

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

**2023 OAL DETERMINATION NUMBER 3
(OAL MATTER NUMBER CTU2023-0612-01)**

REQUESTED BY: Allan Fletcher

CONCERNING: Administrative Directive No. 843 regarding Patient Living Areas issued by the Department of State Hospitals - Coalinga

DETERMINATION ISSUED PURSUANT TO GOVERNMENT CODE SECTION 11340.5.

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. OAL review is limited to the sole issue of whether the challenged rule meets the definition of “regulation” as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA).

If a rule meets the definition of “regulation” but was not adopted pursuant to the APA and should have been, it is an underground regulation as defined in the California Code of Regulations.¹ Nothing in this analysis evaluates the advisability or wisdom of policy issues involved in the underlying action or enactment.

¹ “Underground regulation” means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA. (Cal. Code Regs., tit. 1, § 250, subd. (a).)

CHALLENGED RULE

At issue is whether Administrative Directive No. 843 (AD 843), issued by the Department of State Hospitals - Coalinga (DSH-C), regarding Patient Living Areas, contains underground regulations. AD 843 is attached as Exhibit A.²

DETERMINATION

OAL determines AD 843 contains rules meeting the definition of “regulation” that the Department of State Hospitals (Department) should have adopted pursuant to the APA but did not.

FACTUAL BACKGROUND

On June 12, 2023, OAL received the petition from Allan Fletcher (Petitioner). On August 11, 2023, OAL accepted the petition for consideration.

On August 25, 2023, OAL published a summary of the petition in the California Regulatory Notice Register and solicited comments from the public until September 25, 2023. OAL received public comments from 9 commenters, mostly asserting AD 843 is an underground regulation, that DSH-C amends AD 843 without notice to patients, and that DSH-C makes AD 843 available to patients only in binders among hundreds of other Administrative Directives in a library.

On October 9, 2023, OAL received a response to the petition from the Department, which was due no later than October 9, 2023. The Department's timely response indicates the Department provided a copy of the response to the Petitioner on October 9, 2023.

OAL received no rebuttal from the Petitioner, which was due no later than October 24, 2023.

THE DEPARTMENT'S RESPONSE TO THE PETITION

In its response, the Department asserts AD 843 does not meet the definition of a regulation because it is not applied generally and does not meet the elements set forth in *Tidewater v. Marine Western, Inc. v. Victoria Bradshaw*.³ The Department also asserts AD 843 is not a regulation because it is merely a guide to DSH-C staff.

² Although the petition includes AD 843 (12/24/2021), the Department also furnished AD 843 (12/20/2022) for this matter. This determination is based upon the more recent version, which replaced prior versions.

³ *Tidewater v. Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557.

Also relevant to the analysis in this determination, the Department asserts AD 843 is exempt from the APA for the following six reasons:

1. It relates only to the internal management of DSH-C;⁴
2. It relates to a form utilized only by DSH-C staff;⁵
3. It relates to DSH-C audits and the defense and settlement of topical litigation;⁶
4. It embodies the only legally tenable interpretation of provisions of law;⁷
5. It governs the general control and direction of the property and concerns of each facility and the duty to maintain an effective inspection of the hospital;⁸ and
6. It governs hospital contraband.⁹

EXISTING LAWS AND REGULATIONS RELATING TO THE CHALLENGED RULE

The following existing laws and regulations, which are relevant to the analysis of this determination, relate to AD 843.

1. [The Department] ... may adopt and enforce rules and regulations necessary to carry out [its] ... duties under this division [regarding the care and treatment of persons with mental health disorders under the custody of the Department].¹⁰
2. [The Department] shall have jurisdiction over the execution of the laws relating to care and treatment of persons ... under [its] custody.¹¹
3. [The Department] may adopt regulations concerning [its] patients' rights and related procedures applicable to the ... treatment of ... persons receiving treatment.¹²

⁴ Gov. Code, § 11340.9, subd. (d).

⁵ Gov. Code, § 11340.9, subd. (c).

⁶ Gov. Code, § 11340.9, subd. (e).

⁷ Gov. Code, § 11340.9, subd. (f).

⁸ Welf. & Inst. Code, § 4109.

