy and practice. It should be noted in this regard that:

“If a rule simply applies an *existing* constitutional, statutory or regulatory requirement that has only *one* legally tenable ‘interpretation,’ that rule is not quasi-legislative in nature—no new ‘law’ is created.”<sup>59</sup> [Emphasis added.]

However, if it exists, a policy of not setting new parole dates for all life prisoners whose offenses occurred prior to the 1985 amendment to Penal Code section 3041.5(b)(4) and whose parole date has been rescinded, and applying an all but irrebuttable presumption in rescheduling the hearing that it is not reasonable to expect that parole would be granted to such prisoners if a hearing were held during the following year(s), is not the only legally tenable interpretation of a statute that does not *require* the Board to reset parole dates and schedule the next hearing during the following year.

Nothing in Penal Code section 3041 or 3041.5, nor the implementing regulations adopted by the Board, establishes a general policy that the Board not set new

parole dates for all life prisoners whose offenses occurred prior to the 1985 amendment to Penal Code section 3041.5(b)(4) and whose parole date has been rescinded. In fact, at all times relevant to this determination, subdivision (b) of Penal Code section 3041 has provided that the Board (or a panel thereof) “. . . shall set a release date *unless* it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for the individual. . . .” Neither does Penal Code section 3041.5 establish an all but irrebuttable presumption in rescheduling the hearing for such prisoners that it is not reasonable to expect that parole would be granted if the hearing were held during the following year(s). Instead, subdivision (b)(2) provides that the Board *shall* hear each case *annually* thereafter following a failure to set a parole date *unless* the Board finds that it is not reasonable to expect that parole would be granted.

For this reason, challenged rule no. 2, if it exists, is not merely a restatement of existing law but rather interprets sections 3041.5 and 3041 of the Penal Code. Since the alleged policy, if it exists, meets both parts of the two-part test, OAL concludes it is a “regulation.”

#### **IV. DO THE CHALLENGED RULES FOUND TO BE “REGULATIONS” FALL WITHIN ANY RECOGNIZED 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>60</sup> In *United Systems of Arkansas v. Stamison* (1998),<sup>61</sup> the California Court of Appeal rejected an argument by the Director of the Department of General Services that language in the Public Contract Code had the effect of exempting rules governing bid protests from the APA.

According to the *Stamison* Court:

*“When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language. (See, e.g., Gov. Code, section 16487 [‘The State Controller may establish procedures for the purpose of carrying out the purposes set forth in Section 16485. These procedures are exempt from the Administrative Procedure Act.’]; Gov. Code, section 18211 [‘Regulations adopted by the State Personnel Board are exempt from*

the Administrative Procedure Act’]; Labor Code, section 1185 [orders of Industrial Welfare Commission ‘expressly exempted’ from the APA].) [Emphasis added.]”<sup>62</sup>

Express statutory APA exemptions may be divided into two categories: special and general.<sup>63</sup> *Special* express statutory exemptions 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 typically: (1) apply across the board to all state agencies and (2) are found in the APA. An example of an express *special* exemption is Penal Code section 5058, subdivision (d)(1), which exempts pilot programs of the Department of Corrections under specified conditions. An example of an express *general* exemption is Government Code section 11342, subdivision (g), part of which exempts “internal management” regulations of all state agencies from the APA.

**A. DO THE CHALLENGED RULES FALL WITHIN ANY *SPECIAL* EXPRESS APA EXEMPTION?**

The Board does not contend that any special statutory exemption applies. Our independent research having also disclosed no special statutory exemption, we conclude that none applies.

**B. DO THE CHALLENGED RULES FALL WITHIN ANY *GENERAL* EXPRESS APA EXEMPTION?**

Generally, all “regulations” issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.<sup>64</sup> Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.<sup>65</sup>

The APA excepts policies which pertain solely to the internal management of a single state agency from the notice and hearing requirements of the Act.<sup>66</sup> Government Code section 11342, subdivision (g) states:

“ ‘Regulation’ means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to

govern its procedure, *except one that relates only to the internal management of the state agency.* [Emphasis added.]”

However, as the *Grier* Court found: “. . . the definition of regulation is broad, as contrasted with the scope of the internal management exception, which is narrow.”<sup>67</sup> Internal management policies are those designed to govern the internal operations of the Department. The exception does not apply to “. . . the rules necessary to properly consider the interests of all . . . under the . . . statutes . . .”<sup>68</sup>

The alleged policies and practices, if they exist, are directed at the Board itself and its staff. However, they are not designed to govern the internal operations of the Board. To the contrary, the alleged policies and practices are rules directly affecting the interests of the life prisoners covered by the policies and practices.

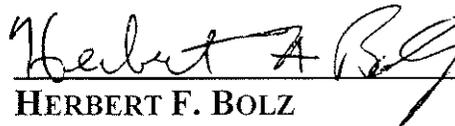
We conclude that the alleged policy and practices, if they exist, do not fall within the internal management exemption, nor within any other general express statutory exemption.

## CONCLUSION

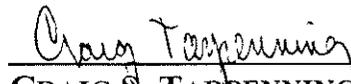
For the reasons set forth above, OAL has concluded that:

- (1) if the Board has implemented an unwritten policy or practice of denying parole release to all ISL life prisoners and almost all (99.97%) DSL life prisoners by applying extremely strong presumptions that such prisoners are unsuitable for parole and that any parole dates previously granted to such prisoners were improvidently granted, thereby denying parole suitability and systematically rescinding previously granted parole dates, such a policy or practice would constitute a "regulation" which is invalid unless adopted pursuant to the APA; and
  
- (2) if the Board has implemented an unwritten policy or practice of failing to set new parole dates for life prisoners whose offenses occurred prior to the 1985 amendment to Penal Code section 3041.5(b)(4) and whose parole date has been rescinded, and applying an all but irrebuttable presumption in rescheduling the hearing that it is not reasonable to expect that parole would be granted to such prisoners if a hearing were held during the following year(s), such a policy or practice would constitute a "regulation" which is invalid unless adopted pursuant to the APA.

