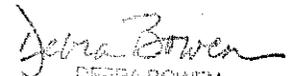


STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW

ENDORSED FILED  
IN THE OFFICE OF

2009 AUG 26 PM 12:50

2009 OAL DETERMINATION NO. 19  
(OAL FILE NO. CTU2009-0223-01)

  
DEBRA BOWEN  
SECRETARY OF STATE

REQUESTED BY: MICHAEL ST. MARTIN

CONCERNING: Special Order No. 239.02, titled "Contraband" Issued by the  
Department of Mental Health

DETERMINATION ISSUED PURSUANT TO GOVERNMENT  
CODE SECTION 11340.5.

### SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of "regulation" as defined in Government Code section 11342.600<sup>1</sup> and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250.<sup>2</sup> OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

### CHALLENGED RULE

The challenged rule is Special Order No. 239.02, titled "Contraband," attached hereto as Exhibit A. Special Order No. 239.02 (Special Order) states that its purpose is to

...classify specific items considered contraband that are prohibited in state hospitals, and establish policy regarding the inspection, search, seizure, reporting and disposition of items considered contraband.

<sup>1</sup> Unless otherwise specified, all references are to the Government Code.

<sup>2</sup> As defined by title 1, section 250(a), an

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

## **DETERMINATION**

OAL determines that the Special Order meets the definition of “regulation,” that no express statutory exemption applies, and therefore, the Special Order should have been adopted pursuant to the APA.

## **FACTUAL BACKGROUND**

The Special Order was issued by the Department of Mental Health (Department), and was effective on January 1, 2002. The Special Order requires Executive Directors of individual state hospitals to:

...either develop a list of items that are considered contraband, or a list of items that are considered allowable, and make the list available on all treatment units, and all areas of patient and public access within the hospital. The list will also be made available to visitors who visit patients at the state hospitals.

In addition, the Executive Directors are required to adopt policies on specific subjects. Examples of the required policies include:

1. Procedures that allow the inspection and searching of patients, their property and living areas, all general hospital areas within and outside the secure treatment area, and of staff and visitors, to effectively ensure that contraband is not present.
2. Procedures that deny access to the facility for any individual, employee or visitor who refuses to submit to an inspection or search, or who has a history of attempting to provide and/or providing contraband items to patients.
3. Directives and procedures concerning allowable personal property by patients.
4. A process for the reporting of searches for contraband and when contraband is found.
5. The initiation of a crime report by the hospital police department concerning illegal items found.
6. A process that allows an interdisciplinary note to be entered in a patient’s medical chart if contraband is found.

The Special Order requires that the directives, procedures and report forms established by the Executive Directors be consistent with the Special Order.

On February 23, 2009, Michael St. Martin submitted a petition to OAL challenging the Special Order as an underground regulation. OAL accepted the petition for consideration on April 24, 2009. OAL received no public comments and the Department did not submit a response to the petition.

## UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), provides that:

(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 [Government Code] 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].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency has issued, utilized, enforced, or attempted to enforce a rule that meets the definition of “regulation” as defined in section 11342.600 that should have been adopted pursuant to the APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to “due deference” in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

## ANALYSIS

OAL's authority to issue a determination extends only to the limited question of whether the challenged rule is a “regulation” subject to the APA. This analysis will determine (1) whether the challenged rule is a “regulation” within the meaning of section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in section 11342.600 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.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4<sup>th</sup> 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the

agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).<sup>3</sup>

As stated in *Tidewater*, the first element used to identify a “regulation” is whether the rule applies generally. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations.

The Special Order requires the Executive Directors of state hospitals to take specific actions to control items considered to be contraband. Among other requirements, the Executive Directors must:

- Compile lists of either contraband or allowable items.
- Adopt procedures for the inspection of patients and hospital grounds.
- Adopt procedures for the denial of access for any employee or visitor who refuses to submit to a search.
- Adopt procedures for the reporting of searches and the discovery of contraband items.

