

**State of California
Office of Administrative Law**

In re:
California Prison Industry Authority

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

**Regulatory Action: Title 15
California Code of Regulations**

Government Code Section 11349.3

**Adopt sections: 8100, 8101, 8102, 8104,
8105, 8106, 8107, 8108,
8110, 8111, 8112, 8113,
8114, 8115, 8116, 8117,
8118, 8119, 8119.1, 8120**

OAL File No. 2015-0130-02 SR

Amend sections: 8000

Repeal sections:

SUMMARY OF REGULATORY ACTION

The California Prison Industry Authority (CALPIA) proposed this action to amend title 15 of the California Code of Regulations. These "Personnel" regulations govern employee conduct, including scheduling restrictions, interaction with ex-offenders, and both on- and off-duty behavior, emergency procedures, and light-duty assignments and reasonable accommodations. Also included are CALPIA's incompatible activity and personal information access regulations.

DECISION

On March 16, 2015, the Office of Administrative Law (OAL) notified CALPIA of the disapproval of this regulatory action. The reason for the disapproval was failure to comply with the "Authority," "Clarity," and "Necessity" standards of Government Code section 11349.1.

DISCUSSION

Regulations adopted by CALPIA must generally be adopted pursuant to the rulemaking provisions of the California Administrative Procedure Act (APA), chapter 3.5 of part 1 of division 3 of title 2 of the Government Code (Gov. Code, secs. 11340 through 11361). Any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA, unless a statute expressly exempts or excludes the regulation from compliance with the APA (Gov. Code, sec. 11346). No exemption or exclusion applies to the regulatory action here under review. Consequently, before these regulations may become effective, the regulations and rulemaking record must be reviewed

by OAL for compliance with the substantive standards and procedural requirements of the APA, in accordance with Government Code section 11349.1.

A. AUTHORITY

Government Code section 11342.1 states, in part, “Each regulation adopted, to be effective, *shall be within the scope of authority conferred* and in accordance with standards prescribed by other provisions of law.” [Emphasis added.] Government Code section 11349, subdivision (b), defines “Authority” as meaning, “the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.” Thus, to ensure promulgation of legally valid regulations, and that agencies act within the scope of their rulemaking authority, Government Code section 11349.1 tasks OAL with reviewing proposed regulations for compliance with the Authority standard of the APA.

The Authority standard is further defined in OAL’s regulation in section 14 of title 1 of the CCR, which provides:

- (a) Sources of “Authority.” “Authority” shall be presumed to exist only if an agency cites in its “authority” note proposed for printing in the California Code of Regulations:
 - (1) a California constitutional or statutory provision which expressly permits or obligates the agency to adopt, amend, or repeal the regulation; or
 - (2) a California constitutional or statutory provision that grants a power to the agency which impliedly permits or obligates the agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted.
- (b) [...]
- (c) Review of “Notes.” In reviewing “notes,” OAL shall use the same analytical approach employed by the California Supreme Court and the California Court of Appeal, as evidenced in published opinions of those courts.
 - (1) For purposes of this analysis, an agency’s interpretation of its regulatory power, as indicated by the proposed citations to “authority” or “reference” or any supporting documents contained in the rulemaking record, shall be conclusive unless:
 - (A) the agency’s interpretation alters, amends, or enlarges the scope of power conferred upon it; or
 - (B) [cont.]

Among the regulations CALPIA proposed to adopt in title 15 of the CCR is section 8101, included below. The proposed text is followed by two Penal Code sections cited by CALPIA as authority for the regulatory provisions.

Proposed regulatory text:

8101. Emergencies.

The General Manager or his/her designee has the authority to declare an emergency. *Regardless of an employee’s civil service classification*, in an emergency, employees

shall perform any task as directed by the General Manager, the General Manager's designee, or the employee's supervisor. In the event an employee is contacted by telephone or is otherwise informed of an emergency situation at a workplace to which they are assigned, the employee *shall report without delay* to the on-site emergency coordinator. [Emphasis added.]

NOTE: Authority cited: Sections 2801 and 2809, Penal Code. Reference: Sections 2801 and 2809, Penal Code.

Underlying statutory authority:

Penal Code section 2801. The *purposes of the authority* are:

- (a) To develop and operate industrial, agricultural, and service enterprises employing prisoners in institutions under the jurisdiction of the Department of Corrections, which enterprises may be located either within those institutions or elsewhere, all as may be determined by the authority.
- (b) *To create and maintain working conditions within the enterprises as much like those which prevail in private industry as possible*, to assure prisoners employed therein the opportunity to work productively, to earn funds, and to acquire or improve effective work habits and occupational skills.
- (c) To operate a work program for prisoners which will ultimately be self-supporting by generating sufficient funds from the sale of products and services to pay all the expenses of the program, and one which will provide goods and services which are or will be used by the Department of Corrections, thereby reducing the cost of its operation. [Emphasis added.]

