

MAR 4 1987

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW At 6:47 o'clock P.M.
MARCH FONG EU, Secretary of State
SACRAMENTO, CALIFORNIA By *Peter Bots*
Deputy Secretary of State

In re:

Request for Regulatory) 1987 OAL Determination No. 3
Determination filed by the)
Prison Law Office) [Docket No. 86-009]
concerning the)
Department of Corrections') March 4, 1987
Classification Manual /1)
) Determination Pursuant to
) Government Code section
) 11347.5; Title 1,
) California Administrative
) Code, Chapter 1, Article 2

Determination by *Linda Hurdle Stockdale Brewer*

Linda Hurdle Stockdale Brewer
LINDA HURDLE STOCKDALE BREWER, Director

Herbert F. Bolz, Coordinating Attorney
Marc Remis, Staff Attorney
Rulemaking and Regulatory
Determinations Unit

THE ISSUE PRESENTED /2

The Prison Law Office has requested the Office of Administrative Law (OAL) to determine whether or not the California Department of Corrections' (CDC or Department) Classification Manual (CLM) is a "regulation" as defined in Government Code section 11342(b) and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the California Administrative Procedure Act (APA). /3, /4

THE DECISION /5, /6, /7, /8, /9

The Office of Administrative Law finds that the above noted Manual (1) is subject to the requirements of the APA, (2) is a "regulation" as defined in the APA, and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA.

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./10 The Director of Corrections is charged with a "difficult and sensitive job",/11

"[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. . . ." /12

Authority/13

Penal Code section 5058(a) provides in part:

"The director [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-Legislature Enactments

The APA applies to all state agencies, except those "in the judicial or legislative department."/14 Since the Department of Corrections is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department./15

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

"The director [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.]/16

Background

In 1975, the Legislature overruled a 1973 court case /17 (which had found the Department exempt from the APA) by specifically providing in Penal Code section 5058(a) that prison administration rules are to be adopted pursuant to the APA.

On July 9, 1986, the Department of Corrections was petitioned pursuant to Government Code section 11347 by the requestor in the current proceeding to adopt the Classification Manual pursuant to the APA.

On July 24, 1986, the Department of Corrections denied the APA petition on the grounds that the Classification Manual was not a "regulation".

On August 4, 1986, the Request for Determination re the Classification Manual was received at OAL.

II. PRELIMINARY ISSUES

The Department's Response to the Request for Determination does not take issue with the requestor's contention that the Classification Manual contains "many hundreds of regulations". Rather, the Response makes three technical or procedural objections, together with a request concerning the belated supplying of background information by the Department to OAL. In light of our responsibility to enforce the legal requirements of the Administrative Procedure Act (APA), we are unable to sustain any of the objections. In light of the procedural requirements set out in the OAL regulations governing the regulatory determination process, we are unable to grant the request to augment the record.

We will first discuss the technical objections. The Department states:

"The CDC objects to the Request of Mr. Specter because it fails to comply with the procedural requirements established in Title 1 . . . and requests that:

1. The Request be rejected in its entirety without prejudice to a later refiling.
2. If the Request is not rejected in its entirety, then the Request be narrowed in scope to those Classification Manual sections identified as examples in Donald Specter's request letter. /18
3. If the Request for Determination is neither rejected entirely nor narrowed in scope, then it is requested that the Notice of the Commencement of Review be withdrawn."/19

ISSUE: IN SUPPORT OF ITS FIRST TWO OBJECTIONS, THE

DEPARTMENT ARGUES THAT THE REQUESTOR HAS NOT COMPLIED WITH TITLE 1, CAC SECTION 122(a)(3).

Section 122(a)(3) requires that the Request include "a copy of the state agency rule which is the subject of the request". The Department interprets section 122(a)(3) as requiring that the "rule or rules at issue be identified". [Emphasis added.] The word "identify", it should be noted, does not appear in section 122(a)(3).

Persons submitting AB 1013 Requests, the argument continues, "must" be required to specifically identify each "section" of the state agency document challenged, or else the "burden of identifying the alleged regulatory material [will be shifted] from the individual making the Request to the state agency and OAL."/20, 21

ANALYSIS

Interpreting the APA and its implementing regulations, we are guided by the following principles.

A statute should be construed with a view toward promoting rather than defeating its general purpose and the policy behind it./22 The part of the APA governing agency rule-making has two primary objectives: meaningful public participation and effective judicial review./23 Finally, in interpreting a statute, it is proper to consider the consequences that will flow from a particular interpretation./24

Government Code section 11347.5 states unequivocally that:

"No state agency shall issue any . . . manual . . . which is a regulation as defined in subdivision (b) of section 11342, unless the . . . manual . . . has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." [Emphasis added.]

This statute codifies the unanimous holding in Armistead v. State Personnel Board,/26 a decision which specifically lists the issuing of "manuals" as a typical means by which state agencies "avoid the mandatory requirements of the Administrative Procedure Act of public notice, opportunity to be heard by the public, filing with the Secretary of State, and publication in the Administrative Code."

What is the meaning of the term "state agency rule", as used in 1 CAC section 122(a)(3), the section upon which the Department relies for its "must identify specific sections" argument?

We turn first to 1 CAC section 121(c), which provides the following definition:

"(c) 'State agency rule' means any state agency guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA." [Emphasis added.]

Clearly, the plain meaning of sections 121(c) and 122(a)(3) is that the requestor has fully satisfied the Title 1 regulatory requirements by submitting with his or her request a copy of an agency "manual"--if this is the requestor's preference. There is, of course, nothing to prevent the citizen from requesting a determination concerning a portion of a larger document. Similarly, there is nothing to prevent an agency whose document is under AB 1013 review from alleging that a discrete portion of the document is non-regulatory or exempt by statute or otherwise not within the scope of Government Code section 11347.5.

There is also a fundamental flaw in the "every specific section" argument. Taken literally, such an interpretation would merely require a person desiring to challenge the whole of an agency manual to include with his or her request a complete list of the numbers of every section contained in the manual--a tedious and pointless chore. In the matter at hand, for instance, the requestor could satisfy the Department's objection by simply mailing in a complete list of the Classification Manual's sections (101 through 5243).

The more basic contention implicit in the Department's Response is that OAL should reject any Request not containing a legal analysis of each discrete provision of the agency document alleged to be an underground regulation.

Assuming arguendo that both of the above noted facets of the "specific section" argument were not foreclosed by the express terms of section 121(c), we would for the following reasons nonetheless be compelled to reject the argument.

