

Each hospital has some version of AD-818 that is applied statewide to all persons detained in Department of Mental Health facilities.

The DMH has taken the firm position that none of its Administrative Directives are regulations subject to the provisions of the APA.

Petitioner alleges that *Administrative Directive AD-818* is a regulation within the meaning of the APA.

"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.... (Tidewater Marine Western, Inc. v. Bradshaw, supra, 14 Cal. 4th at 571, 59 Cal.Rptr.2d 186.)" (*Morning Star Co. V. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333, 42 Cal.Rptr.3d 47, 55)

5. State the legal basis for believing that the guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure is a regulation as defined in Section 11342.600 of the Government Code that no express statutory exemption to the requirements of the APA is applicable.

***Administrative Directive AD-818* Is a Regulation Within the Meaning of the APA**

Prior to implementation, or revision thereof, the Department was required to adopt *Administrative Directive AD-818*, or any revision thereof, but failed to do so, and thus, pursuant to the law the current version now being utilized is invalid and an "Underground Regulation."

Though the Director may prescribe rules and regulations such as *Administrative Directive AD-818*, they must be promulgated and filed per Chapter 3.5 of art. 1 of Division 3 of Title 2 of the Administrative Procedures Act, government Code, section 11340 et seq. There is no evidence that DMH has ever promulgated any version of *Administrative Directive AD-818* pursuant to the APA.

Administrative Directive AD-818 is a regulation. Chapter 3.5, article 5, of the Administrative Procedure Act, Govt. Code sections 11346 et seq., governs adoption, amendment and repeal of regulations by administrative agencies known as rulemaking. Govt. Code section 11342.600 provides that:

"[A regulation is] 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."

Syngenta Crop Protection, Inc. V. Helliker (2d Dist. 2006) 138 Cal.App. 4th 1135, 1175-77, 42 Cal.Rptr.3d 191, 221-222, quotes *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 59 Cal.Rptr.2d 186, which explains:

"[The APA] establishes 'minimum procedural requirements' for rulemaking. ([Govt. C.] § 11346(a).) The agency must provide notice of the proposed action (*Id.* §§ 11346.4,

11346.5), the complete text of the proposal (§ 11346.2(a)), and an initial statement of reasons for the proposal (§ 11346.2(b)), and a final statement of reasons (§ 11346.9(a)). The agency must provide a public hearing if an interested person timely requests a hearing (§ 11346.8(a)), provide an opportunity for interested persons to submit written comments if no hearing is held (*ibid.*), and respond in writing to comments in the final statement of reasons (§ 11346.9(a)(3)). The agency must submit the entire rulemaking file to the Office of Administrative Law (§§ 11347.3(c), 11342.550), which reviews the regulation for compliance with the law and other criteria and approves or disapproves the regulatory action. (§§ 11349.1, 11349.3 . . . " (14 Cal. 4th 557, 59 Cal.Rptr.2d 186.)

"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 Section 11342.600, 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 this chapter." (Govt. Code § 11340.5(a).)

"A substantial failure to comply with chapter 3.5 of the APA renders the regulation invalid. § 11350(a); *Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal. 4th at 576, 59 Cal.Rptr.2d 186.)"

"A regulation subject to the APA thus has two principal identifying characteristics. 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 . . . Second, the rule must 'implement, interpret, or make specific, the law enforced or administered by [the agency], or . . . govern [the agency's] procedure.' ([Former] Govt. Code § 11342(g) [now § 11342.601].) Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases . . . Similarly, agencies may provide private parties with advice letters, which are not subject to the rulemaking provisions of the APA. ([Former] Govt. Code § 11343(a)(3), 11346.1(a) [now § 11340.9(I)].) Thus, if an agency prepares a policy manual that is no more than a summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations . . . A policy manual of this kind would of course be no more binding on the agency in subsequent agency proceedings or on the courts when reviewing agency proceedings than are the decisions and advice letters that it summarizes."(Emphasis added.) (*Tidewater Marine Western, Inc. v. Bradshaw, supra*, 14 Cal. 4th at 571, 59 Cal.Rptr.2d 186.)"

