PETITION TO THE OFFICE OF ADMINISTRATIVE LAW

RE: **ALLEGED UNDERGROUND REGULATION**
Department of Mental Health, Coalinga State Hospital
***Administrative Directive AD-624*, INDIVIDUALS' MAIL AND PACKAGES**

FROM: MICHAEL GEORGE ST.MARTIN, Petitioner

DATE: March 17, 2008

This is a computer generated petition based on the optional OAL form supplying the information required by Title 1, California Code of Regulations, §280, for a petition challenging an alleged underground regulation.

1. Identifying Information: Petitioner

Your Name: **MICHAEL GEORGE ST.MARTIN**
CO-000414-3, RRU-7
Your Address: **P.O. Box 5003, Coalinga, CA 93210**

Your Telephone Number: **(559) 934-0391 or (559) 934-0392**

Your E-Mail (if you have one): michaelst.martin@hotmail.com

2. State Agency or Department being challenged:

California Department of Mental Health ("DMH")

(Coalinga State Hospital ("CSH")

3. Provide a complete description of the purported underground regulation. Attach a written copy of it. If the purported underground regulation is found in an agency manual, identify the specific provision of the manual alleged to comprise the underground regulation. Please be as precise as possible.

Description of alleged Underground Regulation

Petitioner alleges the ENTIRE Coalinga State Hospital ("CSH") Operation Manual is an Underground Regulation, as there is no evidence that any portion of the CSH Operation Manual has been promulgated pursuant to the Administrative Procedures Act.

By this action, Petitioner specifically alleges the section of the CSH Operation Manual known as ***Administrative Directive AD-624*** is an underground regulation, as there is no evidence that this administrative directive has been promulgated pursuant to the Administrative Procedures Act.

Administrative Directive AD-624 described as a "coordinated set of guidelines and procedures regarding the responsibilities, procedures, and limitations which govern an Individual's incoming and outgoing mail and packages."

A true and correct copy of
ADMINISTRATIVE DIRECTIVE AD-624
is attached hereto as EXHIBIT A.

4. Provide a description of the agency actions you believe demonstrate that it has issued, used, enforced, or attempted to enforce the purported underground regulation.

Administrative Directive AD-624 is applied to all persons, no matter what their classification who are detained at Coalinga State Hospital, and this includes, but is not limited to, all persons proposed or adjudicated to be SVPs in California who are detained by the Department of Mental Health. Its existence and use are not in controversy. Examples of its application are further demonstrated in Section "**7**." of this petition.

Each hospital has some version of AD-624 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-624*** 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-624
Is a Regulation Within the Meaning of the APA

Prior to implementation, or revision thereof, the Department was required to adopt ***Administrative Directive AD-624***, 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-624***, 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-624*** pursuant to the APA.

Administrative Directive AD-624 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.)
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> "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-624 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 type of incoming and outgoing mail and packages may be received by SVPs detained at Coalinga State Hospital, and how these items are handled and distributed. Its use is mandatory. Thus the mandate of ***AD-624*** 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-624* 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 "coordinated set of guidelines and procedures," 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 "coordinated set of guidelines and procedures," 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-624 is stated in that document as, "Department of Mental Health Special Order Number 248.01 and 249.01 also pursuant to Section 4136 of the Welfare and Institutions Code." ***Special Orders 248.01 and 249.01*** apply statewide to all DMH facilities. These ***Special Orders*** mandate what each facility must mandate in its own version of an ***Administrative Directive***. Having each DMH facility issue its own mandated version of ***Special Orders 248.01 and 249.01*** 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.*

True and correct copies of
Special Orders 248.01 and 249.01
are attached hereto as EXHIBIT B.

