

STATE OF CALIFORNIA

99 OCT -4 PM 4: 26

OFFICE OF ADMINISTRATIVE LAW

*Bill Jones*  
JONES  
SECRETARY OF STATE

In re:	)	1999 OAL Determination No. 21
Request for Regulatory	)	
Determination filed by FRED	)	[Docket No. 98-005]
PRICE regarding the Prisoner	)	
Classification Process, as	)	October 4, 1999
described in section 62010 of	)	
the Operational Supplement	)	Determination Pursuant to
to the Department of	)	Government Code Section
Corrections Operations	)	11340.5; Title 1, California
Manual, issued by the	)	Code of Regulations,
Warden of CALIFORNIA	)	Chapter 1, Article 3
STATE PRISON, LOS ANGELES <sup>1</sup>	)	
_____	)	

Determination by: CHARLENE G. MATHIAS, Deputy Director

HERBERT F. BOLZ, Supervising Attorney  
DAVID POTTER, Senior Counsel  
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law concludes (1) that the part of an operational supplement banning family visits for inmates classified as Close A merely restates existing law; (2) the parts governing housing and work assignments for inmates classified as Close B are "regulations," but are not subject to the Administrative Procedure Act because of a special express APA exemption for rules applying solely to one particular prison, if specified statutory conditions are met; but, (3) the part repeating a departmental directive establishing minimum terms for inmates in Close B Custody is a "regulation" which should have been, but was not, adopted in accordance with the Administrative Procedure Act.

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## DECISION<sup>2,3,4</sup>

The issue presented to the Office of Administrative Law (“OAL”) is whether certain rules of the California Department of Corrections (“Department” or “CDC”) are “regulations” required to be adopted pursuant to the APA.<sup>5</sup>

- (1) OAL concludes that the challenged rule prohibiting family visits for prisoners classified as Close A Custody is a restatement of existing law and is not a “regulation.”
- (2) The challenged rules governing housing and work assignments for Close B Custody inmates at Los Angeles Prison set forth in section 62010.7.3 of the *Los Angeles Operational Supplement to the CDC Operations Manual* are “regulations,” but are not subject to the APA because of a special express APA exception for rules applying solely to one particular prison, if specified statutory conditions are met.
- (3) The challenged rules establishing minimum terms for inmates in Close B Custody are “regulations” which should have been adopted in accordance with the Administrative Procedure Act.

## DISCUSSION

Fred Price is an inmate at the California State Prison, Los Angeles (located in Lancaster, California). On August 19, 1998, he requested OAL to determine whether the specific rules identified above are invalid since they were not adopted in compliance with the APA. The rules listed above are parts of section 62010 of the Operational Supplement.

### **I. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE DEPARTMENT OF CORRECTIONS?**

Penal Code section 5058, subdivision (a), declares in part that:

“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.]

Clearly, the APA generally applies to the Department's quasi-legislative enactments. However, effective January 1, 1995,<sup>6</sup> Penal Code section 5058 was amended to include several express exemptions from APA rulemaking requirements in subdivisions (c) and (d), which will be discussed later.

For many years, the Department of Corrections maintained a “family of manuals,” including the Classification Manual. These manuals contained most of the statewide rules governing prison administration. In 1990, these individually titled one-volume manuals were replaced by a nine-volume compendium entitled the “Department of Corrections Operations Manual” (also known as the Department Operations Manual or most commonly by the acronym “DOM”). Rules governing inmate classification are now found in volume VI of DOM.

A number of judicial decisions and OAL determinations have found that various CDC manuals and manual provisions violated the statutory prohibition against agency use of “underground regulations” found in Government Code section 11340.5. In 1982, for example, the California Court of Appeal struck down Forms 839 and 840 (new classification standards), which had been issued as part of a headquarters administrative bulletin for inclusion in the Classification Manual.<sup>7</sup> In 1987, OAL determined that the Classification Manual itself contained regulatory material and thus violated Government Code section 11340.5.<sup>8</sup>

In 1991, the California Court of Appeal ordered the Department to cease enforcement of the regulatory portions of DOM.<sup>9</sup> In this latter case, the Department had conceded that “much” of DOM violated the APA; the court found that “a substantial part” was regulatory (i.e., subject to the APA). Following this 1991 appellate case, the Department began a review of DOM, which though intended to be completed in 1993, is still in progress. Using administrative bulletins, the Department issued lists of DOM sections which were “approved for use” and “not approved for use”<sup>10</sup> within the CDC.<sup>11</sup> In its response to the request for determination currently under review, the CDC makes special mention of the fact that a particular DOM section had been “approved for use” by CDC headquarters.