Morning Star Co. v. State Bd. Of Equalization (2006), 38 Cal. 4th 324, 333-334, 42 Cal.Rptr.3d 47, 53-54, confirms the Syngenta/Tidewater analysis, especially that a regulation must be intended to apply generally, and that it must implement, interpret or make specific the law administered by the agency, or govern the agency's procedure.

Administrative Directive AD-818 is a regulation. It is applied to all persons proposed or adjudicated to be SVPs in California who are detained at Coalinga State Hospital. It declares what

personal property may or may not be possessed by SVPs detained at Coalinga State Hospital. Its use is mandatory. Thus the mandate of **AD-818** implements, enforces or otherwise makes specific the language of the Welfare and Institutions Code, §§ 5325, 5325.1, and Title 9, California Code of Regulations (“CCR”), §§).

**NO EXCEPTION EXCLUDES ADMINISTRATIVE DIRECTIVE AD-818
FROM THE APA PROCEDURES.**

Clearly inapplicable are the provisions of Govt. Code § 11340.9 excluding:

"(d) A regulation that relates only to the internal management of the state agency..."

"(f) A regulation that embodies the only legally tenable interpretation of a provision of law..."

"(I) A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state."

Armistead v. State Personnel Bd. (1978) 22 Cal.3d 198, 204-205, 149 Cal.Rptr. 1, 4 quoting from the First Report of the Senate Interim Committee on Administrative Regulations to the 1955 Legislature, documents the necessity for strict adherence to the APA. The court found this necessary so as to prevent state agencies from avoiding obedience to the APA by denominating rules as "'policies,' 'interpretations,' 'instructions,' 'guides,' 'standards,' or the like," and by containing them "in internal organs of the agency such as manuals, memoranda, bulletins, or [directing them] to the public in the form of circulars or bulletins."

Armistead underlined that "[R]ules that interpret and implement other rules have no legal effect unless they have been promulgated in substantial compliance with the APA" (emphasis added), thus provision of state personnel transactions manual governing withdrawal of resignation by state employee merited no weight as agency interpretation where such provision had not been duly promulgated and published.

The Administrative Directive in question here fits the above description perfectly. Although it is referred to as "information," it is called an "Administrative Directive," and is replete with mandatory words such as "shall" and "will" in regard to actions to be taken. It contains mandatory language thus making it much more than simple "information," policies, interpretations, instructions, guides, standards, or the like. Instead, it is a forbidden underground regulation which has not been adopted pursuant to the Administrative Procedures Act.

The justification for issuing AD-818 is stated in that document as, "Department of Mental Health, Special Order 239.02." ***Special Order 239.02*** applies statewide to all DMH facilities. Having each DMH facility issue its own version of ***Special Order 239.02*** under the label of an Administrative Directive is just the sort of "avoiding obedience to the APA" that is discussed in *Armistead v. State Personnel Bd.*

**A true and correct copy of
Special Order 239.02
is attached hereto as EXHIBIT B.**

**ADMINISTRATIVE DIRECTIVE AD-818 APPLIES GENERALLY TO ALL PERSONS
DETAINED PURSUANT TO THE SVPA (WIC §§ 6600 et seq.)**

Modesto City Schools v. Education Audits Appeal Panel, (3d Dist. 2004) 123 Cal.App. 4th 1365, 1381, 20 Cal.Rptr.3d 831, 842, holds that to be deemed an underground regulation, which would be invalid because it was not adopted in substantial compliance with the procedures of the APA, the agency must intend it to apply generally rather than in a specific case, and the agency must adopt it to implement, interpret, or make specific the law enforced by the agency.

Kings Rehabilitation Center, Inc. V. Premo, (3rd Dist. 1999) 69 Cal.App. 4th 215, 217, 81 Cal.Rptr.2d 406, notes:

"The APA is partly designed to eliminate the use of 'underground' regulations; rules which only the government knows about. If a policy or procedure falls within the definition of a regulation within the meaning of the APA, the promulgating agency must comply with the procedures for formalizing such regulations, which include public notice and approval by the Office of Administrative Law (OAL). Failure to comply with the APA nullifies the rule. (Govt. Code § 11350(a); *Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 4") (Emphasis added.)

