

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

2002 OAL Determination No. 2

February 20, 2002

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Bill Jones
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SECRETARY OF STATE

Requested by: DIJON YOUNG

Concerning: DEPARTMENT OF CORRECTIONS – Hearing officer’s findings in a State of California Rules Violation Report from an inmate disciplinary proceeding

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

ISSUE

Do the following findings in a hearing officer’s decision constitute “regulations” as defined in Government Code section 11342.600 that are required to be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act: (A) a finding that certain misconduct is a serious rule violation under section 3315(a)(2)(B) of title 15 of the California Code of Regulations, (B) a finding that the misconduct is a “Division F” offense, and (C) a characterization of the misconduct in the hearing officer’s decision as “overfamiliarity with staff”?¹

CONCLUSION

The findings of the hearing officer that Mr. Young’s misconduct was a serious rule violation under section 3315(a)(2)(B) of title 15 of the California Code of Regulations and that the misconduct was a “Division F” offense, and the characterization of that misconduct as “overfamiliarity with staff” did not create “regulations” which are required to be adopted pursuant to the Administrative Procedure Act. The findings in this administrative adjudication did not create rules of general application.

1. The request for determination, additional comments, and a rebuttal to the Department of Corrections’ response were filed by Dijon Young, B-59175, Pelican Bay State Prison, P.O. Box 7500/A4-232, Crescent City, California 95531-7500. The Department of Corrections’ response was submitted by E. A. Mitchell, Interim Assistant Director, Office of Correctional Planning, Department of Corrections, P.O. Box 942883, Sacramento, CA 94283-0001. The request was given a file number of 00-010. This determination may be cited as “2002 OAL Determination No. 2.”

BACKGROUND

At the time of his determination request, Dijon Young was an inmate at Pelican Bay State Prison. Mr. Young asserts in his request for determination that findings made by a hearing officer in a Department of Corrections (“Department”) Rules Violation Report (“CDC Form 115”) created “regulations” which have not been adopted pursuant to the Administrative Procedure Act, in violation of Government Code section 11340.5.

The hearing officer’s findings followed a hearing conducted pursuant to Department regulations governing inmate discipline. A disciplinary proceeding is initiated when a staff member reports inmate misconduct believed to be a violation of law or not minor in nature on a CDC Form 115. (See Cal. Code Regs., tit. 15, sec. 3312(a)(3).)² The CDC Form 115 submitted by Mr. Young to support his request for determination describes the misconduct, as reported by a staff member, which lead to the findings as follows:

“On Tuesday . . . , I received an Inmate Request for Interview from inmate YOUNG, . . . , former inmate clerk in the Main Kitchen. The Request indicated that YOUNG was in possession of some personal information regarding me that I may have lost. He also wrote that I should contact him at the A Yard Canteen, his current job assignment. On Thursday . . . , [another inmate] handed me an envelope which contained another Request For Interview from YOUNG. This request also stated that I should contact him regarding a possible loss of personal information. . . . I contacted YOUNG via telephone at his worksite. He reiterated that he had knowledge of personal information regarding me that may be ‘floating’ around. At no time, however, did YOUNG specify what this information was. YOUNG said he would contact me again when he was able to decipher the actual information. It should be noted that while YOUNG was assigned to the Main Kitchen, he had approached me saying that he had some important information and would speak with me the next day. This did not occur, however, as YOUNG was unassigned from the Main Kitchen. I had no further occasion to speak with YOUNG until I received the Request For Interview.”

Department staff originally characterized this misconduct on the CDC Form 115 as the specific act of “bribery,” subsequently modified the characterization to “unlawful influence,” and ultimately found the misconduct to be a “potential breach of institution security.”³ After the administrative hearing, at which Mr. Young testified, the hearing officer made the following finding, which is the basis of Mr. Young’s request for determination:

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2. All subsequent “section” references in this determination are references to regulations in title 15 of the California Code of Regulations, unless specified otherwise.
 3. We express no opinion as to whether this shifting characterization of the reported misconduct violates any applicable provision of law other than Government Code section 11340.5, as our determination is limited to whether the findings issued, utilized, enforced, or attempted to enforce a “regulation” which must be adopted pursuant to the Administrative Procedure Act.

