

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

STANDARD TIME

In re:

Request for Regulatory)	1998 OAL Determination No. 8
Determination filed by)	
RICHARD C. BUCHANAN)	[Docket No. 91-003]
regarding DEPARTMENT OF)	
CORRECTIONS Case Records)	July 27, 1998
Manual section 2008(c)--)	
requiring reporting of)	Determination Pursuant to
inmate relationships,)	Government Code Section
behavior, cleanliness, attitude)	11340.5; Title 1, California
and personality on CDC)	Code of Regulations,
Form 128-B ¹)	Chapter 1, Article 3
_____)	

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether manual provisions requiring officers: (1) to report inmate relationships, behavior, cleanliness, attitude and personality; and (2) to use a particular departmental form are "regulations" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

OAL has concluded that:

- (1) the form itself is not a "regulation"--it contains no substantive rules, no standards of general application;

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- (2) The requirement that this particular form and no other recording medium be used is a "regulation," but falls in the internal management exception.
- (3) The requirement that officers (a) report inmate relationships, behavior, cleanliness, attitude and personality, and (b) use this particular form to record these observations is a "regulation." However, except to the extent that the duly recorded observations significantly affect inmates, such as by impacting parole, classification, or discipline, this "regulation" is exempt from the APA because it falls within the "internal management" exception.

Beginning in 1987, the Department adopted, pursuant to the APA, at least a dozen regulations which require use of the form.² For instance, one CCR provision³ requires documentation on the form when denying a request that an inmate be released⁴ due to terminal illness; the form must also be countersigned by the warden or chief deputy warden within three working days of receipt.

ISSUE

OAL has been requested to determine whether Case Records Manual section 2008(c)--requiring use of CDC Form 128-B to report inmate relationships, behavior, cleanliness, attitude and personality, is a "regulation" required to be adopted pursuant to the APA.⁵

ANALYSIS

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

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

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

Clearly, the APA generally applies to the Department's quasi-legislative enactments.⁶

II. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

". . . every rule, regulation, order, or standard of general application *or* the amendment, supplement or revision of any 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 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

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

In *Grier v. Kizer*,⁷ the California Court of Appeal upheld OAL's two-part test⁸ as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

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

Second, has the challenged rule been adopted by the agency to either:

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

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is *not* a "regulation" and *not* subject to the APA. In applying the two-part test, however, we are mindful of the admonition of the *Grier* court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]"⁹

Background of the challenged rule

For many years, the Department of Corrections maintained a "family of manuals," including the Classification Manual and the Case Records Manual. These manuals contained most of the statewide rules governing prison administration. In 1990, these individually titled manuals were replaced by a nine-volume compendium entitled the "Department of Corrections Operations Manual" (also known as the Department Operations Manual or most commonly by the acronym "DOM"). Volume seven of DOM concerns "Case Records Information."

A number of judicial decisions and OAL determinations have found that various manuals and manual provisions violated the statutory prohibition against agency use of "underground regulations," Government Code section 11340.5. In 1982, the California Court of Appeal struck down Forms 839 and 840, which had been issued as part of an administrative bulletin for inclusion in the Classification Manual.¹⁰ In 1986, OAL determined that the Classification Manual violated Government Code section 11340.5. In 1989, OAL determined that the Case Records Manual violated Government Code section 11340.5.¹¹ In 1991, the California Court of Appeal ordered the Department to cease enforcement of the regulatory portions of DOM.¹² In this latter case, the Department had conceded that "much" of DOM violated the APA; the court found that "a substantial part" was regulatory.

Following these judicial decisions and OAL determinations, the Department formally adopted pursuant to the APA and printed in the California Code of Regulations, many rules that had previously been found solely in manuals.

This request for determination concerns one sentence from the Case Records Manual. The challenged manual provision (section 2008 (c) of the Department of Corrections Case Records Manual) states in full:

“The housing officers shall use the CDC Form 128-B to report such items as the inmate’s relationship with fellow inmates, his behavior, personal cleanliness and his general attitude and personality.”