⁹ Welf. & Inst. Code, § 7295.

¹⁰ Welf. & Inst. Code, § 4005.1.

¹¹ Welf. & Inst. Code, § 4011, subd. (a).

¹² Welf. & Inst. Code, § 4027.

4. [The Department] has general control and direction of the property and concerns of each state hospital ... The department shall ... [t]ake care of the interests of the hospital, and see that its purpose and its bylaws, rules, and regulations are carried into effect, according to law and establish regulations ... for regulating the duties of officers and employees of the hospital, and for its internal government ... and management. The Department shall [maintain] an effective inspection of the hospital.¹³
5. Each person committed to a state hospital shall ... have the ... rights ... to keep and use his or her own personal possessions [and] to have access to individual storage space for his or her private use.¹⁴
6. Patients shall have the right ... [to] retain and use [their] personal clothing and possessions as space permits, unless to do so would infringe upon the health, safety or rights of the patient or other patients.¹⁵
7. Each [hospital] resident shall be provided clean, comfortable and reasonably private living accommodations.¹⁶
8. Patients shall be provided with closet or locker space for ... personal belongings.¹⁷
9. General and specialized storage space shall be maintained adequate to meet the needs of patients, for efficient operation of the facility and as required at the time of licensure.¹⁸
10. Non-peace officer staff must visually monitor for contraband at all times within ... patient living areas, and may conduct searches of any room, common area, or bathroom at any time, either announced or unannounced, to locate and secure contraband.¹⁹

¹³ Welf. & Inst. Code, § 4109, subd. (a), (b).

¹⁴ Welf. & Inst. Code, § 5325, subd. (a), (b).

¹⁵ Cal. Code Regs., tit. 22, § 73523, subd. (a)(16).

¹⁶ Cal. Code Regs., tit. 22, § 73611, subd. (b).

¹⁷ Cal. Code Regs., tit. 22, § 73613.

¹⁸ Cal. Code Regs., tit. 22, § 73659, subd. (a).

¹⁹ Cal. Code Regs., tit. 9, § 4351, subd. (a).

11. [A non-Lanternman-Petris-Short Act patient has] a right to personal visits during regularly scheduled visiting days and hours.²⁰
12. Facility visiting hours shall be scheduled seven days a week for a minimum of five hours each day.²¹
13. Patients have the right [to] have daily visiting hours established.²²
14. [The Department] shall develop a list of items that shall be deemed contraband [and prohibited] at every state hospital. A state hospital shall ... develop [its] list of contraband items. Notwithstanding [the APA], the hospital and the department may implement, interpret, or make specific this section without taking regulatory action.²³

UNDERGROUND REGULATIONS

Existing law bars a state agency from issuing or utilizing a rule unless it adopts the rule pursuant to the APA:

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 [Government Code] 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 [the APA].²⁴

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of Government Code section 11340.5, it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether an agency has issued, utilized, enforced, or attempted to enforce a rule that meets the definition of "regulation" as defined in Government Code section 11342.600 and should have been adopted pursuant to the APA.²⁵ An OAL determination is not

²⁰ Cal. Code Regs., tit. 9, § 884, subd. (b)(4).

²¹ Cal. Code Regs., tit. 9, § 4300, subd. (a).

²² Cal. Code Regs., tit. 22, § 73523, subd. (a)(18).

²³ Welf. & Inst. Code, § 7295, subd. (a)-(c), (j).

²⁴ Gov. Code, § 11340.5, subd. (a).

²⁵ Gov. Code, § 11340, subd. (b).

enforceable against the agency through any formal administrative means, but it is entitled to due deference in any subsequent litigation of the issue.²⁶

ANALYSIS

OAL's authority to issue a determination extends only to the limited question of whether the challenged rule is a regulation subject to the APA. This analysis will determine (1) whether the challenged rule is a regulation within the meaning of Government Code section 11342.600; and (2) whether the challenged rule falls within any recognized APA exemption.

1. AD 843 satisfies the elements of a regulation.

A "regulation" is defined in Government Code section 11342.600:

. . . 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.