“FINDING: Guilty of the Div. F-3 (CCR 3315(a)(2)(B)[D]) offense OVERFAMILIARITY WITH STAFF. Not guilty of the Div. C (6) offense BRIBERY. Bribery is an attempt to influence someone in a position of authority with a gift or something of value. The purpose of the bribe must be influencing that public authority. An explicit offer is not required. It is sufficient if any reasonable person would understand from the overall circumstances that a bribe was being offered or implied. While Overfamiliarity [sic] with staff is not explicitly listed under CCR 3315 as a serious offense, it is justified as an offense by the fact that such misconduct potentially breaches institutional security as well as causing disruptions of facility operations and creating a threat to staff. This offense requires evidence that the inmate attempted to develop an overly familiar or personal relationship with a staff member under circumstances that imply or suggest that compromise of that staff member or institutional security procedures was a potential result. [The finding then goes on to describe the evidence upon which it is based.]”⁴

Mr. Young asserts that the hearing officer’s finding (quoted above) creates a “regulation” which expands the language of section 3315(a)(2)(B) in three ways: (A) it transforms section 3315(a)(2)(B) into a chargeable offense; (B) it classifies the inmate’s misconduct as a “Division F” offense; and (C) it creates a new offense, “overfamiliarity with staff.”

In its response, the Department denies that the offense “overfamiliarity with staff” has been created. The Department asserts that Mr. Young was found guilty of a section 3315(a)(2)(B) serious rule violation, specifically “Breach of or hazard to facility security.”⁵ The Department also explains that the hearing officer’s statement in his finding that “overfamiliarity with staff is not explicitly listed under CCR section 3315 as a serious offense” is a “written aside” that only “superficially appears to contradict” the citation of section 3315(a)(2)(B) as the basis of the finding against Mr. Young.⁶

4. With regard to the disposition of the matter, the CDC Form 115 indicates: “No credit forfeiture has been assessed because time constraints have been exceeded. In the hearing, YOUNG was ordered to avoid any and all contact with the Reporting Employee for any reason at any time. Appeal rights were explained. YOUNG was referred to CCR sec. 3084.1 and following for additional information on appeal procedures.”

Mr. Young appealed the hearing officer’s findings, and submitted as additional comments on his request for determination a Director’s Level Appeal Decision on the findings. In the appeal, Mr. Young argued that the hearing officer did not have the authority to find him guilty of a lesser offense of overfamiliarity with staff because it is not specifically listed as a serious offense in section 3315, and no legitimate authority identifies overfamiliarity with staff as a punishable offense. The Director’s Level Appeal Decision denied the appeal explaining: “CCR 3315(f)(3) provides the authority for the [hearing officer] to find the appellant guilty of an included offense. Reduction of the original charge was appropriate. The specific act is a considerable breach of institution security as staff have the opportunity to introduce contraband into the institution that may seriously threaten facility security and safety of persons. Overfamiliarity with staff breeds a willingness to ignore critical security measures. The [hearing officer’s] finding is consistent with the evidence and permissible under cited regulations.” Mr. Young argues that this explanation in effect adopts the offense “overfamiliarity with staff” as a rule which has statewide application. We disagree for the reasons explained in our analysis.

5. Department’s response, p. 3.

6. *Ibid.*

ANALYSIS

The determination of whether the hearing officer's findings challenged by Mr. Young are "regulations" subject to the Administrative Procedure Act ("APA"; chap. 3.5 (commencing with sec. 11340), pt. 1, div. 3, tit. 2, Gov. Code) depends on: (1) whether the APA is generally applicable to "regulations" issued by the Department, (2) whether the challenged findings are "regulations" within the meaning of Government Code section 11342.600, and (3) whether the challenged findings fall within any recognized exemption from APA requirements.

