

MAR 4 1987

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

At 4:47 o'clock P.M.
MARCH FONG EU, Secretary of State
By *[Signature]*
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')
Classification Manual /1)
)
) Determination Pursuant to
) Government Code section
) 11347.5; Title 1,
) California Administrative
) Code, Chapter 1, Article 2

Determination by:

[Signature]
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.]/25

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 sub-division (b) of Section 11342." [Emphasis added.]

2. OAL's Final Statement of Reasons for section 121(c) (the definition of "state agency rule") reveals/27 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

