

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
AGENCY: DEPARTMENT OF CORRECTIONS)	DECISION REGARDING DISAPPROVAL OF A RULEMAKING ACTION
)	
)	(Gov. Code, sec. 11349.6, Pen. Code, sec. 5058.3)
RULEMAKING ACTION: Adopt sections 3480.1, 3484, 3485; Amend sections 3480, 3481, 3482, and 3483 of title 15 of the California Code of Regulations)	OAL File No. 05-0201-01EON
)	

SUMMARY OF RULEMAKING ACTION

This operational necessity emergency rulemaking action revises existing regulations that implement the Prison Inmate Labor Initiative of 1990, approved as Proposition 139. The changes regulate the manner in which the Department of Corrections is to monitor the requirements of the proposition regarding comparable wage rates for joint venture programs, as required by the stipulated injunction in *Ervin, et al. v. State of California, et al.* Superior Court of San Diego County, No. GIC 740832. The action also makes other changes to the regulations unrelated to the injunction regarding joint venture employer selection criteria, joint venture leasing requirements, joint venture contract requirements, and inmate participation.

SUMMARY OF DECISION

On February 22, 2005, the Office of Administrative Law (OAL) disapproved the above-referenced rulemaking action. The reasons for the disapproval are summarized here and explained in detail below.

- A. The supporting explanation and description of underlying facts submitted with this rulemaking action do not demonstrate that an operational need exists to adopt a number of the regulatory changes included in this filing using the emergency rulemaking procedure.

- B. (1) It is not clear whether a provision on non-retaliation in 3485(d)(4) is directed at the department, joint venture employers, or both. (2) New subsection 3482(a)(12)(J) is unclear because it fails to specify how the amount of the bond is to be calculated. In addition, the subsection is facially inconsistent with the injunction in that the regulation fails to address “past due wages.”

C. (1) Certifications are not signed by the person making the certification; (2) a case cited in a Reference note is not implemented, interpreted or made specific by the regulation; (3) the final text needs to be reformatted.

DISCUSSION

The adoption of regulations by the Department of Corrections (“Department”) must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency (“APA”), and must satisfy applicable requirements established by the Penal Code. Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure is subject to the APA unless a statute expressly exempts the regulation from APA coverage. A regulation submitted as an operational necessity emergency regulation is reviewed by the Office of Administrative Law (OAL) for compliance with the requirements of Penal Code section 5058.3.¹ The statement of operational necessity submitted pursuant to Penal Code section 5058.3 is an alternative to a statement of emergency submitted pursuant to Government Code 11346.1. The Legislature has not exempted a statement of operational necessity from OAL review. OAL also reviews an operational necessity emergency regulation for compliance with applicable APA procedural requirements and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In its review OAL

¹ Penal Code section 5058.3 provides: “(a) Emergency adoption, amendment, or repeal of a regulation by the director shall be conducted pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except with respect to the following:

“(1) Notwithstanding subdivision (e) of Section 11346.1 of the Government Code, the initial effective period for an emergency adoption, amendment, or repeal of a regulation shall be 160 days.

“(2) Notwithstanding subdivision (b) of Section 11346.1 of the Government Code, no showing of emergency is necessary in order to adopt, amend, or repeal an emergency regulation if the director instead certifies, in a written statement filed with the Office of Administrative Law, that operational needs of the department require adoption, amendment, or repeal of the regulation on an emergency basis. The written statement shall include a description of the underlying facts and an explanation of the operational need to use the emergency rulemaking procedure. This paragraph provides an alternative to filing a statement of emergency pursuant to subdivision (b) of Section 11346.1 of the Government Code. It does not preclude filing a statement of emergency. This paragraph only applies to the initial adoption and one readoption of an emergency regulation.

“(3) Notwithstanding subdivision (b) of Section 11349.6 of the Government Code, the adoption, amendment, or repeal of a regulation pursuant to paragraph (2) shall be reviewed by the Office of Administrative Law within 20 calendar days after its submission. In conducting its review, the Office of Administrative Law shall accept and consider public comments for the first 10 calendar days of the review period. Copies of any comments received by the Office of Administrative Law shall be provided to the department.

“(b) It is the intent of the Legislature, in authorizing the deviations in this section from the requirements and procedures of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, to authorize the department to expedite the exercise of its power to implement regulations as its unique operational circumstances require.”

may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. The OAL review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret and make specific statutory law, and to ensure that required procedures are followed and that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective. We discuss the specific requirements of Penal Code section 5058.3 below.

A.

The supporting explanation and description of underlying facts submitted with this rulemaking action do not demonstrate that an operational need exists to adopt a number of the regulatory changes included in this filing using the emergency rulemaking procedure.

The regulatory changes included in this rulemaking action are not limited to those for which an operational necessity has been demonstrated. Rather, the changes appear to be a comprehensive update to the Department's Proposition 139 regulations.