Though the CDC has since 1991 successfully codified in the CCR a substantial number of DOM's underground regulations, much remains to be done. In our view, there is a basic problem with the way DOM is perceived by the Department. From a legal perspective, the validly adopted rules governing the administration of the CDC are found in statutes and in the CCR. *However, the Department appears to*

regard DOM--not the Penal Code or the CCR-- as the primary source of governing rules.<sup>12</sup> CDC's response to this request for determination suggests that the Department views DOM provisions that it has "approved for use" as immune from attack on APA grounds. The Department states:

"DOM section 62010 is a *valid* statewide rule distinct from Lancaster's local rules [i.e., the local rules of California State Prison, Los Angeles]. *CDC has previously reviewed the statewide DOM section 62010, concerning classification of inmates, for underground regulations. . . .*" [Emphasis added.]<sup>13</sup>

CDC's assertion that it has reviewed DOM section 62010 for underground regulations confirms that it has obeyed the order of the appellate court to review DOM material. However, the appellate court did not review the Department's work and determine that all of the remaining provisions are in compliance with the APA. DOM sections which have been reviewed by CDC and in good faith "approved for use" are not necessarily wholly free of underground regulations. See, e.g., 1998 OAL Determination No. 18 (concluding that the definition of "media representative" in DOM section 13010, which had been "approved for use," nonetheless violated the APA).<sup>14</sup> *Therefore, CDC's conclusion that the DOM section is "valid" is of no legal consequence.*<sup>15</sup> If a DOM section, after CDC review, is found by the court to contain an underground regulation, then the section violates the APA. If a DOM section is found by the court to be free of underground regulations, then the section does not violate the APA.

## **II. DO THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?**

The key provision of 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.]

Government Code section 11340.5, authorizing OAL to determine whether agency rules are “regulations” and thus subject to APA adoption requirements, provides in part:

“(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 subdivision (g) of Section 11342, *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.]

In *Grier v. Kizer*,<sup>16</sup> the California Court of Appeal upheld OAL's two-part test<sup>17</sup> as to whether a challenged agency rule is a “regulation” as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule 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?

If an uncodified rule satisfies both parts of the two-part test, OAL must conclude that it is a “regulation” and subject to the APA. In applying the two-part test, OAL is guided by the *Grier* court:

“... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]”<sup>18</sup>

Three California Court of Appeal cases provide additional guidance on the proper approach to take when determining whether an agency rule is subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in “a statutory scheme which the Legislature has [already] established. . . .”<sup>19</sup> 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. . . .”<sup>20</sup>

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations (“CCR”) provisions) cannot legally be “embellished upon” in administrative bulletins. For example, *Union of American Physicians and Dentists v. Kizer* (1990)<sup>21</sup> 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.<sup>22</sup> 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.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993), made clear that reviewing authorities are to focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

“. . . the . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it. . . .* [Emphasis added.]”<sup>23</sup>

#### **A. DO THE CHALLENGED RULES CONSTITUTE “STANDARDS OF GENERAL APPLICATION?”**

For an agency rule or standard to be “of general application” within the meaning of the APA, 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.<sup>24</sup> The requester has challenged section 62010 of California State Prison, Los Angeles *Operational Supplement to the CDC Operations Manual* (“*Operational Supplement*”). Section 62010 contains

dozens of rules, certainly too many to analyze here in detail. The common characteristic of these rules, however, is that they apply to all prisoners confined in this particular prison. Thus, the rules are standards of general application because they apply to all members of an open class.

Having concluded that the challenged rules are standards of general application, OAL must consider whether the challenged rules meet the second prong of the two-part test.

**B. DO THE CHALLENGED RULES IMPLEMENT, INTERPRET OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE DEPARTMENT OR GOVERN THE DEPARTMENT'S PROCEDURE?**

Penal Code section 5054 declares 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] . . . .” [Emphasis added.]

The Department's classification system specifically implements Penal Code section 5068, last amended in 1989, which provides, in part:

“The Director of Corrections shall cause each person who is newly committed to a state prison to be examined and studied. This includes the investigation of all pertinent circumstances of the person's life such as the existence of any strong community and family ties, the maintenance of which may aid in the person's rehabilitation, and the antecedents of the violation of law because of which he or she has been committed to prison. Any person may be reexamined to determine whether existing orders and dispositions should be modified or continued in force.

“Upon the basis of the examination and study, *the Director of Corrections shall classify prisoners* and when reasonable, the director shall assign a prisoner to the institution of the appropriate security

level and gender population nearest the prisoner's home, unless other classification factors make such a placement unreasonable." [Emphasis added.]

In duly adopted regulations (i.e., Title 15, CCR, section 3377.1), the Department has established eight custody designations: maximum A, maximum B, close A, close B, medium A, medium B, minimum A, and minimum B.<sup>25</sup>

Section 3377.1 outlines the different degrees of prison security: for instance, those prisoners held in the *strictest* custody (Maximum A) are subject to "direct and constant" supervision and their assignments and activities are limited to "the confines of their housing unit." By contrast, prisoners held in the *least strict* custody (Minimum B) are only subject to sufficient supervision to ensure that the inmates are present, though they must be counted at least four times each 24 hours. Minimum B inmates' assignments and activities include working outside of the facility in emergency firefighting and other "community betterment" projects.

The requester has challenged section 62010 of the *Operational Supplement*. Section 62010 contains many rules governing the prisoner classification process.<sup>26</sup> The requester has, however, directed our attention to only four specific manual provisions, all of which are included in section 62010.7.3. This determination is limited to these four rules, and it does not attempt to analyze the entire content of section 62010.

