



CALIFORNIA DEPARTMENT OF
Mental Health

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Re: **CTU2008-0314-01**

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

ISSUE

On March 14, 2008, the Office of Administrative Law (OAL) received a petition from Michael 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. 818 (A.D. 818).

PROPOSED DETERMINATION

CSH Administrative Directive No. 818 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 Hospital.

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. 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 the patients themselves but for other patients and staff as well.

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.

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 care and provides guidance in handling different situations. Every state hospital is unique and as a result the administrative directives provide guidance for the unique situations that may occur at each local facility.

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 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 818 is an administrative directive that provides a list of items that are considered Contraband by the hospital. This administrative directive provides guidance on safety and security issues of the hospital. AD 818, corresponds with Title 9 CCR section 881(e), which defines contraband, and lists what materials are Contraband as provided in regulations. AD 818 provides staff with guidance as to what items are a danger to the safety and security of the facility and community. AD 818 provides a list of items that have been deemed to be a threat to the safety and security of the hospital and provides direction to the employees as to what type of actions should be taken with the contraband. AD 818 prohibits illegal drugs, weapons, items that may be used as weapons such as knives, metal files, flammable liquids, drugs or medicated products not provided by the hospital, letter openers, etc.

ANALYSIS

I. ADMINISTRATIVE DIRECTIVE 818 IS NOT A REGULATION

A.D. 818 is not a regulation. Instead, the administrative directive is a guide of what items would be considered "contraband" for the specific facility - CSH, those that are a danger to the safety and security of the hospital and community.

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. 818 is not a regulation because it does not apply generally and does not “implement, interpret, or make specific” any statute.

A. ADMINISTRATIVE DIRECTIVE 818 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. 818 does not declare how a certain class of cases will be decided. A.D. 818 provides a list of contrabands that is not allowed specifically at CSH. A.D. 818 applies only to CSH and is specific to that individual State Hospital. Title 9 California Code of Regulations Section 884, specifically indicates that the contrabands are to be listed by the facility. The current regulation is applied generally to all the State Hospitals. However, AD 818 is specific to CSH and not all the State hospitals. Generally, the facility decides what is a contraband based on the conditions of the facility and what would be a risk to safety and security in the facility. (9 CCR § 881(e)). Each state hospital decides on what would be considered contraband depending on the patients that may be at the hospitals and the security of the hospital, in allowing what would be a risk to safety and security in the facility and the community.

The hospital decides on what would be considered contraband based upon the situation of the hospital. The hospital decides on what would be considered contraband except for items already prohibited by law, such as illegal drugs, such as those under Health and Safety Code sections 11350 et seq., 11357 et seq., 11375, etc.

B. ADMINISTRATIVE DIRECTIVE 818 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. 818 does not “implement[s], interpret[s], or make[s] specific the law enforced by the agency.” The Administrative Directive simply provides a list of items that should be considered contraband based upon the need of creating a safe and secure environment.

The listed items are examples of what should be considered a contraband. The list is a list of items that are necessary to maintain safety and security.

Title 9 CCR section 890 allows the facility director to specify the types of clothing. Therefore, it is appropriate for the materials of clothing to be limited within the administrative directive. Limiting what type and materials of clothing the individuals may have, allows the facility to specify the type of clothing. Welfare and Institutions Code section 7232 provides the hospitals with the authority to create administrative directives specific to the clothing of the patients.

If DMH was to promulgate regulations in regards to the contraband, the regulations would need to be made to each specific hospital. If the hospitals have changing situations, then DMH would need to continuously promulgate regulations. This would be a burdensome task on DMH to constantly promulgate regulations to ensure the safety and security of the individuals.

II. ADMINISTRATIVE DIRECTIVE 818 PROVIDES FOR THE SAFETY AND SECURITY

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 result, regulations promulgated by the Department allow for the hospitals to make a determination as to what would be a threat to the safety and security of the individuals. Contraband items do not need to be denied for good cause. The contraband items are items that are illegal, such as illegal drugs. Also, weapons that inflict bodily harms are prevented and many metal combs cannot be brought to the secured areas, where the potential for safety and security is higher. The individual cannot possess items that may be a threat to safety and security such as letter openers, and items that may hide certain possessions, resulting in clear bottles.

Providing the right to privacy, dignity, respect and humane care, includes the right to a secure and safe environment. In providing a secure and safe environment, each hospital should be allowed to determine what is listed as contraband. The California Code of Regulations allows the state hospital as the facility to create a list of items and materials as contraband (9 CCR § 884.) Also, patients have a right to be free from harm. (9 CCR § 883). The list that provides items as contraband, allows the patients to be free from harm. The hospital needs should be able to prevent contraband from coming into the facility or to be used during supervision, since the items present a risk to the safety and the security in the facility.

EXEMPTIONS

I. ADMINISTRATIVE DIRECTIVE No. 818 IS EXEMPTED BY THE CALIFORNIA CODE OF REGULATIONS

“Patients have a right to keep and use personal possessions...except items and materials that are listed as contraband by the facility.” (9 CCR § 884) The facilities are to make a copy of the contraband listing and make it available on all treatment units and public areas within the facility. (Id.) The regulations therefore, give the facility the ability to create a list of contraband. However, statutes or regulations do not give the ability of the facility to create regulations, regulations are to be proposed by the Department. Therefore, it can be inferred that the list of contraband would be created by the facilities as a list and not put into regulations. The CCR provides the facilities to create a list of contraband, that would be specific to the facility, to ensure the safety and the security of the facility.

II. ADMINISTRATIVE DIRECTIVE No. 818 SHOULD BE VIEWED IN TERMS OF PERMISSIVE SAFETY AND SECLUSION 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, as contraband is defined in 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 so that they may react to emergency situations affecting the public health and safety, protecting the lives of inmates and staff. Also, Coalinga State Hospital is situated on CDCR’s premises and CDCR’s exemption should apply.

CONCLUSION

I. ADMINISTRATIVE DIRECTIVE 818 IS NOT A REGULATION

AD 818 is not a regulation subject to the Administrative Procedure Act (APA). AD 818 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 818. (*Tidewater Marine Western, Inc. v. Bradshaw*, (1996) 14 Cal.4th 557, 571). AD 818, 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. 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 818 either. (*Tidewater Marine Western, Inc. v. Bradshaw* 14 Cal.4th 557, 571.) AD 818 does not implement, interpret, or make specific the law. AD 818 provides a list of items that should be considered contraband based upon the need of creating a safe and secure environment. Title 9 CCR Section 884, allows the hospitals to make a list of contraband specific to the hospital. Also, Coalinga State Hospital resides on the Pleasant Valley State Prison, the grounds of CDCR, which has a specific exemption for local rules.

Therefore, AD 818 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. 818 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.¹ *Morning Star Co. v. State Board of Equalization* (2006) 38 Cal.4th 341. As discussed above, A.D. 818 lists items that are a danger to the safety and security to the State Hospital. Therefore, DMH should be allowed to continue to use of A.D. 818 until regulations are promulgated, to ensure that the individuals, staff, and the community is safe and secured.

Respectfully submitted,



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¹ 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.)