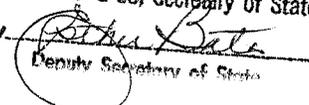


**FILED**  
In the office of the Secretary of State  
of the State of California

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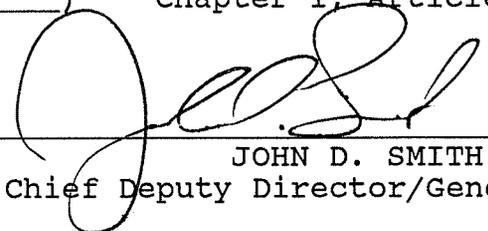
At 4:25 o'clock P.M.

CALIFORNIA OFFICE OF ADMINISTRATIVE  
SACRAMENTO, CALIFORNIA

LAMARCH FONG EU, Secretary of State  
By  Deputy Secretary of State

In re: ) 1987 OAL Determination No. 15  
Request for Regulatory )  
Determination filed ) [Docket No. 87-004]  
by Michael Williamson, )  
concerning sections ) November 19, 1987  
7810 through 7817 of )  
the Department of )  
Corrections' Departmental ) Determination Pursuant to  
Administrative Manual<sup>1</sup> ) Government Code Section  
11347.5; Title 1,  
California Administrative Code  
Chapter 1, Article 2

Determination by:

  
JOHN D. SMITH  
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney  
Shirley S. Alexander, Staff Counsel  
Rulemaking and Regulatory  
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law was whether the portions of the California Department of Corrections' Departmental Administrative Manual governing prison law libraries are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the Department of Corrections has unlawfully established rules and procedures that interpret or supplement statutory, regulatory, or case law. The Office of Administrative Law further concludes, however, that the majority of the challenged material is either (1) non-regulatory or (2) simply a restatement of a court order or of duly adopted California Administrative Code provisions.

THE ISSUE PRESENTED <sup>2</sup>

The Office of Administrative Law ("OAL") has been requested to determine whether sections 7810 through 7817 of the California Department of Corrections' ("Department") Departmental Administrative Manual ("Administrative Manual") are "regulations" as defined in Government Code section 11342, subdivision (b), and are therefore invalid and unenforceable<sup>3</sup> unless adopted as regulations and filed with the Secretary of State in accordance with the Administrative Procedure Act ("APA").

THE DECISION <sup>4, 5, 6, 7</sup>

The Office of Administrative Law finds that:

- I. Sections 7811(b), (b)(1) & (2), and (c); 7816 (second sentence); and 7817 are (1) subject to the requirements of the APA, are (2) "regulations" as defined in the APA, and are (3) therefore invalid and unenforceable unless adopted as regulations and filed with the Secretary of State in accordance with the APA.<sup>8</sup>
  - II. Sections 7810, 7811(a), (b)(3), (d) and (e), 7812, 7813, 7814, and 7815 either are non-regulatory or are simply restatements of a court order or of duly adopted California Administrative Code ("CAC") provisions and are thus not subject to APA requirements.
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I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.<sup>9</sup> The Director of Corrections is charged with a "difficult and sensitive job",<sup>10</sup>

"[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein . . . ." <sup>11</sup>

Authority<sup>12</sup>

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

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA applies to all state agencies, except those "in the judicial or legislative departments."<sup>13</sup> Since the Department is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.<sup>14</sup>

In 1975, the Legislature overruled a 1973 court case<sup>15</sup> (which had found the Department exempt from the APA) by specifically providing that prison administration rules are to be adopted pursuant to the APA.

This 1975 enactment amended Penal Code section 5058, subdivision (a), which now provides in part:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. Such rules and regulations shall be promulgated and filed pursuant to [the APA] . . . ." [Emphasis added.]<sup>16</sup>

Background

The following undisputed facts and circumstances have given rise to the present determination.

A Request for Determination was filed with OAL on March 13, 1987, by Michael Williamson. This Request concerns the Department of Corrections' Administrative Manual sections

7810 through 7817. The Administrative Manual is a 1474-page document, divided into sections 1 through 8006.<sup>17</sup> (In 1985, Chapter 4600 of this Manual was invalidated by the California Court of Appeal for failure to comply with the APA.<sup>18,19</sup>) Sections 7810 through 7817 are seven pages in length. Sections 7810 through 7817 contain the Department's policies concerning the law libraries established in each state prison, inmates' access to these law libraries, purchasing procedures, circulating law library description and procedures, inspection of public records by inmates, and use of law libraries by inmates with court deadlines. The requester alleges that sections 7810 through 7817 implement the inmates' fundamental constitutional right of access to the courts, which requires prison authorities to provide inmates with adequate law libraries or adequate assistance from persons trained in the law.