In *Tidewater v. Marine Western, Inc.*, the California Supreme Court expanded on this definition:

A regulation subject to the [APA] 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.²⁷

As stated in *Tidewater*, the first element used to identify a regulation is whether the rule applies generally. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations.²⁸

AD 843 applies to all staff, patients, and visitors at DSH-C and, therefore, applies to a class of persons. Moreover, each class of persons impacted by

²⁶ *Grier v. Kizer* (1990) 219 Cal.App.3d 422.

²⁷ *Tidewater, supra*, at 571.

²⁸ See also *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 630.

AD 843 is an open class with individuals regularly working at, committed to, discharged from, or visiting the facility. The Department's assertion that AD 843 does not apply generally because it applies only to DSH-C staff is without merit because DSH-C staff, patients, and visitors are open classes of persons, bringing AD 843 squarely within the first element of *Tidewater*.

The second element of a regulation under *Tidewater* is that the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure. AD 843 contains multiple examples of rules doing just that. For example, many provisions in AD 843 govern the possession and use of personal property and Section V.K.3. sets forth many detailed procedures for the timing of searches of patient rooms, related notice requirements, documentation and reporting requirements, and the handling and disposition of a patient's items that purportedly violate the rules. As another example, Section V.G.1.j. limits a patient's wall coverings to 10% of the room's wall space. Yet another example, Section V.C., establishes fixed hours of accessibility for different parts of DSH-C.

These sections implement, interpret, and make specific the Welfare and Institutions Code enforced or administered by the Department and govern the Department's procedure in at least the following four ways:

1. They implement, interpret, and make specific sections 4005.1 and 4011(a), because they are regulations presumably necessary to carry out the Department's duty to execute the laws relating to care and treatment of persons under the Department's custody.
2. They implement, interpret, and make specific section 4027 because they concern patients' rights and related procedures applicable to their treatment.
3. They implement, interpret, and make specific section 4109 because they provide for the general control and direction of the concerns of DSH-C and its interests, they seek to ensure the purpose, rules, and regulations of the Department and DSH-C are carried into effect according to law, and they govern the duties of officers and employees of the hospital and its procedures as well as the duty to maintain effective inspections.
4. Rules governing the possession and use of personal property, Section V.K.3. regarding searches and disposition of personal property, and Section V.G.1.j. regarding the limit on a patient's wall covering, implement, interpret, and make specific section 5325(a) and (b)

because they govern a patient's rights to keep and use personal possessions and to make private use of individual storage space.

AD 843 rules restricting possession and use of personal property, Section V.K.3. regarding searches and disposition of personal property, and Section V.G.1.j. regarding the limit on a patient's wall covering, also implement, interpret, and make specific the California Code of Regulations in at least the following four ways:

1. They implement, interpret, and make specific title 22, section 73523(a)(16), because they govern a patient's right to retain and use his or her personal clothing and possessions as space permits and govern whether doing so would infringe upon the health, safety, or rights of a patient.
2. They implement, interpret, and make specific title 22, section 73611(b), because they govern DSH-C's duty to each hospital resident to provide clean, comfortable, and reasonably private living accommodations.
3. They implement, interpret, and make specific title 22, section 73659(a) because they govern maintenance of adequate general and specialized storage space to meet the needs of patients and for efficient operation of the facility.
4. Section V.K.3. regarding searches and disposition of personal property, implements, interprets, and makes specific title 9, section 4351(a), because it provides parameters and procedures for non-peace officer staff to visually monitor a patient's possessions and to conduct searches of a patient's room.

Section V.C. regarding facility hours, implements, interprets, and makes specific title 22, section 73523(a)(18), and title 9, sections 884(b)(4) and 4300(a), because it governs a patient's right to schedule visitors and limits visitor access to hospital patients.

These examples illustrate how AD 843 meets the definition of "regulation" for purposes of Government Code section 11342.600 under *Tidewater*.

