

At 4:50 o'clock P.M.  
MARCH FONG EU, Secretary of State

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW  
SACRAMENTO, CALIFORNIA

In re: ) 1986 OAL Determination No. 7  
Request for Regulatory )  
Determination filed by ) [Docket No. 86-003]  
Howard I. Sallee, concern- )  
ing the State Personnel ) September 24, 1986  
Board Memorandum of )  
October 27, 1981, ("Use ) Determination Pursuant to  
of out-of-class experience") ) Government Code section  
and the Department of ) 11347.5; Title 1, California  
Food and Agriculture's use ) Administrative Code, Chapter  
of this Memorandum/1 ) 1, Article 2

Determination by:

  
LINDA HURDLE STOCKDALE BREWER, Director

Herbert F. Bolz, Coordinating Attorney  
Debra M. Cornez, Staff Counsel  
Rulemaking and Regulatory Determinations  
Division

THE ISSUE PRESENTED/2

Mr. Howard I. Sallee has requested the Office of Administrative Law (OAL) to determine whether or not either the State Personnel Board ("Board" or "SPB") memorandum, dated October 27, 1981, concerning the use of out-of-class experience in civil service examinations, or the Department of Food and Agriculture's (DFA) use of that memorandum, is a regulation as defined in Government Code section 11342(b) and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the California Administrative Procedure Act (APA)./3

THE DECISION/4, 5, 6

- I. The Office of Administrative Law finds that the memorandum issued by SPB (1) is not a regulation as defined in the APA, and (2) is not subject to the requirements of the APA.
- II. The Office of Administrative Law finds that DFA's use of the memorandum (1) is not a regulation as defined in the APA, and (2) is not subject to the requirements of the APA./7

OUTLINE

I. Agency and Authority; Background

Two statutes grant rulemaking power to the Board: (1) Government Code section 18701 (general rulemaking power), and (2) Government Code section 19994.9 (specific rulemaking power pertinent to this Determination).

In response to Ligon v. State Personnel Board, the Board issued a memorandum, dated October 27, 1981, informing interested parties of the court's interpretation of section 19255 of the Government Code and its application to the Board. In late 1985, DFA used this memorandum to deny the requestor credit for out-of-class experience to meet minimum examination qualifications.

II. DISPOSITIVE ISSUE

WHETHER THE ISSUANCE OF THE CHALLENGED MEMORANDUM CONSTITUTES AN EXERCISE OF QUASI-LEGISLATIVE POWER BY THE STATE AGENCY.

Issuance of the memorandum by the Board

Sub-issue 1: Whether the issuance of the challenged memorandum constitutes an exercise of "quasi-legislative" power as that term has been judicially defined.

Conclusion: The issuance of the memorandum, which announced the court decision and its applications to State employees, is not an exercise of "quasi-legislative" power as that term has been judicially defined because:

- A. A quasi-legislative rule is one formulating a general policy oriented toward future decisions, rather than the application of a rule to the peculiar facts of an individual case; simply applying existing legal requirements to particular situations is not an exercise of quasi-legislative power.
- B. The Board was merely enforcing an existing legal requirement--not making new law; the Board did not add to or change the judicial

interpretation of the statute, but merely informed interested parties of the court's decision and its application to the Board; the enactment was simply "administrative" in nature, rather than "quasi-judicial" or "quasi-legislative."

Sub-issue 2: Whether the Board has been granted pertinent quasi-legislative power.

Conclusion: The Board has not been granted pertinent quasi-legislative power because:

- A. The Board was granted general rulemaking power (see Outline, part I, supra); however, the memorandum under review was not enacted pursuant to delegated rulemaking authority; rather, it was a straightforward notification of an existing legal provision.
- B. The Ligon court held that the Board lacked delegated "authority" to grant credit for out-of-class experience.

Sub-issue 3: Whether the memorandum in question meets the basic definition of "regulation" set out in Government Code section 11342.

Conclusion: The memorandum does not meet the basic definition of "regulation" as set out in Government Code section 11342 because:

- A. Though the memorandum is a standard of general application, the standard is articulated in the statute as judicially construed; the memorandum does not modify or supplement the statute as the statute was construed by the Ligon court.
- B. The rule being enforced is a rule issued by the Legislature (to be precise, as that legislative "rule" was construed by the court), not a rule "issued" by the Board; the Board did not "interpret" the court decision, it simply obeyed it.