ADMINISTRATIVE DIRECTIVE AD-624 **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-624 is neither intended nor utilized to make specific determinations but is utilized generally when determining the incoming and outgoing mail and packages rights of all persons detained under the SVPA. Thus, ***AD-624*** 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-624 is at odds with the rights to mail conveyed by the California and United States Constitutions, and with the statutory rights provided in Welfare and Institutions Code Sections 5325 and 5325.1. ***Administrative Directive AD-624*** is overbroad and not narrowly tailored to accomplish the goal stated in the least restrictive manner as is required by statutory and

constitutional law. Since ***Administrative Directive AD-624*** is replete with mandates that are in direct violation of statutory law and both the California and United States Constitution, OAL regulatory oversight and public comments are needed.

The state authorized enforcement by state employees of the numerous statutory and constitutional violations contained in each and every un-promulgated, underground," ***Administrative Directive*** has resulted in a great deal of litigation at great expense to the taxpayers of California. The OAL, pursuant to its regulatory duties under the OAL, is in a position to bring these underground regulations into the oversight process, and has a duty to the taxpayers to do so.

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.)

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

Administrative Directive AD-624 makes numerous references to ***Administrative Directive AD 626,*** Patient Property, and its attached ***Allowables List***, which on February 6, 2008, the DMH certified, "The Department will not issue, use, enforce, or attempt to enforce the alleged underground regulation." Thus, through the use and enforcement of ***Administrative Directive AD-624***, the DMH continues to enforce the provisions of ***Administrative Directive AD-626*** even after it certified on February 6, 2008, it would no longer do so.

Petitioner herein, Michael St.Martin, filed four Patients' Rights Complaints alleging the violation of statutory law and his First Amendment Constitutional rights. The Department of Mental Health and Coalinga State Hospital justified these violations under the authority of numerous underground regulations, particularly ***Administrative Directive AD-624,*** and/or one of the associated Administrative Directives that refer to and/or derive their authority from ***Administrative Directive AD-624.*** Three of these complaints have been submitted to the Director's Level in Sacramento by St.Martin, but now some 14 months after their original filing remain unanswered. The fourth complaint remains unanswered at the local level.

(1) On January 15, 2007, St.Martin filed Patient Complaint SR# 710302, asserting his right to receive printed material downloaded from the Internet and sent to him through the United States Mail.
(2) On January 15, 2007, St.Martin filed Patient Complaint SR# 710483, asserting his right to utilize all classes of mail normally available through the United States Postal Service.
(3) On January 15, 2007, St.Martin filed Patient Complaint SR# 710518, asserting his right to receive literature and other printed material that is legal to send through the United States Postal Service.
(4) On February 14, 2007, St.Martin filed a Patient Complaint concerning the refusal of the CSH Mail Personnel to mail legal mail to his attorney. This complaint remains unanswered.

Each of the above complaints was denied by DMH employees or officials based on the authority usurped through the use DMH underground regulations which are in direct conflict with statutory law, and both the California and United States Constitutions.

A true and correct copies of
Complaint SR# 710302, dated January 15, 2007
Complaint SR# 710483, dated January 15, 2007
Complaint SR# 710518, dated January 15, 2007
Complaint dated February 14, 2007
are attached hereto as EXHIBIT C.

CSH patient Thomas B. Watson submitted complaint SR#712336 to the DMH attacking the statutory and constitutional violations contained in the CSH mail policy. The text is as follows:

"TO: Department of Mental Health
Office of Human Rights
1600 – 9th Street, Rm. 153
Sacramento, CA 95814

SUBJECT: Appeal of Complaint regarding rejection of legal material, SR 712336
TO WHOM IT MAY CONCERN:
Please find enclosed copies of complaints I filed with the Office of Patients Rights at Coalinga State Hospital (CSH), the Acting Executive Director at CSH, and the Office of Patients' Rights (OPR) in Sacramento, concerning the rejection of legal material sent from the Georgetown University Law School, specifically the *Georgetown Law Journal*. The justification given was: "It did not come from an approved vendor." Also, there was neither due process afforded nor notification given prior to the return of this publication, and thus no pre-return appeal was available. These policies violated Complainant's First, Sixth and Fourteenth Amendment Federal Constitutional rights, the California Constitution, and statutory law, e.g., Welf. & Inst. Code sections 5325 and 5325.1.