On October 13, 1987, the Department filed a Response to the Request with OAL. In this Response, the Department asserted that the Administrative Manual sections in question were either (1) a reiteration of court orders, statutes or regulations or (2) rules relating to internal management of the state agency.

The Department submitted with its Response a copy of the court order issued in Gilmore v. Lynch<sup>20</sup>. In Gilmore, the court had found that prisoners' rights of reasonable access to the courts were seriously infringed by the highly restricted nature of the book list then set forth in California prison rules. The Gilmore Court advised the Department that it could either expand the list of materials available or adopt some other method of satisfying the prisoners' right of access to the courts. After its decision was affirmed by the U.S. Supreme Court, and after the Department elected to enlarge its law libraries, the trial court then issued an unpublished order concerning prison law library holdings and procedures. This unpublished order is set out in part in note 21.<sup>21</sup>

In its Response to the Request for Determination, the Department asserts that pursuant to the court order in Gilmore v. Lynch<sup>22</sup>, the Department adopted rules in the Administrative Manual<sup>23</sup> setting forth a required list of law books and other required procedures for the operation of prison law libraries. The Department included in the Response as Exhibits A and B the Gilmore stipulation and order and the amended stipulation and order dated October 13, 1972, and November 28, 1972, respectively. The Department states this amended "Stipulation and Order" was adopted verbatim by the Department in its Administrative Manual section 330.041, later renumbered to sections 2400 et seq., and now located at sections 7810 through 7817. Other material has been added over time to these sections in order to collect pertinent statutes, regulations and more recent

court orders, as well as, the Department alleges, to add internal management directives to employees to aid performance of their duties.

## II. DISPOSITIVE ISSUES

There are two main issues before us:<sup>24</sup>

- (1) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In pertinent part, Government Code section 11342, subdivision (b) defines "regulation" as:

". . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such 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 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

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

Second, does the informal rule either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

#### ANALYSIS OF AGENCY POSITION

The Department advances several arguments to support the proposition that the challenged Administrative Manual sections (7810 through 7817) are not "regulations" as defined in Government Code section 11342, subdivision (b). We will discuss the following arguments: (1) that much of sections 7810 through 7817 simply restates court cases, and (2) that parts of sections 7810 through 7817 restate CAC provisions and statute. After analyzing these arguments, we will discuss whether or not the remaining challenged Administrative Manual provisions are "regulations."

#### Argument Number 1--Restatement of Court Cases

##### Part A: Gilmore v. Lynch [7811(b)(3), 7812, 7813, and 7815(a) through (j)]

The Department states that, pursuant to the unpublished order in Gilmore v. Lynch, the Department adopted rules in the Administrative Manual setting forth a required list of law books and other required procedures for operation of prison law libraries.

The question presented here is whether the Department's adoption of rules in the Administrative Manual as specifically ordered by the Gilmore decision is subject to APA requirements. We conclude that to the extent that Administrative Manual sections 7810-7817 are a restatement of the Gilmore order and the Department has not changed or added to the court order, but merely informed interested parties of the decision and its application, these sections are not subject to APA requirements. The sections which directly reflect the express terms of the court order do not implement, interpret or make specific the court order within the meaning of Government Code section 11342, subdivision (b). These mandated sections--like a self-executing statute--need not be restated in a regulation in order to be enforced or issued by an agency.

We find that Administrative Manual sections 7811(b)(3), 7812, 7813 and 7815(a) through (j) are restatements of the Gilmore order.

Part B: Stewart v. Gates, Wetmore v. Fields [Sections 7811(e), 7817(a) and (b)]

The Department further argues that it need not comply with the APA insofar as it is conforming its procedures to two additional federal court cases. Specifically, the Department argues as follows. Stewart v. Gates<sup>25</sup> provides a specific procedure whereby restricted inmates are delivered legal materials, as set forth in Administrative Manual subsection 7811(e).<sup>26</sup> Similarly, Wetmore v. Fields<sup>27</sup> provides a specific procedure giving restricted inmates who have court deadlines a priority in delivery of legal materials, as set forth in Administrative Manual subsection 7817(b).<sup>28</sup> General prison population inmates with court deadlines also have (per Wetmore) priority in library access; this policy is set forth in Administrative Manual section 7817(a).<sup>29</sup>

In the two cited federal district court cases, the Department was not--in contrast to Gilmore--a party to the proceedings and thus is not bound by the district court holdings. For the Department to voluntarily follow the rulings of courts in cases concerning the Fourteenth Amendment right of access to the courts would seem to be a prudent means of avoiding future legal problems.<sup>30</sup> However, the fact that a state agency rule may arguably be excellent policy does not render it immune from APA requirements.

As we noted in 1987 OAL Determination No. 10,<sup>31</sup> the source of the informal rule is not the determinative factor in deciding whether the rule is a "regulation." If a rule, regulation, order, or standard of general application is adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, then it is a "regulation" as defined by the APA.