2. All of AD 843 is not APA exempt.

The final issue to examine is whether the challenged rule falls within an express statutory exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. In any

event, the procedural requirements established in the APA shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.²⁹

A. AD 843 does not relate only to internal management.

A regulation that relates only to the internal management of the state agency is exempt from the APA.³⁰ This exemption applies only if a rule satisfies two conditions:

1. The rule affects only the employees of the issuing agency;³¹ and
2. The rule does not involve a matter of serious consequence involving an important public interest.³²

Courts have interpreted the internal management exemption narrowly:

The internal management exception is a narrow one, as demonstrated by a line of cases consistently rejecting its application - even where the policies govern internal administrative matters - if the policies or procedures affect the interests of persons other than the agency itself.³³

The many AD 843 rules restricting possession and use of personal property, Section V.K.3. regarding searches and disposition of personal property, and Section V.G.1.j. regarding the limit on a patient's wall covering, for example, directly affect a DSH-C patient's statutory rights to keep and use personal possessions, to have access to individual storage space for private use, to retain and use personal clothing and possessions as space permits, and to clean, comfortable, and reasonably private living accommodations. Section V.C. regarding facility hours directly affects a patient's right to schedule visitors as well as visitor access to patients.

AD 843 does not affect only the employees of DSH-C. Further, these rules involve matters of serious consequence involving important public interests.

²⁹ Gov. Code, § 11346.

³⁰ Gov. Code, § 11340.9, subd. (d).

³¹ See *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 736; *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204.

³² See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943; *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 436.

³³ *California School Boards Assn. v. State Board of Education* (2010) 186 Cal.App.4th 1298, 1334.

Thus, AD 843 is not APA exempt based upon the internal management exemption.

B. AD 843 is not APA exempt because it references a form utilized only by DSH-C staff.

The APA contains a limited exemption applicable to state agency forms.

The [APA] does not apply to ... [a] form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation on any requirement that a regulation be adopted pursuant to [the APA] when one is needed to implement the law under which the form is issued.³⁴

The Department asserts AD 843 is exempt because *Confiscated/Destroyed Staff Property Form (23-104)*, identified in Section V.K.3.g., is a form utilized by DSH-C staff. The statutory exemption is clear on its face that it does not apply to a form containing a rule the APA requires to be adopted as regulation. To the extent this form contains a regulation, where no other exemption applies, the agency must adopt the form into regulation under the APA. The lone fact that a form may be used only by agency staff is of no import if the content of form is regulatory and does not satisfy the internal management exemption, discussed above, or some other APA exemption.

Without knowing the content of the form, OAL cannot analyze it. Regardless, the assertion that a form is APA exempt solely because only agency staff utilizes it is incorrect.

C. AD 843 is not APA exempt as audit criteria or guidelines or in the defense or settlement of a case.

The APA contains a limited exemption regarding agency audits and material to be used in defense or settlement of a case.

[The APA] does not apply to ... [a] regulation that establishes criteria or guidelines to be used by the staff of an agency in performing an audit, investigation, examination, or inspection, ... or in the defense, prosecution, or settlement of a case, if disclosure of the criteria or guidelines would do any of the following:

- (1) Enable a law violator to avoid detection.

³⁴ Gov. Code, § 11340.9, subd. (c).

(2) Facilitate disregard of requirements imposed by law.

(3) Give clearly improper advantage to a person who is in an adverse position to the state.³⁵

AD 843 has been distributed to patients and the public. Therefore, it is clear that "disclosure of the criteria or guidelines" was acceptable or necessary. In that it is necessary for patients to know the rules, the exemption for audits/investigations does not apply.

D. AD 843 does not embody the only legally tenable interpretation of a provision of law.

Generally, a rule is excepted from the APA if it is the only legally tenable interpretation of a provision of law.

The exception for the lone "legally tenable" reading of the law applies only in situations where the law "can reasonably be read only one way: such that the agency's actions or decisions in applying the law are essentially rote, ministerial, or otherwise patently compelled by, or repetitive of the statute's plain language."³⁶

But to the extent any of the contents of the [statement of policy or procedure] depart from, or embellish upon, express statutory authorization, the [agency] will need to promulgate regulations.³⁷

The provisions of AD 843 governing searches and disposition of personal property, a patient's wall covering, and DSH-C hours are not the only legally tenable interpretations of the relevant provisions of the Welfare and Institutions Code or the California Code of Regulations, discussed above. The Department could have adopted any number of other rules, procedures, frequencies, and methods for these activities to ensure their patients' safety and wellbeing, such as different detailed search parameters, different notice requirements, different recording requirements, different property disposition rules, different amounts of allowable wall covering, or different access hours than those DSH-C chose to include in AD 843.