*Operational Supplement* section 62010.7.3 is a lengthy set of rules pertaining to custody designations of prisoners. It includes rules applicable to seven of the eight custody designations detailed in Title 15, CCR, section 3377.1. The rules identify the allowable activities, necessary level of supervision, and permissible work assignments, visiting, and housing for each of the custody designations. The rules also identify the minimum time to be served before custody level reduction for prisoners classified as "Close A," "Close B," and "Medium A." Close B prisoners have access to a greater variety of assignments and activities than Close A prisoners; Medium A prisoners have access to a greater variety of assignments and activities than Close B prisoners.

(1) The requester has challenged the following rule on visiting applicable to Close A Custody:

“Family visiting privilege will be denied for any inmate designated Close Custody because of Escape History or precluded by DOM Section 54020.29 and privilege group status CCR 3044.”

The rule restates a portion of CCR Title 15, section 3174, subdivision (e), paragraph (2), which, in part, provides:

“Family visits shall not be permitted for inmates who are in any of the following categories: . . . designated Close A or Close B custody;”

Since the application of the challenged rule is limited to prisoners in Close A custody, and CCR Title 15, section 3174, clearly prohibits family visits for *all* prisoners so classified, it is apparent that the challenged rule accurately describes the effect of a portion of section 3174. The additional language in the challenged rule referring to DOM Section 54020.29, and privilege group status CCR 3044, does not change the overall effect of the challenged rule’s prohibition of family visits. Therefore, the prohibition of family visits is a restatement rather than an interpretation of law, and is not a “regulation.”

Thus, the first challenged rule on family visits is not an interpretation of law, and is not a “regulation.”<sup>27</sup>

(2) The requester has challenged the following rule under the heading Close B Custody:

“Upon completing a minimum of one (1) year at Close A custody, an inmate serving a life sentence will be designated Close B custody until within seven (7) years of Minimum Eligible Parole Date (MEPD).”

The above rule restates another provision from section 62010.7.3 of the *Operational Supplement* that is listed under the heading of Close A Custody which provides:

“An inmate serving a life sentence will serve a minimum of his first year of incarceration at Close A custody before review for custody reduction.”

Together these rules will be referred to as “*close custody minimum terms.*” See Attachment “A” to this determination. These rules supplement CCR Title 15, section 3375, which specifies the statewide classification process in detail, and section 3377.1, which outlines the eight custody categories, include “close custody.” These supplementary rules are standards of general application that govern the Department’s procedure for classification of inmates. These rules are therefore “regulations.”

(3) The requester has challenged a rule pertaining to housing Close B Custody inmates. The rule is brief, simply indicating that “Facilities A, C and D” are the housing for Close B Custody. This rule on housing implements Penal Code section 5054 by establishing rules for the supervision and control of a state prison and the custody of persons confined there. The housing rule is therefore a “regulation.”

(4) The requester has challenged a portion of a rule pertaining to work assignments for Close B Custody inmates. The provisions of interest to the requester provide:

“ASSIGNMENTS

“Will be assigned to the following work assignments:

All housing unit porter assignments within their respective facilities *during daylight hours only.*

Housing unit porter assignments on third watch in *designated Close B Custody Buildings,* provided the assignment is within their respective housing unit.

Clerical, academic, vocational and support services assignments within their respective facility during daylight hours.

Close B Custody inmates are not eligible to be assigned to any assignment beyond work change until a classification committee actions (sic) approves the assignment(s).

“The following assignment areas beyond work change will not be assigned to Close B inmates:

Facility D Vocational Computer Repair (due to institutional safety and security concerns).

“Close B Custody inmates are not eligible to be assigned to any assignment beyond the facility pedestrian gate (ie., Captain’s Crew, Vocational Landscaping, Receiving and Release, Central Operations, Central Infirmary, and the C/D Associate Warden’s area). Also, Close B Custody inmates will not be assigned to any satellite kitchens, canteens, or clothing rooms.” [Emphasis in original.]

The laws administered by the Department of Corrections do not prescribe the particular prison jobs which may be performed by inmates classified in Close B custody. All of the preceding provisions relating to work assignments interpret and implement Penal Code section 5054, which provides:

“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.” (Emphasis added.)

These challenged rules provide particulars relating to the custody and employment of inmates. To the extent employment includes training, it, too; is affected. They also interpret Title 15, CCR, section 3377.1, which establishes the system of custody designations.

Except for the prohibition of family visiting, all of the preceding challenged rules also implement section 3001 of Title 15 of the California Code of Regulations, which provides:

“Regardless of commitment circumstances, every person confined or residing in facilities of the department is subject to the rules and regulations of the director, *and to the procedures established by the warden, superintendent, or parole region administrator responsible for the operation of that facility.*” (Emphasis added.)

The challenged rules were issued by Ernie Roe, Warden of the California State Prison - Los Angeles County for the purpose of controlling the prisoners and administration of the prison he oversees. Accordingly, the regulations implement section 3001 at the Los Angeles Prison. In summary, challenged rules (2), (3), and

(4) [rules which were selected by the requester from section 62010.7.3] make specific the Department's policies relating to close custody minimum terms; prisoner housing; and work assignments at the Los Angeles Prison. These challenged rules are therefore "regulations."