The Department submitted this rulemaking action to OAL for review pursuant to Penal Code section 5058.3, as an alternative to filing a statement of emergency pursuant to subdivision (b) of Section 11346.1 of the Government Code. A submission pursuant to section 5058.3 must include a written statement that includes "a description of the underlying facts and an explanation of the operational need to use the emergency rulemaking procedure."

In this instance, the entire description of underlying facts and explanation in the statement of operational necessity is the following:

"The Superior Court of the State of California (San Diego County) required the Department of Corrections, Joint Venture Program, to update its current regulations regarding joint venture activities and inmate employment to reflect current law and federal regulations. Failure to comply with this Court Order could result in the revocation of department certification and the loss of millions of dollars to victims of crime and the State of California.

"These revisions to the regulations governing the activities of the Joint Venture Program will ensure that the business owners and inmate-employees are informed of their employment rights and responsibilities. Additionally, these revisions to the joint venture regulations will ease tension, thereby reducing the opportunity for unrest and violence in the workplace."

The Department also submitted a copy of the stipulated injunction and order signed by the Superior Court in San Diego more than a year ago on February 17, 2004. The parts of the order

that relate to regulatory changes included in this filing involve only the payment of comparable wages² and do not extend to the provisions on the other matters included in the filing.

The statement of operational necessity also avers that the revisions to the joint venture regulations will ease tension and reduce the opportunity for unrest and violence in the workplace. The nexus between a failure to pay inmate-employees comparable wages as required by Proposition 139 and tension in the workplace is obvious. The same, however, cannot be said for the provisions unrelated to the payment of comparable wages. The topics addressed by these unrelated provisions do not have the same inherent possibility of tension as the comparable wage provision. Thus an adequate statement of operational necessity for provisions unrelated to comparable wages must include more than the bare statement that "... these revisions to the joint venture regulations will ease tension, thereby reducing the opportunity for unrest and violence in the workplace."

Thus, a number of regulatory changes included in this rulemaking action are outside of the scope of the operational necessity explained in the supporting statement submitted for review. They are the provisions in the emergency regulations concerning the following topics: the general purposes of the program (section 3480)), consideration of the financial status and stability of prospective joint venture employer (section 3481(d)), contract provisions concerning a description of the joint venture employer's program operation (section 3482(a)(1)), non-inmate employee orientation training (section 3482(a)(3)), hours of inmate employment and work schedule (section 3482(a)(6)), minimum and maximum inmate workforce requirements (section 3482(a)(7)), general liability, fire, legal, and automobile liability insurance (section

² The relevant parts of stipulated injunction in *Ervin, et al. v. State of California, et al.* Superior Court of San Diego County, No. GIC 740832 require the Department to do the following:

1. require each future joint venture employer to submit a Wage Plan and Duty Statements prior to commencing business and to update them annually;
2. include a provision in all future joint venture contracts making compliance with all applicable record-keeping requirements set forth in the California Labor Code and applicable Industrial Welfare Commission (IWC) Wage Orders an express provision of the contract;
3. take reasonable steps to identify the comparable wages required to be paid as required by Penal Code sec. 2717.8;
4. amend its regulations to regulate the manner within which the requirements of Proposition 139 regarding comparable wage rates for joint venture programs are to be monitored;
5. require joint venture entities to advise in writing all current and future inmates employed in joint venture programs of their rights under Penal Code sec. 2717.8, the IWC Wage Orders, and relevant California Labor Code provisions;
6. require a joint venture employer to post in a prominent location at the workplace, and to provide to each inmate worker when the worker agrees to participate in the program a notice explaining rights under Penal Code sec. 2717.8, the IWC Wage Orders, and relevant California Labor Code provisions;
7. notify all inmates employed at Joint Venture Programs of their right to file complaints regarding claimed violations of their rights under Penal Code sec 2717.8, relevant provisions of the Labor Code, and the IWC Wage Orders;
8. ensure that the filing of a complaint by an inmate-employee does not lead to a reprisal by the joint venture employer and will promptly investigate such complaints;
9. require a joint venture employer to post a Security Bond (or the equivalent) in the amount of two months wages for the workforce contemplated after 6 months of operation; and
10. provide that in the event that the bond is called by Defendant, the funds shall be used first to pay past due wages (distributed according to the regulations promulgated in accordance with Proposition 139), and provide that in the event of any surplus, such surplus may be used to pay amounts due to the State.

3482(a)(12)(C)), adherence to health and safety laws and regulations (section 3482(a)(12)(K)), hiring sole determination of joint venture employer (section 3482(a)(12)(M)), inmate-employee time keeping (section 3482(a)(12)(N)), Workers' Compensation Rate (section 3482(a)(12)(O)), agreement regarding non-displacement of non-inmate workers (section 3482(a)(12)(P)), final selection of inmate-employees (section 3482(a)(12)(Q)), responsibility of joint venture employer to comply with all applicable laws (section 3482(a)(12)(R)), inmate-employee performance evaluation (section 3482(a)(12)(S)), designation of a coordinator by the facility (section 3482(a)(13)), right of entry of the production areas (section 3482(a)(13)(C)), inmate-employee discipline (section 3482(a)(13)(D)), program evaluation (section 3482(a)(13)(E)), capacity of agents and employees of the joint venture employer (section 3482(c)), relationship between inmate-employee and the State (section 3482(d)), contents of joint venture leases (section 3483), termination and removal of inmate-employees (section 3485(a)), random urine testing (section 3485(b)), frequency of payment of earned wages (section 3485(c)), and election to close savings account (section 3485(i)(2)).