1. The second sentence of Government Code section 11347.5 specifically provides that determinations may be made covering manuals:

"If [OAL] is notified of . . . the issuance . . . of . . . an agency . . . manual, . . . which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, [OAL]

- may issue a determination as to whether the . . . manual . . . is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added.]
2. OAL's Final Statement of Reasons for section 121(c) (the definition of "state agency rule") reveals²⁷ that the intent of this provision was to define "the list of items specified in Government Code section 11347.5 by the use of the single term 'rule'" in order to avoid the need for reiteration of each of these terms several times in the AB 1013 regulations. The statutory list consists of "guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule". [Emphasis added.]
 3. Were OAL to adopt the interpretation of "state agency rule" urged by the Department, OAL would be required to modify an act of the Legislature (Government Code section 11347.5) and the implementing regulation (Title 1 CAC section 121(c)). OAL is powerless to modify acts of the Legislature or to informally amend its own regulations.
 4. AB 1013 was intended as an inexpensive alternative to litigation by which ordinary California citizens, such as persons with small businesses, could obtain expeditious determinations on the legality of questionable agency regulatory actions. To require comprehensive legal analysis of challenged agency documents would have numerous negative consequences, not the least of which would be to bar the regulatory determinations program to all but lawyers. This consequence cannot be reconciled with the basic APA purpose of fostering meaningful public participation in agency rulemaking.

ISSUE: IN ITS THIRD OBJECTION, THE DEPARTMENT URGES THAT OAL WITHDRAW ITS "NOTICE OF THE COMMENCEMENT OF REVIEW" ON THE GROUNDS THAT OAL LACKS ADEQUATE PROGRAM RESOURCES TO CONDUCT THE "VERY DETAILED AND THOROUGH REVIEW" THAT THE DEPARTMENT DEEMS APPROPRIATE HERE.

The Department suggests that OAL cannot declare the Classification Manual to be invalid and unenforceable unless OAL first completes a comprehensive legal analysis of every line of this 520 page document.

We cannot accept this thesis. This argument suggests that the more extensive the agency's non-APA enactments, the less they will be subject to AB 1013 scrutiny. There is also a second problem with the above argument.

Individual state agencies are responsible for ensuring that they are in compliance with applicable laws, including Government Code section 11347.5. In this case, Penal Code section 5058(a) specifically provides that:

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

If an agency manual should be declared invalid because it is regulatory, it is then the issuing agency's responsibility to remedy past oversights by reviewing the contents of the document in light of the requirements of Government Code section 11347.5. In the words of the Legislative Analyst, OAL's task under AB 1013 is to maintain "regulatory discipline". OAL's role is not to perform basic, ongoing legal and analytical work that should in the first instance be undertaken by the responsible rulemaking agency.

In fact, in an analogous context, the AB 1013 regulations are designed to prevent individual agencies from shifting such tasks to OAL. Title 1, CAC section 122(d) provides in part:

"If the request is submitted by a state agency, . . . [t]he request shall contain the legal analysis and conclusions of the agency's legal counsel" [Emphasis added.]

OAL's Final Statement of Reasons for section 122(d) states at page five that the above requirement is necessary

"to maximize the resources of OAL that are available to the public for such determinations. One of the primary purposes of Government Code section 11347.5 is to provide a cost-effective and less time-consuming alternative to litigation for members of the public. Nothing in the legislative history of Government Code section 11347.5 indicates that the Legislature intended to make OAL available as the primary legal research resource for state agencies regarding their own or other state agency's rules which had not been adopted as regulations." [Emphasis in original.]

We also find that sustaining the Department's third

objection would be inconsistent with judicial precedent interpreting Government Code section 11347.5.

In Stoneham v. Rushen (Stoneham II), /29 the court struck down the "classification scoring scheme" contained in approximately 35 pages of the Classification Manual. The court struck down the "scheme" in its entirety.

The court did not take upon itself the task of reviewing every line of the challenged document.

When the Department later submitted to OAL the Manual provisions that had been before the court, the Department underlined the many significant regulatory portions of the material. Non-regulatory material was not underlined. The underlined, regulatory material was then approved by OAL for incorporation by reference into the CAC./3C. This underlined material may be found in the current Classification Manual as Exhibits "E" and "G" to Chapter 300.

The above division of labor permits both the entity enforcing Government Code section 11347.5 and the responsible rulemaking agency to carry out their respective statutory duties. Nothing in the Department's Response indicates that this Request (concerning portions of the other Classification Manual) is outside the scope of the established judicial and administrative practice described above.

We find that sustaining the Department's third objection would be inconsistent not only with established judicial precedent but also with Title 1 CAC sections 123 and 126 and Government Code section 11347.5.

Section 123 provides that OAL "shall commence active consideration of each request as soon as possible after its receipt within available program resources." [Emphasis added.]

On December 18, 1986, the Classification Manual request was published in the Notice Register and thus taken under active consideration.

Title 1 CAC section 126 provides that

"within 75 days of the date of publication of the notice regarding the commencement of active consideration of the request for determination, [OAL] shall issue a written determination as to whether

the state agency rule is a regulation" [Emphasis added.]

In an earlier AB 1013 matter, another state agency suggested that OAL "withdraw" from the pending proceeding and amend the AB 1013 regulations to permit OAL to grant agency "withdrawal" requests./31 In that earlier matter, we responded:

"the Board suggests amending the regulatory determination regulations to in effect permit OAL to grant agency 'withdrawal' requests. This suggestion will be given appropriate consideration. However, until such time as the regulations are amended (if amended at all), OAL is obligated to follow the present requirements. See Government Code section 11347.5." [Emphasis added.]

ISSUE: IF NONE OF THE THREE OBJECTIONS IS SUSTAINED, THE DEPARTMENT REQUESTS THAT IT BE PERMITTED TO SUPPLY OAL WITH "BACKGROUND INFORMATION" ON THE MATTER UNDER REVIEW.

We must deny this request. Though we are always appreciative of background information from agencies on regulatory determination requests, we can, under Title 1, CAC section 125(f), consider only material submitted pursuant to Title 1, CAC section 125(b) that is received prior to the close of the agency response period, which was in this case 5 p.m., February 2, 1987, the date the Department's official Response was received.

Following this Determination, however, if the Department formally adopts additional classification regulations, it would be appropriate to include all pertinent "background information" in the rulemaking file submitted to OAL./32

III. DISCUSSION OF DISPOSITIVE ISSUES

There are two main issues before us:/32

- (1) WHETHER THE CHALLENGED RULE IS A REGULATION WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In pertinent part, Government Code section 11342(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, . . . manual, instruction [or] . . . standard of general application which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, . . . manual, instruction [or] standard of 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(b) involves a two-part inquiry.

First, is the informal rule either

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

Second, does the informal rule either

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

The answer to both parts of this inquiry is "yes."

By way of background, we will discuss the statutory and regulatory provisions bearing on inmate classification.

