

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

2002 OAL Determination No. 5

May 23, 2002

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BILL JONES
SECRETARY OF STATE

Requested by: RANDY BRANSON

Concerning: DEPARTMENT OF CORRECTIONS – Inmate Pay Schedule
(Department Operations Manual Section 51120.7)

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

ISSUE

Does the inmate pay schedule contained in section 51120.7 of the Department of Corrections Operations Manual constitute a “regulation” as defined in Government Code section 11342.600, which is required to be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act?¹

CONCLUSION

The Department of Corrections’ inmate pay schedule contained in section 51120.7 of the Department Operations Manual constitutes a “regulation” which is required to be adopted pursuant to the Administrative Procedure Act.

1. The request for determination was filed by Randy Branson, J-42183, A.S.P.– Bldg. 510-2-25L, P.O. Box 9, Avenal, CA 93204. 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. The request was given a file number of 00-003. This determination may be cited as “2002 OAL Determination No. 5.”

BACKGROUND

When he submitted his request for determination to the Office of Administrative Law (“OAL”), Randy Branson was an inmate at the California State Prison at Corcoran. In his determination request, Mr. Branson makes reference to the inmate pay provisions for approved prison work assignments and pay contained in the Department of Corrections (“Department”) Operations Manual (“DOM”) section 51120.² However, he specifically challenges DOM section 51120.7, titled “Pay Schedule,” which sets forth “approved job classifications and pay rates which shall be used in facility and parole inmate pay plans.” DOM section 51120.7 includes skill levels, a range of minimum and maximum hourly and monthly pay rates, and information about the payment sources and special situations such as special projects and conservation camp work.³

2. With his determination request, the requester submitted the May 26, 1993 version of DOM section 51120, which includes sections 51120.1 through 51120.14. These sections are now found in Article 12 of Chapter 5 of the current version of the DOM, dated May 1, 2000. The sections contained in the 1993 DOM, including the challenged section 51120.7, are essentially identical to the sections found in Article 12 of the 2000 DOM.

3. DOM section 51120.7, as it existed at the time the request was submitted to OAL, provided in full:

51120.7 The following are approved job classifications and pay rates which shall be used
PAY in facility and parole inmate pay plans.
SCHEDULE

Support and Inmate Welfare Funds	Skill Levels and Pay Rates				
	Skill Level	Minimum		Maximum	
			Hourly	Monthly	Hourly
	Leadperson	\$.32	\$48	\$.37	\$56
	Special Skill	.19	29	.32	48
	Technician	.15	23	.24	36
	Semi-Skill	.11	17	.18	27
	Laborer	.08	12	.13	20

Monthly rates shall apply to full time employment in job classifications paid from the support budget or inmate welfare funds.

Special Projects Inmates assigned to special facility/CCC projects may be paid from the support budget at rates comparable to the Prison Authority (PIA) inmate pay program.

Requests to pay inmates assigned to special projects at the higher rate shall be directed to the Deputy Director, Institutions Division, or the Deputy Director, P&CSD, for approval.

**Conservation
Camps** Refer to Department Operations Manual (DOM) Section 51130 for information regarding inmate pay in conservation camps.

**Prison Industry
Authority** Refer to DOM Section 51121 for information regarding inmate pay in PIA.

Other provisions of the encompassing DOM section 51120 set out the sources and administration of inmate pay, the makeup of inmate pay committees, hiring and pay scale criteria, position classifications and descriptions, transfer, appraisal, and termination procedures, timekeeping documents, and update duties. Mr. Branson states in part that “[t]here is no legitimate [reason] why the standard matrix as adopted in [the Department’s] Operation Manual (D.O.M.) section 51120.7 as of 5-26-93 cannot be amended or adopted into the CCR Title 15.”⁴ Before filing this request, Mr. Branson petitioned the Department to adopt or amend title 15 of the California Code of Regulations (“CCR”) to incorporate clearer provisions for inmate pay and inmate pay reductions. The Department denied the petition.⁵

ANALYSIS

Whether the pay schedule contained in DOM section 51120.7 is a “regulation” subject to the Administrative Procedure Act (“APA”; ch. 3.5, commencing with sec. 11340, pt. 1, div. 3, tit. 2, Gov. Code) depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the Department, (2) whether the challenged rule is a “regulation” within the meaning of Government Code section 11342.600, and (3) whether the challenged rule falls within any recognized exemption from APA requirements.