OAL concludes that, except for the prohibition of family visiting, the challenged rules implement, interpret, and make specific Penal Code sections 5054 and 5068 and the regulations of the Department identified above.<sup>28</sup>

### **III. DO THE CHALLENGED RULES FOUND TO BE "REGULATIONS" 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.<sup>29</sup> In *United Systems of Arkansas v. Stamison* (1998),<sup>30</sup> the California Court of Appeal rejected an argument by the Director of the Department of General Services that language in the Public Contract Code had the effect of exempting rules governing bid protests from the APA.

According to the *Stamison* Court:

*"When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language. (See, e.g., Gov. Code, section 16487 ['The State Controller may establish procedures for the purpose of carrying out the purposes set forth in Section 16485. These procedures are exempt from the Administrative Procedure Act.']; Gov. Code, section 18211 ['Regulations adopted by the State Personnel Board are exempt from the Administrative Procedure Act']; Labor Code, section 1185 [orders of Industrial Welfare Commission 'expressly exempted' from the APA].) [Emphasis added.]"*<sup>31</sup>

Express statutory APA exemptions may be divided into two categories: special and general.<sup>32</sup> *Special* express statutory exemptions typically: (1) apply only to a portion of one agency's "regulations" and (2) are found in that agency's enabling act. *General* express statutory exemptions typically: (1) apply across the board to all state agencies and (2) are found in the APA. An example of a *special* express exemption is Penal Code section 5058, subdivision (d)(1), which exempts pilot programs of the Department of Corrections under specified conditions. An example

of an *general* express exemption is Government Code section 11342, subdivision (g), part of which exempts “internal management” regulations of all state agencies from the APA.

**A. DO THE CHALLENGED RULES FALL WITHIN ANY *SPECIAL* EXPRESS APA EXEMPTION?**

Penal Code section 5058, subdivision (c), states, in part, that:

“(c) The following are deemed *not* to be “regulations” as defined in subdivision (b) [now subdivision (g)] 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. [Emphasis added.]”

This statutory language indicates that the Legislature intends for *local* prison rules to be exempt from APA adoption procedures, provided certain conditions are met. In its response to this request for determination, the Department of Corrections indicates that it views the *Operational Supplement* as a “local rule.” The Department explains “that Warden [Warden of California State Prison, Los Angeles] does not have authority to adopt rules for any other prison.”<sup>33</sup>

When a challenged rule superficially appears to be a local prison rule, OAL must determine whether it actually qualifies under this statutory APA exception. Whether a state agency rule is subject to the APA does not depend solely on the

issuing agency's official designation of the action. According to the California Court of Appeal: "[i]f the action is *not only of local concern, but of statewide importance*, it qualifies as a regulation despite the fact it is called 'resolutions,' 'guidelines,' 'rulings' and the like." (Emphasis added.)<sup>34</sup>

*First*, we have already concluded that the challenged rule prohibiting family visiting for inmates in Close A Custody is not a "regulation." Analysis of whether the local prison rule exemption would cover the rule if it were a "regulation" is therefore unnecessary.

*Second*, the minimum terms for close custody were indeed issued by the Warden of Los Angeles Prison, but they did not originate there. They originated at CDC Headquarters. (See Attachment "A" to this determination.)

The minimum terms are based upon inmate classification. According to DOM section 62010.1 ("Policy"), the goals of the inmate classification system include "provision for *centralized control* over the classification process." [Emphasis added.]

According to DOM section 62010.3:

*"All classification actions are based on the authority of the Director who delegates functions to specific officials. . . . Functions of headquarters staff include, but are not limited to, the following:*

**"Chief Deputy Director**

Acts in all classification matters *on behalf of the Director*.

**"Deputy and Assistant Deputy Director, Institutions**

Responsible for the *general supervision* of the classification process.

Supervise the Chief, Classification Services.

...

Authorize special transfer orders.

...

## **“Chief and Assistant Chief, Classification Services**

Responsible for *operational supervision* of the classification process. . . .” [Emphasis added.]

Thus we see that classification is subject to central control. Central control is evidently maintained through directives from headquarters. According to the CDC response in request for determination 98-007, a pending matter that involves very similar issues, “[in] 1997, after a rash of escapes or attempts, CDC issued a memorandum to Wardens concerning inmate classification of inmates with histories of escape.”<sup>35</sup> We have distilled the following chronology from this thorough, forthright, and helpful CDC response.

- A three-page memorandum headed “Close Custody Assignment for Inmates With Escape History” is written on CDC “letterhead,” dated August 4, 1997, from David Tristan, Deputy Director, Institutions Division (signed “for” Deputy Director Tristan, with a signature we cannot decipher) via Chief Deputy Director for Field Operations Eddie Myers to Interim Director Thomas M. Maddock. The memorandum contains, in addition to the standard author’s signature block, two formal “Approved/Disapproved” signature blocks, with the names of Chief Deputy Director Myers and Interim Director Maddock typed in. The memo was formally “approved” by Chief Deputy Director Myers on August 21, 1997, and by Interim Director Maddock on August 20, 1997. *Two one-page tables are attached.* The first table is headed “Close Custody Criteria for Male Inmates.”<sup>36</sup> This first table is Attachment “A” to this determination.