Resolution of Dispositive Issue Re the Issuance of the Memorandum by the Board:

The issuance of the challenged memorandum does not constitute an exercise of quasi-legislative power by the Board. Since the rulemaking portion of the APA applies only to the exercise of quasi-legislative power, the challenged memorandum is not subject to the APA.

Issuance of the Challenged Memorandum by DFA

Introductory Conclusions:

- A. Legislative changes to pertinent code sections created the "condition" that credit for out-of-class experience could be given only if the experience "was properly verified under standards prescribed by State Personnel Board rule."
- B. These changes, made subsequent to the Ligon court decision, had no impact on the legality of the memorandum.

Sub-issue 1: Whether the issuance of the challenged memorandum constitutes an exercise of "quasi-legislative" power as that term has been judicially defined.

Conclusion: The issuance of the memorandum by DFA does not constitute an exercise of "quasi-legislative" power as that term has been judicially defined because:

- A. DFA was in effect merely applying a legally binding judicial interpretation of a statute, even though this "rule" had been restated in SPB memorandum.

Sub-issue 2: Whether DFA has been granted pertinent quasi-legislative power.

Conclusion: DFA has not been granted pertinent quasi-legislative power.

Sub-issue 3: Whether the memorandum in question, as issued by DFA, meets the basic definition of "regulation" set out in Government Code section 11342.

Conclusion: The memorandum, as issued by DFA, does not meet the basic definition of "regulation" set out in Government Code section 11342 because:

- A. DFA did not modify or supplement the court's ruling when it enforced the Ligon directive.

- B. DFA merely complied with judicial construction of controlling statutes.

Resolution of Dispositive Issue Re the Issuance of the Challenged Memorandum by DFA:

The issuance of the challenged memorandum by DFA does not constitute an exercise of quasi-legislative power. Since the rulemaking portion of the APA applies only to the exercise of quasi-legislative power, the issuance of the challenged memorandum by DFA is not subject to the APA.

III. CONCLUSIONS

- A. The Office of Administrative Law finds that the memorandum issued by SPB (1) is not a regulation as defined in the APA, and (2) is not subject to the requirements of the APA.
- B. The Office of Administrative Law finds that DFA's use of the memorandum (1) is not a regulation as defined in the APA, and (2) is not subject to the requirements of the APA.

I. AGENCY AND AUTHORITY; BACKGROUND

The California State Personnel Board (hereinafter "Board" or "SPB") was created by section 2 of article 7 of the California Constitution./8 The Board is responsible for enforcing civil service statutes, prescribing job classifications and probationary periods, adopting other rules authorized by statute, and reviewing disciplinary actions./9

The Board has been granted general rulemaking power in Government Code section 18701, which provides in part:

"The board shall prescribe, amend, and repeal rules in accordance with law for the administration and enforcement of this part [part 2 of division 5 of the Government Code] and other sections of this code over which the board is specifically assigned jurisdiction." [Emphasis added.]

For purposes of this Determination, Government Code section 19994.9 (formerly section 19369) provides for specific rule-making power. Section 19994.9/10 states in part:

"The State Personnel Board may prescribe rules governing the temporary assignment or loan of employees within an agency or between agencies or jurisdictions for not to exceed two years . . . .

"These temporary assignments or loans shall be deemed to be in accord with the provisions of this part [part 2.6 of division 5 of the Government Code] limiting employees to duties consistent with their class and may be used to meet minimum requirements for promotional as well as open examinations. . . .

"In addition, out-of-class experience obtained in a manner not described in this section may be used to meet minimum requirements for promotional as well as open examinations, only if it was obtained by the employee in good faith and was properly verified under standards prescribed by State Personnel Board rule." [Emphasis added.]

In light of the above provisions of law, we conclude that the Board is fully subject to the Administrative Procedure Act./11

The following facts and circumstances have given rise to the present Determination.

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Section 19255, added to the Government Code in 1945,<sup>/12</sup> formerly provided:

"A person shall not be assigned to perform the duties of any class other than that to which his position is allocated." [Emphasis added.]