There are essentially four interrelated rights involved herein: (1) the right to receive books, magazines and other published material; (2) the right to receive legal material; (3) the right to the Denial of Rights process prior to the material being returned; and, (4) the right to notification, appeal, and choice of disposition for the rejected material.

ITEM (1) THE RIGHT TO RECEIVE PUBLICATIONS

In respect to the right to receive books, magazines and other published material, the answer at every level of this appeal has, to date, essentially stated materials are considered contraband that are not from an "Approved Vendor." However, this is not true. The "Allowables List" attached to Administrative Directive (AD) 626 groups all books, magazines, and published materials into one category designated as "Publications," and states they may be received in three manners: packages received by mail [home packages]; purchased through CSH Canteen; and, purchased through vendor. The problem here is that publications cannot be received from any vendor, but only from specific vendors approved by CSH. This is what violates complainant's rights. CSH has only one approved vendor for books, and that is Edward R. Hamilton, Inc., a company that specializes in discount and close-out books. This severely impacts Complainant's First Amendment rights by limiting available publications to only one specific specialty vendor.

The controversy herein appears to be what restrictions can CSH legally place upon the receipt of publications in the realm of "Approved Vendors." The OPR in Sacramento stated this "complaint does not support an action of abuse or neglect, punitive withholding or unreasonable denial of patients' rights." In reaching this conclusion, the OPR Patients' Rights Specialist, Agnes Lintz, cites the United States Supreme Court case *Bell v. Wolfish*, 441 U.S. 520, at 549-551, 99 S.Ct. 1861 (1979). This high court ruling unquestionably supports complainant's position, and leaves him wondering just whom the Office of Patients' Rights is representing.

The question before the Supreme Court in *Bell v. Wolfish* was "[w]hether the governmental interest in maintaining jail security and order justifies rules that . . . . (b) prohibit receipt at the jail of books and magazines that are not mailed directly from publishers." (441 U.S. at 550, and FN 31.)

Thus, in *Bell v. Wolfish*, 441 U.S. 520, the issue relevant to this appeal involved the Supreme Court's approval of the "'publisher-only' rule to permit the receipt of books and magazines from bookstores as well as publishers and book clubs. 43 Fed.Reg. 305766 (1978) (to be codified in 28 CFR § 50.71)." (*Bell v. Wolfish*, 441 U.S. 520, at 549.) The rule approved of by the High Court involved only hardcover books, as all other publications were allowed from ***any*** source. (*Id.* at 549, 552.) The publication at issue in the present situation, the *Georgetown Law Journal*, is a paperback or soft-cover publication. The Supreme Court further stated, "We are also influenced in our decision by the fact that the rule's impact on pretrial detainees is limited to a maximum period of approximately 60 days." (*Id.* at 550.)

Thus, both state and federal prisons allow prisoners to received books and other printed material directly from ***any*** publisher or legitimate book store without reference to a specific designated "approved vendor." In California, Penal Code §§ 2600, 2601, create a ***right*** for prisoners to receive publications directly from publishers and book stores. Prisoners are not subjected to any specific "approved vendor" requirement for printed material, and as ***civil*** detainees, individuals at CSH must be given no less than prisoners. (*Jones v. Blanas* (9th Cir. 2004) 393 F. 3d 918, *cert. denied*, 546 U.S. ____ (10/3/05); *Hydrick v. Hunter* (9th Cir. 2006) 449 F. 3d 978.)

Therefore, any policy which allows or requires rejection of printed material which is legally distributed by the United States Post Office, for any reason, is patently unconstitutional and in violation of federal law. In the present case, an "AD" which places a ½" limit on received publications, is arbitrary and capricious. It is also similar to the prison regulation declared unconstitutional in: *Morrison v. Hall,* (9th Cir. 2001) 261 F. 3d 896, 906, where a prison regulation that rejected certain classes of mail was declared unconstitutional; and, *Ashker v. California Dep't of Corrections*, (9th Cir. 2003) 350 F. 3d 917, enjoining the enforcement of a book labeling policy that required publishers and bookstores to affix a special label on books being mailed to prisons. The Courts have consistently held that institutions' security needs are met when they retain the option of searching the package.

