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BILL JONES
SECRETARY OF STATE

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2000 OAL Determination No. 8

April 20, 2000

Requested by: **DAVID WILLIAM FINNEY**

Concerning: **BOARD OF PRISON TERMS --Various Administrative Directives**

Determination issued pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3

ISSUE

The Office of Administrative Law ("OAL") has been requested by David William Finney to determine whether various administrative directives issued by the Board of Prison Terms ("Board") are "regulations" as defined in Government Code section 11342, subdivision (g), and therefore invalid unless adopted as regulations and filed with the Secretary of State in accordance with rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with section 11340), Division 3, Title 2, Government Code; hereafter, "APA").[1]

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1. This request for determination was filed by David William Finney, B-62624, P.O. Box 7500, Crescent City, Ca. 95532-7500. The Board of Prison Terms' response was filed by James W. Nielsen, Chairman, 428 J Street, 6th Floor, Sacramento, Ca. 95814, (916) 445-4072. This request was given a file number of 99-010. Of the 28 administrative directives of the board challenged by Mr. Finney, all but six have been formally rescinded by the Board, and consistent with Mr. Finney's wishes, are not addressed in this determination. Those rescinded directives were nos. 77/23, 78/7, 79/3, 80/11, 80/15, 82/8, 82/12, 82/17, 83/2-A, 83/3, 83/6, 84/1, 84/2, 84/3, 85/3, 85/6, 85/8, 85/9, 86/4, 87/1, 87/2, 87/3. This determination may be cited as "**2000 OAL Determination No. 8.**"

CONCLUSION

The policies established by the Board of Prison Terms in those administrative directives, except those which restate existing law or are matters of internal management, are invalid unless adopted as regulations pursuant to the APA.

ANALYSIS

Background of the Board

Prior to July 1, 1977, sentencing was governed by the Indeterminate Sentencing Law ("ISL"). Under it, "[c]ourts did not specify a definite term of imprisonment."[2] That was the responsibility of Adult Authority, the predecessor agency to the Board of Prison Terms.[3] Effective July 1, 1977, the ISL was replaced by the Uniform Determinate Sentencing Act (Determinate Sentencing Law or "DSL").[4] The DSL reflected a substantial change in the statutory scheme governing imprisonment in California. The Legislature declared that the purpose of imprisonment was now punishment rather than social rehabilitation. Whereas the length of sentences served before parole had previously been based upon the Adult Authority's judgment of the adjustment and social rehabilitation of the individual under the ISL, after July 1, 1977 the length of time served prior to parole would be based upon a framework of uniform terms for similar offenses. The Board (as the Adult Authority's successor) was authorized to establish guidelines for the setting of parole release dates with less discretion to deviate from the guidelines that existed under the ISL.

Applicability of the APA to Board Directives

A determination of whether the Board's administrative directives are "regulations" subject to the APA depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the board, (2) whether the challenged standards contain "regulations" within the meaning of Government Code section 11342, and (3) whether those challenged standards fall within any recognized exemption from APA requirements.

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2. In re Monigold (1983) 139 Cal.App.3d 485, 489, 188 Cal.Rptr. 698, 701.

3. See In re Stanworth (1982) 33 Cal.3d 176, 182, 187 Cal.Rptr. 783, 786.

4. Stats 1976, ch. 1139.

(1) As a general matter, all state agencies in the executive branch of government, which are not expressly exempted, are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Government Code sections 11342, subdivision (a); 11346.) In this connection, the term "state agency" includes, for purposes applicable to the APA, "every state office, officer, department, division, bureau, board, and commission." (Government Code section 11000.) The Board is an executive branch state agency that has not been expressly exempted.

In addition, Penal Code section 5076.2, subdivision (a), provides in part:

> "Any rules and regulations, including any resolutions and **policy statements**, promulgated by the Board of Prison Terms, *shall be promulgated and filed pursuant to* [the APA] . . . ." (Emphasis added.)

Thus, OAL concludes that APA rulemaking requirements generally apply to the Board. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).)

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

> ". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. . . . [Emphasis added.]"

