

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
MINUTE ORDER

Date: 08/27/2008

Time: 02:56:20 PM

Dept: C22

Judicial Officer Presiding: Judge Sheila Fell
Clerk: Rick Burns

Bailiff/Court Attendant: S Grimes

Reporter: None,

Case Init. Date: 07/09/2008

Case No: 30-2008-00109007-CU-WM-CJC Case Title: Naurist Action Committee vs. California State
Department of Parks & Recreation

Case Category: Civil - Unlimited

Case Type: Writ of Mandate

Event Type: Chambers Work

Causal Document & Date Filed:

Appearances:

No appearances.

The Court having considered extensive briefs filed by the parties, having heard oral argument, having reviewed applicable law, and having taken Petitioner's Writ of Mandate, under submission on August 20, 2008, now addresses and rules as follows:

Petitioners seek a writ of mandate compelling Respondents to maintain application of its current policy pertaining to nude sunbathing at San Onofre State Beach while rulemaking is conducted with regard to that policy.

The primary issue before the Court is whether respondent California State Department of Parks and Recreation ("Parks") may change the manner in which it enforces Cal.Code of Regs. §4322 ("§4332") without first complying with the provisions of Government Code §11346, et seq., the Administrative Procedure Act ("APA").

Petitioners ("Naurist") say no; the enforcement practices stated in what has come to be known as the "Cahill Policy," restated in the "Harrison Letter" is a regulation within the meaning of the APA and cannot be altered until the procedures of the APA have been complied with.

Parks says yes; the Cahill Policy is not a regulation, but an interpretation precedent to enforcement. As an interpretation, proposed changes are not legislative or quasi-legislative in nature, and therefore are not subject to the requirements of the APA.

As set forth more fully below, applying the holding of Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal.4th 557, the court concludes the Cahill Policy is a regulation within the meaning of the APA. As such, Parks may not change enforcement of §4332 until it has complied with the APA.

The parties' briefs and oral argument establish the following:

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Adopted in 1979, §4332, in pertinent part, provides:

"No person shall appear nude in any unit except in authorized areas set aside for that purpose by the Department."

Also in 1979, Parks' then-Director Cahill issued a memorandum regarding enforcement of this regulation, which provided in relevant part:

"No clothing optional beaches will be designated within the California State Park System at this time. . .

Therefore, it shall be the policy of the Department that enforcement of nude sunbathing regulations with in the State Park System shall be made only upon the complaint of a private citizen. Citations or arrests shall be made only after attempts are made to elicit voluntary compliance with the regulation. . . ."

Parks' continued reliance on the Cahill Policy was reiterated in 1988 by the Harrison Letter, issued by then Deputy-Director for Operations, Jack Harrison.

In Tidewater Marine, the court analyzed whether a policy followed by the Department of Fair Labor Standards Enforcement was a case-specific interpretation, not subject to the APA, or a regulation, which was. In reaching its conclusion the policy was a regulation, the court identified two characteristics of a regulation subject to the APA. "First, the agency must intend its rule to apply generally, rather than in specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain classes of cases will be decided. (Citation omitted.) Second, the rule must 'implement, interpret, or make specific the law enforced or administered by [the agency] or . . . govern [the agency's] procedure. (Gov.Code, §11342, subd. (g))." Tidewater Marine, at p. 571.

The parties agree the Cahill Policy is the operative document. The terms of the policy are not disputed.

The Cahill Policy appears to have been intended to apply generally. By its terms it was adopted after public hearings and comment. No contrary evidence has been offered by Parks. By its terms, it applies to Parks' entire beach system; it is addressed to "All" Division/Office Chiefs, District Superintendents, and Area Managers. Parks offered no evidence the policy was limited in any manner. The first characteristic of a regulation is established.

With regard to the second characteristic of a regulation, the Cahill Policy cannot be viewed as anything other than an implementation or interpretation of §4322, as to nudity on public beaches. The Cahill Policy and Harrison Letter do not discuss any specific case and contain commentary, hallmarks of a regulation as opposed to an internal policy.

Parks has argued the Cahill Policy is merely an internal policy, thus excluded from the requirements of the APA. However, it provided the court with no evidence that it was viewed by Parks as an internal policy. Further, Parks provided the court with no explanation why the holding of Tidewater Marine supports its assertion of internal policy rather than regulation. Finally, Parks provided the court with no authority contradicting or questioning Tidewater Marine's analysis and holding.

Parks presented evidence of the reasons why a change in the Cahill Policy is necessary. The court offers no opinion on the sufficiency of this evidence; a change in policy may be warranted. However, this evidence is properly offered in the required administrative comment process, where it can become part of a comprehensive record.

Based upon the foregoing, the court orders a writ of mandate shall issue

California Code of Regulations, Title 14, §4322 is a regulation that allows nudity in state parks in designated areas. As an interpretation of this regulation that has been generally applied throughout the state parks' beaches system, the Cahill Policy, as interpreted by the Harrison letter, is a regulation. See, Government Code §11342 and Tidewater Marine Western v. Bradshaw (1996) 14 Cal.4th 557. Thus, Parks must comply with the provisions of the Administrative Procedure Act before it makes any changes in its enforcement.

Parks is ordered to submit changes in the regulation to the procedures set forth in the Administrative Procedure Act. Further, until the administrative process is completed, Parks is ordered to maintain the status quo, and enforce the Cahill Policy as it has done since its issuance and subsequent interpretation by the Harrison letter, at Trail 6 in San Onofre State Beach.

Clerk will give notice.

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STATE OF CALIFORNIA - DEPARTMENT OF JUSTICE

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CLERK'S CERTIFICATE OF MAILING (1013A) I certify that I am not a party to the within action or proceeding, that I am over the age of 18, and that a copy of this document was mailed first class, postage prepaid, in a sealed envelope addressed as shown above. Mailing an execution of this certificate occurred on August 27, 2008, at Santa Ana, CA

ALAN SLATER, EXECUTIVE OFFICER/CLERK by **RICHARD BURNS**, Deputy