Based on the above discussion, we conclude that subsections 7817(a)-(b) are regulations. As discussed below, subsection 7811(e) is duplicative of a CAC provision and as such, was adopted pursuant to APA requirements, and therefore, is not violative of Government Code section 11347.5.

Argument Number 2--Restatement of CAC [Administrative Manual Sections 7810; 7811(a), (b)(1), (2) & (3), (d), and (e); 7816(second sentence)]

The Department argues that several of the challenged portions of the Administrative Manual merely repeat or paraphrase without adding anything of substance to existing statute or regulation. The Department alleges, for example, that sections 3120 and 3121 of Title 15 of the CAC are paraphrased in sections 7810 and 7811(a), (b)(2), (d), (e) and the second sentence of section 7816. Penal Code section 2600 is allegedly paraphrased in Administrative Manual section 7811(b)(3). These provisions are set out below.

Section 3120 of Title 15 of the CAC provides:

"Each institution will maintain a library for the benefit of all inmates. An institution's approved plan of library operation shall reflect provisions for the access to library services for all inmates regardless of their housing status or level of custody. Inmates who violate institution library procedures may be denied access to institution library services." [Emphasis added.]

Section 3121 of Title 15 of the CAC provides:

"Each institution will designate a suitable area as the inmate law library. Such area will contain space to accommodate state-owned law books and to allow individual study of the available books. Law books are defined to include constitutions, codes, court reports, legal texts, and law dictionaries. An institution's approved plan of library operation shall contain provisions for the access to law library services for all inmates regardless of their housing status or level of custody." [Emphasis added.]

Administrative Manual section 7810 provides:

"There shall be established in each institution an inmate law library. Each institution will designate a suitable area as the inmate law library. Such areas will contain space to accommodate state-owned books and to allow individual study of the available books. Law books are defined to include constitutions, codes, court reports, legal texts, and law dictionaries."

Administrative Manual subsection 7811(a) provides:

"(a) All interested inmates will have access to the inmate law books in accordance with institutional procedures."

Administrative Manual subsections 7811(b) and (b)(2) provide:

"(b) Each institution head shall formulate an operational plan for the inmate law library. These plans will include the regulations and procedures governing access to each law library and the days/hours of library operation. [Emphasis added.]

. . . . .

"(b)(2) These regulations and procedures governing access to each law library will take into consideration the needs of inmates assigned to security, segregation and other restricted housing units."

Administrative Manual subsection 7811(d) provides:

"(d) Inmates confined in restricted housing units including security, segregation, and other restricted housing status may possess and have access to any legal resource material available to the general inmate population."

Administrative Manual section 7811(e) provides:

"(e) Arrangements will be made to deliver requested and available law material to the quarters of any inmate whose housing restricts him from going to the law library."

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Administrative Manual section 7816 provides:

"Chapter 200 of this manual sets forth departmental policy concerning the inspection of policy and procedural manuals and paroling [sic] board directives by inmates. A copy of all revisions to the Director's Rules and Regulations is to be placed in the inmate law library."

Title 15, CAC, subsection 3164(c) provides:

"(c) Inmates who are housed in any restricted unit and who are not serving a period of disciplinary detention may possess and have access to any legal resource material available to the general population and may assist each other in their legal work to the extent compatible with institution security. For the purpose of this subsection, restricted units include reception centers, institution reception or orientation units, controlled housing and security housing units."

Title 15, CAC, subsection 3164(d) provides:

"(d) If an inmate's housing prevents him from going to the inmate law library, arrangements will be made to deliver requested and available law library material to the inmate's quarters."

Section 7811(e)

Administrative Manual subsection 7811(e) essentially duplicates subsection 3164(d) of Title 15 of the CAC.

Section 7811(b)(3)

Contrary to the Department's assertion, Penal Code section 2600 is not paraphrased in Administrative Manual subsection 7811(b)(3).

Penal Code section 2600 provides:

"A person sentenced to imprisonment in a state prison may, during any such period of confinement, be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public." [Emphasis added.]

Administrative Manual subsection 7811(b)(3) provides:

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~~"The operational plans, regulations and procedures shall provide for maximum inmate access consistent with space limitations and institutional security needs." [Emphasis added.]~~

However, a provision in the Gilmore order does state:

"Each institution head shall formulate regulations governing access to each library and hours of library operation, these regulations shall provide for maximum inmate access consistent with space limitation and institutional security needs." [Emphasis added.]

Sections 7810, 7811, 7816

To the extent the Department has duplicated the provisions of the California Administrative Code, the provisions were adopted pursuant to APA requirements and are not violative of Government Code section 11347.5.