Penal Code section 2809. Notwithstanding any other provision of law, commencing July 1, 2005, *the authority may recruit and employ civilian staff that may be necessary to carry out the purposes of this article*, and shall establish recruiting, testing, hiring, promotion, disciplinary, and dismissal procedures and practices which will meet the unique personnel needs of the authority. The practices may include incentives based on productivity, profit-sharing plans, or other criteria which will encourage civilian employee involvement in the productivity goals of the authority. The procedures and practices shall apply to all employees working in enterprises under the jurisdiction of the authority. The general manager shall be the appointing authority for all personnel of the authority other than the general manager. [Emphasis added.]

Government Code section 11342.2 provides, "*Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.*" [Emphasis added.] Likewise, CCR, title 1, section 14, subdivision (a), *supra*, prescribes that a delegation of rulemaking authority may be either express or implied.

An express delegation of authority *expressly* specifies that regulations “may” or “shall” be adopted by the agency. By contrast, in an implied delegation of authority, the underlying statute does not expressly state that the agency may or shall adopt regulations. Instead, the statute expressly gives the agency a duty to undertake, with no express mention of authority to adopt rules in furtherance of such a duty. In these circumstances, courts have found that agencies that have expressly been given a duty by statute have *implicitly* been delegated the authority to adopt those regulations necessary to efficiently perform the duty.

“[T]he authority of an administrative board or officer, ... to adopt reasonable rules and regulations which are deemed necessary to the due and efficient exercise of the powers expressly granted cannot be questioned. This authority is implied from the power granted.” *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976. “[The agency head’s] powers are not limited to those expressly conferred by statute; ‘rather, “[i]t is well settled in this state that [administrative] officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers.’”” *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805. [Emphasis in original.]

The remaining analysis involves how to determine the scope of implied authority. It is well settled that the purpose of the agency is instrumental in defining the scope of implied authority. In *Rich Vision Centers, Inc. v. Board of Medical Examiners* (1983) 144 Cal.App.3d 110, 114, the court reasoned that when express rulemaking authority is not present, “we must...decide whether the ability to [regulate] may be implied from the overall statutory scheme. *In so doing, we look to the purpose of the agency for guidance.*” [Emphasis added.] With implied authority established, the court next determines if a proposed regulation is within the scope of that authority. The touchstone for this analysis is whether the proposed regulations are necessary for the due and efficient exercise of the powers and duties furnished by the underlying statutes.

Pursuant to Government Code section 11349.1 and CCR, title 1, section 14, OAL must first decide whether the General Manager of CALPIA has the express or implied authority to adopt regulations, and if so, whether he acted within the scope of that authority in adopting section 8101. Specifically, OAL must determine whether the Penal Code sections cited expressly or impliedly authorize the General Manager to 1) declare an emergency situation within a CALPIA workplace, 2) suspend civil service classification rules during an emergency, and 3) require all CALPIA employees to report to their assigned workplace without delay when informed of an emergency. As evidenced in the rulemaking record, CALPIA’s position is that Penal Code sections 2801 and 2809 impliedly provide this power, with a scope broad enough to authorize adoption of regulation section 8101. OAL disagrees.

In the instant case, no statutory or constitutional provision expressly provides that CALPIA “may” or “shall” adopt regulations to effectuate the purpose or purposes of the underlying law. CALPIA’s Initial Statement of Reasons (ISR) states, “PC Sections 2801 and 2809 provide CALPIA with implied rulemaking authority. PC Section 2809 authorizes the CALPIA to recruit and employ civilian staff as necessary to carry out its purpose and establishes the General Manager as the appointing authority for all personnel of CALPIA.” In accordance with *Rich*

Vision Centers and CCR, title 1, section 14(c), OAL must look to the purpose of the agency in determining whether CALPIA has implied authority to adopt section 8101. Fortunately, the California Legislature explicitly imparted the function of CALPIA in Penal Code section 2801. CALPIA is tasked with operating business enterprises that employ prisoners (*see* 2801(a)), managing those enterprises as much like private businesses as possible while providing rehabilitative training to employed prisoners (*see* 2801(b)), and making the enterprises profitable enough to sustain CALPIA and reduce operating expenses of the Department of Corrections and Rehabilitation (CDCR) (*see* 2801(c)). The salient question is whether these purposes are reasonably effectuated by proposed section 8101.