Government Code section 11340.5, subdivision (b), authorizes OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements. It provides as follows:

> "If [OAL] is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general

application, or other rule, is a regulation as defined in subdivision (g) of Section 11342."[5]

In *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251[6] the California Court of Appeal upheld OAL's two-part test[7] as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g).

Under this test, a rule is a "regulation" for these purposes if (1) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (2) the challenged rule was 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 satisfies both parts of the two-part test, it is a "regulation" subject to the APA. In applying the two-part test, we are mindful of the admonition of the *Grier* court:

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5. See also *California Coastal Com'n v. OAL* (1989) 210 Cal.App.3d 758, 763, 258 Cal.Rptr. 560, 563 (OAL is empowered "to issue advisory opinions as to whether or not a particular action or rule is a regulation.")

6. OAL notes 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, 59 Cal.Rprt.2d 186, 198. Grier, however, is still good law, except as specified by the *Tidewater* court. *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.*

7. 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 or administered by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, . . . slip op'n., at p. 8.) [*Grier*, disapproved on other grounds in *Tidewater*]."

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, . . . 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.]" (219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.)

For an agency policy to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).)

A review of the policies in question clearly indicates that they are standards of general application. All of the directives either pertain to or govern the administration of prisoner parole or sentencing on a statewide basis.

The challenged administrative directives cover a wide variety of subjects. Each must be individually analyzed to determine whether it contains "policies" or "regulations" that implement, interpret, or make specific the law enforced or administered by the Board or govern the Board's procedure.

(A) Administrative Directive No. 81/4

Penal Code section 1170.2, subdivision (b) permits the Board to extend the term of an ISL prisoner if certain aggravating circumstances are associated with his crime. Two Board commissioners are required to make such a determination. The prisoner is then entitled to receive notice and a hearing before a panel consisting of at least two Board commissioners. The hearing must be held within 120 days "*of receipt of the prisoner. . . .*"[8]

Directive No. 81/4 addresses situations where the court issues an amended abstract of judgment altering the prisoner's sentence. It provides that the 120 days for such a hearing "*runs from the date of receipt of the abstract.*" In addition, if the amended abstract is believed to be incorrect, the Board will still go forward with the hearing even if the problem has not been rectified with the court in the interim.

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8. Penal Code section 1170.2, subdivision (b).

If the court does not respond to the Board's inquiry or correct the problem until *after* the hearing, then "[a]ny problems with the extended term hearing decision resulting from the court's subsequent response can be handled through the administrative appeals process."[9]

Directive No. 81/4 clearly implements and makes specific the requirements of Penal Code section 1170.2, subdivision (b). It appears to set additional time limits for situations not specifically addressed in this statute. It creates special procedures for situations involving amended abstracts of judgment or abstracts which are suspected to be in error. For these reasons, Directive No. 81/4 is a "regulation" which should be adopted pursuant to the APA.

(B) Administrative Directive No. 82/15

Penal Code 3000, subdivision (a), provides that "[a] sentence . . . shall include a period of parole, unless waived . . . ." The Board is further given the authority to waive parole "for good cause."[10] Directive No. 82/15 sets forth the procedures the Board follows in determining whether to waive parole. For instance, it states as follows:

> "Prisoners subject to this review have no independent right to be considered for discharge. The review is conducted on behalf of the Board for its own benefit and, therefore, is distinguished from the discharge review established by BPT § 2535. A prisoner may not file an appeal on the basis that parole was not waived in his/her case."[11]

The directive also establishes both the timing and the criteria which govern this review. It gives a lengthy list of offenses which automatically disqualify the prisoner from eligibility for waiver of parole. Also disqualified are persons whose current offense was committed while on parole and prisoners "serving a current sentence for three or more felony offenses."[12]

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9. Directive No. 81/4.

10. Penal Code section 3000, subdivision (b)(1).

11. Directive No. 82/15, p. 1.

12. *Id.* at 1 – 2.

