

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

Bill Jones  
SECRETARY OF STATE

In re: )  
Request for Regulatory )  
Determination filed by DAVID )  
WILLIAM FINNEY regarding )  
the policy of the BOARD OF )  
PRISON TERMS, concerning )  
the application of parole )  
consideration guidelines for )  
life prisoners sentenced )  
under the Indeterminate )  
Sentence Law<sup>1</sup> )  
)

Modification to 1999  
OAL Determination No. 4

[Docket No. 97-009]

September 28, 1999

Decision by: CHARLENE G. MATHIAS, Deputy Director

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

In a letter dated January 21, 1999, the Board of Prison Terms ("Board") requested that the Office of Administrative Law ("OAL") modify the above entitled determination regarding Administrative Directive No. 83/2 ("AD 83/2") based upon arguments which were not included by the Board in its response to the request for this determination. The Board now argues that:

1. Section 3041.7 of the Penal Code is not applicable to *Stanworth* hearings and that section 7.d. of AD 83/2 is a restatement of the existing law;
2. Section 3041.5 of the Penal Code is not applicable to *Stanworth*

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hearing procedures and that section 7.g. of AD 83/2 is a restatement of existing law;

3. Section 7.c. of AD 83/2 is a restatement of existing law;
4. Sections 3.a., 3.b., and 3.c. of AD 83/2 fall under the exception to the Administrative Procedure Act (“APA”) contained in subdivision (a)(3) of Government Code section 11343; and
5. Section 3.a. and 3.b. of AD 83/2 are internal guidelines exempt from the APA pursuant to subdivision (g) of Government Code section 11342.

## DISCUSSION

Effective July 1, 1977, the Indeterminate Sentence Law (“ISL”) was replaced by the Uniform Determinate Sentencing Act (“DSL”).<sup>2</sup> AD 83/2 was issued by the Board in 1983 in an attempt to implement a decision of the California Supreme Court, *In re Stanworth*.<sup>3</sup> In *Stanworth*, the court 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 to the benefit of the earlier release date of the two standards.<sup>4</sup> Before addressing the Board’s concerns, it must be clarified that the following discussion concerns only the term hearing under the ISL required by the court in *Stanworth* for prisoners sentenced to a “life” imprisonment under the ISL. The discussion has no application to an initial parole hearing held to determine a prisoner’s suitability for parole.

- 1. The Board now argues that section 3041.7 of the Penal Code is not applicable to *Stanworth* (ISL) hearings and that section 7.d. of AD 83/2 is a restatement of existing law.**

In its January 21, 1999 letter, the Board states that:

“*Stanworth* held that prisoners who committed a crime prior to July 1, 1977, and were sentenced to a term of life imprisonment, were entitled to a parole consideration hearing under the regulations and guidelines which were in effect at that time, as well as a hearing

under guidelines presently in place. *Id* at 187. The regulations and guidelines which were in place prior to July 1, 1977, were contained within the Parole Board Rules (PBR). The present guidelines are contained within the California Code of Regulations (CCR), title 15 . . . .”

“The statutes contained within the Penal Code, specifically sections 3041.7 and 3041.5, were instituted after July 1, 1977, when California changed over to the Determinate Sentencing Law (DSL), and are not applicable to the PBR rules because PBR rules are based on the law which was in effect prior to July 1, 1977.”

“OAL states on page 10, paragraph 5, of the determination that certain provisions contained within AD 83/2 are underground regulations because the AD interprets and ‘conflicts’ with statutory law. AD 83/2 section 7.d. states that at a Parole Board Rules (PBR) hearing, a prisoner is not permitted representation by an attorney. OAL erroneously contends that this provision conflicts with both the 1995 and the 1998 versions of Penal Code section 3041.7, which allows a prisoner to have counsel at a parole consideration hearing.”

“*Stanworth* clearly holds that a PBR hearing is to be conducted under the procedures, regulations and statutes in effect prior to July 1, 1977. *Id* at 183-184. PBR section 2116 states that an attorney is not allowed at a parole consideration hearing. Penal Code section 3041.7, which allows counsel, did not go into effect until July 1, 1977, as part of the change to DSL law; consequently, it is not the law which controls for a PBR hearing. Therefore, the statement contained within AD 83/2 7.d., which states that an attorney is not allowed at a PBR hearing, is both a correct statement of the law as well as a documented regulation contained within the PBR rules at section 2116.”