Administrative Directive AD-818 is neither intended nor utilized to make specific determinations but is utilized generally when determining the property rights of all persons detained under the SVPA. Thus, **AD 818** is a regulation that must be promulgated as a regulation but otherwise is a null and void underground regulation.

6. Provide information demonstrating that the petition raises an issue of considerable public importance requiring prompt resolution.

Administrative Directive AD-818 does not conform to existing laws, thus public comment and OAL oversight is needed in order to halt the "bureaucratic tyranny" warned of in *Tidewater* and *Morning Star*.

Morningstar reiterates, "[2] These requirements promote the APA's goals of bureaucratic responsiveness and public engagement in agency rulemaking. 'One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation [citation], as well as notice of the law's requirements so that they can conform their conduct accordingly [citation]. The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. [Citation.] [132 P.3d 255] (*Tidewater, supra*, 14 Cal.4th at pp. 568-569, 59 Cal.Rptr.2d 186, 927 P.2d 296.)" (*Morning Star Co. V. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333, 42 Cal.Rptr.3d 47, 53.)

Protection & Advocacy, Inc. (PAI), a non-profit agency that provides legal advice and advocacy

services on disability rights issues in California. PAI submitted the following comments to the OAL in a companion petition to this present petition that challenged CSH AD-626. Both AD-626 and AD-818 operate together, along with several other companion Administrative Directives, and are used to control patients' property possession. PAI raised concerns that Coalinga State Hospital (CSH) is applying an underground regulation with respect to its policies on contraband:

"PAI believes that the Administrative Practices Act must be followed in regard to these two CSH ADs so that public comment can be submitted to the OAL for review and conformance to existing law.

Title 9, CCR, § 884(b)(1) provides that a non-LPS patient has a right to keep and use personal possessions as space permits except items that are listed as contraband by the facility. The list of items shall be made available on all treatment units and public areas within the facility. See Title 9 CCR § 884(b)(1). What this means is that patients should be able to keep personal possessions unless CSH has designated the item to be contraband or the item can be denied based on "good cause" finding that factors exist to deny the right. See Title 9 CCR § 884(c).

A hospital can designate an item as "contraband" and thus a patient cannot keep the item as a personal possession so long as the item fits under the definition of "contraband" found in Title 9, CCR § 881(e). "Contraband" is 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. See Title 9 CCR § 881(e).

A patients' right to personal property at CSH is outlined in several ADs. CSH ADs 626 (Individual's Property and Storage) and 818 (Contraband) discuss what personal property a patient can have in the facility, and what items a patient cannot have respectively. Copies of both ADs are enclosed for review.

If a patient's property is taken away from him, and the property is not listed as contraband on the current contraband list, the facility must provide a good cause denial in writing. See Title 9 CCR § 884(c). A facility can only find good cause if exercising a specific right under 884 would cause harm to the patient, others, the facility, or there is a compromise in the safety and security of the facility and/or safety to others. Further, there must also be no less restrictive means of protecting the patient's interest. *Id.* Withholding of rights under 884 cannot be done for punitive measures, nor can the right be viewed as a privilege to be earned. See Title 9 CCR § 884(d). A denial of rights cannot exceed thirty days without additional staff review. *Id.* The denial of rights must be in writing in the patient's treatment record. See Title 9 CCR §§ 884(f) and (I). Rights under section 884 can only be denied for as long as the good cause for denial exists. See Title 9 CCR § 884(h).

CSH AD 818 Does Not Comply with Title 9 CCR § 881(e) and the Definition of Contraband.

CSH AD 818 contains a list of controlled items designated as contraband that do not comply

with § 881(e)'s definition of contraband. Therefore, CSH's practice of confiscating personal property labeled as contraband is an underground regulation.

