



C A L I F O R N I A D E P A R T M E N T O F
Mental Health

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Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Re: **CTU2008-0321-01**

The Department of Mental Health submits the following response to the above referenced petition from Michael St. Martin.

ISSUE

On March 21, 2008, the Office of Administrative Law (OAL) received a petition from Mr. St. Martin alleging that the Department of Mental Health (DMH) has issued, used, enforced, or attempted to enforce underground regulations. The alleged underground regulation is Coalinga State Hospital (CSH) Administrative Directive No. 624 (A.D. 624).

PROPOSED DETERMINATION

CSH Administrative Directive No. 624 is not a regulation subject to the Administrative Procedure Act (APA).

BACKGROUND

The Department of Mental Health is charged with the care of mentally ill individuals, both civil and forensic commitments, including Sexually Violent Predators. The Department of Mental Health currently operates five state hospitals. As part of operating the state hospitals and taking care of the mentally ill, the state hospitals need to ensure the safety of the staff and the individuals (i.e. patients) who are housed at the state hospitals.

Coalinga State Hospital is one of the five DMH state hospitals. CSH houses and provides care and mental health treatment to patients under both civil and forensic commitments, including Sexually Violent Predators. CSH is located on the premises of Pleasant Valley State Prison, a state prison under the jurisdiction of California Department of Corrections and Rehabilitation. Coalinga State Hospital houses approximately 1,500 individuals and employs approximately 1,600 staff. In addition to patient care, CSH face similar issues of safety and security similar to prison facilities. CSH must evaluate the safety and security not only for each individual patients themselves but for other patients and staff as well.

DMH state hospitals draft administrative directives to 1) to provide directions and guidance to staff; 2) to provide guidance on safety and security issues; and 3) to guide the staff on how to handle health concerns for patients. The administrative directives are specific to each hospital. The hospital takes into account the facility, the patients, and patient care and needs to provide guidance in handling different situations. Every state hospital is unique and as a result the administrative directives provide guidance for the unique situations, safety and security, physical space, and the ability for the staff to provide mail service.

Title 9 of the California Code of Regulations, provides for patients' rights, including the right to privacy, dignity, respect and humane care, as well as a right to keep and use personal possessions. (9 CCR § 883, 884). A patient has a right to have access to... mail and receive correspondence. (9 CCR § 884 (b)(6)). A patient also has a right to receive packages. (9 CCR § 884(b)(7)). However, the facility is allowed to open and inspect mail and packages for contraband. (9 CCR § 884(b)(6) and (b)(7)). A patient is allowed to keep personal possession except for items and material listed as contraband by the facility. (9 CCR § 884). Contraband is defined as "materials, articles, or goods that patients are prohibited from having in their possession because such materials, articles or goods present a risk to safety and security in the facility." (9 CCR § 881(e)).

AD 624 is an administrative directive that provides guidance to the staff at the hospital of the writing materials the patients may obtain, the rights to have mail, with the restrictions of the facility being able to search for the contraband. This administrative directive provides guidance on how to handle the mail appropriately to ensure that the individuals at the hospital properly receive the mail that they are allowed to receive. AD 624 provides staff with guidance to the search of mail for the individuals, to ensure the security and safety of the facility. AD 624, restates Welfare and Institutions Code Section 4136 and Title 9 Code of California Regulations Section 884, and is for internal use only.

ANALYSIS

I. ADMINISTRATIVE DIRECTIVE 624 IS NOT A REGULATION

A.D. 624 is not a regulation. Instead, the administrative directive is a guide to the staff at the facility of how to handle the mail and what mailing materials the individuals are permitted to have. The administrative directive restates statute and current regulations.

For an agency's action to constitute a regulation, it must have two identifying characteristics established in *Tidewater Marine Western, Inc. v. Bradshaw*, (1996) 14 Cal.4th 557, 571. First the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. (*Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 630 [167 Cal.Rptr. 552].) Second, the rule must "implement, interpret, or make specific" the law enforced or administered by the agency, or govern the agency's procedure. (Gov. Code, § 11342(g)).

Under the first characteristic, a rule does not apply generally where it relates to practices for which there is a need for flexible and individual approaches. For example, a policy regarding the use of Medi-Cal auditing procedure used in some, but not all audits fails to constitute a rule of general application. (*Taye v. Coye* (1994) 29 Cal.App.4th 1339, 1345.) Under the second characteristic, the rule must be quasi-legislative by establishing a policy, guideline, or set of rules. (*Sherwin-Williams Co. v. South Coast Air Quality Management District* (2001) 86 Ca.App.4th 1258, 1284).