In general, if the agency does not add to, interpret, or modify a statute, it may legally inform interested parties in writing of the statute and “its application.” Such an enactment is simply “administrative” in nature, rather than “quasi-judicial” or “quasi-legislative.” If, however, the agency makes new law, i.e., supplements or “interprets” a statute or other provision of law, such activity is deemed to be an exercise of quasi-legislative power. 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. The issue here is whether section 7.d. of AD 83/2 merely restates existing law which has only one legally tenable interpretation.

On May 21, 1976, the Board filed regulations with the Secretary of State implementing the ISL. These regulations, which went into effect on June 1, 1976, were contained in title 15 of the California Administrative Code (now the California Code of Regulations) and were included in an article entitled “Inmate Rights at Term Hearings.”<sup>5</sup> Section 2116 within this article provided as follows:

“Representation. Representation by an attorney or other advocate on behalf of the inmate will not be permitted at the hearing.”

Section 2116 was later repealed following the enactment in 1977 of the DSL. Section 7.d. of AD 83/2, issued by the Board in 1983, purports to implement the *Stanworth* decision. Section 7.d. of AD 83/2 provides:

“Attorney Representation. Representation by an attorney or other advocate on behalf of the inmate will not be permitted at the PBR hearing.”

Section 7.d. of AD 83/2 is clearly a restatement of the former law (Cal. Code Regs., tit. 15, sec. 2116) governing a prisoner’s right to representation at term hearings under the ISL in 1976. However, is it a restatement of the applicable law for the current conduct of ISL term hearings for prisoners sentenced to a “life” imprisonment under the ISL?

In *Stanworth*, the California Supreme Court was faced with the following question:

“May a defendant who has been sentenced to a ‘life’ imprisonment under the Indeterminate Sentence Law (ISL) (former Pen. Code § 1168, repealed eff. Jan. 1, 1977) be entitled to parole release consideration under both ISL and the administrative guidelines which were in effect at the time he was sentenced and also under the Uniform Determinate Sentencing Act of 1976 (DSL) (Pen. Code § 1170 et seq.) and its implementing regulations?”<sup>6</sup>

The *Stanworth* court found that the defendant

“... is entitled to parole release consideration under both ISL and DSL standards. Defendant is entitled to a hearing and to the benefit of the earlier release date, if any, set pursuant to both standards.”<sup>7</sup>

Any doubt under *Stanworth* as to a prisoner’s right to representation currently at an ISL term hearing was dispelled by the California Court of Appeal, Second District, in a 1985 decision, *In The Matter of Richard DeMond*.<sup>8</sup> This case was not cited by the Board in its response to the request for determination nor by the Board in this subsequent request for reconsideration. In *DeMond*, the court was asked to decide whether a prisoner sentenced to life under the ISL is now entitled to be represented by counsel at hearings conducted to determine his parole release date pursuant to the ISL. The prisoner specifically challenged the application of the same language contained in section 7.d. of AD 83/2 as unlawfully denying him the right to counsel at his *Stanworth* (ISL) hearing.

The *DeMond* court stated initially that:

“The *Stanworth* opinion did not address the issue of whether a prisoner was entitled to counsel at a hearing conducted pursuant to the ISL.”<sup>9</sup>

However, the *DeMond* court went on to conclude that:

“In enacting Penal Code section 3041.7, the Legislature was referring only to parole release hearings conducted pursuant to the provisions of the DSL. . . .”

“The impact of *Stanworth* was merely to put the life prisoner, in the same position he was prior to the enactment of the DSL. There was no right to counsel then and neither Penal Code section 3041.7 nor section 3065 have changed the picture. . . .”<sup>10</sup>

For this reason OAL’s determination in this matter should be modified to reflect that section 7.d. of AD 83/2 does not conflict with Penal Code section 3041.7 and that it is a restatement of applicable law.

- 2. The Board now argues that section 3041.5 of the Penal Code is not applicable to *Stanworth* (ISL) hearings and that section 7.g. of AD 83/2 is a restatement of existing law.**

In its January 21, 1999 letter, the Board states that:

“Similar to the contention made by OAL on page 10 of the determination, on page 11, paragraph 3, OAL states that AD 83/2 section 7.g. conflicts with both the 1995 and the 1998 versions of Penal Code section 3041.5 which states that ‘. . .the prisoner shall be permitted to request and receive a stenographic record of all proceedings.’”

