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SECRETARY OF STATE

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2001 OAL Determination No. 7

August 15, 2001

Requested by: ROBERT COLLINS

Concerning: DEPARTMENT OF CORRECTIONS – **Memorandum on "Inmate Participation in Contests" Issued by the Warden of Folsom State Prison**

Determination issued pursuant to Government Code Section 11340.5; California Code of Regulations, Title 1, Section 121 et seq.

ISSUE

Do the rules contained in the Department of Corrections' memorandum on "Inmate Participation in Contests" issued by the warden of Folsom State Prison constitute "regulations" as defined in Government Code section 11342.600 which are required to be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act?[1]

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1. This request for determination was filed by Robert Collins, J-44263 (4/N-15), San Quentin State Prison, San Quentin, CA 94974. Mr. Collins' former address was at Folsom State Prison. The Department of Corrections' response was filed by E. A. Mitchell, Interim Assistant Director, Office of Correctional Planning, Department of Corrections, P.O. Box 942883, Sacramento, CA 94283-0001. This request was given a file number of 99-027. This determination may be cited as **"2001 OAL Determination No. 7."**

CONCLUSION

With one exception, the rules contained in the Department of Corrections' memorandum on "Inmate Participation in Contests" issued by the warden of Folsom State Prison are *not* "regulations" which are required to be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act ("APA") because the rules either merely quote or reiterate existing, properly adopted regulations or are exempt from the APA under the Department of Corrections "local rules" exemption. The rule in the memorandum that repeats a rule in the Department's Operations Manual – setting forth the particular process to be employed by a prison for handling incoming inmate mail containing instruments used in a "game of chance" – constitutes a "regulation" which is required to be adopted under the APA.

BACKGROUND

Robert Collins was an inmate at Folsom State Prison at the time he submitted his request for determination to the Office of Administrative Law ("OAL"). Mr. Collins received a "Notice of Special Disposition – Inmate Mail" from the Folsom State Prison Mail Room that returned a letter to him for being ". . . in violation of 3009 gambling . . . ." The notice did not identify what mail was being returned, but Mr. Collins indicates that it was his entry for the "Pro-Pick'em" contest[2] sponsored by the West County Times of Pinole, California.

As part of his request for determination, Mr. Collins included a copy of a memorandum dated November 22, 1999, which is captioned "Inmate Participation in Contests," (the "Memorandum"). This Memorandum was signed by G. A. Mueller, Warden of Folsom State Prison, and issued to all staff and inmates at Folsom State Prison. The Memorandum sets forth a number of rules pertaining to inmate gambling and bookmaking, inmate participation in media contests, and the handling of incoming inmate mail where the mail contains instruments used in a "game of chance" (such as state lottery tickets, sweepstakes tickets, etc.). It is this

2. According to the "Pro-Pick'em" advertisement submitted by Mr. Collins, "Pro-Pick'em" awards are given to people for their ability to pick the winners of each week's professional football games, with the winning prize being $100 per week.

Memorandum issued by the warden of Folsom State Prison that is the subject of this OAL determination.[3]

ANALYSIS

The challenged Memorandum states as follows:

> "It has come to my attention that in the past inmates have participated in Media Sponsored contests that offer prizes. The following is a reiteration and clarification of Departmental and Institutional policies.
>
> 1. California Code of Regulations, Division 3, Chapter 1, Article 1, Section 3009, Gambling: *'Inmates may not participate in any form of gambling or bookmaking.'*
>
> 2. California Code of Regulations, Division 3, Subchapter 2, Article 4, Section 3138(g), Contests: '*Inmates may not participate in any contest advertised in or sponsored by the media when a financial obligation is involved, or when such participation will result in an expense to the facility beyond the routine cost of processing mail. Exceptions may be individually approved by the warden.*' (Financial Obligation includes both parties, participant and contest sponsor.)
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> 3. California Department of Corrections Operations Manual (DOM), Volume 5, Chapter 50000 Custody/Security Operations, Subchapter 54000 Services, Section 54010, Mail:

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3. Additionally, Mr. Collins submitted a page that did not identify its source. It was captioned "Subject: Inmates are Not Allowed to Participate in the Pro-Pick'em Football Contest." Because this page essentially repeats a number of the same rules contained in the Memorandum (and does not go beyond the scope of the Memorandum), we do not address this page separately. We further note that in his request for determination Mr. Collins raised legal issues which go beyond the question of whether the Department of Corrections' rules constitute "regulations" which are required to be adopted under the APA (such as whether the warden of Folsom State Prison misinterpreted CCR, Title 15, section 3138, subdivision (g), and whether "certain parties here at Folsom are attempting to re-write the D.O.M. and Title 15 without proper authority"). In connection with a request for determination, OAL is limited to making those determinations and findings set forth in Government Code section 11340.5, subdivision (b), and CCR, Title 1, section 121.