(1) Generally, all state agencies in the executive branch of government and not expressly exempted by statute 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 it is expressly exempted by statute, the APA rulemaking requirements generally apply to the Department.

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4. Request for Determination, page 1. In the context of a request for determination under Government Code section 11340.5 and California Code of Regulations, title 1, sections 121 through 128, OAL’s authority is limited to determining whether the state agency rules at issue are “regulations” as defined in Government Code section 11342.600 which are required to be adopted pursuant to the APA, and not whether the rules would meet the APA standards in Government Code sections 11349 and 11349.1.
 5. On July 6, 1999, Mr. Branson filed a petition under Government Code section 11340.6 asking the Department to amend the title 15, CCR, provisions on inmate pay provisions and canteen allowances. On October 5, 1999, the Department granted the canteen request and denied the part of the petition concerning inmate pay amounts and procedures.

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 the 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, and 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 that reiterate a statutory scheme which the Legislature has already established. But “to the extent 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., 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;⁶ *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).) The challenged rule contained in DOM section 51120.7 applies to all members of the open class of inmates and parolees "engaged in productive work" as described in DOM section 51120.1, the inmate pay "Policy" provision. An "open class" is one whose membership could change just as the membership of the class of inmate and parolee workers could change over time. Consequently, DOM section 51120.7 is a standard of general application.

Further, the pay schedule implements, interprets, or makes specific the law enforced or administered by the Department and governs the Department's procedure. In particular, this challenged provision implements, interprets, or makes specific Penal Code sections 2700, 5054 and 5058.⁷ Neither existing statutes applicable to the Department nor existing regulations duly adopted under the APA contain the pay schedule set forth in DOM section 51120.7. The relevant regulations (sections 3040, 3041, 3041.1, and 3041.2, title 15, CCR) generally touch on inmate work performance, placement, and pay, but do not indicate approved job classifications and the corresponding pay schedule, which is exactly what the challenged rule, section 51102.7, does. In other words, DOM section 51102.7 "embellishes upon" existing law. This provision also governs the Department's procedure relating to inmate pay.

6. 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 this purpose.

7. Penal Code section 2700 provides:

"The Department of Corrections shall require of every able-bodied prisoner imprisoned in any state prison as many hours of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the Director of Corrections.

"Whenever by any statute a price is required to be fixed for any services to be performed in connection with the work program of the Department of Corrections, the compensation paid to prisoners shall be included as an item of cost in fixing the final statutory price.

"Prisoners not engaged on work programs under the jurisdiction of the Prison Industry Authority, but who are engaged in productive labor outside of such programs may be compensated in like manner. The compensation of such prisoners shall be paid either out of funds appropriated by the Legislature for that purpose or out of such other funds available to the Department of Corrections for expenditure, as the Director of Finance may direct. . . ."

Thus, DOM section 51120.7 is a “regulation” as defined in Government Code section 11342.600.

(3) Does the DOM section 51120.7 pay schedule 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.”) The Department seems to assert that an APA exemption applies to the inmate pay schedule, as discussed below.

The “Local Rule” Exemption: In its response to the request for determination, the Department claims that the inmate pay provisions are “not standards of general application,” and that the provisions are used by the Inmate Pay Committee (IPC) at each institution/facility “as a guideline of pay parameters along with various different factors to determine the relative worth of various inmate job assignments.”⁸ The Department cites two cases to illustrate its argument that “California courts have long distinguished between rules applying to only one institution and those,[sic] which apply statewide.”⁹ While the Department cites valid principles distinguishing between statewide and local rules, the distinction is not relevant in this case.