A "class" is a state civil service job classification, such as "Deputy Attorney General IV."

In a memorandum dated May 22, 1974, from the executive officer of the Board to "All Personnel Officers" of state agencies, the Board set forth its policy concerning assignment of out-of-class duties. The memorandum provided in part:

"It is the policy of the State Personnel Board that out-of-class assignments are infrequent occurrences prompted by extraordinary or crisis situations. . . . Frequent use of out-of-class experience is contrary to well administered classification, pay, and selection plans. . . . To provide for recognizing the experience gained by employees in those instances where out-of-class duties have been performed, the examination process permits out-of-class experience to qualify toward meeting the minimum qualifications. The departmental personnel officer must certify, however, that the out-of-class duties were performed. The attached 'State Personnel Board Procedures Regarding Out-of-Class Experience' outlines the procedures and standards for accepting out-of-class experience as qualifying in an examination."<sup>/13</sup> [Emphasis added.]

The above facts are drawn from a September 1981 California Court of Appeal decision--Ligon v. State Personnel Board.<sup>/14</sup> In that case, the court ruled that "the Board's policy is a regulation which was not promulgated by the Board in substantial compliance with the requirements of the APA and is therefore invalid. [Citation.]"<sup>/15</sup> (Fn. omitted; emphasis added.)

In addition, the court found "no authority which would permit out-of-class experience to be substituted for the actual minimum time experience in the job classification."<sup>/16</sup> (Emphasis added.) The court impliedly found that the Board had general rulemaking authority, but lacked specific statutory authorization (in APA terms, no "reference" statute was available<sup>/17</sup>). Hence, the court's decision was that "the

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Board may not consider . . . out-of-class experience in determining qualifications and [eligibility] to take . . . advancement and promotional examinations."/18 The court relied upon the 1981 version of Government Code section 19255 (quoted supra) in reaching this decision.

In response to the Ligon decision, the Board issued a so-called "pink" memorandum (the challenged rule in this Determination) to "All State Agencies and Employee Organizations," dated October 27, 1981, concerning the "Use of out-of-class experience." The pink memorandum stated in part that:

"As a result of the court decision [in Ligon v. State Personnel Board] and advice of the Attorney General's Office, it has been determined that claims of out-of-class experience will no longer be recognized in the examination process for any examination which has a final file date on or after November 13, 1981. This decision impacts all merit system selection processes including those application review processes delegated to State agencies." [Emphasis added.]

(For the full text of the Board's October 27, 1981 memorandum, see Appendix A.)

In 1982, the Legislature sought to resolve the problem of the lack of statutory authorization for the Board's crediting of out-of-class experience. Section 19255 was amended/19 (effective January 1, 1983) to read:

"A person shall not be assigned to perform duties of any other class other than that to which his or her position is allocated, except as permitted by Section 19994.9." [Emphasis added.]

Section 19994.9 (formerly 19369)/20 made clear (as of January 1, 1983) that the Board could grant examination credit for out-of-class experience only after it had adopted formal regulations setting out verification procedures/21:

"The State Personnel Board may prescribe rules governing the temporary assignment or loan of employees . . . for any of the following purposes:

- (a) To provide training to employees.
- (b) To enable an agency to obtain expertise needed

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to meet a compelling program or management need.

- (c) To facilitate the return of injured employees to work.

"These temporary assignments or loans shall be deemed to be in accord with the provisions of this part limiting employees to duties consistent with their class and may be used to meet minimum requirements for promotional as well as open examinations. . . .

"In addition, out-of-class experience obtained in a manner not described in this section may be used to meet minimum requirements for promotional as well as open examinations, only if it was obtained by the employee in good faith and was properly verified under standards prescribed by State Personnel Board rule." [Emphasis added.]

We now turn to more recent facts and circumstances which prompted the filing of this Request for Determination with OAL. These undisputed facts were drawn from the Request, Response and comments submitted.