54010.17 Contests

> Inmates shall not participate in any contest advertised or sponsored by the media when a financial obligation is involved or when such participation will result in an expense to the facility beyond cost of processing mail.
>
> If lottery tickets, etc., are discovered in incoming inmate mail the entire envelope and contents shall be returned to sender with a preprinted notice to the sender which states:
>
>> 'Inmates are not permitted to receive or possess any instrument used in a game of chance (i.e., state lottery tickets, sweepstakes tickets, etc.). Please remove the unauthorized item(s) from this envelope and feel free to send the letter to the addressee.
>>
>> Thank you for your cooperation.
>>
>> Mail Room Staff
>> Folsom State Prison'
>>
>> (Game of Chance: Any contest where 'probability' is an integral component, i.e., Pro-Pick Em' [sic], Pick Fours, Sports Picks, etc.)
>
> Departmental and institution policy clearly prohibits inmate participation in any advertised or media sponsored contest involving the possibility of winning prizes of a monetary value. [Emphasis in original.]"

A determination of whether the rules contained in the Memorandum are "regulations" subject to the APA (Chapter 3.5 (commencing with section 11340), Part 1, Division 3, Title 2, Government Code) 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 are "regulations" within the meaning of Government Code section 11342.600, and (3) whether the challenged rules fall within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government and not expressly exempted are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities. *(Winzler & Kelly v.*

Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Gov. Code, secs. 11342.520 and 11346.) Moreover, the term "state agency" includes, for purposes applicable to the APA, "every state office, officer, department, division, bureau, board, and commission." (Gov. Code, sec. 11000.)

Penal Code section 5054 provides that:

> "The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director [of the Department of Corrections]."

The Department is in neither the judicial nor legislative branch of state government, and therefore, unless expressly exempted therefrom, the APA rulemaking requirements generally apply to the Department.

In this connection, Penal Code section 5058, subdivision (a), states in part as follows:

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

Thus, the APA rulemaking requirements generally apply to the Department. (See *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.))

(2) Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules without complying with the APA. It states as follows:

> "(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 Section 11342.600, *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.]"

Government Code section 11342.600, defines "regulation" as follows:

> ". . . *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.]"

According to *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274-275, agencies need not adopt as regulations those rules contained in a "'statutory scheme which the Legislature has [already] established . . . .'" 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 . . . ."

Similarly, agency rules properly adopted *as regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon." For example, *Union of American Physicians and Dentists v. Kizer* (1990) 223 Cal. App.3d 490, 500, 272 Cal.Rptr. 886, 891 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. Thus, 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.

Under Government Code section 11342.600, 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;[4] *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.)

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4. 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.

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).)

The challenged rules contained in the Memorandum apply, at a minimum, to all members of the open class of prisoners at Folsom State Prison. An "open class" is one whose membership could change, and the membership of the class of prisoners at Folsom State Prison could certainly change over time. Therefore, we find that the challenged rules contained in the Memorandum are standards of general application.

Next, we examine whether the specific rules contained in the Memorandum have been adopted by the Department to either implement, interpret, or make specific the law enforced or administered by the Department, or to govern the Department's procedure.

First, several provisions contained in the Memorandum merely quote or reiterate existing Department regulations which have previously been adopted pursuant to the rulemaking provisions of the APA. The Memorandum quotes California Code of Regulations ("CCR"), Title 15, section 3009, which reads as follows: "Inmates may not participate in any form of gambling or bookmaking." The Memorandum also quotes from and reiterates CCR, Title 15, section 3138, subdivision (g), which reads: "Inmates may not participate in any contest advertised in or sponsored by the media when a financial obligation is involved, or when such participation will result in an expense to the facility beyond the routine cost of processing mail. Exceptions may be individually approved by the warden." These provisions of the Memorandum, which merely quote from or reiterate existing, properly adopted regulations already in the CCR, do not further implement, interpret, or make specific the law enforced or administered by the Department or further establish rules that govern the Department's procedure.