To illustrate how CSH AD 818 violates regulations, it divides contraband items into different categories depending on where the item is not allowed or under what supervision the item is allowed. This is hardly a "contraband" list because it provides a blanket list of what items are not allowed as personal property without following the "good cause" careful analysis that is required. Items such as musical instrument, CDs, DVDs, denture cleaner, or personal tennis shoes are not allowed to individuals unknown to the treatment team, if the patient is found not to be able to handle the items responsibly, or if the patient misuses the item.

CSH has not articulated any nexus between listing these items as contraband and the regulatory definition of contraband under § 881(e). CSH has laid out a blanket list of items patients cannot have or items that patients can have (CSH AD 626). By doing this, CSH is circumventing the good cause denial requirement outlined in § 884(c) rather than starting from the place of allowing patients to possess property *unless* it is contraband or a good cause denial is proven. Instead, the AD purports to give CSH the authority to determine what is not allowed first. Pursuant to Title 9 CCR § 884's good cause denial, an item not meeting the regulatory definition of "contraband" can only be confiscated if good cause exists and a written denial is placed into the patient's chart.

Further, CSH does not recognize that §§ 880 et seq. Controls the creation and implementation of its contraband list. Under CSH AD 818, CSH cites Department of Mental Health (DMH) Special Order 239.02 as its authority. DMH Special Order 239.02 is authorized by the Deputy Director of Long Term Care Services. A copy of DMH Special Order 239.02 is enclosed.

OAL oversight and a public comment period are needed to ensure that CSH implements a contraband policy that follows California regulation. The CSH contraband list is currently reviewed by the Contraband and Technology Transfer Committee and reviewed by CSH's Executive Director. See CSH AD 818, section V(B)(1). Furthermore, CSH AD 818 gives the executive director and chief of police at CSH the authority to declare any item contraband immediately when emergency circumstances are present. This decision is not reviewed until the next scheduled contraband committee meeting. See CSH AD 818, section V(B)(2). CSH does not define what an "emergency circumstance" is that gives rise to the authority of the executive director and chief of police. Having the contraband list reviewed and implemented by CSH staff has resulted in a blank contraband list that is arbitrary and lacking in authority from Title 9 CCR §§ 880et seq. Therefore OAL oversight and a comment period are needed to ensure a legal contraband police is implemented at CSH."

7. (Optional) Please attach any additional relevant information that will assist OAL in evaluating your petition.

Administrative Directive AD-818 and *Administrative Directive AD-626* are always used together and make repeated reference to each other.

CSH patient James A. Hydrick challenged AD-626 alleging it was an "Underground" regulation through a petition to the Office of Administrative Law on August 6, 2007. The OAL accepted this petition and set a public comment period. Protection & Advocacy attorney Sean Rashkis of Sacramento filed a brief in support of the Hydrick Petition.

On February 5, 2008, the Director of the Department of Mental Health, Stephen Mayberg, PhD., signed a "Delegation of Authority" for certification which stated, "I hereby delegate my authority and responsibilities for these matters to the following individuals:" The only individual listed is "Cindy Radavsky." On February 6, 2008, Cynthia A. Radavsky signed the statement, "We fully understand and accept this delegation."

Also on February 6, 2008, on a Department of Mental Health letterhead, Cynthia Radavsky issued a Certification which she signed as Deputy Director, Long Term Care Services, California Department of Mental Health. The body of this certification states:

CERTIFICATION PURSUANT TO 1 CCR 280

I, Cynthia A. Radavsky, Deputy Director of Long Term Care Services, California Department of Mental Health (Department), hereby certify:

1. The Department received a copy of a petition filed with California Office of Administrative Law by James A. Hydrick, on or about August 15, 2007. A copy of the petition is attached hereto as Exhibit A.
2. The Department will not issue, use, enforce, or attempt to enforce the alleged underground regulation. Coalinga State Hospital Administrative Directive No. 626.
3. A copy of this certification was sent to the petitioner by certified mail, and a copy of the receipt is attached hereto as Exhibit B.