The thrust of the memorandum is that certain inmates must be kept under tighter control in order to prevent escapes. The memorandum begins by discussing the need for tighter control of inmates with a “history of escape or serious attempted escape from a secure perimeter.” It then shifts into a more broadly focused discussion of the *need for “standardized” statewide criteria for assignment to two specific custody levels, Close Custody A and Close Custody B*, the third and fourth most restrictive levels of custody in the California prison system.

The table for male inmates provides that inmates serving a Life Term should serve the first year in Close A Custody and then serve in Close B Custody

“[u]ntil within 7 years to (MEPD) [Minimum Eligible Parole Date] after at least first year at Close A.”

- A memorandum to wardens dated September 18, 1997, from Chief Deputy Myers concerning “Close Custody Assignment for Inmates with Escape History,” which enclosed the August 4 memo and attachments, with additional commentary.

DOM is published by CDC headquarters in Sacramento. DOM section 51020<sup>37</sup> explicitly authorizes individual prisons to issue “supplements” to specific headquarters-written DOM sections. DOM section 51020.1 cautions prisons that:

- supplements may not create “new policy/regulation”
- something is a “regulation” if it “implements, interprets, or makes specific the provisions of statute, case law, or regulations of controlling agencies.”

This policy of authorizing individual prisons to add pages to the statewide DOM Manual may cause confusion concerning the source of rules. The *close custody minimum terms* issued by Warden Roe of the Los Angeles prison and challenged by the requester are *identical* to the minimum terms issued by or on behalf of the Deputy Director of the Institutions Division, and approved by the Chief Deputy Director of Field Operations and the Interim Director of the Department. Language included in the August 4, 1997, letter from the Deputy Director of the Institutions Division provides as follows:

“Attached are charts that act as a guide for the criteria. This (sic) criteria was developed based on input from a Warden’s Advisory Group on Security in 1996. This proposal seeks to *standardize* the expectations and criteria for assigning Close custody.” [Emphasis added.]

Given the circumstances surrounding the issuance of the challenged rule on *close custody minimum terms*, OAL cannot classify it as a “local prison rule.” DOM indicates that prisoner classification is subject to central control. The August 4, 1997, letter from that central entity (CDC Headquarters) contains the same standard challenged by the requester. The headquarters directive also emphasizes the need for *standardization of expectations and criteria*. Although couched in language that is not necessarily compulsory,<sup>38</sup> the August 4, 1997, letter is a standard of

general application issued by the Department in its administration of the prisons to guide local prison actions. The locally issued rule on *close custody minimum terms* (see attachment “A”), identical to the statewide standard, is simply its reiteration. The APA is not so limited that its reach can be avoided by the simple expedient of directing local prisons to adopt standardized rules.

*Third*, the challenged rule on housing for Close B Custody inmates assigns them to “Facilities A, C and D” at Los Angeles Prison. On its face, this appears to be a genuine local rule, based upon the particular characteristics of the specified facilities. Other state prisons may have facilities identified by capital letters, however they would not be the facilities described in this regulation. It is doubtful this rule would be of use in another prison. We can envision the circumstance where a rule assigning inmates to facilities A, C and D could be the local embodiment of a centrally issued standard requiring inmates statewide in Close B Custody to be housed in facilities having specified characteristics. If this were the case, then the centrally issued rule requiring the promulgation of local prison rules would be a “regulation” which should be adopted in accordance with the APA. In any event, we have no evidence to indicate that the rule on housing inmates at Los Angeles Prison is anything other than a local rule. As such, it is exempt from the requirements of the APA.

*Fourth*, the challenged rule on work assignments specifically describes the jobs at Los Angeles Prison that inmates classified as Close B Custody may, and may not perform. Similar rules are probably in use in all prisons that house inmates of the same classification. In 1999 OAL determination No. 21,<sup>39</sup> OAL examined two rules issued by the Warden of California State Prison, Solano. The first rule prohibited work assignments for inmates with Close B custody during evening hours (after 1800 hours). The second rule restricted work assignments for the same inmates to the secure perimeter of each facility, and provided:

“This allows for assignments in Academic Education, Center Complex, Housing Units, or the yard areas only.”

OAL concluded that the challenged Solano work rules were local rules applying solely to one particular prison, and not subject to the APA.

Although both the Solano work rules and the Los Angeles rules have provisions limiting some work to daylight hours, the breadth of the restrictions is different. The Solano rule applies to both work and *program* assignments, while the Los

Angeles rule affects only work assignments. The Solano rule applies to *all* work performed by inmates classified as Close B custody, but the Los Angeles rule limiting work to daylight hours applies only to specified jobs (porter assignments, clerical, academic, vocational and support services). It is impossible for OAL to be sure the Los Angeles rule on work assignments was not issued from a central source within the Department, but the differences between these rules suggest that they are genuine, locally developed rules. We have no information to indicate that this particular regulation has any effect or significance at other prisons. There is no indication in the record that this rule is a restatement of an invalidly issued statewide rule.<sup>40</sup> Thus, OAL concludes that challenged rule on work assignments is a “local rule” applying solely to one particular prison and, so long as the two statutory conditions have been satisfied, it falls within the scope of the express specific statutory exemption found in Penal Code section 5058, subdivision (c).