These requirements to adopt procedures and policies on specific subjects apply to all Executive Directors of state hospitals. Executive Directors of state hospitals are a clearly defined class of persons. In addition, the policies and procedures adopted by the Executive Directors will ultimately apply to employees, patients and visitors of the state hospitals. These are also clearly defined classes of persons. Because the Special Order applies to these clearly defined classes of persons, the first element used to identify a “regulation” is met.

The second element used to identify a “regulation” as stated in *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency’s procedure.

Welfare and Institutions Code section 4100 states that the Department has jurisdiction over the five state hospitals in California:

- Atascadero State Hospital.
- Coalinga State Hospital.
- Metropolitan State Hospital.
- Napa State Hospital.
- Patton State Hospital.

Welfare and Institutions Code section 4101 requires that:

...all of the institutions under the jurisdiction of the State Department of Mental Health shall be governed by uniform rule and regulation of the State Department of Mental Health and all of the provisions of this chapter shall apply to the conduct and management of such institutions.

The Special Order requires every Executive Director to:

...either develop a list of items that are considered contraband, or a list of items that are considered allowable, and make the list available on all treatment units, and all areas of patient and public access within the

---

<sup>3</sup> Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

hospital. The list will also be made available to visitors who visit patients at the state hospitals.

The Special Order establishes the required content of the rules dealing with contraband at each of the state hospitals under the jurisdiction of the Department. The Executive Directors are required to adopt specific policies and procedures that must be consistent with the provisions in the Special Order. The policies required to be adopted by the Executive Directors are the uniform rules and regulations required by Welfare and Institutions Code section 4101 for the governance of state hospitals under the jurisdiction of the Department. The Special Order, therefore, implements, interprets and makes specific Welfare and Institutions Code sections 4100 and 4101. The second element used to identify a "regulation" is met. The Special Order, therefore, meets the definition of "regulation" in Government Code section 11342.600.

The final issue to examine is whether the challenged rule falls within an express statutory exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to section 11346, the procedural requirements established in the APA "shall not be superseded or modified by any subsequent legislation *except to the extent that the legislation shall do so expressly.*" (Emphasis added.)

One exemption which could arguably apply to the Special Order is found in Government Code section 11340.9:

[The APA] does not apply to any of the following:

...

(d) A regulation that relates only to the internal management of the state agency.

The internal management exemption has been judicially determined to be narrow in scope.<sup>4</sup> The courts apply a two prong analysis of the "internal management" exemption:  
(1) The "regulation" at issue affects only the employees of the issuing agency,<sup>5</sup> and  
(2) The "regulation" at issue does not address a matter of serious consequence involving an important public interest.<sup>6</sup>

The Special Order is directed towards the Executive Directors of the state hospitals. The Executive Directors are employees of the Department. In addition to the employees of the state hospitals, the Special Order affects patients of the state hospitals and visitors who must comply with the policies and procedures required by the Special Order. The Special Order, therefore, does not meet the first prong for the internal management exemption and is, therefore, not exempt from the requirements of the APA pursuant to the internal management exemption.

<sup>4</sup> *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 436, 268 Cal.Rptr. 244, 252-253.

<sup>5</sup> 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.

<sup>6</sup> 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.

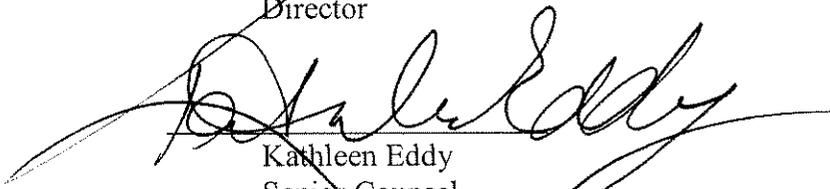
The Department has not identified an express statutory exemption from the APA that would apply to the Special Order, nor did OAL find such an exemption.