On February 13, 2008, the Office Of Administrative Law issued a letter, Re: CTU2007-0815-01, The AD-626 Petition. In this letter to the petitioner signed by Susan Lapsley, Director, the OAL states:

The Office of Administrative Law has received your petition alleging that the Department of Mental Health has issued, used, enforced, or attempted to enforce an underground regulation. The rule you challenge is Coalinga State Hospital Administrative Directive 626. Department of Mental Health has certified, pursuant to California Code of Regulations, title 1 section 280, that it will not issue, use, enforce, or attempt to enforce Administrative Directive 626. OAL, therefore, pursuant to section 280, will suspend all action on the petition.

Our decision in no way reflects on the merits of the underlying issue presented by your petition. It does not constitute a judgment or opinion on any issue raised in your petition. Nothing in our decision restricts your right or ability to pursue this matter directly with the Department of Mental Health

On February 27, 2008, CSH Executive Director Norm Kramer issued a memorandum on DMH letterhead that, in part, announced:

“Coalinga State Hospital is addressing the security issues that were identified in the abolished AD by reviewing, revising and approving the Contraband List, which is authorized under Title 9, 884(b)(1). Coalinga State Hospital is also finalizing a new Administrative Directive that identifies the process for storage of personal possessions within the facility. It is anticipated this Administrative Directive will be reviewed and approved the first week of March 2008.

The facility reserves the right to review items entering the facility for suspected contraband and control storage space at its discretion until both documents, the revised contraband list and the new Administrative Directive are published.”

**A true and correct copy of the
Kramer Memorandum dated February 27, 2008
is attached hereto as EXHIBIT C.**

Thus, although the Department of Mental Health certified they would “not issue, use, enforce, or attempt to enforce the alleged underground regulation, *AD 626*, the DMH does in practice continue to use, enforce, and attempt to enforce *AD-626*. And to do so, the DMH has incorporated AD-626 into *AD-818*, the Administrative Directive being specifically challenged in this petition.

Petitioner alleges the Department of Mental Health utilized this sleight-of-hand diversion tactic of certifying Pursuant to Title 1, of the California Code of Regulations, § 280, that they would not issue, use, enforce, or attempt to enforce the alleged underground regulation, for the express purpose of preventing oversight by the Office Of Administrative Law and thus avoiding compliance with the Administrative Procedures Act.

CONCLUSION

"Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. [Citation.] [132 P.3d 255] (*Tidewater, supra*, 14 Cal.4th at pp. 568-569, 59 Cal.Rptr.2d 186, 927 P.2d 296.)" (*Morning Star Co. v. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333, 42 Cal.Rptr.3d 47, 53.)

Such bureaucratic tyranny has been a problem throughout the history of this country. Now, it must be stopped once again. The tyrannical bureaucrats in the Department of Mental Health must be directed to follow the law.

The DMH, part of the Executive Branch, lacks Constitutional authority to enact legislation. The Legislature has granted state agencies and departments quasi-legislative powers through the APA providing they follow specific promulgation procedures. However, until and unless the DMH does follow the provisions of the APA to properly promulgate *Administrative Directive AD-818*, it is an underground regulation which has been implemented in violation of the Separation of Powers Clause, Article III, Section 3, of the California Constitution.

To allow the DMH to continue to utilize a controversial Administrative Directive, such as *Administrative Directive AD-818*, would be to allow the sort of unfettered power in the Executive Branch that is a step toward a totalitarian concentration of power in the executive; a power to be exercised with inadequate legislative standard, and capable of avoiding judicial review, particularly when done through sleight-of-hand tactics designed to avoid review, has been prohibited from the earliest times. See *Hayburn's Case*, (1792) 2 U.S. (Dall.) 408, 1 L.Ed. 436, and its progeny.

Based on the foregoing, it is clear that there is a need for public participation in the regulatory process which directs the attention of agency policymakers within the Department of Mental Health to the public they serve, and to ensure that those persons or entities whom a regulation will affect have a voice in its creation.

8. Certifications:

I certify that I have submitted a copy of this petition and all attachments to:

Stephen W. Mayberg, Ph.D., Director
California Department of Metal Health
1600 9th St., Suite 151
Sacramento, CA 95814
(916) 654-2413 / (916) 654-2309

I certify that all the above information is true and correct to the best of my knowledge.

MICHAEL GEORGE ST.MARTIN
PETITIONER

Date