The Penal Code makes the Department responsible for the "care, custody, treatment, training, discipline and employment" of all prisoners"/34 and for "prescrib[ing]

. . . rules and regulations for the administration of the prisons."/35 This Request focuses on one specific aspect of "custody" and of "administration": the criteria and procedures used in "classification" of prisoners. The classification process involves the balancing of two significant public interests: (1) the need to protect the general public, departmental staff and other prisoners from inmates who are prone to violence or likely to attempt escape or both; and (2) the need to control expenditure of public funds by minimizing the number of inmates who are confined in maximum-security, intensively supervised environments. Reflecting this latter concern, the Legislature, in enabling legislation providing for construction of new prisons, declared its intent that "the department house each inmate at the lowest custody level consistent with his or her classification"/36

The basic outline of the classification process is contained in this part of Penal Code section 5068 (much of which is drawn from a 1944 statute):

"The Director of Corrections shall cause each person committed to a state prison to be examined and studied. This includes the investigation of all pertinent circumstances of the person's life 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 determine the prison in which the prisoners shall be confined." [Emphasis added.]

The provisions of Penal Code 5068 have been supplemented by two of the "Director's Rules"--15 CAC sections 3375 and 3376. Located in Article 10 "Classification" these sections are titled respectively "General Policy" and "Operational Plans".

Section 3375 provides:

(1) "[a]ll determinations affecting an individual inmate's institution placement, transfer between institutions, participation in available programs, the degree of control and supervision required to maintain custody of the individual, the security of the institution and

safety of persons, will be through the inmate classification procedures of the department..."; (2) the classification process includes a standardized classification scoring system; (3) the inmate is classified for initial placement, for disciplinary reasons and periodically. [The full text of section 3375 is attached as Appendix A.]

Two key classification forms (along with extensive instructions) have been incorporated by reference into section 3375 pursuant to Stoneham v. Rushen (Stoneham II), which held that this material was regulatory in nature in that it constituted a "rule of general application significantly affecting the male prison population in the custody of the Department." Each of the two forms, the CDC Classification Score Sheet and the CDC Reclassification Score Sheet, is one page in length, with a notice on the reverse side; each is accompanied by 16 pages of instructions. These four documents (two forms and two sets of instructions) appear as Exhibits D, E, F, and G to Chapter 300 of the Classification Manual.

Our basic task today is to review the balance of the Manual in light of the Stoneham test: whether or not the Manual is a rule of general application significantly affecting the male prison population in the custody of the Department; a rule that was adopted to implement or interpret statutory or regulatory provisions governing classification.

We note that the Department unsuccessfully has taken the position that only "general policies" need to be spelled out in formally adopted regulations; that "procedural details" needed to implement regulations may either be included in the CAC or placed in a departmental manual./37

For purposes of analysis, we will focus on three particular provisions of the Classification Manual, as examples of the numerous regulatory provisions in the Manual. Other regulatory provisions are discussed in note 38.

Example 1 - Enemies List

Section 301 of the Classification Manual provides:

"(a) A CDC Form 812, Notice of Critical Case Information-Safety of Persons [Attached as (Appendix B) to this

Determination], shall be filed in each Central File. Its purpose is to alert staff of any information regarding an inmate/parolee which is or may be critical to the safety of persons inside or outside an institution...

(b) Responsibilities: ... (4) If an inmate claims to have enemies, he/she is responsible for providing sufficient information to positively identify the claimed enemy. Staff are responsible for verifying this information. Such verification shall include an interview with the alleged enemy when it can be done so without jeopardizing an investigation or endangering the inmate. Staff shall document the receipt of this information on the CDC Form 812....

(c) ... [I]t is the responsibility of that recording staff person to ensure such critical information is included on the CDC Form 812s of all identified inmates or parolees."

Form 812 provides that all "References [information on the form] must be considered in the classification, placement, transfer, assignment and supervision of the subject [inmate]."
[Emphasis added.]

This provision is one which generally applies to all inmates with known enemies and has a significant effect on the prison population in that if the Department fails to keep "known enemies" housed separately, injury and other violence would probably result.

By requiring several reports to be filed in the inmate's central file, requiring the inmate to sufficiently identify the enemy, to require staff to investigate and/or interview the alleged enemy, and to complete a "Notice of Critical Case Information-Safety of Persons [form];" the Manual is implementing, interpreting and making specific the following laws:

Section 3335 of Title 15 of the CAC "Administrative Segregation," where an inmate's presence within the general prison population presents an imminent threat to that prisoner or others;

Section 3326(c) "Records of Disciplinary Matters," where the enemy list is among the information considered and used in disciplinary matters;

Section 3375(d) "General Policy [for classification of inmates]," an inmate may be housed in an institution

with a different classification level that would ordinarily be required of the inmate's classification score, as an administrative exception when the department's need, the inmate's individual needs, or safety and security requirements are determined to warrant an exception;

Penal Code section 5054, "Control of penal institutions and inmates," the director is vested with the responsibility for the care, custody, treatment, training, discipline and employment of inmates: and

Penal Code section 5068, "Examination and study of prisoners," ...[u]pon the basis of the examination and study, the Director of Corrections shall classify prisoners and determine the prison in which the prisoners shall be confined.

Example 2 - Prison Gang Criteria

Section 302 of the Classification Manual provides:

"(a) When a gang affiliation is entered on the CDC form 812, staff shall prepare a CDC Form 812-A, Notice of Critical Information--Prison Gang Identification (Exhibit "C" to Chapter 300); [attached as Appendix C to this Determination]. This form shall be completed only when inmates have been identified with such prison gangs as the Nuestra Familia, Mexican Mafia, Black Guerilla Family or Aryan Brotherhood....

(b) The CDC Form 812-A shall be completed in detail. The designation of an inmate as a member, affiliate, associate or defector of a prison gang shall be validated, and all supporting documentation listed on the form....

(e) Methods of identification shall include a reference to each source document in the inmate's/parolee's file and adhere to the following guidelines: (1) Self-Admission... (2) Tattoos and Symbols... (3) Written Material... (4) Photos... (5) Staff Information... (6) Other Agencies... (7) Association... (8) Inmate Informants... (9) Commitment Offense... (10) Legal Documents... (11) Visitors.... [Emphasis added.]

Form 812-A provides that "References [all information in the Form] must be considered in the classification, placement, transfer, assignment and supervision of the inmate". [Emphasis added.]

This provision is one which generally applies to all inmates identified as belonging to gangs and has a significant effect on the prison population in from other members of his/her gang or fails to keep one gang housed separately from other gangs or the general prison population, the possibility of escapes, violence, or other illegal activities is increased.