In the present situation, it is ludicrous to claim security as the reason patients can only receive publications from the institution's sole book vendor, Edward R. Hamilton, when patients may receive ***all*** publications in home packages. To so require is simply a violation of Complainant's First Amendment rights. Not every patient has someone willing to purchase books from a publisher or bookstore, then repackage those books and send them in a home package. On the other hand, nearly every patient does have the ability to order those publications directly from the publisher, a book store, or a book club. It is totally absurd for CSH to require every possible publisher or bookstore to submit to the rigors of becoming what CSH has defined as an "Approved Vendor."

The CSH Acting Executive Director, Ben McLain, stated in his answer to this appeal, "A facility can inhibit access to published and printed materials so long as it is related to legitimate safety and security interests." However, no official at CSH actually reviewed the publication, and McLain failed to proffer any particular safety and security concern for the *Georgetown Law Journal*, a publication mailed directly from the publisher, the Georgetown University, one the nation's most prestigious law schools. McLain's safety and security interest becomes particularly absurd when considering that this same publication would have been allowed had it been received in a package from home.

ITEM (2) THE RIGHT TO RECEIVE LEGAL MATERIAL

The right to receive legal material is a fundamental First Amendment Right. It implicates both the Free Speech Clause and the Right of Access to the Courts. This educational legal material should not be confused with "confidential Legal Mail," as did the Office of Patients' Rights in Sacramento. Complainant is not asking to receive legal publications as confidential mail, but rather to receive legal material "from bookstores as well as publishers and book clubs," where the institution retains the ability to search the material for contraband the same as would be done if the same material was received, as is presently allowed, in a home package.

In the prison context, the Ninth Circuit cites the U.S. Supreme Court in *Clement v. Terhune*: "The First Amendment 'embraces the right to distribute literature, and necessarily protects the right to receive it.' *Martin v. City of Struthers, Ohio,* 319 U.S. 141, 143 (1943). It protects material distributed over the internet as well as by the means of communication devices used prior to the high-tech era. *Reno v. ACLU*, 521 U.S. 844, 868 (1997). '[T]he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them.' *Lamont v. Postmaster General of U.S.*, 381 U.S. 301, 308 (1965) (Brennan, J. concurring)." (See *Clement v. Terhune* (9th Cir. 2004) 364 F. 3d 1148, 1151.) Prisoners retain their First Amendment right to receive information while incarcerated. *Turner v. Safely*, 482 U.S. 78, 84 (1987) ["Prison walls do not form a barrier separating inmates from the protections of the constitution."] See also *Prison Legal News v. Cook*, (9th Cir.) 2001) 238 F. 3d 1145, 1149; *Morrison v. Hall* (9th Cir. 2001) 261 F. 3d 896, 906 ["The Supreme Court has repeatedly recognized that restrictions on the delivery of mail burden an inmate's ability to exercise his or her First Amendment rights."] In *King v. Borg*, (E.D.Cal. 1993), CIV S-87-0519, the federal court added "legal organizations" to the definition of legal mail. This would include law schools.

ITEM (3) THE RIGHT TO DENIAL OF RIGHTS PROCESS AND TO APPEALS

Complainant has a Fourteenth Amendment right to due process of law. Patients in California have not only constitutional rights afforded them, but also state created rights which are set forth in Welfare and Institutions Code (WIC) §§ 5235 and 5325.1, commonly referred to as the "Patients Bill of Rights." Contrary to the Hospital's position, all of the rights in WIC §§ 5325 and 5325.1 apply to patients committed under WIC §§ 6600, et seq. See *In re Calhoun* (2004) 121 Cal. App. 4th 1315, where the appellate court Applies §§5325 and 5325.1 to § 6600 detainees based on the equal protection clauses of the state and federal constitutions. The Appellate Court based its decision on the California Supreme Court holding in *In re Qawi,* (Cal. 2004)

32 Cal. 4th 1, 7, 7 Cal.Rptr. 3d 780, where the Supreme Court held that the rights of a mentally disordered offender (MDO) are the same as those of patients involuntarily committed under the LPS Act. The Legislature also applied WIC § 5325 to WIC § 6600 detainees in Penal Code Section 1610(c).