Second, after quoting from CCR, Title 15, section 3138, subdivision (g), the Memorandum sets forth the following added rule: "<u>Financial Obligation</u> includes both parties, participant and contest sponsor." (Emphasis in original.) This added rule essentially defines the scope of the term "financial obligation" as used in section 3138, subdivision (g), thus further interpreting the existing regulation. Without this definition, subdivision (g) of section 3138 could be read to mean only

a financial obligation that is incurred by the inmate (the contest participant). Furthermore, this rule implements, interprets, or makes specific Penal Code section 5054 and section 2601, subdivision (c)(1), which states in relevant part that ". . . Pursuant to this section, prison authorities may exclude any of the following matter . . . . (C) Any matter concerning gambling or a lottery." Although this rule meets the basic definition of "regulation," this rule is exempt from being a "regulation" under the "local rule" exemption, as discussed below.

Third, the Memorandum sets forth a rule (taken directly from section 54010.17 of the Department's Operations Manual (DOM)) pertaining to the particular process for handling incoming inmate mail where the mail contains instruments used in a game of chance. This rule reads: "If lottery tickets, etc., are discovered in incoming inmate mail the entire envelope and contents shall be returned to sender with a preprinted notice to the sender which states: 'Inmates are not permitted to receive or possess any instrument used in a game of chance (i.e., state lottery tickets, sweepstakes tickets, etc.). Please remove the unauthorized item(s) from this envelope and feel free to send the letter to the addressee . . . .'" (Emphasis in original.)

This rule, setting forth the particular process to be employed by the prison for handling incoming inmate mail containing instruments used in a game of chance, must be considered in the context of existing Department regulations pertaining to the handling of inmate mail. CCR, Title 15, section 3006, subdivision (c), provides in relevant part that "Except as authorized by the institution head, inmates shall not possess or have under their control any matter which contains or concerns any of the following: . . . (13) Gambling or a lottery." CCR, Title 15, section 3136 then provides in relevant part: "Staff shall not permit an inmate to send or receive mail which, in their judgment, has any of the characteristics listed in Section 3006(c) . . . . Disapproved incoming mail shall be disposed of in the manner set forth in subsection 3147(a)(5)(B)." The referenced section 3147 of Title 15 of the CCR is part of the very detailed scheme of Department regulations pertaining to the handling of inmate mail which is set forth in CCR, Title 15, sections 3130 through 3147. Subdivision (a)(5)(B) of section 3147 provides as follows:

> "Incoming mail disallowed under the provisions of this article, under facility procedures, or pursuant to an appeal, shall be destroyed or mailed at the inmate's expense to an approved outside correspondent. The undelivered mail shall be destroyed 15 days after notification of undelivered mail is forwarded to the inmate unless the inmate designates who is to receive the mail and authorizes withdrawal from their trust account to pay for the

expense of mailing, or as authorized by the institution head, provides sufficient postage stamps already in the inmate's possession."

The provisions of CCR, Title 15, sections 3006, 3136 and 3147 discussed above would appear to provide that incoming inmate mail containing instruments used in a game of chance would *either be destroyed or mailed at the inmate's expense to an approved outside correspondent designated by the inmate.* Instead, the rule in the Memorandum pertaining to the handling of incoming inmate mail containing instruments used in a game of chance provides that the entire envelope and contents of the incoming inmate mail shall be *returned to the sender with a specified preprinted notice.* The "inmate mail" rule in the Memorandum thereby further implements, interprets, or makes specific Penal Code section 2601, subdivision (c)(1), Penal Code section 5054, and CCR, Title 15, section 3006, subdivision (c), and CCR, Title 15, section 3136, by providing a process for handling incoming inmate mail which is specific to mail containing instruments used in a game of chance (a process which appears to differ from the regulations generally established for handling disallowed incoming inmate mail). Thus, this "inmate mail" rule meets the definition of "regulation."

Fourth, the Memorandum contains the following definition of the term "Game of Chance": "Game of Chance: Any contest where 'probability' is an integral component, i.e., Pro-Pick Em'[sic], Pick Fours, Sports Picks, etc." This definition further implements, interprets, or makes specific Penal Code section 2601, subdivision (c)(1), and Penal Code section 5054, providing that "Game of Chance" includes *any* contest where "*probability*" is an integral component and listing *specific examples* of games of chance (including Pro-Pick'em). Although this rule meets the basic definition of "regulation," this rule is exempt from being a "regulation" under the "local rule" exemption, as discussed below.