By requiring several reports to be filed in the inmate's central file, staff to investigate and validate the designation of a inmate as a gang member, affiliate, associate or defector, complete a "Notice of Critical Information--Prison Gang Identification [form]," and by listing and describing the above eleven methods of gang member identification, the Manual is implementing, interpreting and making specific the following laws:

section 3335 of Title 15 of the CAC "Administrative Segregation," where an inmate's presence within the general prison population presents an imminent threat to that prisoner or others;

section 3236 "Membership in Outside Organizations," where such presents a threat to institution security or safety of persons;

section 3233 "Activity Groups" are prohibited when they violate or advocate or encourage violations of the law or rules and regulations of the director;

section 3005 "Conduct," standards which are expected of inmates prohibit violence, or the assistance, attempt or incitement of violence;

section 3375(d) "General Policy [for classification of inmates]," an inmate may be housed in an institution with a different classification level...as an administrative exception where the department's need, the inmate's individual needs, or safety and security requirements are determined to warrant an exception; Penal Code section 5054, "Control of penal institutions and inmates,: the director is vested with the responsibility for the care, custody, and discipline of the inmates;

and Penal Code section 5068, "Examination and Study of Prisoners," the director shall classify prisoners and determine the prison in which the prisoners shall be confined.

Example 3-Criteria for Protective Housing Placement

Section 3122 of the Classification Manual also provides the following criteria for inmate placement in the Protective Housing Unit:

- "(a) Inmates shall not require specialized housing for other than protective custody.
- (b) Inmates shall not have a serious psychiatric or medical condition which requires prompt access to hospital care.
- (c) The inmate shall not be a documented affiliate of a prison gang.
- (d) The inmate must not pose a threat to the safety or security of others.
- (e) The inmate must have specific enemies identified (on CDC Form 812) or such notoriety that it is likely to result in great bodily harm to him/her.
- (f) It has been determined that enemies are both likely and capable of causing the inmate great bodily harm.
- (g) There is no alternative placement which can provide for the inmate's custody and ensure his/her safety."

This provision is one which generally applies to all inmates whose safety would be endangered by housing placement in the general prison population and has a significant effect on the prison population in that if the department fails to house such inmates separately, violence or injury is likely to result.

By requiring inmates to meet the above seven criteria for placement in a protective housing unit, the Manual is implementing, interpreting and making specific the following laws:

Section 3335 of Title 15 of the CAC "Administrative Segregation," where an inmate's presence within the general prison population presents an imminent threat to that inmate or others;

Section 3336 "Segregation Order," specifies some considerations which must be addressed before an inmate can be put in administrative segregation prior to a hearing on the matter;

Section 3325(c) "Records of Disciplinary Matters," where the enemy list is among the information considered and used in disciplinary matters;

Section 3375(d) "General Policy [for classification of inmates]," an inmate may be housed in an institution with a different classification level than would ordinarily be required of the inmate's classification score, as an administrative exception when the department's need, the inmate's individual needs, or safety and security requirements are determined to warrant an exception;

Penal Code section 5054, "Control of penal institutions and inmates," the director is vested with the responsibility for the care, custody, treatment, training, discipline and employment of inmates; and

Penal Code section 5068, "Examination and study of prisoners," ...[u]pon the basis of the examination and study, the Director of Corrections shall classify prisoners and determine the prison in which the prisoners shall be confined.

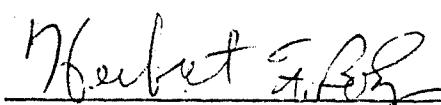
SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA./³⁸, /³⁹ We conclude that none of the recognized exceptions (set out in note 38) apply to the Classification Manual.

III. CONCLUSION

For the reasons set forth above, OAL finds that the Classification Manual (1) is subject to the requirements of the APA, (2) is a "regulation" as defined in the APA and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA.

DATE: March 4, 1987


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CPT
CLM.1-CLM.14

Notes

1. In this proceeding, the Prison Law Office was represented by Donald Specter, Esq. The Department was represented by Deputy Directors Gregory W. Harding and Jerold A. Prod, by Roz Ryan, Esq., and by Charles Hull, Chief, Policy Documentation Section.
2. The legal background of the regulatory determination process--including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CAC). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum narrowly interpreting ambiguous statute). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396 n.5, 211 Cal.Rptr. 758, 764 n.5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems.
3. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code. Sections 11340 through 11356, Chapters 4 and 5, also part of the APA, concern administrative adjudication rather than rulemaking.
4. The "state agency rule" which is, pursuant to Title 1 CAC section 122(a)(3), the subject of this Determination is the Classification Manual dated 1985 as updated by revision CL/1 (12-27-85). The validity of the entire 520 page Manual has been brought into question by the Request.
5. As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great

weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5:

"The office's determination shall be published in the California Administrative Notice Register and be made available to . . . the courts." (Emphasis added.)

6. A timely Response to the Request for Determination was received from the Department.

In general, in order to obtain full presentation of contrasting viewpoints, we encourage affected agencies to submit responses. If the affected agency concludes that part or all of the challenged rule is in fact an underground regulation, it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

7. An OAL finding that a challenged rule is illegal unless adopted "as a regulation" does not of course exclude the possibility that the rule could be validated by subsequent incorporation in a statute.
8. Pursuant to Title 1 CAC section 127, this Determination shall become final on the 30th day after filing with the Secretary of State.
9. Portions of the Manual merely repeat verbatim provisions contained in statutes, CAC sections, or judicial decrees. For instance, as the Department has pointed out, section 601 duplicated Penal Code §1170(d). The validity of such binding statutory, regulatory, and decisional law provisions is, of course, in no way affected by this Determination. We note that Exhibits D, E, F and G, to Chapter 3 of the Manual have already been incorporated by reference into 15 CAC, section 3375.

If the Department deems that one or more of the Manual provisions which are not simply verbatim restatements of statutes or CAC provisions or judicial decrees are nonetheless needed

for the administration of the prisons, the Department may submit emergency regulations to OAL, finding pursuant to Government Code section 11346.1 that the proposed regulations are "necessary for the immediate preservation of the public peace, health and safety or general welfare". If the Department presents "specific facts showing the need for immediate action" pursuant to Government Code section 11346.1(a) and meets the requirements of Government Code section 11349.6, OAL will approve the emergency regulations.

10. Penal Code section 5000.
11. Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778, 781.
12. Penal Code section 5054.
13. We discuss the affected agency's rulemaking authority (See Gov. Code, §11349(b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Administrative Code, OAL will, pursuant to Gov. Code, §11349.1(a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of necessity, authority, clarity, consistency, reference, and nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Gov. Code, §11349.1(a). At that point in time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy

an APA requirement, OAL will disapprove the regulation. Gov. Code, §11349.1.

14. Government Code section 11342(a). See Government Code sections 11346; 11343. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).

15. See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.

16. Section 3 of Statutes of 1975, chapter 1160, p. 2876 provided:

"It is the intent of the Legislature that any rules and regulations adopted by the Department of Corrections or the Adult Authority prior to the effective date of this act, shall be reconsidered pursuant to the provisions of the Administrative Procedure Act before July 1, 1976."