As such, the Hospital is required by state law, and by DMH regulations to follow the Denial of Rights process prior to denying any right. See DMH Special Order Number 254.01 (Oct. 10, 2003), where the policy statement is made: "It is the policy of the Department of Mental Health that each state hospital shall protect and promote patient's rights and shall not deny a patient one or more rights without meeting good cause criteria."

A publication, such as the *Georgetown Law Journal* does not fall into any of the enumerated "good cause criteria" which would allow its receipt to be denied.

Section V of Special Order 254.01 lists only five criteria for denying a patient's right, none of which could be applied to the receipt of published legal material. Section VII requires a specific documentation process. Section VIII requires a restoration of right procedure. None of these procedures were followed in the present case.

ITEM (4) THE RIGHT TO APPEAL AND NOTIFICATION PRIOR TO DISPOSAL OF PROPERTY

The very basic right to appeal, or "the right of the people . . . to petition the Government for a redress of grievances" (First Amendment), was not allowed prior the rejection and disposition of the *Georgetown Law Journal* which was received directly from the publisher.

CSH Administrative Directive 818, CONTRABAND, allows that the determination of disposition of items not allowed in the Individual's possession may be made by the Individual. The individual in this case was given no such opportunity.

CONCLUSION

Complainant, in his argument, has asserted Federal Constitutional rights. Complainant also asserts the same rights under the California Constitution.

The CSH policy being complained of herein is almost the reverse of those used in the California prison system, where books may only be received from publishers, bookstores and book clubs, but not in home packages. At CSH, all publications can be received in home packages, but not from publishers, bookstores, or book clubs.

It is illogical, illegal, arbitrary and capricious to not allow publications from publishers, bookstores, or book clubs when all publications are allowed in home packages. As civil detainees, patients at CSH should be allowed to receive publications from ***any*** source.

Complainant now requests that the present policy be amended to come into compliance with current constitutional and statutory law, and that he be reimbursed for any costs incurred in the illegal rejection of his legal material."

The Director's Level response, signed by Andria Quinnell, Patients Rights Analyst, failed to address the issues raised. The statutory and Constitutional violations presented were ignored, and instead Patient's Rights Analyst Andria Quinnell issued an answer that was mere ephemeral sophistry.

This Director's Level response simply delayed, denied and diverted attention away from the issues by directing appellant to "work with program staff," and by calling legal material "Educational materials [which] must be approved by the Central Program Services Education Staff and your Wellness and Recovery Team..."

A true and correct copy of
DMH Office of Human Rights, Director's Level Response
***To complaint #712336, d*ated January 14, 2008**
is attached hereto as EXHIBIT D.

This type of obdurate opposition to correcting illegal and unconstitutional contents in its Administrative Directives perfectly illustrates why the Legislature established the procedures set forth in the Administrative Procedures Act. This clearly demonstrates the absolute need for oversight and public input to halt the type of bureaucratic tyranny exhibited by the Department of Mental Health by issuing, using, enforcing, or attempting to enforce this type of underground regulation.

CONCLUSION

The Department of Mental Health is not, and has not been, responsive to the public they serve. Nor has the DMH been responsible to the taxpayers who must pay the bills that result from the failure of the DMH to follow the law and serve the public who pays their salaries. The California Supreme Court directed attention to this problem by stating:

"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-624,*** 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-624***, 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.

_____ March 12, 2008

MICHAEL GEORGE ST.MARTIN
PETITIONER

Date