

**State of California
Office of Administrative Law**

In re:
**Department of Corrections and
Rehabilitation**

Regulatory Action:

Title 15, California Code of Regulations

Adopt sections:

Amend sections: 3173.2

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2016-0804-02

**OAL Matter Type: Certificate of
Compliance (C)**

SUMMARY OF REGULATORY ACTION

The Department of Corrections and Rehabilitation (Department) submitted a timely Certificate of Compliance, which would have permanently amended title 15, section 3173.2 of the California Code of Regulations (CCR) to modify search options for individuals visiting Department facilities who alert positive as a result of passive canine air scans and to eliminate unclothed searches of visitors based solely upon a positive passive canine air scan. These regulations were adopted as an emergency in OAL File No. 2016-1103-01EON and re-adopted in OAL File No. 2016-0429-04EON.

On August 4, 2016, the Department submitted the above-referenced rulemaking action to the Office of Administrative Law (OAL) for review. On September 16, 2016, OAL notified the Department that OAL disapproved the proposed regulations. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced rulemaking action for the following reasons:

1. The proposed regulation failed to comply with the consistency standard of Government Code section 11349.1, subdivision (a)(4);
2. The proposed regulation failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3); and
3. The proposed regulation failed to comply with the necessity standard of Government Code section 11349.1, subdivision (a)(1).

All Administrative Procedure Act (APA) issues must be resolved prior to OAL's approval of any resubmission.

DISCUSSION

The Department's regulatory action must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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. (Gov. Code, sec. 11346.)

Before any regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the APA standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In this review, OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

1. Consistency Standard

Government Code section 11349.1, subdivision (a)(4), requires that OAL review all regulations for compliance with the consistency standard. Government Code section 11349, subdivision (d), defines "consistency" to mean "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." As discussed below, the consequences for an individual refusing a passive canine air scan while visiting a Department facility are inconsistent with Penal Code section, 6402, subdivision (e). Penal Code section 6402, subdivision (e), provides as follows:

The Department of Corrections and Rehabilitation (CDCR) shall develop policies related to the department's contraband interdiction efforts for individuals entering CDCR detention facilities. When developed, these policies shall include, but not be limited to, the following specifications:

...

(e) All visitors attempting to enter a CDCR detention facility who refuse to be searched by a passive alert dog shall be informed of options, including, but not limited to, the availability of a noncontact visit.

...

The proposed amendments to section 3173.2, subdivision (c)(3)(B), seek to establish increasingly severe restrictions on visitors who either have a positive result during the drug interdiction process and/or refuse to participate in the process. These restrictions require individuals to participate in the drug interdiction process on subsequent visits and if the visitor refuses, they are denied a visit, even a noncontact visit. However, Penal Code section 6402, subdivision (e), allows visitors to refuse a search by a passive alert dog and still be allowed a noncontact visit, if available.

Based on the express language of Penal Code section 6402, subdivision (e), visitors to detention facilities maintained by the Department are allowed to refuse to be searched by a passive alert dog and still be allowed a noncontact visit, if available. The Department must revise the regulation text to be consistent with Penal Code section 6402, subdivision (e).

2. Clarity Standard

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1, subdivision (a)(3), requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c), defines “clarity” to mean: “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

In this rulemaking action, proposed section 3173.2 fails to comply with the clarity standard of the APA. Proposed section 3173.2, subdivision (c)(2)(B), reads as follows:

(B) The canine handler shall advise the visitor he/she is going to conduct a passive canine air scan search of the visitor. All visitors, including attorneys or legal organizations as identified in section 3141(c)(9) and employees of other governmental agencies, shall be informed that: (1) he/she does have the right to refuse the search, and (2) any visitor who refuses to be searched in this manner shall be denied contact visiting but may be authorized for a non-contact visit if available on that same day.

Subdivision (c)(2)(B) is unclear because the regulation presents information in a format that is not readily understandable by persons “directly affected” by this regulation. The language indicates that a visitor “may be authorized” for a non-contact visit, but does not explain the process for this authorization. What criteria will be used to authorize such non-contact visits? Therefore, as written, the section violates the clarity standard because the meaning of the proposed regulation would not be easily understood by those persons directly affected by the regulation.

For the reason discussed above, proposed section 3173.2 fails to comply with the clarity standard of the APA. The Department must make proposed modifications to the text available to the

public for comment for at least 15 days pursuant to Government Code section 11346.8, subdivision (c), and section 44 of title 1 of the CCR before adopting the regulation and resubmitting this regulatory action to OAL for review. Additionally, any comments made in response to the proposed modifications must be presented to the Department for consideration, and objections and recommendations must be summarized and responded to in the Final Statement of Reasons (FSOR) pursuant to Government Code section 11347.1, subdivision (d).

3. Necessity Standard

OAL must review regulations for compliance with the necessity standard of Government Code section 11349.1, subdivision (a)(1). Government Code section 11349, subdivision (a), defines “necessity” as follows:

“Necessity” means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

To further explain the meaning of “substantial evidence” in the context of the necessity standard, subdivision (b) of section 10 of title 1 of the CCR provides:

(b) In order to meet the “necessity” standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

- (1) A statement of the specific purpose of each adoption, amendment, or repeal; and
- (2) information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An “expert” within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

In order to provide the public with an opportunity to review and comment upon an agency’s need for a regulation, the APA requires that the agency describe the need for the regulation in the Initial Statement of Reasons (ISOR). The ISOR is the primary document in the rulemaking record that demonstrates that the adoption, amendment, or repeal satisfies the necessity standard. Specifically, Government Code section 11346.2, subdivision (b), states:

(b) An initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation ... shall include ... :

(1) A statement of the specific purpose of each adoption, amendment, or repeal, the problem the agency intends to address, and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it is proposed. The statement shall enumerate the benefits anticipated from the regulatory action, including the benefits or goals provided in the authorizing statute....

