

Study N-304

August 11, 1999

First Supplement to Memorandum 99-52

Administrative Rulemaking: Exemptions from Administrative Procedure Act

We have received a letter from the Prison Law Office, suggesting that certain rulemaking procedure exemptions enjoyed by the Department of Corrections are “not warranted and have been abused.” It urges the Commission to study whether these exemptions should be reformed. **The staff recommends that the issues raised by the Prison Law Office be investigated by the staff and considered by the Commission at another meeting.**

Respectfully submitted,

Brian Hebert
Staff Counsel

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August 11, 1999

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Re: Exemptions from APA

Dear Mr. Hebert:

I recently learned that the Commission is considering the issue of exemptions to the rulemaking requirements of the APA. I have reviewed your memorandum 99-52 stating that no comments were received and that the staff do not believe any further inquiry into this issue is necessary. I am writing to request that the Commission undertake an inquiry into exemptions from the APA, at least as it relates to the California Department of Corrections (CDC).

The CDC has several exemptions to the APA's rulemaking requirements. Under Penal Code §5058(c)-(e) the CDC is exempt from the APA (1) when the rules apply to a particular prison, (2) when the rules regulate a pilot program (exemption is limited to two years) and (3) for emergency regulations. In our opinion, the last two exemptions, for pilot programs and emergencies, are not warranted and have been abused. We urge the commission to study the manner in which the CDC has used these two exemptions.

The most egregious problems relate to the CDC's use of emergency regulations. Under this exemption, the CDC may enact regulations without public comment for up to 320 days without any showing of an emergency other than a written statement by the director or his designee. Pen. Code, §5058(e). Under this provision the CDC has adopted many regulations without any evidence that serious harm would result if the process was delayed for public comment. Recently, for example, the CDC planned to issue regulations that would have restricted the ability of families to send packages to their family members in prison, a practice that has been in existence for at least twenty years. The CDC decided not to issue the emergency regulations only after pressure from members of the Legislature. In other instances the CDC has adopted emergency regulations for placing prisoners into substance abuse programs, penalties for disciplinary infractions and procedures for processing court-ordered restitution payments. Although I do not know this for a fact, the slowness by which the CDC makes regulatory decisions leads me to believe that these regulations were under consideration for at least several months before they were issued.

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Besides the fact that these instances do not represent true emergencies, there is no effective method of challenging the Director's determination that it is an emergency. The statute is written in such a way as to make the Director's decision virtually immune from legal challenge. This has led to the situation where the exception is swallowing the rule.

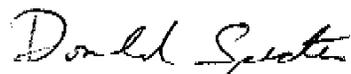
In addition, there is no requirement that any member of the public be notified that the CDC intends to issue emergency regulations. Thus, for example, by the time this office learns of the regulations, they already have been adopted. The public's interest in commenting on the wisdom and legality of the proposed regulations is thwarted for a considerable period of time.

The second problem, although less serious, is the use of pilot program regulations. Under §5058(d) these regulations remain in force for two years without public comment. Recently, this office obtained an order that the CDC develop policies and procedures for prisoners with disabilities. The CDC issued regulations and designated them as relating to a pilot program, thereby avoiding the public comment period. However, this was a pilot program only in the sense that it was new. It was not something designed to determine if a program would work and should be duplicated. The program governed all prisoners with disabilities. Under the statute a pilot program is defined as something that affects 10% or less of the total prison population. With the current population of approximately 155,000 prisoners, a pilot program affects very large number of people. At the very least, the definition of pilot program in §5058(d)(1)(A) should be revised.

In conclusion, we believe that the exemptions in Penal Code §5058 are contrary to the purposes of the APA and are not necessary to the proper functioning of the CDC. We therefore request that the Commission study this subject, at least with respect to the CDC.

Thank you for your attention to this matter. Please contact me if I can provide any further information.

Sincerely,



Donald Specter