“Penal Code section 3041.5 became law on July 1, 1977. AD 83/2 section 7.g. is a correct statement of the law prior to July 1, 1977. PBR section 2118 requires that a written summary of the hearing be provided to the prisoner, and upon his request, a tape recording be provided, if one was made. Since PBR hearings are conducted under the law prior to July 1, 1977, neither the 1995 or the 1998 versions of Penal Code section 3041.5 are applicable. As such, AD 83/2 section 7.g. is both a correct application of the law as well as a documented regulation contained within the PBR rules.”

Subdivision (a)(4) of Penal Code section 3041.5 provides that the prisoner shall be permitted to request and receive a stenographic record of all proceedings. The *DeMond* discussion of why Penal Code section 3041.7 does not apply to ISL hearings would logically apply also to Penal Code section 3041.5. For this reason, the statement in OAL’s determination in this matter that section 7.g. “. . . makes specific Penal Code section 3041.5, although apparently conflicting with it. . . .” is inaccurate. From the reasoning in *DeMond* it would appear that Penal Code section 3041.5 applies only to the DSL hearings and, for that reason, section 7.g. of AD 83/2, which applies only to the ISL term hearings, cannot conflict with it. However, unlike section 7.d. which is a restatement of former section 2116 of title 15 of the California Code of Regulations, section 7.g. of AD 83/2 is not merely a restatement of a prior existing regulation.

Former section 2118 of title 15 of the California Code of Regulations as it existed in 1976, and prior to its repeal following enactment in 1977 of the DSL, provided:

**“Right to Written Summary of Hearing.** Every inmate will receive a written summary of the hearing. Every inmate will receive written notification of the decision made and the reasons for the decision as required by Chapter 2, Article 5 for term fixing decisions and as

required by Chapter 4 for parole decisions. Every inmate upon request will receive a copy of a tape recording of the hearing if one was made by the parole board.”

Section 7.g. of AD 83/2 provides:

“Record of the Hearing. The hearing shall be recorded using whatever means the Board finds accurate and efficient. Upon request the Board shall send a copy of the decision to the prisoner.”

Section 7.g. of AD 83/2 varies from and is not a restatement of former section 2118 of title 15 at all. While former section 2118 requires that the Board provide the inmate with a written summary of the hearing and written notification of the decision and the reasons for the decision, section 7.g. requires that the Board only send a copy of the decision to the prisoner and only if requested to do so. While former section 2118 requires that an inmate receive a copy of a tape recording of the hearing if one was made by the Board, section 7.g. states rather that the hearing shall be recorded using whatever means the Board finds accurate and efficient.

In its July 27, 1999 Comments on Proposed Modification to 1999 OAL Determination No. 4, the Board asserts that section 7.g. states that a prisoner who has had a PBR hearing may obtain a copy of the “hearing” upon request. The Board states that this is merely a restatement of the third sentence of former section 2118 of title 15 which provided that every inmate upon request will receive a copy of the recording of the hearing if one was made.<sup>11</sup> Unfortunately, section 7.g. does not so state. Instead section 7.g. provides that:

“Upon request the Board shall send a copy of the *decision* to the prisoner.”  
(Emphasis added.)

Former section 2118 of title 15 provided that every inmate will receive a written summary of the hearing and written notification of the decision with the reasons for the decision. Former section 2118 did not make the duty to send a copy of the *decision* to the prisoner conditional upon request. For this reason, section 7.g. of AD 83/2 cannot be categorized as merely a restatement of existing law. Section 7.g. of AD 83/2 is a “regulation.”

**3. The Board now argues that section 7.c. of AD 83/2 is a restatement of**

**existing law.**

In its January 21, 1999 letter, the Board states that:

“OAL erroneously contends that the Board is applying ISL hearing standards during DSL hearings when the Board has a choice between which of the two laws is applied. The Board is assuming when OAL makes reference to DSL law and DSL hearings that OAL is speaking of the laws and hearings for life prisoners which came into effect after July 1, 1977. It is important to note that when the law changed on July 1, 1977, life prisoners remained indeterminately, not determinately, sentenced.

“Referring to PBR hearing, section 7.c. of AD 83/2 states that ‘[A]t this hearing the prisoner shall have the rights specified in Parole Board Rules ...’”