The ISOR must be submitted to OAL with the notice of the proposed action and be made available to the public during the public comment period, along with all of the information upon which the proposal is based. (Gov. Code, sec. 11346.2, subd. (b); Gov. Code, sec. 11346.5, subds. (a)(16) and (b).) In this way, the public is informed of why the regulation is needed and why the particular provisions contained in the regulation were chosen to fill that need. This information is essential in order for the public to comment knowledgeably. The ISOR and all data and other factual information, studies, or reports upon which the agency relies in the regulatory action must also be included in the rulemaking file. (Gov. Code, sec. 11347.3, subds. (b)(2) and (7).)

Proposed amendments to section 3173.2 include increasingly severe consequences if a visitor to a detention facility refuses a drug interdiction process more than one time during a twelve month period. The consequences begin with a requirement that the visitor participate in the drug interdiction process and culminate in the possibility of a permanent exclusion from the facility or potentially all Department facilities. An example of the consequences outlined in the regulatory text is found in section 3173.2, subdivision (c)(3)4, that reads as follows:

A visitor, who refuses to participate in a drug interdiction process or submit to a clothed body search after a positive EDDE scan/passive canine air scan alert for the fourth time in a twelve (12) month period, shall be denied a visit for that day. The institution head or designee may issue an order to suspend the visitor from the institution/facility within his/her jurisdiction for up to twelve (12) months and refer the case to the director or designee for review of permanent exclusion of a person from any or all institutions/facilities, pursuant to CCR, Title 15, Sections 3176.1, 3176.2 and 3176.3.

Any refusal to participate in the drug interdiction process results in the denial of a visit, even a non-contact visit.

Also proposed in this rulemaking action in section 3173.2, subdivision (c)(4)(B), is a procedure utilized by the Department if someone has a positive alert due to prescribed medication(s). This procedure outlines how a visitor may prove the positive alert was due to a prescribed medication

utilizing a valid prescription for such medication(s). The text of section 3173.2(c)(4)(B) reads as follows:

Should the visitor claim that a positive canine alert is due to one or more prescribed medications, that person must provide current documentation in the form of a licensed physician's, licensed physician's assistant's or certified nurse practitioner's verification or a valid prescription for the medication(s) that is/are suspected to have caused the positive canine alert before they will be permitted a contact visit. The visitor shall be informed that he/she shall be required to submit to an EDDE scan to determine drug type. The visitor shall also be informed that if he/she has a negative scan or alerts to a substance consistent with his/her medical verification, he/she shall be required to submit to a clothed body search as a condition of visiting. Any item(s) brought into the facility/institution by that visitor shall be subject to a thorough search. If no contraband is discovered, the visitor will continue through processing. If the document is not readily available, the individual shall be informed that he/she shall be required to submit to a clothed body search as a condition for non-contact visiting, if space is available. If no contraband is discovered, the visitor shall be permitted to have a non-contact visit.

The ISOR explains in general terms what the regulations do, but there is only one paragraph that is designed to establish the necessity for all of the amendments to section 3173.2 including those discussed in detail above. The ISOR reads as follows:

Recognizing the ongoing problem with illegal drug use and trafficking within the institutions, CDCR must focus on a comprehensive approach to preventing the introduction of illegal drugs and contraband into its prisons. Persons entering CDCR institutions sometimes employ extraordinary means to try to smuggle illegal drugs and contraband into prisons. These methods include secreting illegal drugs and contraband in hidden pockets in clothing or in body cavities. Importing, trafficking, and illegal drug use pose many problems in a prison setting, including an increase in assaults, power struggles within the inmate population, establishment of an underground economy, and staff corruption.

The ISOR contains broad, general statements of necessity, providing the reader only with background information and an overview of the problem the action is intended to address. The ISOR failed to explain the specific purpose and rationale for any of the proposed regulatory amendments to section 3173.2, including those discussed above. As a result, the Department must prepare an addendum to the ISOR that addresses this issue. The Department will need to add the document to the rulemaking file and must make the document available for 15 days pursuant to Government Code section 11347.1.

CONCLUSION

For the foregoing reasons, OAL disapproved the above-referenced rulemaking action. Pursuant to Government Code section 11349.4, subdivision (a), the Department may resubmit a revised regulation within 120 days of its receipt of this Decision of Disapproval. The Department shall make all substantive regulatory text changes, which are sufficiently related to the original text, and the addendum to the ISOR providing rationale for the modifications, available to the public for at least 15 days for public comment pursuant to Government Code sections 11346.8 and 11347.1. Any comments made in relation to these proposed modifications must be considered by the Department and any objections and recommendations must be summarized and responded to in the FSOR. OAL reserves the right to review the Department's resubmitted regulation and rulemaking record for compliance with all substantive and procedural requirements of the APA.

Date: September 21, 2016


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