CALPIA explains in the rulemaking record that regulation section 8101 is necessary to achieve these purposes. The Supplemental Statement of Reasons (SSR) provides:

“It is mission essential for the General Manager [...] to have the ability to declare an emergency which may occur outside of normal business hours due to the nature of products such as dairy and poultry farms, laundry facilities, and food packaging enterprises. Any situation threatening the production of products and services is severely critical because CDCR relies on the products and services for incarcerated inmates. *CALPIA employees must be aware of the potential need to be available to support continuous operations of CALPIA when an emergency has been declared. Employees must also be aware of the potential need to be available to aid in all other types of emergencies such as chemical spills, gas leaks, prison lockdowns or riots, escaped inmates or farm animals, flooding, fires, or any type of threat to public health, safety, peace and general welfare.* The General Manager [...] must have the authority to declare an emergency and require employees to report to work immediately to aid in the emergency and perform any task as directed.”

The intended regulatory effect described above dramatically highlights how, by proposing to adopt section 8101, the CALPIA General Manager exceeded the scope of any implied authority granted by the Legislature. CALPIA reasons in the SSR that in order to support continuous operations, the General Manager must be able to summon off-duty employees not only to keep a dairy or laundry facility operating, but to aid in suppressing a prison riot or apprehending an escaped inmate. Even a deferential reading of the Penal Code does not suggest that the Legislature intended this responsibility to be an additional purpose of CALPIA. The power that this overbroad regulation – requiring each CALPIA employee, “regardless of civil service classification,” to “report without delay” and “perform any task” in any emergency – would confer upon the General Manager is well outside the scope reasonably necessary to ensure that CALPIA’s industrial, agricultural, and service enterprises remain self-sustaining.

A related assertion in the rulemaking record is that the close working proximity of CALPIA and CDCR employees – most CALPIA workplaces are technically “on CDCR institution grounds,” if not within prison walls entirely – necessitates the adoption of regulations by CALPIA that are as similar to and harmonious with CDCR regulations as possible. CALPIA is in the untenable position of existing apart from CDCR, and therefore outside the protective umbrella of CDCR’s personnel regulations within title 15 of the CCR, yet so intertwined with CDCR that CALPIA’s

own regulations must be enough alike so as not to confuse employees who spend their days in correctional facilities working side-by-side not only with inmates, but with guards and other CDCR personnel. For example, CALPIA's section 8101 is modeled after CDCR section 3397. The issue is that CDCR's rulemaking authority – Penal Code section 5058, in the case of CCR, title 15, section 3397 – is entirely different and distinguishable from Penal Code sections 2801 and 2809. Penal Code section 5058, subdivision (a), provides, in part, "The director may prescribe and amend rules and regulations for the administration of the prisons and for the administration of the parole of persons sentenced under Section 1170...." The scope of CDCR's express authority is clearly aimed at management and control of correctional institutions, whereas CALPIA's implied authority, defined according to the purposes enumerated in Penal Code section 2801, is focused instead on maintaining profitable enterprises and high productivity. For these reasons, OAL finds that proposed section 8101 violates the Authority standard of the APA.

B. CLARITY

OAL must review regulations for compliance with the Clarity standard of the APA, as required by Government Code section 11349.1. Government Code section 11349, subdivision (c), defines "Clarity" as meaning "...written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."

The Clarity standard is further defined in section 16 of title 1 of the CCR, which provides the following:

In examining a regulation for compliance with the "clarity" requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

- (a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exists:
 - (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
 - (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or
 - (3) the regulation uses terms which do not have meanings generally familiar to those "directly affected" by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
 - (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
 - (5) the regulation presents information in a format that is not readily understandable by persons "directly affected;" or
 - (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

- (b) Persons shall be presumed to be “directly affected” if they:
- (1) are legally required to comply with the regulation; or
 - (2) are legally required to enforce the regulation; or
 - (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
 - (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

In this “Personnel” rulemaking action, a number of proposed regulatory provisions fail to comply with the Clarity standard. Two clarity problems are discussed below. Additional clarity concerns (such as minor grammatical problems) will also need to be corrected in any resubmission of this rulemaking.

1. Section 8000

Proposed regulation section 8000 provides, in part, “Emergency means a situation within a CALPIA workplace that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.” As discussed above, CALPIA looked to CDCR regulations as models when drafting the text of this action. In addition to section 3397 (“Emergencies,” discussed *supra*), CDCR adopted section 3383, “State of Emergency,” in title 15 of the CCR. Section 3383 defines an emergency situation, describing who may declare an emergency, how an emergency suspends ordinary procedures, conditions for terminating an emergency, and other related provisions. Accordingly, an important purpose of section 3383 is delineating the conditions that “trigger” the employee response to an emergency declaration described in section 3397. Initially, a clarity problem arose because CALPIA proposed section 8101 without a companion “trigger” regulation that described an emergency similar to CDCR section 3383. Whether CALPIA intended section 3383 to trigger its own emergency response was also uncertain. CALPIA attempted to address this problem by revising the proposed text to include the emergency definition in section 8000 quoted above.