For purposes of analysis, this provision may be divided into three components: (1) the CDC Form 128-B; (2) the requirement that this particular form and no other recording medium be used; and (3) the requirement that officers (a) report inmate relationships, behavior, cleanliness, attitude and personality and (b) use this particular form to record these observations.

Technically, the Case Records Manual has been superseded by Volume seven of DOM (“Case Records Information”). However, the challenged Case Records Manual provision has been continued in nearly identical language in DOM.¹³ Though the manual containing the sentence has been superseded, the sentence itself has not been rescinded, rather it has merely been relocated.¹⁴

A. IS THE CHALLENGED RULE A “STANDARD OF GENERAL APPLICATION?”

As noted above, the challenged provision of the Case Records Manual may be divided into three components.

(1) CDC Form 128-B

The first component is the CDC Form 128-B itself. The form is referred to either by its number or as the “General Chrono.”¹⁵ The form is printed on an 8 ½ by 11 inch sheet of paper, divided into three equal parts, so that three forms appear on each sheet. A sample copy of Form 128-B appears as Appendix “A,” following the endnotes.

The form is basically a blank space in which dated notations concerning specifically identified inmates are to be typed. The form by itself is innocuous; it contains no substantive rules. OAL concludes that the form, viewed in isolation, is not a standard of general application. Thus, component one of the challenged provision is not a "regulation" subject to the APA.

(2) The requirement that this particular form and no other recording medium be used.

All departmental housing officers are required to use Form 128-B. This requirement applies statewide to all housing officers, and thus to all inmates that are housed in departmental facilities. OAL therefore concludes that component two of the challenged rule is a standard of general application, thus satisfying the first element of the two-part test.

(3) The requirement that officers (a) report inmate relationships, behavior, cleanliness, attitude and personality and (b) use this particular form to record these observations.

Though the provision itself is not entirely clear, the context and the agency response indicate that it should be understood to require all departmental housing officers to report specified behavior by inmates on Form 128-B. The provision applies statewide to all housing officers, and thus to all inmates that are housed in departmental facilities.

OAL therefore concludes that component three of the challenged rule is a standard of general application, thus satisfying the first element of the two-part test.

B. DO COMPONENTS TWO AND THREE OF THE CHALLENGED RULE INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

Penal Code section 5058, subdivision (a) declares:

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

Penal Code section 5054 declares:

"The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director [of the Department of Corrections]"

Penal Code section 2081.5 provides in part:

"The Director of Corrections shall keep complete *case records* of all prisoners under custody of the department, which records shall be made available to the Board of Prison Terms. . . .

"Case records shall . . . include a record of the diagnostic findings, considerations, actions and dispositions with respect to *classification*, treatment, employment, training, and *discipline* as related to the institutional correctional program followed for each prisoner." (Emphasis added.)

According to the California Court of Appeal in *Stoneham v. Rushen*:¹⁶

"Upon arrival at a state prison facility, an inmate is required to undergo an examination of his personal background which thereafter serves as a basis of the Director's decision to 'classify [the prisoner] and determine the prison in which the [prisoner] shall be confined. ([Penal Code] Section 5068.) The prisoner may also undergo reexaminations to determine whether existing orders should be modified. (Section 5068.)"

Pursuant to Title 15, CCR, sections 3375-3379, a numerical score is developed for both new and previously classified inmates. That score is used by the Department not only to determine the proper level of custody and place of confinement, but also for planning and budgeting purposes.¹⁷

The second and third components of the challenged provision of the Case Records Manual implement, interpret, and make specific Penal Code sections 5058, 5054, 2081.5, and 5068. For instance, Penal Code section 2081.5 requires complete "case records." Since the challenged provision is part of the former Case Records Manual and details how to prepare a particular type of inmate record, the provision clearly implements the statutory mandate that case records be

maintained. Completed versions of Form 128-B comprise one part of an elaborate system in which records are created, routed, and placed in the central file maintained for each inmate. There are a series of forms bearing numbers and letters. Many of these forms have been adopted pursuant to the APA; many are in fact printed in the CCR, such as CDC Form 812-A "Notice of Critical Information--Prison Gang Identification," which is printed in the CCR as part of Title 15, section 3378.