Fifth, the Memorandum contains the following statement: "Departmental and institution policy clearly prohibits inmate participation in any advertised or media sponsored contest involving the possibility of winning prizes of a monetary value." This statement further implements, interprets, or makes specific Penal Code section 2601, subdivision (c)(1), and Penal Code section 5054 by adding the criterium "involving the possibility of winning prizes of a monetary value" to the existing interpretation regarding media contests contained in CCR, Title 15, section 3138, subdivision (g), (thereby further interpreting the existing regulation). Although this provision meets the definition of "regulation," this rule is exempt from being a "regulation" under the "local rule" exemption, as discussed below.

(3) With respect to whether the rules contained in the Memorandum 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. (Gov. Code, sec. 11346; *United Systems of Arkansas, Inc. v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411 ("*When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language.*") (Emphasis added.)

Penal Code section 5058, subdivision (c), declares in relevant part the following:

> "The following are deemed not to be 'regulations' as defined in Section 11342.600 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."

Thus, the Legislature has provided an express statutory exemption for *local* prison rules, provided that certain conditions are met. In its response, the Department relies upon this exemption, contending that ". . . the memorandum does not need to be adopted pursuant to the APA, Government Code Section 11340 et seq., since it is merely a 'local rule' pertaining to that facility . . . ."[5]

We find that the following three rules contained in the Memorandum are exempt from being "regulations" subject to the rulemaking provisions of the APA under the "local rule" exemption (assuming the conditions of Penal Code section 5058, subdivision (c)(1), are satisfied):

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5. Department's response to the request for determination, December 12, 2000, page 3.

(1) "Financial Obligation includes both parties, participant and contest sponsor." (Emphasis in original.)

(2) "Game of Chance: Any contest where 'probability' is an integral component, i.e., Pro-Pick Em' [sic], Pick Fours, Sports Picks, etc." (Emphasis in original.)

(3) "Departmental and institution policy clearly prohibits inmate participation in any advertised or media sponsored contest involving the possibility of winning prizes of a monetary value."

Nothing in the documents filed in connection with this determination suggests the these three rules are anything other than "local rules" which apply solely to inmates housed at Folsom State Prison.

The "local rule" exemption does *not* apply, however, to the rule which reads as follows:

> "If lottery tickets, etc., are discovered in incoming inmate mail the entire envelope and contents shall be returned to the sender with a preprinted notice to the sender which states: 'Inmates are not permitted to receive or possess any instrument used in a game of chance (i.e., state lottery tickets, sweepstakes tickets, etc.). Please remove the unauthorized items(s) from this envelope and feel free to send the letter to the addressee . . . .' [Emphasis in original.]"

This rule regarding the particular procedure to be employed for the handling of incoming inmate mail containing instruments used in a "game of chance" is taken directly from section 54010.17 of the statewide DOM.[6] Consequently, although this rule is set forth in a memorandum issued by the warden of Folsom State Prison, the rule is actually a rule that applies to prisons or other correctional facilities throughout the state.[7] The rule does *not* apply solely to a particular prison

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6. DOM section 12010.6, entitled "Department Operations Manual," states in part the following: "[The] DOM contains policy and procedures for *uniform operation of the Department* and is issued *statewide* to inform staff of the approved procedures for program operations." (Emphasis added.)

7. We note that section 54010.17 of the DOM is among a number of DOM provisions that have been designated as "not approved for use" within the Department (as listed in an "Administrative Bulletin" or "Notice of Change to Department Operations Manual" issued by the Department). However, despite this designation, the warden of Folsom

or correctional facility as required under Penal Code section 5058, subdivision (c). Consequently, the "local rules" exemption does not apply to this one rule. We are aware of no other APA exemption which would apply to this inmate mail rule. Therefore, this rule is subject to the rulemaking provisions of the APA.

DATE: August 15, 2001

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State Prison has utilized DOM section 54010.17, directly quoting and specifically citing DOM section 54010.17 as authority, even though that section was "not approved for use" both before and after the date of issuance of the Memorandum. Notwithstanding that section 54010.17 and other such sections have been designated "not approved for use," if they are not formally rescinded and deleted from the DOM, and continue to be available for use by institutions within the Department, we think these sections remain statewide rules of the Department subject to the APA.