“OAL states that the reference is to the ISL (PBR) regulations which were repealed prior to the time of the request for determination. This is true. ISL law was repealed on July 1, 1977, whereas the determination in question was filed in 1995. OAL next states that these sections differed from the corresponding sections contained within the DSL regulations. This is true. PBR regulations were promulgated in accordance with ISL law which was repealed July 1, 1977, when DSL law went into effect. DSL regulations, as they pertain to life (ISL) prisoners, are contained with the California Code of Regulations (CCR), title 15. OAL next contends that *Stanworth* did not require that ISL hearing rights be applied during DSL hearings. This is true. The law as first interpreted in *Stanworth*, and upheld in *In re Seabock* 140 Cal.App.3d 29 (1983) and *In re Duarte* 143 Cal.App.3d 943 (1983), is that DSL law is applied during DSL hearings and ISL law is applied during ISL hearings. If the prisoner is given a parole date during his hearing under current law, then he has a second hearing conducted under the ISL law that was in effect at the time of his offense. Therefore, the DSL hearing is conducted under DSL law and the PBR hearing is conducted under ISL law.”

“OAL then contends that the Board’s application of ISL regulations in a DSL hearing, when given the choice between the two, was an interpretation of *Stanworth* and therefore a ‘regulation’ which is invalid unless adopted in compliance with the Administrative Procedures Act (APA). This is an

erroneous conclusion by OAL. There is no choice between which of the two laws is applied during the hearing. ISL regulations are not applied in a DSL hearing. The conclusion by OAL is an incorrect interpretation of the law as stated in *Stanworth*. The Board's interpretation of *Stanworth* as corroborated in both *Seabock* and *Duarte* is contained within 15 CCR, section 2292. Section 2292(a) states that 'all life prisoners committed to state prison for crimes committed prior to July 1, 1977, shall be heard in accordance with rules in effect prior to 7/1/77.' The rules which were in effect prior to 1977 were the PBR rules. Subsection (c) of section 2292 goes on to state that these prisoners shall first be given a parole hearing conducted under present law, and if found suitable, then a second hearing conducted under PBR rules is held, and the earliest parole release date of the two hearings is the controlling date. Therefore, section 7.c. of AD 83/2 is both a correct interpretation of the law and a valid regulation contained within the CCR." (Emphasis in original.)

Section 7.c. of AD 83/2 provides:

"Prisoner's Hearing Rights. At this hearing the prisoner shall have the rights specified in Parole Board Rules (15, Cal.Adm.C., Div. 2, Reg. 76, No. 21, 5/22/76) Sections 2110-2119, which are attached to this Directive."

Section 2110 through 2119 are the regulations which were present in 1976 in title 15 of the California Administrative Code (now the California Code of Regulations) in the article entitled "Inmate Rights at Term Hearings." Although the *DeMond* case was not cited by the Board in either its response to the request for determination nor this subsequent request for reconsideration, the reasoning in *DeMond* logically applies here also. Although *DeMond* dealt specifically only with one of these rights (see previous discussion of section 7.d. of AD 83/2 and former section 2116 of title 15), based on the court's discussion OAL has no reason to believe the prisoner's rights specified in the other former sections in this article in title 15 would be treated any differently.

"The impact of *Stanworth* was merely to put the life prisoner in the same position he was in prior to the enactment of the DSL. . . ." <sup>12</sup>

For this reason, OAL's determination in the matter should be modified to reflect that there was no choice as to whether ISL or DSL regulations applied at *Stanworth* (ISL) hearings and that section 7.c. of AD 83/2 is merely a restatement

of existing law.<sup>13</sup>

4. **The Board now argues that sections 3.a., 3.b., and 3.c. of AD 83/2 fall under the exception from the Administrative Procedure Act (“APA”) contained in section 11343, subdivision (a)(3), of the Government Code.**

In its January 21, 1999 letter, the Board states that:

“The APA allows that certain procedures for state agencies do not need to be codified if they fall within a specified group of exceptions. The Board contends that three sections contained within AD 83/2 do fall within this group of exceptions and are exempt from being underground regulations under the APA”.

“OAL contends that AD 83/2 sections 3.a., 3.b., 3.c., establish due dates for the notification of hearing eligibility and filing of appeals, and this constitutes a regulation.”

“To a limited extent, the Board agrees with this statement in regards to section 3.c. However, the Board strongly contends that this procedure would fall under the exception noted in Government Code section 11343 (a)(3). The establishment of this date affected only a small population of inmates housed within the California Department of Corrections. This procedure did not apply to a general group of persons throughout the state, but instead, was aimed at a small percentage of selected inmates and the procedure was only briefly used by the Board as a means of complying with the *Stanworth* decision. This procedure was used to deal with this select group of inmates and became obsolete shortly thereafter; therefore, adopting a regulation at the present time would serve no purpose since this situation has long ago been resolved. The internal guideline established in AD 83/2 section 3.c. became obsolete in 1984.”