(1) The Department is a "state agency" in the executive branch of state government, and is thus subject to APA rulemaking requirements, unless expressly exempted by statute. The term "state agency" includes, for APA rulemaking purposes, "every state office, officer, department, division, bureau, board, and commission." (Gov. Code, sec. 11000.) The rulemaking requirements of the APA do not apply to agencies in the judicial or legislative branches of state government. (Gov. Code, sec. 11340.9, subd. (a).) Generally, all state agencies in the executive branch not expressly exempted by statute must comply with the APA when engaged in rulemaking. (*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.) (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (an agency created by the Legislature is subject to and must comply with the APA).) Moreover, applicability of the APA to the Department's rulemaking activities is specifically confirmed by subdivision (a) of Penal Code section 5058, which provides, as relevant:

"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, APA rulemaking requirements generally apply to the Department.

(2) Subdivision (a) of section 11340.5 of the Government Code generally prohibits state agencies from making any use of any rule which satisfies the APA definition of "regulation" without complying with the procedural requirements of the APA. The subdivision states:

"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.]"

Section 11342.600 of the Government Code 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.]”

Under Government Code section 11342.600, a challenged rule⁷ is a “regulation” for these APA purposes if (1) the state agency 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;⁸ *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.)

For a challenged rule to be a “standard of general application,” it need not apply to all citizens of the state. It is sufficient if the challenged 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).) A standard of general application is by nature prospective in operation. (See, e.g., *Best v. California Apprenticeship Council* (1987) 193 Cal.App.3d 1448, 1456, 240 Cal.Rptr. 1, 5.)

We consider each of Mr. Young’s three assertions in turn.

(A) Mr. Young asserts that the hearing officer’s finding transforms section 3315(a)(2)(B) into a chargeable offense, arguing that section 3315 does not itself create a chargeable offense, but has as its only purpose the classification of offenses created by other regulations as either “administrative” or “serious.”

We cannot agree with this assertion. The hearing officer’s finding that the requester’s violation of section 3315(a)(2)(B) is a serious rule violation does not itself create a new rule of general application. Section 3315(a)(2)(B) is part of a series of regulations that set out a disciplinary procedure for inmate misconduct. Under the disciplinary procedure, staff must report inmate misconduct believed to be a violation of law, or not minor in nature on a CDC Form 115. (Sec. 3312(a)(3).) Each CDC Form 115 must then be classified as “administrative” or “serious” pursuant to sections 3314 and 3315, respectively. Different procedural requirements and different authorized dispositions are tied to each classification. Section 3315(a) provides:

“(a) *Inmate misconduct reported on a CDC Form 115 shall be classified serious if:*
(1) It is an offense punishable as a misdemeanor not specified as administrative in section 3314(a)(3) or is a felony, whether or not prosecution is undertaken.

7. A “challenged rule” as used in this determination means the policy or procedure that is the subject of the request for an OAL determination.

8. 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.

(2) *It involves any one or more of the following circumstances:*

(A) Use of force or violence against another person.

(B) *A breach of or hazard to facility security.*

(C) A serious disruption of facility operations.

(D) The introduction or possession of controlled substances or dangerous contraband.

(E) An attempt or threat to commit any act listed in (A) through (D), coupled with a present ability to carry out the threat or attempt if not prevented from doing so.

(3) Serious rule violations include but are not limited to: [The rule then specifically lists 24 serious rule violations, an example being: ‘Harassment of another person, group, or entity either directly or indirectly through the use of the mail or other means.’]

[Emphasis added.]”

Mr. Young’s assertion that the finding expands the language of section 3315(a)(2)(B) by transforming it into a chargeable offense is based upon the flawed premise that section 3315(a)(2)(B) does not itself establish a rule for inmate behavior, which if violated may result in a disciplinary action.