The directive then sets out screening procedures to be used in determining which cases it will review. After these cases are screened out, review is conducted and the Board is to make a decision based on "the nature and circumstances of the commitment offense(s), the prisoner's personal and criminal history, conduct in prison and parole plans." The directive also lists a number of guidelines falling under two broad categories: 1) "Current Commitment Offense;" and 2) "Postconviction Factors."[13]

One of the Board's regulations found in Section 2514 of Title 15 of the CCR is entitled "Waiver of Parole." The text of this regulation reads in its entirety as follows.

> "The board may, for good cause, waive parole and discharge any prisoner. An 1170 prisoner [under determinate sentencing] or the department may request waiver of parole under the procedures of Sections 2525 – 2526.
>
> A prisoner whose parole date was set by the board and who desires a waiver shall request a waiver of parole to the hearing panel at the time of the board action setting or modifying the parole date."

Noticeably missing from this regulation are the *criteria* the Board will use for determining eligibility. Those have been supplied by Directive No. 82/15. Directive No. 82/15 thus adds detailed procedures not found in either the Board's enabling legislation or its regulations. For these reasons, Directive No. 82/15 "implements" or "makes specific" existing law and is a "regulation" as that term is defined in Government Code section 11342, subdivision (g).

(C) Administrative Directive No. 85/1

Directive No. 85/1 addresses the problem of possible readjustment of the timing of parole consideration hearings when there has been a change in the prisoner's minimum eligible parole date ("MEPD"). Normally, a parole consideration hearing must be held approximately one year before the prisoner's MEPD.[14]

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13. *Id.* at 2 – 4.

14. See Penal Code section 3041. Directive No. 85/1 states that such hearings are to be held in the "thirteenth month prior to the prisoner's MEPD."

According to the Board, however, the MEPD can fluctuate or "float" depending on credits earned or lost by the prisoner in the interim. Thus, the hearing date should be moved back or forward accordingly.

Directive No. 85/1 created an exception to this procedure. It reads as follows:

> "The Board of Prison Terms has approved the policy that any changes in a prisoner's MEPD, which occur *within six months of his scheduled hearing date*, will not change the scheduled hearing date. This will mean, in some cases, that the Board of Prison Terms will not be holding the initial parole consideration hearing during the thirteenth month prior to the MEPD of a prisoner." [Emphasis added.]

This rule clearly has an impact on the timing of the prisoner's parole consideration hearing. To use an example which is somewhat the opposite of the one in the directive, assume a prisoner has a February 1, 2002 MEPD. His initial parole hearing is scheduled for January 2001. In September 2000, he receives three months *credit*. This advances his MEPD to November 1, 2001. Accordingly, his hearing date of January 2001 should be moved forward to October 2000. Under Directive No. 85/1, the hearing would still be held in January 2001 because the MEPD was changed within six months of the hearing date.

Directive No. 85/1 thus clearly appears to make specific or implement the current statutory and regulatory requirements concerning the timing of parole consideration hearing and as such is a "regulation."

(D) Administrative Directive No. 85/2

Directive No. 85/2 creates an additional procedural exception to the normal parole hearing schedule. Section 2269.1 of the Board's regulations requires that "documentation hearings" be conducted for certain categories of crimes which are punished with life sentences. The first of these hearings is to be held 36 months after the life term begins. Subsequent documentation hearings are to be held at three-year intervals. In addition, the Board is required to conduct an initial parole hearing one year or thirteen months prior to the prisoner's MEPD.[15]

15. Penal Code section 3041, subdivision (a).

Directive No. 85/2 describes how it is possible for a documentation hearing to be scheduled in relatively close time proximity to an initial parole hearing for a prisoner serving a life sentence. To avoid "holding two hearings within a relatively short period of time," the Board "adopt[ed]" the following "policy:"

> "[I]f the latest documentation hearing falls within one year of the scheduled initial parole consideration hearing, then the documentation hearing will not be required to be placed on the calendar. This may in some cases require the Initial Parole Consideration Hearing Board panel to consider a four year in-prison conduct review instead of the normal three year span of time for documentation hearing reviews."

This policy is clearly a "regulation" which implements or interprets Penal Code section 3041 as well as section 2269.1 of the Board's duly adopted regulations.