Consequently, OAL disapproves these provisions as being outside the scope of the Department's operational needs as justified in the statement of operational necessity.

B.

(1) It is not clear whether a provision on non-retaliation in 3485(d)(4) is directed at the department, joint venture employers, or both. (2) New subsection 3482(a)(12)(J) is unclear because it fails to specify how the amount of the bond is to be calculated. In addition, the subsection is facially inconsistent with the injunction in that the regulation fails to address "past due wages."

Each regulation must satisfy the Clarity standard. (Gov. Code, sec. 11349.1.) "'Clarity' means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." (Gov. Code, sec. 11349.)

(1) New subsection 3485(d)(4) provides: "Inmates shall not be subject to retaliation by the department for their use of the inmate appeal process as specified in Title 15, CCR, Section 3084.1(d), to address Joint Venture Employer-Related matters. Inmates shall not be subject to retaliation for exercising rights guaranteed under the State Labor Code or elsewhere in law to address Joint Venture Employer-related matters."

The first sentence is specifically directed at the department. It is not easy to understand, however, whether the second sentence is directed at the department, joint venture employers, or both. Consequently, the second sentence fails to satisfy the Clarity standard.

(2) With regard to the bonding requirement the stipulated injunction says: "[E]ach new joint venture employer will be required to post a Security Bond (or the equivalent) in the amount of two months wages for the workforce contemplated after 6 months of operation. The bond (or its equivalent) shall be retained by Defendant for the duration of the contract and, in the event that the bond is called by Defendant, the funds shall be used first to pay past due wages (distributed

according to the regulations promulgated in accordance with Proposition 139). In the event of any surplus, such surplus may be used to pay amounts due to the State.”

The proposed regulation on bonding, new subsection 3482(a)(12)(J), says: “A Security Bond, or equivalent security, requirement shall be included in the contract. The bond, or its equivalent shall be retained by the department and may be used by the department in the event a Joint Venture Employer fails to submit payroll or defaults on any of its obligations to the State. The department may apply the bond to unpaid obligations to the State, including, but not limited to rent, utilities, workers’ compensation, and custody costs.”

The bonding regulation is unclear because it fails to specify how the amount of the bond is to be calculated. In addition, the bonding regulation is facially inconsistent with the injunction in that the regulation fails to address “past due wages.” “Consistency” means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” (Gov. Code sec. 11349(d).) Consequently, subsection 3482(a)(12)(J) fails to satisfy the Clarity and Consistency standards of Government Code section 11349.1.

C.

(1) Certifications are not signed by the person making the certification; (2) a case cited in a Reference note is not implemented, interpreted or made specific by the regulation; (3) the final text needs to be reformatted.

(1) Two signatures are inappropriate. The Form 400 certification is signed by someone “for” Ernest C. Van Sant, Chief Deputy Director, whose name is typed in. One cannot certify on another’s behalf. The certification must be signed by the person making the certification. Also, the certification on the Form 400 must be made by the head of the agency or someone with a written delegation of authority from the head of the agency to sign the Form 400. (Gov. Code sec. 11343(f).) The Certification of Operational Necessity is also signed by someone “for” Ernest C. Van Sant, Chief Deputy Director, whose name is typed in. This certification must also be signed by the person making the certification.

(2) It is not appropriate to cite *Vasquez v. State of California*, 105 Cal.App.4th 849 in the Reference note for section 3482. That appellate case overturned a dismissal entered after the trial court sustained without leave to amend a demurrer of the State. That decision is not implemented, interpreted, or made specific by section 3482.

(3) The final text needs to be reformatted. The final text includes a separate instruction for virtually each subsection of the regulation. For example: “Subsection 3481(a)(5) is amended to read:” These subsection by subsection instructions are unnecessary, because section 8 of title 1 of the California Code of Regulation requires the final text to show the underlying text of a regulation section as it appears in print in the California Code of Regulations with text to be added in underline or italic and text to be deleted in strikeout. In some instances the underlying text of some of the renumbered subsections is not even shown in the final text. As an example the final text includes as an instruction, “Subsection 3482(a)(10)(B) is renumbered to

3482(a)(13)(B), text unchanged,” but fails to include these subsection numbers in underline/strikeout and fails to include the underlying text that is moved. The underline of some new Authority and Reference citations is omitted.

For these reasons OAL disapproved the above-referenced rulemaking action.

Date: February 25, 2005

MICHAEL McNAMER
Senior Counsel

for: WILLIAM L. GAUSEWITZ
DIRECTOR

Original: Jeanne Woodford, Director
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