As described below, A.D. 624 is not a regulation because it does not apply generally and does not “implement, interpret, or make specific” any statute.

A. ADMINISTRATIVE DIRECTIVE 624 IS NOT APPLIED GENERALLY

A regulation is a rule that is generally applied and not applied in a specific case. First, the test for generality requires a declaration of “how a certain class of cases must be decided.” (*Tidewater Marine Western, Inc. v. Bradshaw* at p. 571.)

A.D. 624 does not declare how a certain class of cases will be decided. A.D. 624 applies only to CSH and is specific to that individual State Hospital. The hospitals are allowed to make a determination as to what is the specific size, weight, and volume that is allowable, taking into consideration factors as the individuals, the safety and security of the facility. The hospital makes a determination as to what vendors would be appropriate vendors and what types of materials will be permissible depending on the vendor, the individuals at the facilities, and the facilities safety and security.

B. ADMINISTRATIVE DIRECTIVE 624 IS NOT QUASI-LEGISLATIVE

As for the second requirement, the challenged action must be quasi-legislative. The agency must take action to implement, interpret, or make specific the law enforced by the agency. (*Tidewater Marine Western, Inc. v. Bradshaw* 14 Cal.4th 557, 571.)

A.D. 624 does not “implement[s], interpret[s], or make[s] specific the law enforced by the agency.” The Administrative Directive restates statutes and current regulations. AD 624 does specify how the staff is to handle a package or mail, but these are internal matters. AD 624 gives guidance in how the staff is to notify the individual and how to bring the packages to the patient, or the fact that a package is to be opened by the patient.

Welfare and Institutions Code specifically provide the writing materials and postage that will be available to the individuals. (Welf. & Instit. Code § 4136). AD 624 Section V.C. recites what is provided in statute. Newly admitted individuals are allotted up to two one ounce letters per week and first-class mail postage for the first thirty days after initial admission. (AD 624 Section V.C.1., reciting Welf. & Instit. Code § 4136(a)). Additional writing materials are available for purchase. (AD 624 Section V.C.4., reciting Welf. & Instit. Code § 4136(c)). AD 624 also provides the definition of “indigent individuals” as provided in Welfare and Institutions Code, and allows indigent individuals sufficient

materials for one letter each week. (AD 624 V.C.2. and V.C.3., reciting WIC 4136(b) and (d)).

Title 9 CCR 884 regulates mails and packages. Individuals are given a right to access to letter writing materials and mail and correspondence. (9 CCR § 884(a)(6)) However, the facility employees shall open and inspect all incoming and outgoing mail addressed to and from patients for contraband. (Id.) Confidential mail is the only exception. Confidential mail is defined as “letters or documents sent to or received from attorneys, courts or government officials through the mail.” (9 CCR § 881(c)). AD 624 explains that the employees will open and inspect the incoming and outgoing mail for contraband and provides for the exception of legal correspondences from the search.

EXEMPTIONS

I. ADMINISTRATIVE DIRECTIVE No. 624 IS A RESTATEMENT OF STATUTE AND REGULATIONS

Welfare and Institutions Code allows the individuals “to have ready access to letterwriting materials, including stamps, and to mail and receive unopened correspondence.” (Welf. & Instit. Code § 5325(e)) Welfare and Institutions Code specifies how much writing material they may have for free, and requires that the facility allow any additional materials to be purchased by the individuals. (Welf. & Instit. Code § 4136). AD 624 restates the materials to be provided and describes the procedures mail and packages that are subject to being searched. Even though individuals are allowed to receive unopened correspondence, it is limited in scope. The California Code of Regulations specifies that mail and packages may be subject to search by the facilities for contraband. (9 CCR §§ 884 (a)(6) and (7)). AD 624 simply restates that the packages will be searched for contraband and if contraband is found, the contraband will be discarded. AD 624 does not further implement or interpret the law.

II. ADMINISTRATIVE DIRECTIVE No. 624 IS FOR INTERNAL MANAGEMENT

If OAL determines that the selected provisions of AD 624 are regulations, these provisions are exempt from the APA because they merely constitute internal management directions exempt from the APA. (Govt. Code § 11340.9.) AD 624 does provide details for internal management. AD 624 guides the staff in how to do a search for materials that are contraband, and what procedures are to be taken if the contraband is found. AD 624 is used for the management to keep a log and to help in ensuring that the packages and mail are properly given to the correct individuals. Also, searching through the packages and mail for contraband ensures the safety and security of the patients and the facility.

