

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2008 OAL DETERMINATION NO. 2
(OAL FILE # CTU 07-0928-01)

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REQUESTED BY: TOM F. MANISCALCO

**CONCERNING: DEPARTMENT OF CORRECTIONS AND
REHABILITATION – SPECIFIC LANGUAGE IN
DEPARTMENT OPERATIONS MANUAL (DOM)
SECTIONS 54020.24 AND 54020.29 DEALING WITH
REMOVING ITEMS FROM A VISITING AREA**

**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 a "regulation" as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of a "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. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

ISSUE

On September 28, 2007, Mr. Maniscalco (Petitioner) submitted a petition to OAL challenging specific language in the Department of Corrections and Rehabilitation's (CDCR) Department Operations Manual (DOM) sections 54020.24 and 54020.29. These sections deal with the removal, consumption or disposal of food items when leaving the prison visiting area. The Petitioner alleges that language in these sections meet the definition of a "regulation" and should have been adopted pursuant to the APA.

DETERMINATION

OAL determines that the challenged language in DOM sections 54020.24 and 54020.29 meets the definition of a "regulation" as defined in Government Code section 11342.600 and the language should have been adopted pursuant to the APA.

FACTUAL BACKGROUND

The DOM contains both restatements of regulations found in the California Code of Regulations and other rules and procedures published by CDCR which may or may not be subject to the APA. The Petitioner challenges specific language in two sections of the DOM, sections 54020.24 and 54020.29, as underground regulations. These sections deal generally with the rules affecting inmate visitation. The specific challenged language in these sections deals with the ability of inmates and visitors to remove food items from the visiting area. The language at issue is:

54020.24 Food in Visiting Areas

....

Inmates and visitors may not take any food items from the visiting area.

....

Food items taken into designated visiting areas shall be consumed during the visit or taken from the visiting areas by the visitors at the conclusion of the visit.

54020.29 Visiting Conduct

....

All food items shall be consumed or disposed of at the conclusion of the visit.

....

The Petitioner argues that this language contains requirements that are not included in California Code of Regulations, title 15, section 3170.1(g):

3170.1. General Visiting Guidelines.

....

(g) During contact visits, the inmate and visitor may pass, exchange, or examine any item of property or consume food either party is permitted to bring into or purchase in the visiting area, except those items that are deemed to be contraband when in the possession of the inmate. Neither party may retain or take anything from the visiting area which the other party was permitted to bring into or purchase in the visiting area, except legal documents as provided in section 3178, and photographs that are taken during the visit.

UNDERGROUND REGULATIONS

Section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the APA:

(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 issued, utilized, enforced, or attempted to enforce a rule that meets the definition of a "regulation" as defined in section Government Code 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.

To determine whether an agency issued, utilized, enforced, or attempted to enforce an underground regulation in violation of Government Code section 11340.5, it must be demonstrated that the agency rule is a "regulation" and not exempt from the APA.

ANALYSIS

A determination of whether the challenged rule is a "regulation" subject to the APA depends on (1) whether the challenged rule contains a "regulation" within the meaning of Government Code section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in Government Code 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.4th 557, 571, 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)).

The first element of a regulation is whether the rule applies generally. The language challenged in the DOM sections applies to all inmates and their visitors. As *Tidewater* pointed 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. Inmates and their visitors are both clearly defined classes of persons. The first element is, therefore, met.

The second element established 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.

Penal Code section 5058, subdivision (a), states:

The director may prescribe and amend rules and regulations for the administration of the prisons and for the administration of the parole of persons sentenced under Section 1170 except those persons who meet the criteria set forth in Section 2962. The rules and regulations shall be promulgated and filed pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except as otherwise provided in this section and Sections 5058.1 to 5058.3, inclusive. All rules and regulations shall, to the extent practical, be stated in language that is easily understood by the general public.

The DOM sections limiting the removal of food items from visiting rooms is part of the administration of the prisons and directly affects both inmates and those persons visiting inmates. The DOM sections, therefore, implement Penal Code section 5058, subdivision (a).

More specifically, California Code of Regulations, title 15, section 3170.1(g) deals with the subject of the removal or consumption of food items in visiting rooms. Section 3170.1(g) states:

Neither party may retain or take anything from the visiting area *which the other party* was permitted to bring into or purchase in the visiting area, except legal documents as provided in section 3178, and photographs that are taken during the visit. (Emphasis added)

Section 3170.1(g) requires only that an inmate may not take any item out of the visiting room which was brought into the room by a visitor, and a visitor may not take any item out of the visiting room which was brought into the room by the inmate. The challenged language in the DOM sections imposes additional requirements on inmates and visitors. DOM section 54020.24 prohibits inmates and visitors from taking *any* food items from the visiting area and conversely, it also requires all food items to be consumed or taken from the visiting room *by the visitor*. It prohibits both inmates and visitors from removing any food items from the visiting area, but at the same time permits the visitor to take items from the visiting room no matter who brought the item into the room. Neither of these options is included in California Code of Regulations, title 15, section 3170.1(g).

DOM section 54020.29 requires that food items be consumed or disposed of at the conclusion of the visit. This is also more restrictive than California Code of Regulations, title 15, section 3170.1(g), because it prohibits all food items from being taken out of the visiting room without regard to which party brought them into the room.

OAL considered whether the DOM sections merely restate California Code of Regulations, title 15, section 3170.1(g); however, based on the analysis above, OAL found that the challenged language in the DOM sections further implements, interprets or makes specific both Penal Code section 5058 and California Code of Regulations, title 15, section 3170.1(g). It does not contain restatements of existing law.

The second element in *Tidewater* is, therefore, met.

The final issue to examine in determining whether CDCR has created an underground regulation by issuing the language in these DOM sections is to determine if the language falls within an exemption from the APA. We can find no APA exemptions that would apply to the challenged language in DOM sections 54020.24 and 54020.29.

AGENCY RESPONSE

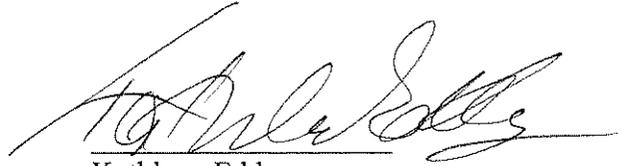
CDCR did not submit a response to this petition.

CONCLUSION

The challenged language in DOM sections 54020.24 and 54020.29 meets the definition of a "regulation" as defined in section 11342.600, does not fall within

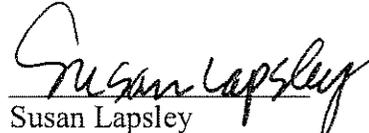
any express statutory APA exemption, and therefore, it should have been adopted pursuant to the APA.

Date: March 12 2008



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