## CONCLUSION

OAL concludes that the challenged rule prohibiting family visits for prisoners classified as Close A Custody is restatement of current law and is not a "regulation." The challenged rules governing housing and work assignments for Close B Custody inmates at Los Angeles Prison set forth in section 62010.7.3 of the *Los Angeles Operational Supplement to the CDC Operations Manual* are "regulations," but are not subject to the APA because of a special express APA exception for rules applying solely to one particular prison, if specified statutory conditions are met. The challenged rules establishing minimum terms for inmates in Close B Custody are "regulations" which should have been adopted in accordance with the Administrative Procedure Act.

DATE: October 4, 1999

  
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## ENDNOTES

1. This Request for Determination was filed by Fred Price, H-63510, D4-110 CSP-LAC, 44750 60th Street West, Lancaster, CA 93536. The agency's response was submitted by Meg Halloran, Deputy Director (A) of the Legal Affairs Division, Department of Corrections, 1515 S Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001. (916) 327-5306.
2. This determination may be cited as **"1999 OAL Determination No. 21."**

Pursuant to Title 1, CCR, section 127, this determination becomes effective on the 30th day after filing with the Secretary of State, which filing occurred on the date shown on the first page of this determination.

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

"Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published [in the California Regulatory Notice Register]."

Determinations are ordinarily published in the Notice Register within two weeks of the date of filing with the Secretary of State.

3. If an unmodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) An agency rule found to violate the APA could also simply be rescinded.
4. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121 (a), provides:

"*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA.

[Emphasis added.]”

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that unmodified agency rule which constituted a “regulation” under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was “*invalid*”). We note 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 authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to “the two-part test of the Office of Administrative Law,” citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

5. According to Government Code section 11370:

“*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *Chapter 4.5* (commencing with Section 11400), and *Chapter 5* (commencing with Section 11500) constitute, and may be cited as, *the Administrative Procedure Act*.” [Emphasis added.]

*OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 (“Administrative Regulations and Rulemaking”) of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.*

6. For a detailed description of the APA and the Department of Corrections' history, three-tier regulatory scheme, and the line of demarcation between (1) statewide and (2) institutional, e.g., “local rules,” see **1992 OAL Determination No. 2** (Department of Corrections, March 2, 1992, Docket No. 90-011), California Regulatory Notice Register 92, No. 13-Z, March 27, 1992, p. 40.
7. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr.130.
8. **1987 OAL Determination No. 3**, CANR 87, No. 12-Z, March 20, 1987, p. B-74.
9. *Tooma v. Rowland* (Sep. 9. 1991) California Court of Appeal, Fifth Appellate District, FO15383 (granting writ of mandate ordering Director of Corrections “to cease enforcement of those portions of the Department Operations Manual that require compliance with the Administrative Procedure Act pending proof of satisfactory compliance with the provisions of the Act,” typed opinion, pp. 3-4).
10. As noted in 1998 OAL Determination No. 13, endnote 23, the Department has not addressed the issue of whether regulatory DOM sections which have been designated “not

to be used” nonetheless violate Government Code section 11340.5 in that they have been “issued” and *not yet removed* from DOM. (This determination may be found in CRNR 98, No. 34-Z, August 21, 1998, p. 1619.) In 1998 OAL Determination No. 13, OAL concluded that DOM section 54020.9 (concerning unclothed body searches of visitors, searches of minors, and the circumstances under which they shall be conducted) does indeed violate the APA. OAL reached this conclusion even though this DOM section had been listed by CDC under the “not to be used” heading.

11. Administrative Bulletin 97/8, like earlier bulletins, states:

“Also listed are the DOM sections which are not approved for use within the CDC under the Administrative Procedure Act. Each CDC office, institution, and parole region shall place the following disclaimer in front of each nonapproved DOM section. ‘This section is not currently approved for use. Refer to the following local procedure(s).’ If no local procedures exist then omit the reference to local procedures. Each institution and parole region shall *independently* implement local procedures in accordance with all applicable laws and regulations to govern those policies and procedures which are not covered by an approved DOM section.” [Emphasis added.]

12. DOM sections do not contain specific references to the specific provisions of law they repeat, summarize, or restate. This deficiency makes it difficult to compare DOM language to CCR language, and may have the unintended consequence of increasing the number of complaints alleging that DOM provisions are underground regulations. That is, a person adversely affected by a DOM provision may read the provision, see no reference to an underlying provision of law that can be compared against the DOM language, and then draw the inference that the DOM provision is an underground regulation. The interested party may then file a request for determination with OAL or file a lawsuit.