III. ADMINISTRATIVE DIRECTIVE No. 624 IS EXEMPTED BY THE CALIFORNIA CODE OF REGULATIONS

Title 9 CCR section 884 provides specific exemptions for some of the limitations of the mail and packages. The CCR specifically provides that a designated facility employee to

complete the search. This allows the facility to make a determination as to which facility employee or employees would be the appropriate people to complete the searches of mail and packages depending on the individual structure and employees of the facility. The regulations also specifically states that the "limitations on size, weight and volume of mail shall be specified by formal facility policy." Therefore, in regards to the limitation of size, weight, and volume, the facility is allowed to create a policy based on the situation of the facility such as patient property space, the capabilities of the facility, and safety and security of the facility.

IV. ADMINISTRATIVE DIRECTIVE No. 624 SHOULD BE VIEWED IN TERMS OF PERMISSIVE SAFETY AND SECURITY MEASURES

The Department of Mental Health state hospitals must establish rules that solely apply to a particular state hospital with high security patients and issues of safety and security of the all the patients and the staff. The level of security differs depending on the state hospital and as a result, every state hospital should be able to determine what affects the security and safety of the hospital and how to handle the mail and make a determination as what is considered a contraband. AD 624 also takes into consideration fire regulations and limits the weight, size, and quantity of packages. To ensure the safety and security of the patients would also require that the facility be in compliance and aware of fire regulations.

CDCR's "local rule" allows for rules to be promulgated by the Director of CDCR if it is specific to the facility. (See Penal Code § 5058) The legislative history indicates that allowing these rules to be promulgated allows CDCR to be able to immediately react to emergency situations affecting the public health and safety, thereby protecting the lives of inmates and staff. Also, it allows CDCR to enhance the ability to quickly implement policies based upon urgent, though not emergency, operational needs. (Assem. Comm. on Public Safety, Analysis of AB 3563 (1993-1994 Reg. Sess.) as amended April 11, 1994)

Similarly, the state hospitals have forensic patients, where the directors of the hospitals will need to react to emergency situation immediately. Atascadero State Hospital houses high security risk patients. Each state hospital must examine their facilities and the individuals at the hospitals and make determinations as to how to ensure that contraband does not get to the inside of the facilities to ensure the safety and security of the individual and staff. Moreover, since Coalinga State Hospital is situated on CDCR's premises and the CDCR's exemption should apply.

V. ADMINISTRATIVE DIRECTIVE 624 IS CONSTITUTIONALLY PERMISSIVE

Coalinga State Hospital holds Penal Code and civilly committed individuals. These individuals can be a danger to themselves as well as others. Due to some of the conditions of the patients, the Hospital needs to ensure the safety and the security of the patients and of the staff. As a part of ensuring the safety and security of the individuals and staff, the facility needs to make sure that contraband is not able to get in through the mail. Therefore, the individuals do not have a right to completely uninspected mail.

The federal courts have recognized that forensic patients at State Mental Hospitals do not have a right for their mail not to be searched. In *Martyr v. Mazur-Hart*, a patient involuntarily committed challenged the Oregon regulations that allowed staff to open all mail of Oregon State Hospital while Oregon statute provided that every mentally ill person committed have the right to communicate freely by sending and receiving sealed mail. (*Martyr v. Mazur-Hart*, 789 F.Supp. 1081, citing OAR 309-102-020, and ORS 426.385). In *Martyr*, the hospital confiscated pieces of the patient's mail to determine if there was a presence of prohibited items. Similarly, in this situation, California Welfare and Institutions Code recognizes that individuals have a right to unopened correspondence (Welf. & Instit. Code § 5325). However, California Regulations provides that the mail may be searched for contraband. (9 CCR 884). The court in *Martyr*, recognized that Oregon State Hospital had similar security goals as prison and rehabilitative goals. (*Martyr*, 789 F.Supp. 1081, 1084) Similarly, California State Hospitals have similar security and rehabilitative goals as prison with the forensic patients. Many state hospital patients are committed by the courts as forensic patients, and the state hospitals need to secure the perimeter of the hospitals. While they are not prisoners and do have more liberties than prisoners there are still security issues that the state hospitals must address.

Federal Courts have also recognized that mail for those in state mental hospitals may be censored. The mail may be searched if there is a important or substantial governmental interest unrelated to the suppression of expression and there is necessary or essential to the protection of the particular governmental interest involved.¹ (Id. at 1086). The administrative directive specifically states the purpose to provide for the right of individuals to send and receive mail and packages, and ensure that the hospital operates according to its security needs, fire regulations, and physical space limitations. (AD 624) The packages are to be searched for contraband, to ensure the safety and security of the facility, an important and substantial governmental interest. The search is necessary to ensure the safety of the facility and is therefore constitutionally permissive.