(E) Administrative Directive No. 85/7

Directive No. 85/7 appears to augment existing regulations governing parole consideration hearings for life term prisoners. Some of its procedures appear to restate current regulatory requirements. For instance, the right of the victim's next-of-kin and the District Attorney to speak at parole consideration hearings is also provided for in sections 2029(a) and 2030(a)(3) of the Board's regulations. The directive also appears to contain provisions relating to internal management. One such example would be directions relating to calendaring various types of hearings.[16]

The Board, however, apparently utilized Directive No. 85/7 for the purpose of inaugurating a new set of procedures not found in its current regulations. The directive provides as follows:

> "The Board of Prison Terms has approved a program which allows life term prisoners to waive their formal parole consideration hearing, stipulate to unsuitability or to request a postponement/continuance of their hearing."

16. Administrative Directive No. 85/7, p. 3.

One of those new procedures established by the Board reads as follows:

> "The prisoner has the option of waiving the hearing when it becomes apparent to the prisoner that it is unrealistic to expect that he/she will be found suitable for parole.
>
> This option may be exercised at any time prior to or during the hearing."[17]

Additionally, the prisoner may stipulate to unsuitability "contingent upon a denial for a specific period of time,"[18] or may continue the hearing for a year in order to avoid a potentially adverse finding by the Board.[19] The directive also contains specific procedures to be followed in executing a waiver or continuance by the prisoner and his attorney, if represented. One such procedure contains guidelines staff should follow in determining *whether* a prisoner is competent to execute a waiver in the first instance.[20]

The prisoner's desire to waive or continue the hearing or stipulate to unsuitability is, however, not dispositive. A waiver or continuance must be approved by the assigned hearing panel. If it is not, then the matter goes forward.[21]

Directive No. 85/7 therefore appears to significantly supplement existing rules or procedures governing parole consideration hearings for life term prisoners. As such, it contains "regulations" that supplement, further implement, or make specific the law administered or enforced by the Board.

(F) Administrative Directive No. 86/3

Directive No. 86/3 was issued in response to the Ninth Circuit Court of Appeals ruling in *Haygood v. Younger* (1985).[22] There, the court noted as follows:

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17. *Id.* at 1.

18. *Id.*

19. *Id.* at 2.

20. *Id.*

21. *Id.* at 3.

> "A prisoner's petition for damages for excessive custody can be a legitimate § 1983 claim. . . . If the wrongful taking of liberty results from either affirmatively enacted or de facto policies, practices or customs, the court must determine when the responsible state officers received notice of a claim that a wrong was being done."[23]

Directive No. 86/3 reads as follows:

> "[This directive] establishes due process hearing procedures for implementing *Haygood v. Younger*. This new due process hearing shall be entitled a *Legal Status Review Hearing*." [Emphasis in original.][24]

To further these purposes, the directive establishes, among other things, the following: 1) criteria prisoners/parolees must meet in order to be entitled to a hearing; 2) procedures for filing a petition; 3) requirements for contents of the petition; 4) when a petition can be dismissed for failure to exhaust administrative remedies; 5) procedures for notice to the prisoner, timing and conduct of the hearing; and 6) the prisoner's appeal rights.[25]

Clearly, Directive No. 86/3 was issued in order to implement and make specific the requirements of the *Haygood v. Younger* decision. As such, it is a "regulation" under the definition found in Government Code section 11342, subdivision (g).

(3) With respect to whether the Board's regulations fall within any recognized 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. (Government Code section 11346; *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411, ("*When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language.*" [Emphasis added.])

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22. 769 F.2d 1350 (9th Cir. 1985) (en banc), cert. denied, 478 U.S. 1020.

23. *Id.* at 1359.

24. Directive No. 86/3, p. 1.

25. *Id.*

The Board does not contend that any express exemption applies. Our independent research having also disclosed no express statutory exemption, we conclude that none applies.

Consequently, the policies established by the Board of Prison Terms in those administrative directives, except those which restate existing law or are matters of internal management, are invalid unless adopted as regulations pursuant to the APA.

DATE: April 20, 2000

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