Administrative Manual section 7810 does indeed essentially duplicate section 3121 of Title 15 of the CAC. Also, Administrative Manual subsection 7811(a) is paraphrased at section 3120 of Title 15 of the CAC. And, though Administrative Manual section 7811(d) is not duplicated at

section 3120 or 3121 of Title 15 of the CAC (as stated by the Department), it does appear to duplicate section 3164(c) of Title 15 of the CAC.

We conclude that section 7810 and subsections 7811(a), (b)(3), (d) and (e) paraphrase or duplicate provisions of title 15 of the CAC or the Gilmore order.

However, as is discussed below at page 15, we reject the Department's argument concerning section 7816 and the remaining provisions of sections 7811, and conclude that the Department has issued rules which implement, interpret, or make specific the holding and order of Gilmore and are thus regulatory.

Remainder of Administrative Manual section 7811 (subsections (b), (b)(1) and (2), and (c)).

Section 7811(b) provides:

"(b) Each institution head shall formulate an operational plan for the inmate law library. These plans will include the regulations and procedures governing access to each law library and the days/hours of library operation." [Emphasis added.]

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>32</sup> The provisions of Administrative Manual section 7811 are such rules. Any prison inmate seeking access to the institution's law library will be governed by the provisions of section 7811. Section 7811 sets forth the policies and procedures which each State penal institution will follow in formulating an operational plan for the inmate law library.

Section 7811 implements, interprets, or makes specific three separate and distinct provisions of law: (1) published appellate opinions delineating the contours of the Fourteenth Amendment right of access to the courts, such as Gilmore and Bounds v. Smith,<sup>33</sup> (2) the unpublished Gilmore order, and (3) Title 15, CAC, sections 3120 and 3121. We will focus on three provisions from section 7811, as examples of the regulatory provisions within this section.

Example No. 1 -- Subsection 7811(b)(1), (2) and (c)

Subsection 7811(b)(1) states that:

"(1) The operational plans in determining the actual days/hours of operation, will take into consideration the needs of inmates assigned to day work, training, or academic education."

Subsection 7811(b)(2) states:

"(2) These regulations and procedures governing access to each law library will take into consideration the needs of inmates assigned to security, segregation and other restricted housing units."

Subsection 7811(c) provides:

"(c) The operational plan will be reviewed and approved by each institution head and forwarded to the Coordinator, Policy Documentation for annual review by the director."

The Gilmore court held that the Department of Corrections could decide whether to expand the present list of basic codes and references of legal materials in the manner suggested by that opinion, or adopt some new method of satisfying the legal needs of its charges. The Department chose to expand its law library holdings. The court order thus contained an expanded list of law books and procedures for the operation of the prison law libraries. The court order provided:

"Each institution head shall formulate regulations governing access to each law library and hours of library operation, [sic] these regulations shall provide for maximum inmate access consistent with space and institutional security needs."<sup>34</sup>

We find subsections 7811(b), (b)(1) & (2) and (c) further implement, interpret and make specific how operational plans will be formulated and what provisions these plans shall include; these provisions make specific the unpublished Gilmore order and are thus regulatory.<sup>35</sup>

Example No. 2 -- Section 7817

Section 7817 interprets Gilmore. The Department has issued a rule designed to ensure that prisoners are afforded access to the courts. Section 7817 provides:

"(a) General population inmates with established court deadlines will be given priority for passes to the inmate law library. If there is a waiting list for legal books these inmates will be given priority over non-court deadline requests.

"(b) Inmates in restricted housing units with established court deadlines will be given priority in

submitting requests for law materials and in the delivery and pick-up of these materials to and from the unit."

"(c) Verification of established court deadlines will be made by a correctional counselor."

These provisions set forth a rule ensuring access to the courts in that prisoners with established court deadlines will be given priority passes.

Faunce v. Denton<sup>36</sup> held that the APA required that specific examples of allowable types of inmate personal property be listed in the CAC rather than merely in the Administrative Manual. We also found in an earlier Determination that in some instances, "examples" provided greater specificity and interpreted existing statutes or regulations, and therefore were underground regulations.<sup>37</sup>

WE CONCLUDE THAT (1) ADMINISTRATIVE MANUAL SECTIONS 7811(b), (b)(1) & (2), 7816<sup>38</sup> AND 7817 ARE "REGULATIONS" AS DEFINED IN GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.<sup>39</sup>

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INTERNAL MANAGEMENT EXCEPTION--GOVERNMENT CODE SECTION 11342, SUBDIVISION (b)

The Department argues that Administrative Manual sections 7811(c), 7814, 7815(k), and 7816 (first sentence) fall within the "internal management" exception to APA requirements. We concur as to sections 7814 and 7815(k); we reject this argument as it applies to sections 7811(c) and 7816.

Government Code section 11342, subdivision (b) provides in pertinent part:

"'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such 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, except one which relates only to the "internal management" of the state agency." [Emphasis added.]