CONCLUSION

I. ADMINISTRATIVE DIRECTIVE 624 IS NOT A REGULATION

AD 624 is not a regulation subject to the Administrative Procedure Act (APA). AD 624 does not fulfill the required two identifying characteristics. The first characteristic that the agency must intend its rule to apply generally, rather than in a specific case does not apply to AD 624. (*Tidewater Marine Western, Inc. v. Bradshaw*, (1996) 14 Cal.4th 557, 571). AD 624, is not applied generally, rather the rule is applied by the specific State Hospital, based upon the facility and determinations of what items would be a threat to the safety and security of the hospital, fire regulations, and physical space limitations of

¹ The two part test was used by the US District Court in Oregon. The Supreme Court *Procunier v. Martinez*, 416 US 396, was a case that dealt with inmates. However, the test has been applied for Mental State Hospitals, for Oregon, Ohio, and Illinois. The United States District Court of Missouri did not use the test but recognized that State Hospitals could inspect the mail similar to prison institutions.

the facility. The second characteristic that the agency must take action to implement, interpret, or make specific the law enforced by the agency does not apply to AD 624 either. (*Tidewater Marine Western, Inc. v. Bradshaw* 14 Cal.4th 557, 571.) AD 624 does not implement, interpret, or make specific the law. AD 624 restates statutes and regulations and provides internal management clarifications. Title 9 CCR Section 884, allows the hospitals to designate employees to search the mail and packages and to provide limitations on the size, weight and volume, and frequency/number of packages and mail by formal facility policy. (9 CCR 884(a)(6) and (a)(7)). In addition AD 624 should be permitted for safety and security measures, in light of CDCR's "local rule."

Therefore, AD 624 is not a regulation subject to the APA.

II. ALTERNATIVE

In the alternative, DMH respectfully requests OAL to allow DMH to continue use of A.D. 624 until valid regulations can be promulgated in order to avoid significant disruptions at Coalinga State Hospital and to ensure the safety and security of the individuals and staff at Coalinga State Hospital.² *Morning Star Co. v. State Board of Equalization* (2006) 38 Cal.4th 341. As discussed above, A.D. 624 restates the ability of the Hospital to search and monitor the mail and packages to ensure the safety and security of the facility. Therefore, DMH should be allowed to continue to use of A.D. 624 until regulations are promulgated, to ensure that the individuals, staff, and the community is safe and secure.

Respectfully submitted,



ALICE LEE
Staff Counsel
Department of Mental Health

² In *Morning Star*, respondents argued that a remedy for failing to adopt material as a regulation would be for the court to give the Board time for that process to occur. *Morning Star Co. v. State Board of Equalization* (2006) 38 Cal.4th 341. There, the court directed the Board to conduct further administrative proceedings on Morning Star's request, without reliance upon an invalid regulation. However, to avoid significant disruption of the hazardous waste fee scheme, the court also directed that the proceedings be stayed and the fee system continued in effect until valid regulations could be promulgated. (*Id.* At p. 341.)

PROOF OF SERVICE

Re: Coalinga State Hospital Administrative Directive #818, *Contraband*
Case No: CTU2008-0321-01

I am a citizen of the United States and a resident of the county of Sacramento. I am over the age of eighteen years and not a party to the above referenced action; my business address is Department of Mental Health, Office of Legal Services, 1600 9th Street, Rm. 153, Sacramento, CA 95814. On the below mentioned date I served the foregoing document(s) described as:

Response to Petition Alleging AD 624 as an Underground Regulation

on the parties below addressed as follows:

Michael St. Martin
CO-000414-3, RRU-7
P.O. Box 5003
Coalinga, CA 93210

Office of Administrative Law
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Sacramento, CA 95814

The parties where served as follows:

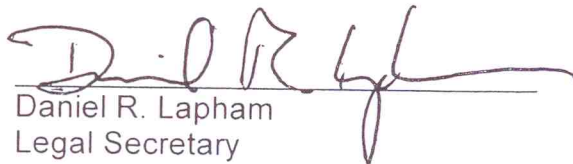
☒ U.S. Postal Service by placing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail after the close of the days business (St. Martin)

☒ Personal Service / (OAL)

☐ Facsimile ☐ Hard Copy to Follow

☐ Overnight mail

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document is signed at Sacramento, California on: June 23, 2008.


Daniel R. Lapham
Legal Secretary