DATE: November 30, 1999



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## ENDNOTES

1. This request for determination was filed by Carl D. McQuillion, B-54054 California Men's Colony – East, P.O. Box 8101-3306X, San Luis Obispo, CA 93409-8101. The agency was represented by James W. Nielson, Chairman, Board of Prison Terms, 428 J Street, 6<sup>th</sup> Floor, Sacramento, CA 95814, (916) 445-4071. Comments were received from the requester (Carl D. McQuillion), Michael Milan, Michael and Deborah Baker, Theresa Torricellas, and Robert Polete.

2. This determination may be cited as “**1999 OAL Determination No. 27.**”

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. 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 and 11349.1.)
5. 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*.

6. *OAL Determinations Entitled to Great Weight in Court*

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, disapproved on other grounds in *Tidewater*. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of “regulation” as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule met the definition of “regulation,” and therefore was subject to APA requirements. **1987 OAL Determination No. 10**, CRNR 96, No. 8-Z, February 23, 1996, p. 293. The *Grier* court concurred with OAL’s conclusion, stating that:

“Review of [the trial court’s] decision is a question of law for this court’s independent determination, namely, whether the Department’s use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) [now subd. (g)]. [Citations.]” (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted for its consideration in the case, the court further found:

“While the issue ultimately is one of law for this court, ‘the contemporaneous administrative construction of [a statute] by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]’ [Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due consideration.*[*Id.*; emphasis added.]”

See also *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886 (same holding) and note 5 of **1990 OAL Determination No. 4**, California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384, at p. 391 (reasons for according due deference consideration to OAL determinations).

7. 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.*

8. Indeterminate Sentencing Law
9. Determinate Sentencing Law
10. Stats. 1944, ch. 2.
11. Stats. 1976, ch. 1139.
12. Stats. 1979, ch. 255.
13. Penal Code sections 5076.1 and 5077.
14. Request for determination, page 1.
15. Stats 1976, ch. 1139
16. (1982) 33 Cal.3d 176, 187 Cal.Rptr. 783.

17. (1983) 140 Cal.App.3d 29, 189 Cal.Rptr. 310.
18. Request for determination, pages 1 and 2.
19. Request for determination, pages 1 and 2.
20. Request for determination, page 4.
21. Request for determination, pages 12 and 13.
22. Requester's comments, July 20, 1999, page 9.
23. Requester's comments, July 20, 1999, page 9.
24. Requester's comments, July 20, 1999, page 9.
25. Government Code section 11349.1
24. Agency response, pages 3, 4 and 6.
27. Agency response, page 3.
28. Agency response, page 6.
29. 1998 OAL Determination No. 41, CRNR 99, No. 3-Z, January 15, 1999, p. 148.
30. Government Code section 11342, subdivision (a).
31. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of the APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).
32. (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*.

33. 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.

34. (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.

35. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.

36. *Id.*

37. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.

38. *Id.*

39. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.

40. Agency response, pages 4-6.

41. Request for determination, pages 4 and 5.

42. (1972) 7 Cal.3d 639, 102 Cal.Rptr. 749.

43. (1972) 7 Cal.3d at page 643, 102 Cal.Rptr. at page 751.

44. (1972) 7 Cal.3d at page 645 and 646, 102 Cal.Rptr. at page 753.
45. (1972) 7 Cal.3d at page 646, 102 Cal.Rptr. at page 753.
46. (1972) 7 Cal.3d at page 647, 102 Cal.Rptr. at page 754.
47. (1983) 140 Cal.App. 3d 29, 189 Cal.Rptr. 310.
48. (1983) 140 Cal.App.3d at page 37, 189 Cal.Rptr. at page 314.
49. (1983) 140 Cal.App 3d at page 37, 189 Cal.Rptr. at page 315.
50. (1983) 140 Cal.App. 3d at pages 37-39, 189 Cal.Rptr. at pages 315-316.
51. *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).
52. Agency response, page 2.
53. Agency response, page 3.
54. CRNR 99, No. 3-Z, January 15, 1999, p. 148.
55. At pages 9 and 10.
56. Request for determination, pages 3 and 4.
57. Agency response, pages 6 through 8.
58. Agency response, page 8.
59. 1986 OAL Determination No. 4 (State Board of Equalization, June 25, 1986, Docket No. 85-005) California Administrative Notice Register 86, No. 28-Z, July 11, 1986, p. B-15, typewritten version, p. 12.
60. Government Code section 11346.
61. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.
62. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.
63. 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).

64. Government Code section 11346.
65. 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); emphasis added.)
  - 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. 168-169, 175-177, CRNR 91, No. 43-Z, October 25, 1991, p. 1458-1459, 1461-1462. In *Grier v. Kizer* ((1990) 219 Cal.App.3d 422, 437-438, 268 Cal.Rptr. 244, 253), the court reached the same conclusion as OAL did in **1987 OAL Determination No. 10**, pp. 25-28 (summary published in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 63); complete determination published on February 23, 1996, CRNR 96, No. 8-Z, p. 293, 304-305), rejecting the idea that *City of San Joaquin* (cited above) was still good law.
66. Government Code section 11342, subdivision (g).
67. *Grier v. Kizer, supra*, 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 251, disapproved on another point, *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198.
68. *City of San Marcos v. California Highway Commission, Department of Transportation* (1976) 60 Cal.App.3d 383, 408, 131 Cal.Rptr. 804, 820, quoted in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204-205, 149 Cal.Rptr. 1, 3.