The language of the section belies this assertion. Section 3315(a)(2)(B) requires inmate misconduct reported on a CDC Form 115 to be classified as a serious rule violation if the acts involve a “breach of or hazard to facility security.” The rule of behavior implicit in this provision is that any inmate acts that involve a breach of or hazard to facility security are prohibited. Section 3315(f)(3) then establishes disciplinary consequences that may be imposed if an inmate is found guilty of a serious rule violation, or guilty of an included serious rule violation. Thus, the regulation itself establishes that it is a chargeable offense to engage in any act that involves a breach of or a hazard to facility security.

This reading of the regulation is consistent with the language in section 3315(a)(2)(E) that makes an attempt to commit “any act listed in (A) through (D)” of section 3315 a serious rule violation. The reading is also confirmed by the provision in section 3315(a)(3) which states that serious rule violations are not limited to those listed in the regulation. Consequently, the hearing officer’s finding that the requester’s violation of section 3315(a)(2)(B) is a serious rule violation is a finding that the existing regulation applies to Mr. Young’s actions. Thus, the hearing officer’s finding did not create a rule of general application for purposes of the APA.

(B) Mr. Young next asserts that the classification of his offense as a “Division F” offense expands the language of section 3315 so as to create a regulation that must be adopted pursuant to the APA.

We do not agree with this assertion. Existing regulations provide for the classification of certain offenses as “Division F” offenses. Section 3315(f)(3) provides that upon completion of the fact-finding portion of the disciplinary hearing, the inmate may be found “[g]uilty as charged or guilty of an included serious rule violation and assessed a credit forfeiture pursuant to section 3323.” Section 3323 sets out a disciplinary credit forfeiture schedule for offenses which it categorizes as “Division ‘A’” through “Division ‘F’” offenses. For each division, section 3323 lists the offenses to which the division applies and specifies the number of days of credit

forfeiture that may be imposed if an inmate is found guilty of an offense listed under the division.

With regard to “Division F” offenses, section 3323(h) provides that any serious rule violation listed in section 3315, other than gambling in a community-access facility or a late return to a community access facility, that is not a crime is a “Division ‘F’” offense, which may be assessed a credit forfeiture of 0-30 days. Because a violation of section 3315(a)(2)(B) is a serious rule violation, existing regulation section 3323(h) makes a violation of section 3315(a)(2)(B) a “Division F” offense. Thus, the hearing officer’s classification of the offense of which Mr. Young was found guilty as a “Division F” offense did not create a new rule of general application.

(C) Mr. Young also asserts that the description of the misconduct in the hearing officer’s finding as “overfamiliarity with staff” and the explanation that this offense “. . . requires evidence that the inmate attempted to develop an overly familiar or personal relationship with a staff member under circumstances that imply or suggest that compromise of that staff member or institutional security procedures was a potential result”⁹ creates a regulation which expands the language of section 3315(a)(2)(B).

We do not agree with this assertion. Section 3315(a)(2)(B) specifically provides that inmate misconduct must be classified as serious misconduct if it involves “[a] breach of or hazard to facility security.” The hearing officer’s characterization of the reported behavior as “overfamiliarity with staff” and his description of required evidence were no more than shorthand descriptions or characterizations of behavior which, in the hearing officer’s judgment, constituted “[a] breach of or hazard to facility security.” Nothing in the APA prohibits the Department from making case-by-case determinations as to whether the actions of an inmate constitute “[a] breach of or hazard to facility security.” The hearing officer’s findings here determined the rights and duties of one named person, Mr. Young. These findings are in the nature of an individual adjudication rather than a rulemaking. A rulemaking creates rules of general application for prospective application in making decisions. That did not occur here.

Because we have determined that the findings of the hearing officer in this instance did not create a rule of general application, there is no need to determine whether any rule implements, interprets, or makes specific the law enforced or administered by the agency, or whether an express statutory exemption applies.

Thus, the findings of the hearing officer did not create “regulations” that are required to be adopted pursuant to the APA.

9. CDC Rules Violation Report, p. 3, 5/4/99.

DATE: February 20, 2002

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