The Departmental Operations Manual specifies that Form 128-B "shall be used by staff when the subject matter to be reported involves matters of *classification*, *parole*, or social service." (Emphasis added.)¹⁸

Not only are components two and three of challenged provision standards of general application, they also implement, interpret, and make specific the laws enforced by the Department, notably those laws concerning maintenance of records for purposes of classification and parole. Penal Code section 2081.5 requires the Department to maintain case records for use in the parole decision-making process of the Board of Prison Terms, commonly known as "the parole board."

OAL thus concludes that components two and three of the challenged provision are "regulations" within the meaning of Government Code section 11342.

III. DO THE COMPONENTS OF THE CHALLENGED RULE FOUND TO BE "REGULATIONS" FALL WITHIN ANY *SPECIAL EXPRESS* STATUTORY EXEMPTION FROM APA REQUIREMENTS?

After this request was filed, the Department's enabling act was amended to include several express exemptions from APA rulemaking requirements (Penal Code section 5058, subdivisions (c) and (d)).¹⁹ OAL is obliged to consider both the state of the law at the time the request was filed, and the state of the law as of the date this determination is issued.²⁰

Since the above-noted enabling act provisions were not in force when the request was filed, they will not be considered in applying the law in effect at that earlier time. However, OAL will consider the applicability of these special exemptions in reviewing the law in effect on the date this determination is issued.

In its response, the Department does not contend that any of these special exemptions apply. OAL concurs. None of these special exemptions applies here.

IV. DO THE COMPONENTS OF THE CHALLENGED RULE FOUND TO BE "REGULATIONS" FALL WITHIN ANY *GENERAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.²¹ Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.²² The Department argues that the challenged rule falls within both the general exception concerning "internal management" and the general exception concerning forms.

INTERNAL MANAGEMENT

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

""Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, *except one that relates only to the internal management of the state agency.*" (Emphasis added.)

Grier v. Kizer provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (b), the *Grier* court states:

"*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to

all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes. . . .*' [Fn. omitted.] . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.][²³]

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,] and embodied 'a rule of general application significantly affecting the male prison population' in its custody. . . .

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception. . . ." ²⁴

Component Two

OAL will first discuss component two, the requirement that this particular form (CDC 128-B) and no other recording medium be used. OAL agrees with the Department that this component of the challenged rule falls within the internal management exception. OAL concludes that this requirement relates solely to the management of the internal affairs of the Department itself.

Component Three

Component three is more complex. This component requires that officers (a) report inmate relationships, behavior, cleanliness, attitude and personality and (b) use this particular form to record these observations. According to the California Court of Appeal, as noted above, the key consideration in evaluating contentions that prison rules fall within the internal management exception is whether the rule significantly affects the inmates.

In a public comment, M. Allen Hopper, Attorney at Law, stated that component two does significantly affect inmates:

“To the extent, if any, that 128(b) forms are used in support of prison gang validation packages, which can and do result in prisoners receiving indeterminate, and often very lengthy, sentences of confinement in the Segregated Housing Unit (SHU), the 128(b) forms and procedures are significant because they have clearly profound impact upon prisoners. As such, the CDC Case Records Manual section 2008(c) should be subjected to the notice and comment requirements pertaining to ‘regulations’ as defined by Government Code section 11342.” (Emphasis added.)

The Department did not reply to this contention in its response.

However, existing departmental regulations in the CCR indicate that the CDC 128-B reporting procedures are used in the process of confirming prison gang affiliations. For instance, Title 15, CCR, section 3378 (a) (“Documentation of Critical Case Information”) states in part:

“Any information regarding an inmate/parolee which is or may be critical to the safety of persons inside or outside an institution shall be documented as required below on a CDC Form 812”

CDC Form 812-A, which is part of section 3378, states in part:

“A CDC 128-B which delineates gang activity/association shall be completed per the CDC Operations Manual.” (Emphasis added.)

Thus, it appears that completion of a Form 128-B can be part of the process that leads officials to conclude that a particular inmate is linked to a prison gang, a conclusion that significantly affects the inmate's classification, housing, program options, etc. The challenged provision mandates use of CDC Form 128-B to report "such items as the inmate's relationship with fellow inmates" Gang associations would appear to fall under the heading of "relationship with fellow inmates."