17. American Friends Service Committee v. Procunier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.

As noted in 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, p. B-13; typewritten version, p.6, Procunier was to a significant degree further overruled by Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1.

18. The Department suggests that the Request should be narrowed because the Department lacks time to respond fully. In reply, we note that the Department was put on notice of APA problems with its manuals by four published appellate decisions (Stoneham v. Rushen (Stoneham I)) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132; Stoneham v. Rushen (Stoneham II) (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122. Also, in the summer of 1986, the Department was advised by OAL and by the requestor of the pendency of the current Request.

19. Page 1.

20. Agency Response, p.2.

21. The word "section" is not defined by the Department. Referring to the Classification Manual, we note that the document's "sections" vary in length from one sentence to several pages.

22. Fig Garden Park v. Local Agency Formation (1984) 162 Cal.App.3d 336, 343, 208 Cal.Rptr. 474, 478.
23. See California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 510, 131 Cal.Rptr. 744, 751.
24. Fig Garden, cited above at n.22.
25. A Youth and Adult Correctional Agency bill analysis dated May 5, 1981 opposed AB 1013, warning that the proposed legislation "could result in a great part of our [i.e., Department of Corrections'] procedural manuals going under the Administrative Procedure Act process--particularly classification." (Emphasis added.)
26. (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, 4.
27. p.3.
28. p.5.
29. (1984) 156 Cal.Ap.3d 180, 203 Cal.Rptr. 20.
30. See Title 1, CAC §20 on incorporation by reference.
31. 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p.B-18, B-21; typewritten version, page 6.
32. Information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision may consist of "expert opinion." 1 CAC §(b)(2).
33. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 3); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 & 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

We also conclude that the Classification Manual is "quasi-legislative" in nature because it is a rule formulating a general policy oriented toward future decisions. Gov. Code, §11346. See Pacific Legal Foundation v. California Coastal Commission (1982) 33 Cal.3d 158, 168, 188 Cal.Rptr. 104, 111 (quasi-legislative acts are reviewable by ordinary mandamus (Code Civ. Pro., sec. 1085) or action for declaratory relief (Code Civ. Pro., sec. 1060); whereas,

quasi-judicial or adjudicatory acts are reviewable by administrative mandamus (Code Civ. Pro., sec. 1094.5)).

34. Penal Code §5054.
35. Penal Code §5058.
36. Statutes of 1980, Chapter 1122, section 2, p. 3620, cited in Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 733 n.1, 188 Cal.Rptr. 130, 132 n.1.
37. In 1976, before OAL was established, the following was inserted by the Department into a "preface" to the Department's portion of the CAC (Title 15, Division 3):

"Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures."

[Emphasis added.]

This "detail" argument was rejected by Stoneham I, Hillery v. Rushen, and Faunce v. Denton. As required by these decisions, we reject it also. [See note 18 for citations.]

38. The Classification Manual contains numerous regulatory provisions--too numerous to be listed here. Each of the regulatory provisions meets both prongs of the statutory definition of "regulation."

Brief mention will be made of several particular provisions as examples of the content of the Classification Manual.

(Ch. 100) Section 101 specifies the scope of the classification process, and defines the classification process by detailing its application to each aspect of the inmate's custody in prison. This section implements, interprets and makes specific Stats. 1980, ch. 12122, §2, p. 3620 [uncodified] and section 3375 of Title 15 of the CAC.

(Ch. 200) Section 202 provides that within 14 days after an inmate's arrival at a reception center that he or shall shall be issued a copy of the Director's Rules and apprised "of the consequence of their involvement in prison gangs and advised that any degree of involvement with a prison gang may result in segregated housing placement." (Emphasis added.)

This section implements, interprets and makes specific Penal Code section 5054 and sections 3002, 3335, 3236, 3233, 3005, and 3375(d) of Title 15 of the CAC.

(Ch. 300) Section 311 defines certain types of prisoner information as confidential, including "[i]nformation which jeopardizes the Department's position in any litigation if known to the inmate or others." This provision interprets and makes specific sections 2084, 2087, 2235, 2245, 3003 and 3321 of Title 15 of the CAC.

(Ch. 400) Section 401 describes the uses of a Case Summary. This provision implements, interprets and makes specific Penal Code sections 2081.5, 5068 and 5079, as well as section 3375 of Title 15 of the CAC.

(Ch. 500) Section 503 specifies two types of diagnostic and treatment temporary cases which reception center administrators may reject. This section interprets and makes specific Penal Code section 1203.03(d).

(Ch. 600) Section 604 specifies criteria on which the Director would initiate a recall of an inmate's commitment. This section interprets Penal Code section 1170(d) and (f).

Section 651 prohibits a departmental study for the purpose of a recall from being initiated pursuant to a request from "defense attorneys, family members or other private citizens." Section 651 also sets forth a list of circumstances which might indicate that it would be appropriate for the Department to initiate a recall for the purposes of recommending probation for the inmate. These provisions implement, interpret and make specific Penal Code section 1170(d).

Section 652 (a)(1)(B) states: "This study evaluates the defendant's potential for success under sentencing alternatives to state prison and the threat posed to the community should the defendant not fulfill that potential. The clinical case study method does not lend itself to an adequate consideration of other issues involved in uniform sentencing." This provision implements and interprets Penal Code section 1170(b) and (d) in that it elaborates on the uses and purposes of a study for the purposes of recall.

(Ch. 700) Section 711 provides that an inmate who chooses to waive his or her right to 72-hours notice, prior to a classification committee hearing which may have an adverse effect, must sign a written waiver on CDC Form 128-G. Section 711 further provides that emergency lockups and

transfers are exempt from the 72 hour notice requirement but that the inmate gains certain other rights of redress. These provisions implement sections 3375(i) and 3383 of Title 15 of the CAC.

Section 712 defines the term "adverse effect" for the purposes of determining which meetings of the classification committee require the presence of the inmate whose case is to be discussed. This section interprets and makes specific section 3375(h) of Title 15 of the CAC.

Section 753 specifies seven "administrative determinants" which take precedence over the "classification score" in determining inmate placement. This section makes specific the term "administrative exception" as used in section 3375(d) of Title 15 of the CAC.

(Ch. 800) Sections 803 and 804 and Exhibit "A" to Chapter 800 set forth the procedure for crediting inmates with Work/Training Credits, eligibility criteria for participation in this program, formula for computing the amount of credits earned and a "Time Credit Waiver" (Form Exhibit "A" to Chapter 800) which also includes a formula for computing the amount of credits earned as well as specifying loss of credit penalties for various types of offenses. These provisions implement, interpret and make specific Penal Code sections 2931, 2933 and 2934, as well as sections 3043 and 3043.3 of Title 15 of the CAC.