For example, a critically important part of DOM contains a list and definitions of custody designations. DOM section 62010.7.3 lists eight custody designations: maximum A, maximum B, close A, close B, medium A, medium B, minimum A, and minimum B. Curiously, the two pages of DOM section 62010.7.3 contain no reference at all to the provision of law which lists and defines these eight custody levels--Title 15, CCR, section 3377.1. Even the “reference” section (section 62010.12) at the end of the twenty-eight page DOM section 62010 does no more than state “California Code of Regulations, Title 15, Division 3.” This is not a helpful reference: Division 3 is the location of *all* CDC regulations.

The best practice when preparing agency manuals designed to restate existing law is to cite to specific statutes or CCR provisions *after each restated rule*. For example, if one were listing the APA requirements applying to the Final Statement of Reasons, one item could read:

“Determination whether regs impose mandate upon local agencies/school districts (Gov. Code sec. 11346.9(a)(2)).”

Looking at Government Code section 11346.9(a)(2), we see that this provision of law requires in part that the Final Statement of Reasons prepared as part of the APA adoption process contain “a determination as to whether the regulation imposes a mandate on local agencies or school districts.”

Such a citation practice permits not only (1) readers and but also (2) agency staff who are assigned to update the manual to quickly compare the contents of the manual provision against the provision of law which it is intended to restate. If the underlying provision of law is repealed or amended, the manual must be updated to reflect the legal change.

13. Agency response, p. 1.
14. CRNR 98, No. 36-Z, September 4, 1998, p. 1763.
15. According to *Engelmann v. State Board of Education* (1991), a state agency’s “administrative interpretation” that the APA does not apply to a particular enactment of that agency should be accorded “no significance.” 2 Cal.App.4th 47 \_\_\_, 3 Cal.Rptr. 264, 272. By contrast, OAL’s view concerning whether or not the APA applies to a particular agency enactment are entitled to “great weight.” *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244.
16. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. 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. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.  
  
*Tidewater* itself, in discussing which agency rules are subject to the APA, referred to “the two-part test of the Office of Administrative Law,” citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.
17. The *Grier* Court stated:

“The OAL’s analysis set forth a two-part test: ‘First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency’s procedure?’ (1987 OAL Determination No. 10, . . . slip op’n., at p. 8.) [*Grier*, disapproved on other grounds in *Tidewater*].”

OAL’s wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--**1987 OAL Determination No. 10**--was published in California Regulatory Notice Register 96, No. 8-Z, February 23, 1996, p. 292.

18. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253. The same point is made in *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001,1010, 74 Cal.Rptr.2d 407, 412, review denied.
19. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.
20. *Id.*
21. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.
22. *Id.*
23. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.
24. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
25. Section 3377.1, subsection (a), erroneously states that there are *nine* custody designations. Departmental representatives have informally confirmed that this duly adopted regulation only lists *eight* designations. Subsection (a)(3) provides further details on Maximum B custody, rather than itself constituting a ninth designation.
26. Classification issues are covered in Department Operations Manual, Volume VI.
27. The challenged rule refers to DOM Section 54020.29. This section describes a procedure designed to verify claimed family relationships, protect family members from some inmates’ propensity for violence, prevent escape, and assure orderly family visiting when authorized. An examination of whether the provisions precluding family visits in DOM Section 54020.29 are “regulations” is beyond the scope of this determination. The reference to “CCR [Title 15, section] 3044” identifies the regulation which defines the four privilege groups used in the classification of prisoners. For each of the groups, section 3044 specifies whether, and how often, family visits are permitted. It works in conjunction with section 3174, entitled “Family Visiting.” Subdivision (e), of section

3174 provides, in part:

“Family visiting is a privilege. Eligibility for family visiting will be limited by the assignment of the inmate to a work/training incentive group as outlined in section 3044.”

Thus, the challenged rule’s language stating that family visiting privilege will be denied when it is precluded by “privilege group status CCR 3044” simply serves to identify the applicable regulation. It does not interpret the law applicable to family visitation.

28. OAL does not review alleged underground regulations for compliance with the APA’s six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. However, in the event regulations are proposed by the Department under the APA, OAL will review the *proposed* regulations for compliance with the six statutory criteria. (Government Code sections 11349 & 11349.1.)
29. Government Code section 11346.
30. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.
31. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.
32. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself).
33. Response to request for determination, page 1.
34. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.
35. Page 1.
36. Request for determination 98-007 alleges that a document virtually identical to this first table is an underground regulation. The second table is titled “Close Custody Guide for Female Inmates.”
37. The DOM provision states in full as follows:

#### **51020.1 SUPPLEMENTAL PROCESS POLICY**

There may occasionally be a need at the facility/parole region level to clarify or supplement information in a section of the Department Operations Manual (DOM). This need may arise from insufficient detailed information upon which to provide for day-to-day operation or it

may occur based on a need to clarify specifics of operations provided in the DOM. When such needs occur, a supplement shall be developed clarifying the manual.

Supplements shall:

Be brief and generally no more than two to four pages for any DOM section.

Be attached to the applicable DOM section.

Not create new policy/regulation

Clarify and not duplicate or conflict with the DOM Provisions.