### CONCLUSION

In accordance with the above analysis, OAL determines that the Special Order meets the definition of "regulation" that no express statutory exemption applies, and therefore, the Special Order should have been adopted pursuant to the APA.

Date: August 26, 2009

  
\_\_\_\_\_  
SUSAN LAPSLEY  
Director

  
\_\_\_\_\_  
Kathleen Eddy  
Senior Counsel

# Exhibit A

CALIFORNIA DEPARTMENT OF MENTAL HEALTH

SPECIAL ORDER

Section: 200-299 Administrative

**Special Order No.:** 239.02  
**Replaces:** 239.01

**Effective Date:** January 1, 2002

**Subject:** CONTRABAND

---

**Special Order:** The Department of Mental Health (Department) recognizes that the control of items considered contraband in the state hospitals is essential for the safety and protection of employees, patients, and the general public who reside within the communities adjacent to the state hospitals.

**Authority:** By order of the Deputy Director, Long Term Care Services.

**Purpose:** The purpose of this Special Order is to classify specific items considered contraband that are prohibited in the state hospitals, and establish policy regarding the inspection, search, seizure, reporting and disposition of items considered contraband.

**Method:** Each Executive Director shall establish directives, procedures, and report forms consistent with this Special Order.

Consistent with this Special Order, each Executive Director shall either develop a list of items that are considered contraband, or a list of items that are considered allowable, and make the list available on all treatment units, and all areas of patient and public access within the hospital. The list will also be made available to visitors who visit patients at the state hospitals.

Special Order 227 (Special Incident Reports) will be followed when contraband items such as weapons and illegal substances are found or when staff are involved.

Special Order Number: 239.02

#### GENERAL STATEMENT

Items that should be considered contraband are items that would constitute a breach of security to the state hospital and/or affect the safety of the patients, staff and the public, or items that are allowed but in excess of established amounts and quantities.

In addition to the items identified by the individual state hospital as being contraband, all contraband lists shall include any illegal drug, including but not limited to narcotics, marijuana, and hallucinogenic, drug paraphernalia or any other item prohibited by law. These items shall not be brought on the state hospital grounds.

State hospital policies shall include, but not be limited to the following:

1. Procedures that allow for the inspection and searching of patients, their property and living areas, all general hospital areas within and outside the secure treatment area, and of staff and visitors, to effectively ensure that contraband is not present.
2. Procedures that deny access to the facility for any individual, employee or visitor, who refuses to submit to an inspection or search, or who has a history of attempting to and/or providing contraband items to patients. Employees and visitors denied entrance will be instructed to leave the state hospital grounds.
3. Directives and procedures concerning allowable personal property by patients.
4. A process for the reporting of searches for contraband and when contraband is found. A State Hospital Special Incident Report and Contraband Report will be initiated when contraband is found. These reports will be forwarded to the appropriate personnel as determined by hospital policy.
5. The initiation of a crime report by the Hospital Police Department or Investigators (CDC at PSH) concerning illegal items found.
6. A process that allows an interdisciplinary note to be entered in a patient's medical chart if contraband is seized from the patient or from the patient's living area. The process should include a method to provide the patient with a receipt for all items removed from their person or living area.

Special Order Number: 239.02

7. Directives and procedures concerning the receipt of packages, donations, gifts and other items by patients. Items are not to be given directly to patients by visitors or staff.
8. Procedures concerning the search of newly admitted patients and/or their property.
9. Procedures concerning the search of patients when entering and leaving the visiting room.
10. A process for the disposition and/or disposal of contraband, including at a minimum a record that clearly indicates the item(s), and the date and process of the disposition/disposal.
11. Directives and procedures concerning items secured as part of an investigation, whether criminal or administrative in nature.
12. Reviews and updates of contraband Administrative Directives, procedures or policies shall be conducted at least once every two years.

Signature on File  
JOHN RODRIGUEZ, Deputy Director  
Long Term Care Services  
Department of Mental Health

December 21, 2001  
Date