Section 821 specifies performance standards for inmates participating in the Work/Training Incentive Program which include the requirement that the inmate sign a copy of and meet the minimum performance standards for each distinct work/training position. This provision implements Penal Code sections 2931 and 5054, as well as section 3041 of Title 15 of the CAC.

Section 822 specifies the conditions under which inmates who either are not physically present or meeting the minimum performance standards for each distinct work/training position may receive full work/training credits. This provision implements Penal Code sections 2931, 2933 and 5054, as well as sections 3043, 3043.4 and 3045 of Title 15 of the CAC.

Section 823 specifies special rules for eligibility and computation of work/training credits in cases where inmates are transferred into a different level institution or program or location. This provision implements and makes specific Penal Code sections 2933, 5054 and 5968,

Stats. 1980, ch. 1122, §2, p. 3620 [uncodified], and sections 3335 and 3375 of Title 15 of the CAC.

Section 824 specifies the timekeeping and reporting rules for computation and recording of inmate work including recording excused time off (ETO) in two-hour increments and awarding double time credit for inmate work performed during state holidays (HX). This provision implements, interprets and makes specific Penal Code sections 2933, 5054, and 5968, as well as section 3043 of Title 15 of the CAC.

(Ch. 1000) Section 1021 states that "[i]nmates shall be afforded an opportunity to discuss with the counselor any aspect of the report they question...[and to] prepare a statement...[to be] presented to the Board." This section implements, interprets and makes specific sections 2247, 2249 and 2252 of Title 15 of the CAC.

Section 1023 describes and gives instructions for the preparation of a "life prisoner evaluation report." This section implements Penal Code section 3041.5.

Sections 1041 and 1042 specify the preparation and format of the psychiatric evaluations prepared for consideration of parole for life prisoners. Each of these sections implement and make specific section 2281 of Title 15 of the CAC.

(Ch. 1100) Sections 1143 and 1146 provide for review of a drug addict inmate's case in order to certify the inmate for release or as annual review, respectively. Each of these sections implements and makes specific Welfare and Institutions Code section 3151.

(Ch. 1200) Sections 1201 and 1203 establish the Departmental Review Board as the final authority for appeal of certain decisions of the Classification Committee, and state the criteria by which the Board will determine its jurisdiction to hear the appeal. These provisions implement and make specific section 3375 of Title 15 of the CAC.

(Ch. 2000) Section 2200 specifies criteria which prohibit certain inmates from "off-reservation" work assignments. This provision interprets and makes specific sections 3040 and 3375 of Title 15 of the CAC.

(Ch. 2100) Section 2125 places conditions on certain types of inmate discipline, that is, transfers to other facilities, institutions, segregated housing units, or deten-

tion. This provision implements, interprets and makes specific Penal Code section 5054 and sections 3312, 3314, 3315, 3317, 3322, 3323, 3330 and 3375 of Title 15 of the CAC.

(Ch. 2200) Section 2201 states that assignment into and out of all medical treatment categories shall be through the classification process. It further provides that inmates which are endorsed for any of the specified medical treatment categories shall receive an annual medical evaluation to determine if continued medical placement is appropriate. Section 2220 provides an analogous system for psychiatric treatment. These provisions implement and make specific Penal Code section 5069 and sections 3350 and 3375(c) of Title 15 of the CAC.

(Ch. 2300) Section 2302 defines the term "mental illness" in that it specifies criteria for transfers of Department of Corrections inmates to Department of Mental Health facilities. This provision implements, interprets and makes specific Penal Code sections 2684, 2690, 2960, Welfare and Institutions Code sections 5003.5, 5150 and 7227 and section 3360(c) of Title 15 of the CAC.

Section 2303 provides that if the inmate refuses to waive a due process (Vitek) hearing, that a hearing will be held but that a staff assistant will assist the inmate in presenting his or her case to the hearing officer, and that "[a]ttorney representation of the inmate shall not be permitted." [Emphasis added.] This section implements, interprets, and makes specific all the legal provisions cited in the paragraph above as well as Vitek v. Jones (1980) 100 S.Ct. 1254, 1266-68.

(Ch. 2400) Section 2413 specifies the interrelationship of Youth Authority Rules to Department of Corrections Rules as they apply to Corrections' inmates transferred to Youth Authority facilities. This section implements and interprets Welfare and Institutions Code section 1731.5.

(Ch. 2500) Section 2504, and Exhibit A (to Chapter 2500), set forth a written consent form which must be signed by an inmate before he or she can be transferred to an out-of-state institution. This provision implements Penal Code section 11191.

(Ch. 2600) Section 2643 specifies criteria, in addition to the inmate's classification scores, which would exclude inmates serving a life term from placement in a Level I or Level II institution. This provision interprets and makes specific section 3375 of Title 15 of the CAC.

(Ch. 3000) Section 3018 provides for a lien against future "credits" if the penalty for a rule violation exceeds the amount of credits an inmate has earned which are of the type which are subject to loss. In addition, this section provides for a retroactive adjustment of "credits" in specified circumstances. These provisions implement, interpret and make specific Penal Code sections 2932, 2933, 2934, and 5058; section 3323 of Title 15 of the CAC; and In re Paez (1983) 148 Cal.App.3d 919, 95 Cal.Rptr. 652; In re Ramirez (1980) 109 Cal.App.3d 529, 167 Cal.Rptr. 174.

(Ch. 3100) Section 3123 specifies criteria for substantiation of the need to place an inmate in a Protective Housing Unit and provides for a hearing process by the classification committee as well as emergency approval for this placement. This provision implements Penal Code section 5054 and sections 3335, 3336 and 3375 of Title 15 of the CAC.

Section 3144 and Exhibit "A" to Chapter 3100--"Base Range Guide" specify the method for establishing a determinate term of inmate placement in a Security Housing Unit and terms which must be imposed absent documentation of mitigating or aggravating factors. These provisions implement and make specific Penal Code sections 5054 and 5068, as well as sections 3315, 3338 and 3375 of Title 15 of the CAC.

(Ch. 4000) Section 4012 states criteria for inmate participation in any of several specified apprenticeship building and construction trades programs. This section implements and makes specific section 3040 of Title 15 of the CAC.

(Ch. 4100) Sections 4113, 4123 and 4133 each specify the required course length for several vocational courses, as well as making "a working knowledge of the assigned trade" a prerequisite for maintenance work placement (e.g., plumbing). Specification of required course length serves as a description of the minimum performance standards required of an inmate in order for he or she to receive work/training credits which reduce the prison term. [See paragraphs discussing Chapter 800, above, in this footnote.] Each of these sections implement and make specific section 3040 of Title 15 of the CAC.

(Ch. 4200) Section 4205 specifies criteria for drug addict confinement at a specified branch of the California Rehabilitation Center. This provision implements Welfare and Institutions Code sections 3300 and 3303, and section 5505(c) of Title 15 of the CAC.