A definition of regulation is that it:

Implements, interprets, or makes more specific the provisions of statute, case law, or regulations of controlling agencies.

Is a mandate and applies equally to all inmates parolees, and the public in like situations.

Imposes a standard or required inmate behavior with consequences for noncompliance.

Imposes requirements which shall be met to qualify for any general entitlement or privilege available to inmates, parolees, or the public.

Imposes criteria which govern staff decisions affecting inmate custody, discipline, classification, programming, release date, visiting, transfer, etc.

Mandates fair and prompt staff response (due process) or entitlement (rights).

**51020.2  
SUPPLEMENTAL  
PROCESS PURPOSE**

The purpose of this section is to provide a process by which facilities and parole regions shall clarify the DOM for local operational purposes.

**51020.3  
OPERATIONAL  
SUPPLEMENTS TO  
THE DEPARTMENT  
OPERATIONS MANUAL**

An operational supplement shall contain only exceptional information required for day-to-day operation. It shall contain procedures required to accomplish the mandate of the DOM section. The supplement could include such things as who escorts certain groups of inmates within or from a specific housing (DOM) designation or in which offices computers shall be located. Only when there is an exceptional need to add to the DOM section to provide for a specific operational need shall a supplement be used. Supplements shall be reviewed for policy compliance during the audit process. Supplements shall be in the same format as the DOM.

**51020.4  
SUBSTANTIVE  
EXEMPTION TO A  
SECTION OR  
SUBSECTION OF  
THE DOM**

It is the intent of the California Department of Corrections not to have substantive changes to requirements of the DOM. However, on rare occasions there may be other mandates which require an exemptions to some DOM section or subsection. Such mandated section/subsections shall include court orders which affect a particular facility's operation or statutory requirement not required to be implemented statewide.

**51020.5  
REVISIONS TO THE  
SUPPLEMENT  
PROCESS**

The Deputy Director, Evaluation and Compliance Division, or designee, shall be responsible for ensuring that the contents of this section are kept current and accurate.

**51020.6  
REFERENCES FOR  
THE SUPPLEMENTAL  
PROCESS**

Penal Code Sections 5054 and 5058.

Government Code Section 11304 [sic], et seq.

California Code of Regulations, Title 1, Sections 10 through 128; and Title 15, Section 3423.

38. See 1999 OAL determination No. 17, pp. 11, 12 and endnotes 38 through 41. (CRNR 99, No. 33-Z, August 13, 1999, p. 1575, at p. 1581.)
39. CRNR 99, No. 21-Z, May 21, 1999, p. 1083.
40. OAL has found that such restatements fail to qualify as true "local rules."

# CLOSE CUSTODY GUIDE FOR MALE INMATES

*Handwritten:*  
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LENGTH OF SENTENCE		CLOSE A CUSTODY		CLOSE B CUSTODY	
LIFE TERM	Life without Possibility of Parole (LWOP)	First 5 years	Next 10 years after at least 5 years at Close A		
	Determinate Sentence (DSL) or Total Term of 50 years or more	First 5 years	Next 10 years after at least 5 years at Close A		
	Multiple Life Terms	First 5 years	Until within 7 years to Minimum Eligible Parole Date (MEPD) after at least 5 years at Close A		
	Life Term	First year	Until within 7 years to MEPD after at least first year at Close A		
	Determinate Sentence or Total Term of 15 years or more	First year	Next 4 years after at least first year at Close A		
ESCAPE	Escape w/Force or Attempted Escape w/Force from any correctional setting or armed escort within 5 years of return to custody	First 8 years	Next 2 years after at least 8 years at Close A		
	Escape w/o Force or Attempted Escape w/o Force from a secure perimeter facility or armed escort within 5 years of return to custody	First 5 years	Next 5 years after at least 5 years at Close A		
	Involvement in documented plot or plan to escape from a secure perimeter facility within 2 years	First 2 years	Next 2 years after at least 2 years at Close A		
HOLD	Active law enforcement HOLD for an offense which could result in sentencing as an LWOP, to Multiple LIFE Terms, or to a DSL/Total Term of 50 years or more	Until HOLD is removed or 5 years based on potential Total Term	Until HOLD is removed after at least 5 years at Close A		
	Active law enforcement hold for an offense which could result in sentencing to a Total Term of LIFE or to a DSL/Total Term of 15 years or more	Until HOLD is removed or one year based on potential Total Term	Until HOLD is removed after at least one year at Close A		
DISCIPLINARY	Murder of Non-Inmate while in custody	Total Term after SHU	Not eligible		
	Murder of inmate in custody within last 6 years	First 6 years after SHU	Next 4 years after at least 6 years at Close A		
HISTORY	Found guilty of RVR division A-1 or A-2 or who is determined by classification committee to demonstrate a pattern of or a continuing propensity for violence, escape or narcotic trafficking		Two years before eligible for custody reduction		
	Former gang member (Dropout) for a period of observation		One year before eligible for custody reduction		
NOTORIOUS	Designated Special Public Interest Case	First 5 years	Next 5 years after at least 5 years at Close A		