

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

2000 OAL Determination No. 13

July 21, 2000

Requested by: **MARC SCHACHTER**

Concerning: **DEPARTMENT OF CORRECTIONS rules 6, 7 and 8 contained in the May 11, 1999 Memorandum captioned "Rules and Regulations for the Facility D Gym" at the California Substance Abuse Treatment Facility and State Prison at Corcoran, California.**

**Determination issued pursuant to Government Code Section 11340.5;
Title 1, California Code of Regulations, Chapter 1, Article 3**

ISSUE

Are rules 6, 7, and 8 of the May 11, 1999 Memorandum captioned "Rules and Regulations for the Facility D Gym" at Corcoran State Prison "regulations" as defined in Government Code section 11342, subdivision (g), which are required to be adopted pursuant to the Administrative Procedure Act (Chapter 3.5 (commencing with section 11340), Division 3, Title 2, Government Code; hereafter, "APA")?¹

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1. This request for determination was filed by Marc Schachter, K-44425, SATF/SP, D-5 238L, P.O. Box 5242, Corcoran, CA 93212. The Department of Corrections' response was filed by John W. Sugiyama, Deputy Director, Legal Affairs Division, Department of Corrections, P.O. Box 942883, Sacramento, CA 94283-0001, (916) 445-0495. This request was given a file number of 99-015. This determination may be cited as "**2000 OAL Determination No. 13.**"

CONCLUSION

Rules 6, 7, and 8 of the May 11, 1999 Memorandum captioned "Rules and Regulations for the Facility D Gym" at Corcoran State Prison are "regulations" but are not subject to the APA because the challenged rules come within the express APA exception for "local rules" applying solely to one particular prison if express specified statutory conditions are met.²

ANALYSIS

The challenged rules state as follows:

"Rules and Regulations for the Facility D Gym

6. Food: There will be no group consumption of food (spreads etc.) between 2130 hours and 0800 hours. Individual inmates may consume their personal food on their own bunks at any time.
7. Gym Visiting: No loitering in between the bunks (isles) or bunk visiting allowed. Only one inmate on a bunk at any time.
8. Bunks: No sitting on the edge of the bunk. All feet and legs must be on the bunk and not hanging over the edge."

A determination of whether rules 6, 7 and 8 are "regulations" subject to the APA depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the Department of Corrections ("Department") (2) whether the challenged rules contain "regulations" within the meaning of Government Code section 11342, and (3) whether those challenged rules fall within any recognized exemption from APA requirements.

(1) It is well settled that APA rulemaking requirements generally apply to the Department. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (an agency created by Legislature is subject to and must comply with the APA.)

2. If challenged rules 6, 7 and 8 contain restatements of a centrally issued standard which has not been adopted pursuant to the APA, the "local rule" exception does not apply to those restatements.

(2) 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.]"

Under Government Code section 11342, subdivision (g), a rule is a "regulation" for these purposes if (1) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (2) the challenged rule has 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. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251;³ *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.)

For an agency rule 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 all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556; see *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (a standard of general application applies to all members of any open class).)

Rules 6, 7, and 8 are standards of general application because they apply to all members of the open class of prisoners utilizing the Facility D Gym at Corcoran State Prison. Although this may be a small group, the size of the group to which rules apply is not the pivotal legal issue.

Furthermore, we find that the challenged rules implement, interpret and make specific Penal Code section 5054 which declares that

"The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and

3. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198. *Grier*, however, is still good law for these purposes.

employment of persons confined therein are vested in the director [of the Department of Corrections]."

(3) With respect to whether the Department's rules 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. (Government Code section 11346; *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411.)

Penal Code section 5058, subdivision (c) declares as follows:

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

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

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

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

This statutory language indicates that the Legislature intends for "local rules" to be exempt from the APA, provided certain conditions are met. In its response, the Department asserts the following:

"The Memorandum was addressed to all gym staff and inmates, Facility 'D', at the California Substance Abuse Treatment Facility and State Prison at Corcoran only, and not to staff and/or inmates at all institutions/facilities. Each correctional institution/facility has the authority and discretion to issue rules of procedure to maintain a safe, healthy, and secure environment.

These 'rules' are considered 'local rules' as they address the unique needs of that particular institution/facility.

"The Department specifically denies that the Memorandum needs to be adopted pursuant to the Administrative Procedure Act (APA), Government Code Section 11340 et seq., since it is merely a 'local rule' at Corcoran, and even more specifically, Facility 'D' Gym. (See Government Code Section 11342(g)).

"California courts have long distinguished between rules applying to only one institution and those which apply statewide. For example, *American Friends Service Committee v. Procunier* [1973] 33 Cal.App.3d 252, 109 Cal.Rptr. 22, 25 distinguished between the two types of rules:

'The rules and regulations of the Department are promulgated by the Director and are distinguished from the institutional rules enacted by each warden of the particular institution affected.'

"More recently, a federal court has maintained this distinction between statewide formal regulations and a warden's informal rules covering his own institution. *Hillery v. Rushen*, (1983) 720 F.2d 1132, 1135-36. *Hillery* states:

'This case does not present the question whether the director may under certain circumstances delegate to the wardens and superintendents of individual institutions the power to devise particular rules applicable solely to those institutions. Nor does it present question whether the wardens and superintendents may promulgate such rules without complying with the APA.'

"*Hillery* held that the rules at issue in that case were required to be adopted pursuant to the APA since they were adopted by the Director and were of general applicability. Conversely, the memorandum under discussion affected only staff and inmates at Corcoran in Facility 'D' Gym and not the prison system generally. Therefore, the memorandum setting forth rules applying to the Facility 'D' Gym at Corcoran, is a type of rule which the courts have held to be within a warden's authority to make." [Emphasis original.]

There is no evidence or assertion by Mr. Schachter that Rules 6, 7 and 8 were issued or implemented at any other prison facility other than Corcoran State Prison's Facility "D" Gym. We agree with the Department's position that rules 6, 7 and 8 come within the express "local rules" exception and are therefore not subject to the APA.⁴

DATE: July 21, 2000

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4. The other issue raised by Mr. Schachter of whether or not Lieutenant Zamora is authorized to "create or implement" rules 6, 7 and 8 is not within OAL's scope of review when issuing a determination. OAL does not review challenged state agency rules for compliance with the APA's six substantive standards of Necessity, Authority, Clarity, Consistency, Reference and Nonduplication.