(Ch. 4300) Sections 4311 and 4313 each specify the required course length for several vocational courses, as well as making "a working knowledge of the assigned trade" a prerequisite for maintenance work placement (e.g., carpentry). Each of these sections implement and make specific section 3040 of Title 15 of the CAC.

(Ch. 4400) Sections 4413 and 4423 each specify the required course length for several vocational courses, as well as making "a working knowledge of the assigned trade" a prerequisite for maintenance work placement (e.g., electrical). Each of these sections implement and make specific section 3040 of Title 15 of the CAC.

(Ch. 4500) Section 4513 specifies the required course length for several vocational courses. Sections 4513 and 4543 each make "a working knowledge of the assigned trade" a prerequisite for maintenance work placement (e.g., plumbing). Each of these sections implement and make specific section 3040 of Title 15 of the CAC.

(Ch. 4600) Section 4611 specifies criteria which civil addicts must meet prerequisite to obtaining housing or programs at the men's unit of the California Rehabilitation Center. This provision implements and makes specific Welfare and Institution Code sections 3301 and 3303 and section 5505 of Title 15 of the CAC.

(Ch. 4700) Section 4712 specifies the required course length for several vocational courses, as well as making "a working knowledge of the assigned trade" a prerequisite for maintenance work placement (e.g., carpentry). This section implements and makes specific section 3040 of Title 15 of the CAC.

(Ch. 4800) Section 4812 specifies the required course length for several vocational courses, as well as making "a working knowledge of the assigned trade" a prerequisite for maintenance work placement (e.g., painting). This section implements and makes specific section 3040 of Title 15 of the CAC.

(Ch. 4900) Section 4913 specifies the required course length for several vocational courses, as well as making "a working knowledge of the assigned trade" a prerequisite for maintenance work placement (e.g., electrical). This section implements and makes specific section 3040 of Title 15 of the CAC.

(Ch. 5000) Section 5013 specifies that convicted child molesters are barred from participation in the landscape gar-

dening program. This section implements and makes specific Penal Code section 2022 and section 3040 of Title 15 of the CAC.

(Ch. 5100) Section 5113 specifies criteria for inmate participation in the fireman training program. This section implements and makes specific Penal Code section 6206 and section 3040 of Title 15 of the CAC.

(Ch. 5200) Section 5243 specifies criteria for inmate participation in the camp cook program. This section implements and makes specific section 3040 of Title 15 of the CAC.

We note that Classification Manual section 4001 incorporates Administrative Manual section 4000 for purposes of preparing operational plans for each institution in 44 subject areas. Administrative Manual section 4000 in turn incorporates rules found in specified sections of the "Business Administrative Manual," the "Classification Manual," and the "Director's Rules." Classification Manual section 3006 incorporates drug testing methods found in "DAM [Administrative Manual or a different manual] chapter 1350." We also note that section 1206 of Title 15 of the CAC provides for the establishment of a Medical and Mental Health Procedures Manual. Because the question is not properly before us, we express no opinion as to whether or not the above noted material would pass muster under Government Code §11347.5.

Finally, section 1001 specifies that "BPT [Board of Prison Terms'] Rules are [in part] set forth...Administrative Directives issued by the BPT." We express no opinion as to whether or not these "Administrative Directives" would pass muster under Government Code §11347.5; OAL has a pending request for determination regarding AD 86-4.

38. The following provisions of law may also permit agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:
 - a. Rules relating only to the internal management of the state agency. Government Code section 11342(b).
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. Government Code section 11342(b).
 - c. Rules that "establish[] or fix [] rates, prices or tariffs." Government Code section 11343(a)(1).

- d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. Government Code section 11343(a)(3).
- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. Government Code section 11342(b).
- f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party had not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions.

39. Pursuant to Penal Code section 5068, the thrust of the Classification Manual is to set out criteria and procedures for classifying inmates and determining which penal institution inmates are to be housed in. In light of the fact that the internal management exception is limited to policies which affect only employees of the issuing agency (Armistead; Stoneham I), it is apparent that the "Classification Manual" (emphasis added) does not fall within the scope of this narrow exception. The fact that classification policies affecting inmates are carried out by departmental employees in accord with departmental instructions does not mean that such policies are thereby immunized from APA compliance.

This immunization thesis, if accepted, would effectively exempt from APA compliance any policy carried out by any state employee.

notes1-7

3375. General Policy.

(a) All determinations affecting an individual inmate's institution placement, transfer between institutions, participation in available programs, the degree of control and supervision required to maintain custody of the individual, the security of the institution and safety of persons, will be through the inmate classification procedures of the department.

(b) The classification process for felon inmates shall include a standardized classification scoring system wherein specific weight, positive or negative, shall be assigned to selected case factors relating to the inmate's precommitment history, commitment offense, and the term of imprisonment. The factors shall include the inmate's military service, history of employment and education, and documented behavior during previous terms of imprisonment. A lower classification score shall indicate lower security control needs, and a higher score shall indicate a need for greater security control. Higher initial scores shall result from case histories reflecting negative factors, including physically assaultive behavior, drug involvement, escapes, and failure to participate in assigned work, vocational or educational programs during previous terms of imprisonment. Lower initial scores shall result from case histories reflecting fewer negative factors and positive participation in assigned work, vocational or educational programs during previous terms of imprisonment. The device for determining the classification score shall be the CDC Form 839 and the instructions thereto as administratively adopted in June, 1980, as amended July 23, 1984. Form 839 and those parts of said instructions which specify the factors and their related numerical weights to be used in determining the individual classification score and all other regulatory language, which has been underlined, is hereby incorporated into this section by reference.

(c) Each felon inmate's classification score shall be recalculated periodically, but no less often than every 12 months. Additional selected and weighted case factors relating to the inmate's favorable and unfavorable conduct while incarcerated shall be considered in the recalculated classification score shall focus on the inmate's documented behavior. A finding of guilt for any Serious rule violation as described in Section 3315 or failure to participate in assigned work, vocational or educational programs shall result in a score increase. A reduction in score shall result from positive participation in assigned work, vocational or educational programs and the lack of Serious rule violations. The device for determining the recalculated score shall be the CDC Form 840, Reclassification Score Sheet and the instructions thereto as administratively adopted in June, 1980, as amended June 11, 1984. Form 840 and those parts of said instructions which specify the factors and their related numerical weights to be used in determining the individual classification score and all other regulatory language, which has been underlined, is hereby incorporated into this section by reference.

(d) An inmate may be housed in an institution with a different custody level than would ordinarily be required of the inmate's classification score, as an administrative exception when the department's need, the inmate's individual needs, or safety and security requirements are determined to warrant an exception.

(e) The classification process will begin upon the reception of a person committed to the custody of the Director of Corrections and will continue throughout the entire time the individual remains under the jurisdiction of the Director of Corrections.