Though the agency response did not address the "prison gang validation package" issue raised by the public comment, it does shed light on whether component two significantly affects inmates. The agency response states:

"In the present case, the staff were merely being instructed to use CDC Form 128-B to document such things as the inmate's relationship to others, his behavior, attitude, etc. This information is necessary for the safety and security of staff and inmates alike. An aggressive, hostile inmate should not be housed with an equally aggressive inmate; inmates who have openly hostile attitudes toward members of a certain race should not be housed in the same cell with an inmate of that race, and observation of an inmate's personal cleanliness is necessary because a sudden change in personal hygiene habits can be attributed to the onset of mental illness or an indication of other problems." (Emphasis added.)²⁵

The Department's response suggests that the challenged provision significantly affects inmates. First, the Department states that documenting inmate behavior, etc., is necessary for the safety of inmates and staff.²⁶ Safety is a significant concern. Second, the Department states that completed forms can be helpful in identifying the onset of mental illness. This statement supports the conclusion that completed forms will in some instances significantly affect the inmates. One may infer that psychiatric diagnoses may be based in part on information contained in completed forms.

OAL concludes that component three of the challenged provision falls within the internal management exception, insofar as it relates solely to the management of the internal affairs of the Department. However, component three does not fall within the internal management exception insofar as it significantly impacts inmates, such as in classification, parole, disciplinary, and medical treatment matters.

FORMS

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

“‘Regulation’ does not mean . . . *any form* prescribed by a state agency or any instructions relating to the use of the form, *but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.*” [Emphasis added.]²⁷

This statutory provision contains a significant restriction on the use of the “form” exception. The limits to the “form” exception have been covered in a previous determination:

“According to the leading case, *Stoneham v. Rushen*, the language quoted directly above creates a ‘statutory exemption relating to *operational forms.*’ (Emphasis added.)²⁸ An example of an operational form would be as follows: a form which simply provides an operationally convenient space in which, for example, applicants for licenses can write down information that existing provisions of law already require them to furnish to the agency, such as the name of the applicant.”

“By contrast, if an agency form goes beyond *existing legal requirements*, then, under Government Code section 11342, subdivision (b), a formal regulation is ‘*needed to implement the law under which the form is issued.*’ For example, a hypothetical licensing agency form might require applicants to fill in marital status, race, and religion--when none of these items of information was required by existing law. The hypothetical licensing agency would be making new law: i.e., ‘no application for a license will be approved unless the applicant completes our application form, i.e., furnishes his or her name, marital status, race, and religion.’ [Emphasis added.]”

“In other words, according to the *Stoneham* Court, if a form contains ‘uniform substantive’ rules which are used to implement a statute, those rules must be promulgated in compliance with the APA. On the other hand, a ‘regulation is *not* needed to implement the law under which the form is issued’ (emphasis added) insofar as the form in question is a simple operational form limited in scope to *existing* legal requirements.”

“In sharp contrast, the Agency Response reads section 11342 as exempting from the APA ‘any’ form prescribed by a state agency. This reading of section 11342 is too broad.”

“An interpretation of the forms language in section 11342 which permits agencies to avoid APA rulemaking requirements by the simple expedient of typing regulatory material into a form would lead to absurd consequences. There would be no limit to the degree to which agencies would be able to avoid public notice and comment, OAL review, and publication in the California Code of Regulations. Read in context, and in light of the authoritative interpretation rendered by the *Stoneham* Court, section 11342 cannot be reasonably interpreted in the broad fashion proposed by the Agency Response. (Endnote: [It is not plausible] that the *Armistead* Court would have reached a different conclusion and *upheld* the employee resignation rule involved in that case if the Personnel Board had simply thought to incorporate the rule in a form or form instruction.)”²⁹

OAL has previously concluded that Form 128-B, viewed in isolation, fails to satisfy the first prong of the two-part “regulation” test because it contains no standards of general application. The form by itself was component one of the challenged provision.

OAL has previously concluded that component two fell within the internal management exception. Component two was the requirement that this particular form and no other recording medium be used.