Government Code section 11349, subdivision (c), requires regulation text to be easily understood by those persons directly affected by the regulation. Unlike CDCR’s section 3383, CALPIA’s definition of emergency is too broad and vague to clearly identify “trigger” conditions. OAL finds that section 8000 fails to satisfy the Clarity standard of the APA.

2. Section 8115

Proposed regulation section 8115 (“Familiarity”) states:

- (a) For the purposes of this section, “familiarity” means an employee discussing their personal affairs with inmates, parolees, or family members, friends, or associates of inmates or parolees.
- (b) Employees shall not engage in undue familiarity with inmates, parolees, or family members, friends, or associates of inmates or parolees.

- (c) When employees engage with inmates, parolees, or family members, friends, or associates of inmates or parolees for work related purposes, the employee shall only discuss:
- (1) Work related topics; or
 - (2) Non-personal topics such as weather, sports, current events, etc. The employee shall not allow non-personal topics to include personal views or become personal in nature.

The rulemaking record indicates that section 8115 is modeled after CDCR regulation 3400, which also prohibits “undue familiarity” and employee discussion of any personal affairs with inmates. Section 8115 is unclear because OAL is unable to determine when “familiarity” becomes “undue.” It is possible that CALPIA intended to prohibit employees from all discussion of personal affairs, therefore making all such discussion undue. Yet, subdivision (c) appears to distinguish between work-related discussions and all others. Are employees allowed to discuss personal affairs with inmates when off-duty? What if an employee “engages” with a parolee while on-duty but not for a work-related purpose? The application of the regulation is not clear. Because section 8115 is not written so as to be easily understood by persons directly affected, as required by Government Code section 11349, subdivision (c), OAL finds that CALPIA’s section 8115 violates the clarity standard of the APA.

OAL notes that the nearly identical CDCR rule that is already in the CCR, section 3400, was included in title 15 before OAL existed; thus, OAL did not review rule 3400 for clarity.

C. NECESSITY

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

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 a rulemaking agency describe the need for the regulation and identify documents relied upon in proposing the regulation in the Initial Statement of Reasons, pursuant to Government Code section 11346.2, subdivision (b).

Proposed section 8116 ("Committed Family and Friends of Employees") provides:

- (a) While off-duty, employees may conduct relationships with an inmate, parolee, or person known by the employee to be a family member, friend, or associate of an inmate or parolee who is the employee's family member, as defined in section 8000, pursuant to disclosure set forth in subsection (c).
- (b) Employees shall disclose current or previous relationships with someone who has been previously or is currently committed to the jurisdiction of CDCR, pursuant to disclosure set forth in subsection (c).
- (c) Employees shall notify their supervisor in writing of relationships described in subsection (a) and (b). The supervisor shall provide the written notice to the General Manager, the warden at the employee's assigned workplace, the appropriate CDCR Director, and CDCR Assistant Secretary.

The ISR does not provide substantial evidence of the need for section 8116. The ISR indicates that this proposed section was necessarily modeled after CDCR regulation section 3406 in order to create personnel rules as similar as possible to CDCR rules. Section 3406 states:

If an employee becomes aware that any relative or person with whom the employee has or has had either a personal or business relationship, has been committed to or transferred to the jurisdiction of the department, the employee shall notify in writing, the employee's institution head or appropriate director/assistant secretary of that fact.

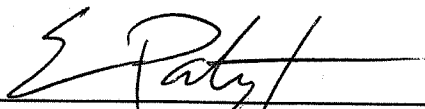
Contrary to the statement in the ISR, aside from the general requirement of disclosure, section 8116 is not similar to section 3406. In some ways, section 8116 applies more narrowly than the CDCR regulation. For example, section 8116, subdivision (a), permits the disclosed behavior only during off-duty hours, yet section 3406 applies universally. Further, the employee-inmate relationship nexus in section 8116 is one of family, while section 3406 requires disclosure based on any past or present, personal or business relationship. In other ways, section 8116 is broader. Section 3406 requires disclosure of past or present relationships with presently committed persons, while section 8116 adds disclosure of relationships with persons previously incarcerated.

CALPIA does not adequately explain these deviations from the CDCR regulation in the ISR. Most of the evidence included to support the need for this section is merely a restatement of the proposed text itself, not the substantial evidence required pursuant to Government Code section 11349, subdivision (a). Therefore, OAL finds that section 8116 violates the Necessity standard of the APA.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 322-3761.

Date: March 23, 2015


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