(f) Reclassification, or reevaluation, will be an ongoing process of reviewing the individual inmate's needs, interests and desires, in keeping with the institution's and the department's responsibilities as to the effect on the individual, other inmates, staff and public safety.

(g) Whenever possible, the inmate will be given written notice sufficiently in advance of a hearing before a classification committee, in order to be reasonably prepared to discuss the purpose, reasons or issues to be considered at the hearing. When it is known or can be anticipated by a classification committee, an inmate appearing before the committee will be informed when he or she will again routinely appear before a classification committee. The inmate will always be given a written statement of the results of any classification committee hearing.

(h) Except as provided in Section 3383, the inmate shall be present at all initial classification committee hearings and at all classification committee hearings which may have an adverse effect upon his or her current conditions of confinement. An inmate will be informed of an initial hearing or of an unscheduled hearing wherein an adverse effect is anticipated at least 72 hours prior to the hearing. Absentia hearings are authorized only under the following circumstances:

- (1) The inmate refuses to appear before the committee.
- (2) The inmate is physically incapable of appearing before the committee, or mentally incompetent to participate and understand the purpose of the hearing as determined by a psychiatrist.
- (3) The predetermined purpose of the hearing is to reduce or remove a restriction upon the inmate.
- (4) The predetermined purpose is to approve an action requested in writing by the inmate.
- (5) The purpose of the hearing is for a routine progress review to determine the need for scheduling a future classification committee action. When an absentia hearing is held for any reason, the fact and the reason will be included in the committee's documentation of the hearing.

(i) When a classification hearing includes the consideration of a newly calculated or recalculated classification score, the inmate shall be provided with a copy of the completed scoring form at least 72 hours in advance of the hearing, as provided in subsection (d) for an adverse hearing. An inmate may contest the classification score in the hearing and may appeal the classification score if dissatisfied with the decisions or recommended actions of the hearing.

NOTE: Authority cited: Section 5058, Penal Code. Reference: Sections 5054 and 5068, Penal Code; Chapter 1122, Section (2)(c), Statutes of 1980; *Wright v. Enomoto* (1976) 462 F Supp. 397; *Stoneham v. Rushen* (1984) 156 Cal. App. 3rd 302.

HISTORY:

1. New Article 10 (Sections 3375-3376) filed 4-18-80; effective thirtieth day thereafter (Register 80, No. 16).
2. Amendment filed 12-9-80 as an emergency; effective upon filing (Register 80, No. 50). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 4-8-81.
3. Order of Repeal of 12-9-80 order filed 12-17-80 by OAL pursuant to Government Code Section 11349.6 (Register 80, No. 51).
4. Amendment of subsection (d) and new subsection (e) filed 8-31-81; effective thirtieth day thereafter (Register 81, No. 36).
5. Amendment filed 12-11-81; effective thirtieth day thereafter (Register 81, No. 50).
6. Amendment of subsections (b) and (c) filed 6-22-84 as an emergency; effective upon filing (Register 84, No. 27).
7. Order of Repeal of 6-22-84 order filed 6-25-84 by OAL pursuant to Government Code Section 11349.6(b) (Register 84, No. 27).
8. Editorial correction of 6-25-84 Order of Repeal filed 7-10-84 (Register 84, No. 27).
9. Amendment of subsections (b) and (c) filed 7-24-84 as an emergency; effective upon filing (Register 84, No. 32). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 11-20-84.
10. Certificate of Compliance including amendment transmitted to OAL 11-20-84 and filed 12-20-84 (Register 84, No. 51). THE STANDARDIZED SCORING SHEETS AND INSTRUCTIONS REGARDING THE CLASSIFICATION AND RECLASSIFICATION OF PRISONERS ARE PRINTED IN FULL IN NOTICE REGISTER 85, NO. 5-Z (PUBLICATION DATE: 2-1-85).
11. Editorial correction of HISTORY NOTE No. 10 (Register 85, No. 7).

NOTICE OF CRITICAL CASE INFORMATION—SAFETY OF PERSONS

This notice is to alert staff to information in subject's case record that is or may be critical to the safety of persons. References given must be considered in the classification, placement, transfer, assignment, or supervision of subject. Information/document in the file must support notations.

This form is a nonconfidential document. Do not enter confidential information on the form. Reference or should be given to confidential information/document.

(Ref: Classification Manual, chapter 300)

ENEMIES

None known

NAME	CDC No.	LAST KNOWN LOCATION OF ENEMIES	LOCATION OR IDENTITY OF SUPPORTING DOCUMENTS	STAFF PERSON MAKING ENTR
				NAME TITLE INST-REGION

GANG AFFILIATIONS

None known

GROUP	MEMBER	ASSOCIATE	SUSPECT	LOCATION OR IDENTITY OF SUPPORTING DOCUMENTS	STAFF PERSON MAKING ENTR
					NAME TITLE INST-REGION

ASSAULTS ON OTHERS

None known

VICTIM	CDC No.	LAST KNOWN LOCATION OF VICTIMS	LOCATION OR IDENTITY OF SUPPORTING DOCUMENTS	STAFF PERSON MAKING ENTR
				NAME TITLE INST-REGION

VICTIM OR ASSAULT

None known

ASSAILANTS	CDC No.	LAST KNOWN LOCATION OF ASSAILANTS	LOCATION OR IDENTITY OF SUPPORTING DOCUMENTS	STAFF PERSON MAKING ENTR
				NAME TITLE INST-REGION

CONTINUED ON REVERSE SIDE

NAME

NUMBER

APPENDIX "B"

NOTICE OF CRITICAL INFORMATION – PRISON GANG IDENTIFICATION

This notice is to alert staff to information in subject's case record that is verification of his involvement in prison gang activity. References must be considered in classification, placement, transfer, assignment, and supervision of inmate. Information/documents in the file must support notations.

This form is a non-confidential document. Do not enter confidential information on the form. Reference only should be given to confidential information/document.

(Reference Classification Manual, Chapter 300)

GROUP AFFILIATION: _____

SUSPECT: _____ ASSOCIATE: _____ MEMBER: _____ DEFECTOR: _____ OTHER: _____

METHOD OF IDENTIFICATION:

A. SELF ADMISSION: _____

B. TATTOOS AND SYMBOLS: _____

C. WRITTEN MATERIAL: _____

D. GROUP PHOTOS: _____

E. STAFF INFORMATION: _____

F. OTHER AGENCIES: _____

G. ASSOCIATION: _____

H. INMATE INFORMANT: _____ (Reliability must be spelled out)

I. COMMITMENT OFFENSE: _____ (Gang related)

J. LEGAL DOCUMENTS: _____

K. COMMUNICATIONS: _____ (Mail)

L. VISITORS: _____

NAME: _____ NO. _____