Although Form 128-B is involved in component three, the reporting requirement that is the heart of component three is not contained in the form or its instructions (strictly speaking, no instructions are printed as part of the form). Assuming that the reporting requirement found in the challenged Case Records Manual provision may be correctly characterized as a form instruction, this requirement nonetheless falls outside the forms exception because it constitutes a uniform, substantive rule.

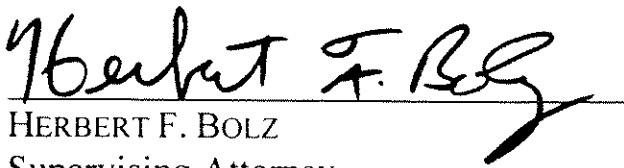
Thus, OAL concludes that component three does not fall within the forms exception.

CONCLUSION

For the reasons set forth above, OAL finds that:

- 1) the form itself is not a "regulation"--it contains no substantive rules, no standards of general application;
- (2) The requirement that this particular form and no other recording medium be used is a "regulation," but falls in the internal management exception.
- (3) The requirement that officers (a) report inmate relationships, behavior, cleanliness, attitude and personality, and (b) use this particular form to record these observations is a "regulation." However, except to the extent that the duly recorded observations significantly affect inmates, such as by impacting parole, classification, or discipline, this "regulation" is exempt from the APA because it falls within the "internal management" exception.

DATE: July 27, 1998


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ENDNOTES

1. This Request for Determination was filed by Richard C. Buchanan, an inmate at Pelican Bay State Prison. The Department of Corrections was represented by Peggy McHenry of the Regulations and Policy Management Branch, 1515 "S" Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001, (916) 358-2458.
2. Form 128-B is referred to in the following sections in Title 15 of the California Code of Regulations: 3040(e); 3041.2(d)(2); 3044(b)(1); 3075(d); 3076.2(a)(5) & (b)(3); 3084.7(f)(1)(A-B); 3162(b); 3317; 3326(b) & (d); 3378(b)(2); 3999.1.1 (p. 188.49 Attachment "E", p. 188.41, p. 188.42, p. 188.45 Attachment "C"); 3999.1.2 (p. 188.54).
3. Title 15, CCR, section 3076.2(a)(5).
4. More precisely, the Department recommends to the sentencing court that the inmate's commitment be recalled, i.e., that the inmate be released.
5. According to Government Code section 11370:

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

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.
6. For a detailed description of the APA and the Department of Corrections' history, three-tier regulatory scheme, and the line of demarcation between (1) statewide and (2) institutional, e.g., "local rules," see **1992 OAL Determination No. 2** (Department of Corrections, March 2, 1992, Docket No. 90-011), California Regulatory Notice Register 92, No. 13-Z, March 27, 1992, p. 40.
7. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v.*

State Personnel Board (1978) 22 Cal.3d 200, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

8. The *Grier* Court stated:

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

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was belatedly published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

9. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

10. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr.130.

11. **1989 OAL Determination No. 3** (Department of Corrections, February 21, 1989, Docket No. 88-05), California Regulatory Notice Register 89, No. 9-Z, March 3, March 1889, p. 556 (dealt with Case Records Manual chapters 100-1900). **1988 OAL Determination No. 19** (Department of Corrections, Nov. 18, 1988, Docket No.87-026), California Regulatory Notice Register 88, No. 49-Z, Dec. 2, 1988, p. 3950 (dealt with Case Records Manual sections 1002 and 1053, finding that one violated the APA while the other did not).

12. *Tooma v. Rowland* (Sep. 9. 1991) California Court of Appeal, Fifth Appellate District, FO15383 (granting writ of mandate ordering Director of Corrections "to cease enforcement of those portions of the Department Operations Manual that require compliance with the Administrative Procedure Act pending proof of satisfactory compliance with the provisions of the Act," typed opinion, pp. 3-4).