³⁵ Gov. Code, § 11340.9, subd. (e).

³⁶ *Morning Star Co. v. State Board of Equalization* (2006) 38 Cal.4th 324, 336-337 (internal citations omitted).

³⁷ *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62.

The specific procedures DSH-C put into AD 843 are not the only legally tenable interpretations of existing law. The Department has many options available under existing law which existing law does not patently compel. Provisions in AD 843 are not a plainly ineluctable result of existing law. AD 843 includes multiple provisions which are neither the only legally tenable interpretation of a provision of law nor a restatement of existing law.

E. AD 843 is not APA exempt because it governs the general control and direction of the property and concerns of each facility and the duty to maintain an effective inspection of the hospital.

The Department asserts that AD 843 is APA exempt because existing statute provides that the Department has the general control and direction of the property and concerns of each facility and the duty to maintain an effective inspection of the hospital.³⁸ Although the statute may delegate **authority** to the Department to implement the statutes the Department cites, the question is whether implementation requires the adoption of AD 843 pursuant to the APA.

As discussed above, the procedural requirements established in the APA shall not be superseded or modified by any legislation except to the extent that the legislation shall do so expressly.³⁹ The statute the Department relies upon to support its assertion provides no express APA exemption. The Department must adopt regulations pursuant to the APA to implement, interpret, or make specific this statute unless an express statutory exemption applies.

F. It is unclear whether AD 843 contains items that have been developed as contraband.

The Welfare and Institutions Code expressly provides an APA exemption for the Department to develop a list of contraband items prohibited statewide on hospital grounds and for an individual hospital to develop its own hospital contraband list using statutorily enumerated procedures.⁴⁰

The Department asserts AD 843 contains various limits, restrictions, and prohibitions on possession and use of personal property items of DSH-C patients and concludes any item of personal property held in “excess quantities” or used, stored, or otherwise held in a manner inconsistent with the provisions of AD 843 is contraband. Accordingly, the Department asserts AD

³⁸ Welf. & Inst. Code, § 4109.

³⁹ Gov. Code, § 11346.

⁴⁰ Welf. & Inst. Code, § 7295, subd. (a)-(c), (j).

843 falls within the contraband exemption with respect to its personal property restrictions.

For purposes of the exemption, “contraband” means materials, articles, or goods that a patient is prohibited from having in his or her possession because the materials, articles, or goods present a risk to the safety and security of the facility.⁴¹ To qualify for the contraband exemption, the Department or hospital must have added the item to the applicable contraband list pursuant to the enumerated statutory procedures. Development of the list must occur through a duly formed contraband committee with the participation of patient representatives and the Office of Patient’s Rights. A contraband list must be subject to timely review and approval of the Department’s Director. A hospital must post a contraband list prominently in every unit of the hospital, throughout the hospital, and online.⁴²

This record contains no evidence that the Department or DSH-C adopted the items sought to be characterized as prohibited contraband pursuant to these requirements. The Department did not furnish the statewide or DSH-C contraband list in response to the petition. In addition, multiple commenters objected to how DSH-C developed AD 843 and stated that AD 843 has not been posted prominently in every unit of the hospital, throughout the hospital, and online. It is, therefore, unclear if DSH-C adopted the purported contraband elements of AD 843 pursuant to the requirements of Welfare and Institutions Code section 7295 or whether the contraband exemption applies to any of them.

CONCLUSION

OAL determines AD 843 contains rules meeting the definition of a “regulation”, such as fixed hours of accessibility for different parts of DSH-C, that should have been adopted pursuant to the APA.

Date: December 26, 2023

_____/s/
Mark Storm
Senior Attorney

Copy:
Sunny Lowell
Department of State Hospitals
1215 O Street
Sacramento, CA 95814

⁴¹ Welf. & Inst. Code, § 7295, subd. (i).

⁴² Welf. & Inst. Code, § 7295, subd. (c)-(h).