Before discussing this contention, it should be clarified that the copy of AD 83/2 provided to OAL contained no subsection 3.c. and for this reason OAL did not discuss this subsection, if it even exists, in its determination. Subsection 3.a. and 3.b. of AD 83/2 as supplied to OAL provide in part:

“a. Eligible Life Prisoners”

“ . . . Since the regularly scheduled progress hearings may not occur for some time, Board and Department of Corrections staff shall review prisoners’ records to determine which prisoners with BPT parole dates are entitled to PBR hearings. The Department shall notify each eligible prisoner that the prisoner is entitled to a PBR hearing. This notification shall be done as soon as possible but no later than May 1, 1983.”

“b. Life Prisoners Who Are Not Notified”

“Any life prisoner who believes he or she is eligible for a hearing but is not notified shall file an administrative appeal as soon as possible after May 15, 1983. The Classification and Parole Representatives are authorized to decide these appeals. If the Classification and Parole Representative denies the appeal, the prisoner may request review by the Board of Appeals Unit.”

Government Code section 11343(a)(3) states in part:

“Every state agency shall:

- (a) Transmit to the office [of Administrative Law] for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one which:

. . .(3) Is directed to a *specifically named person or to a group of persons and does not apply generally throughout the state.*”

In order to qualify for an APA exemption pursuant to Government Code section 11343, subdivision (a)(3), state agency communications must meet both parts of the two-prong test, that is, the provisions must be directed to a specific person or group of persons *and* not apply generally throughout the state.<sup>14</sup> The above quoted provisions within subsections 3.a. and 3.b. of AD 83/2 applied generally throughout the state to all members of an open class, i.e., those prisoners sentenced to a “life” imprisonment under the ISL. Thus the above-cited provisions in subsections 3.a. and 3.b. meet neither part of the two-prong test required in order to be exempt pursuant to subdivision (a)(3) of Government Code section 11343.

- 5. The Board now argues that sections 3.a. and 3.b. of AD 83/2 are internal guidelines exempt from the APA pursuant to section 11342,**

**subdivision (g), of the Government Code.**

In its January 21, 1999 letter, the Board states that:

“The Board further contends that the procedural guidelines established within AD 83/2 section 3.a. and 3.b. are internal guidelines that did not mandate being put into regulations. Section 3.a. states that the Department of Corrections will notify prisoners of their rights as to a PBR hearing ‘as soon as possible.’ This was for internal procedure only and would be covered under the internal management exception of Government Code section 11342(g). Similarly, section 3.b. asks that prisoners who were not notified regarding a PBR hearing, but believe that they are eligible, to file an appeal ‘as soon as possible.’ Once again, no definite date or deadline was set, but merely a request to make the appeal in a timely manner so as to allow the Board a sufficient amount of time to process the appeal. This was an internal management decision only and is not applicable to prisoners currently incarcerated with the Department of Corrections.”

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

“‘Regulation’ means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, *except one that relates only to the internal management of the state agency.* [Emphasis added.]”

*Grier v. Kizer* provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (b), the *Grier* court states:

“*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was ‘designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to

all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes. . .*' [Fn. omitted.] . . . [Citation; emphasis added by *Grier* court.]

“*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.][<sup>15</sup>]

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

“By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency’s personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception. . . .”<sup>16</sup>

The internal management exception has been judicially determined to be narrow in scope.<sup>17</sup> A brief review of relevant case law demonstrates that the “internal management” exception applies if the “regulation” at issue (1) affects only the employees of the issuing agency,<sup>18</sup> and (2) does not address a matter of serious consequence involving an important public interest.<sup>19</sup>

Again, subsections 3.a. and 3.b. of AD 83/2, as supplied to OAL, provide in part:

“a. Eligible Life Prisoners.”

“. . . Since the regularly scheduled progress hearings may not occur for

some time, Board and Department of Corrections staff shall review prisoners' records to determine which prisoners with BPT parole dates are entitled to PBR hearings. The Department shall notify each eligible prisoner that the prisoner is entitled to a PBR hearing. This notification shall be done as soon as possible but no later than May 1, 1983."

"b. Life Prisoners Who Are Not Notified"

"Any life prisoner who believes he or she is eligible for a hearing but is not notified shall file an administrative appeal as soon as possible after May 15, 1983. The Classification and Parole Representatives are authorized to decide these appeals. If the Classification and Parole Representative denies the appeal, the prisoner may request review by the Board of Appeals Unit."