13. The DOM version of this provision replaces "items" with "information." OAL will address the Case Records Manual version, since the request was directed at that version

14. The sentence, along with the surrounding part of the former Case Records Manual, now appears in DOM as bullet number four in section 72010.7.2 ("CDC Form 128-B, General Chrono"). DOM section 72010.7.2 begins with this sentence, apparently carried over from the Case Records Manual:

"The CDC Form 128-B (canary yellow in color) shall be used by staff when the subject matter to be reported involves matters of classification, parole, or social service."
15. The phrase "General Chrono" is used in Title 15, California Code of Regulations ("CCR"), section 3378(b) and in the Department's response to the request for determination. In Title 15, CCR, section 3326(b), by contrast, Form 128-B is referred to as the "Informative Chrono."
16. (1982) 137 Cal.App.3d 729, 731, 188 Cal.Rptr. 130, 131.
17. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr.130, 132.
18. DOM section 72010.7.2
19. All state agency "regulations" are subject to the APA unless expressly exempted by statute. Government Code section 11346. Express statutory APA exemptions may be divided into two categories: special and general. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120,126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself). *Special* express statutory exemptions, such as Penal Code section 5058, subdivision (d)(1), which exempts Corrections' pilot programs under specified conditions, typically: (1) apply only to a portion of one agency's "regulations" and (2) are found in that agency's enabling act. *General* express statutory exemptions, such as Government Code section 11342, subdivision (g), part of which exempts internal management regulations from the APA, typically apply across the board to all state agencies and are found in the APA.
20. **1998 OAL Determination No. 7** (Department of Social Services, Docket No. 91-011, June 18, 1998), typewritten version, p. 9, California Regulatory Notice Register 98, No. 30-Z, July 24, 1998, p. 1400.
21. Government Code section 11346.
22. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)

- 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. (Gov. Code, sec.11342, subd. (g).)
- c. Rules that "[establish] or [fix], *rates, prices, or tariffs.*" (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)
- f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *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). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the idea that *City of San Joaquin* (cited above) was still good law.

- 23. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, fn. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
- 24. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.
- 25. Agency response, pp. 1-2.
- 26. OAL will thus assume for purposes of analysis that the manual provision directs officers to observe and document the specified items, and to document them on Form 128-B.

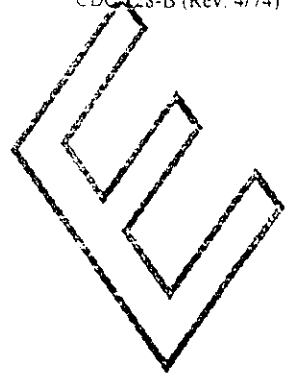
The Department has not cited and OAL has not located a CCR provision or statute that directs officers to report the above noted information. To an extent, existing law would appear to mandate some degree of observing and reporting. For instance, Title 15, CCR, section 3061 states in part that inmates "must keep themselves clean." By inference, officers would be expected to observe and report problems with personal cleanliness.

- 27. Government Code section 11342, subdivision (g).
- 28. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.

29. **1993 OAL Determination No. 5.** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register (CRNR) 94, Volume 2-Z, January 14, 1994, p.61 at 105; typewritten version at p. 266.

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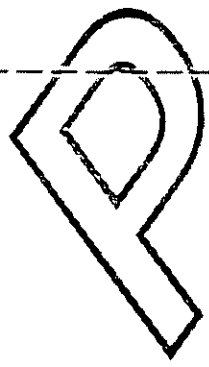


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GENERAL CHRONO

NAME and NUMBER

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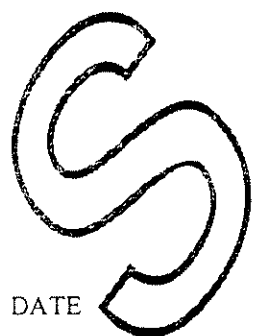
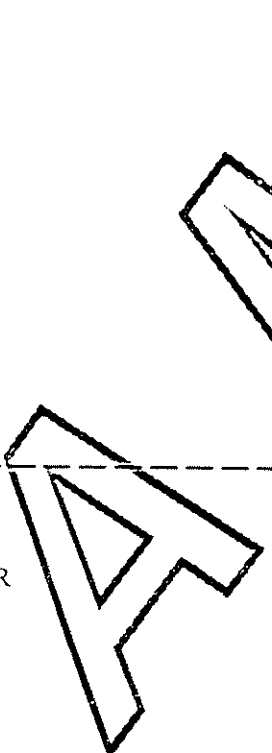


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