The Department seems to be arguing that the “local rule” exemption applies to the inmate pay schedule, although it does not cite to the relevant Penal Code section. Penal Code section 5058, subdivision (c), added in 1995, explicitly exempts rules which apply to a particular facility or prison from the APA.¹⁰ However, the requester did not challenge the inmate pay provisions as applied by the IPC at his institution.¹¹ He challenged section 51120.7 of the DOM which has

8. Department’s “Response to Request for Determination,” September 26, 2001, p. 1.

9. Department’s “Response to Request for Determination,” September 26, 2001, p. 1.

10. Penal Code section 5058, subdivision (c) declares in part as follows:

"(c) The following are deemed not to be 'regulations' as defined in Section 11342.600 of the Government Code:

(1) Rules issued by the director 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. . . . "

11. Although the requester’s main concern seems to be the alleged failure of his prison’s IPC to follow section 51120.7, he requested OAL to issue a determination as to whether DOM section 51120.7 is a “regulation” as defined in Government Code section 11342.600, and thus, should be adopted pursuant to the APA.

statewide application.¹² The Department acknowledges the statewide application of section 51120.7 in its statement: “The Department contends that the policy affects inmates at CSATF/SP individually, *as well as inmates at other institutions/facilities. . .*”¹³ (Emphasis added.) The Department also provides the following statement: “The word ‘shall’ in this specific DOM section [51120.7] *directs the individual Wardens or ‘facility officials’ to follow procedures in the DOM and their own local institutional procedures.*”¹⁴ (Emphasis added.)

In *In re Carlos Tomas Garcia on Habeas Corpus* (1998) 67 Cal.App.4th 841, 79 Cal.Rptr.2d 357, the court distinguished between the proposed statewide rule which concerned mail among inmates system-wide and the legitimate *local* rule, which related only to the Donovan facility and was upheld by the court as a “local rule” that was exempt from the APA. (67 Cal.App.4th 845-6, 79 Cal.Rptr.2d 359-360.)

The situation here, however, is not the same as that in *Garcia*. In this instance, the challenged DOM section 51120.7 directs the director’s designees at each facility statewide to adopt pay schedules and perform other duties concerning inmate pay. DOM section 51120.7 establishes “approved job classifications and pay rates which *shall be used in facility and parole inmate pay plans.*” Additionally, DOM section 51120.8 provides the following: “Inmate pay positions have been established and *shall be used in facility support and CCC operations. All inmate pay positions shall be assigned to one of [the job classifications set forth in section 51120.7]* based on position description [in section 51120.8] . . .” Mr. Branson did not challenge the particular pay schedule at his facility (i.e., the application of the DOM section by his facility’s IPC). Rather, he argues that the challenged DOM section 51120.7 pay schedule should be adopted pursuant to the APA because it applies to all facilities. DOM section 51120.7 is a rule of general application directed to the management of each facility and its inmate pay committee, and it affects inmates employed by the Department at the individual institutions and facilities. It is not a rule that applies only to one particular facility.

After reviewing the APA exemption discussed above, as well as all other potentially applicable APA exemptions, OAL finds that no express statutory exemption from the APA applies with respect to the pay schedule as set forth in DOM section 51120.7.

Thus, we conclude that the inmate pay schedule contained in DOM section 51120.7 constitutes a “regulation” which is required to be adopted pursuant to the APA.

12. The DOM has statewide applicability. DOM section 12010.6, titled “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.) Additionally, DOM section 51120.2 states the purpose of the entire section 51120, which encompasses section 51120.7 and is titled “Inmate Pay,” as “This procedure establishes guidelines for uniform interpretation, application, and administration of inmate pay plans.”

13. Department’s “Response to Request for Determination,” September 26, 2001, p. 2.

14. *Id.*

DATE: May 23, 2002

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