It is readily apparent that the above cited provisions in sections 3.a. and 3.b. of AD 83/2 affect more than the employees of Board. Employees of the Department of Corrections (a separate state agency) are also affected. Of course, the prisoners themselves are the most significantly impacted. These sections affect the manner in which prisoners entitled to *Stanworth* (ISL) hearings are identified, when they will be notified of their rights, and the prisoners' appeal process. As we correctly stated in the determination on this request:

"The procedural provisions of the directive significantly affect ISL life prisoners entitled to ISL parole hearings under *Stanworth* in that they define the procedural rights of inmates entitled to the constitutional protection of *Stanworth*. OAL concludes that the procedures involved in implementing *Stanworth* are a matter of serious consequence involving an important public interest. The procedures do not relate solely to the internal management of the affairs of the Board. Therefore, the internal management exception does not apply."<sup>20</sup>

## CONCLUSION

For the reasons stated above, 1999 OAL Determination No. 4 should be modified to reflect that sections 7.d. and 7.c. of AD 83/2 are restatements of existing law.

## ENDNOTES

1. The original request for determination was dated May 17, 1995 and was filed on May 22, 1995 by David Finney, B-62624, C2-144, P.O. Box 5002, Calipatria, CA 92233 (Current address P.O. Box 7500, Crescent City, CA 95532-7500). The agency's response was dated November 6, 1998 and was submitted by James W. Nielsen, Chairman, 428 J Street, 6th Floor, Sacramento, CA 95814, (916) 445-4072. Relevant arguments the responding agency wishes OAL to consider should be included in the agency's response to a request for determination rather than being raised for the first time in a letter written after the determination has been issued.
2. Stats. 1976, ch.1139.
3. (1982) 33 Cal.3d 176, 187 Cal.Rptr. 783.
4. 33 Cal.3d at 188, 187 Cal.Rptr. at 791
5. Chapter 2, Article 2, Sections 2110-2119
6. 33 Cal.3d at 178-179, 187 Cal.Rptr. at 783.
7. 33 Cal.3d at 189, 187 Cal.Rptr. at 791.
8. (1985) 165 Cal.App.3d 932, 211 Cal.Rptr. 680.
9. 165 Cal.App.3d at 935, 211 Cal.Rptr. at 681.
10. 165 Cal.App.3d at 936, 211 Cal.Rptr. at 682-683
11. Comments on Proposed Modification to 1999 OAL Determination No. 4, at p. 4.
12. 165 Cal.App.3d at 935, 211 Cal.Rptr. at 682.
13. The Board for the first time in this request for reconsideration contends that section 7.c. of AD 83/2 is a restatement of subsection (a) of section 2292 of title 15 of the California Code of Regulations. Subsection (a) provides in part:

“All life prisoners committed to state prison for crime(s) committed prior to July 1, 1977 shall be heard in accordance with rules in effect prior to 7/1/77.”

However, this language in subsection (a) of section 2292 was not filed with Secretary of State until November 13, 1985 and was not effective until thirty days thereafter. Since the *Stanworth* and *DeMond* decisions predate this amendment to subsection (a) of section 2292 and OAL has now concluded that section 7.c. of AD 83/2 is a restatement of the law as expressed in *Stanworth*, an analysis of section 2292(a) is not included here.

14. **1998 OAL Determination No. 29** (State Personnel Board, Docket No. 93-002, October 29, 1998), CRNR 98, No. 46-Z, November 13, 1998, p. 2286, endnote 44, p. 2297.
15. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, n. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
16. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253 disapproved on another point, *Tidewater Marine Western, Inc. V. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198.
17. (1990) 219 Cal.App.3d 422, 436, 268 Cal Rptr. 244, 252-253 disapproved on another point, *Tidewater Marine Western, Inc. V. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198.
18. See *Armistead v. State Personnel Board* (1978) 22 Cal. 3d 198, 149 Cal.Rptr. 1; *Stoneham v. Rushen (Stoneham I)* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr 130; *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596.
19. See *Poschman, supra*, 31 Cal.App.3d at 943, 107 Cal.Rptr. at 603; and *Armistead, supra*, 22 Cal.3d at 203-204, 149 Cal.Rptr. at 3-4. See also **1989 OAL Determination No. 5**, CRNR 89, No. 16-Z, April 21, 1989, pp. 1120, 1126-1127; typewritten version, pp. 192-193.
20. **1999 OAL Determination No. 4**, at p.13, (Board of Prison Terms, 97-009, January 8, 1999), CRNR 99, No. 4-Z, January 22, 1999, p.238.