The requestor, Mr. Sallee, is an employee of the Department of Food and Agriculture (hereinafter DFA). In November 1985, Mr. Sallee filed an application to take the DFA promotional examination for Branch Chief, Pest Management and Prevention. His application listed, in addition to his other qualifications, out-of-class experience gained by working for over two years as a Special Assistant, Division of Pest Management. This out-of-class experience was listed in order to meet the minimum qualifications for the examination. After the preliminary screening of applications, DFA's Examination Unit, Personnel Management Services, eliminated Mr. Sallee from the application process. The Examinations Unit sent a letter, dated November 19, 1985, to Mr. Sallee explaining that his application did not meet the minimum qualifications for the examination. The Examinations Unit had not considered Mr. Sallee's out-of-class experience as a Special Assistant./22

On November 25, 1985, Mr. Sallee delivered a letter to the DFA Examinations Unit, requesting a response as to why his out-of-class experience had not been considered. Mr. Sallee pointed out in this letter, inter alia, that the Board had "adopted" Rule 212 at its November 5, 1985 Board meeting. (We note that Board's "adoption" meant that Rule 212 was

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approved for submission to OAL, not that it had become legally effective./23) According to Mr. Sallee's request, Rule 212 provided for employees to receive credit for out-of-class experience in meeting minimum qualifications for civil service examinations.

The DFA Examinations Unit responded to the November 25 letter by transmitting to Mr. Sallee, via departmental route slip, a copy of the challenged SPB pink memorandum, dated October 27, 1981. This pink memorandum was received by Mr. Sallee on December 10, 1985.

On December 26, 1985, the Board submitted Rule 212 to OAL for review pursuant to Government Code section 11349.1. It was disapproved on January 27, 1986. The Board resubmitted Rule 212 on April 15, 1986, and it was approved by OAL and filed with the Secretary of State on May 15, 1986. Generally, pursuant to Government Code section 11346.2, a regulation required to be filed with the Secretary of State becomes effective on the 30th day after the date of filing. No special effective date was requested in this case; accordingly, Rule 212 (Title 2, CAC, section 212) became effective on June 13, 1986. (See Appendix B for full text of Rule 212.)

On February 5, 1986, OAL received Mr. Sallee's Request for Determination concerning the SPB memorandum dated October 27, 1981. OAL began active consideration of Mr. Sallee's request on July 11, 1986, pursuant to Title 1, CAC, section 123./24

In response to the Request for Determination, the Board argues that section 19994.9 allows the Board to prescribe rules setting the standards by which out-of-class experience could be used to meet minimum requirements for promotional examinations./25 The Board states that it determined that legislation was necessary to provide statutory authority for it to promulgate rules/26 and that in effect adoption of such rules was a condition precedent to accepting out-of-class experience. Further, the Board states that it tried diligently to adopt such rules, but it was not until mid-1986 that such rules were adopted by the Board, approved by OAL, and filed with the Secretary of State./27

## II. DISPOSITIVE ISSUE

The threshold issue before us is:/28

WHETHER THE ISSUANCE OF THE CHALLENGED MEMORANDUM CONSTITUTES AN EXERCISE OF QUASI-LEGISLATIVE POWER BY THE STATE AGENCY./29

The term "quasi-legislative" is not defined in the APA. In determining whether a rule is the result of the exercise of quasi-legislative power, we consider three elements:

- 1) Whether the issuance of the challenged rule constitutes an exercise of "quasi-legislative" power as that term has been judicially defined;
- 2) Whether the state agency in question has been granted pertinent quasi-legislative powers; and
- 3) Whether the rule in question meets the basic definition of "regulation" set out in Government Code section 11342.

The Request for Determination asks that we look at the memorandum at two different points in time: (1) at the time the Board first issued the memorandum, and (2) at the time DFA applied the memorandum to Mr. Sallee in late 1985. After discussing how the above three elements apply to the Board, we will consider how these elements apply to DFA.

Whether the issuance of the challenged rule constitutes an exercise of "quasi-legislative" power as that term has been judicially defined.

According to the California Supreme Court, a quasi-legislative rule is one formulating a general policy oriented toward future decisions, rather than the application of a rule to the peculiar facts of an individual case.<sup>/30</sup>

The Board's issuance of the October 27, 1981, memorandum concerning the use of out-of-class experience to meet minimum examination qualifications.

Simply applying existing legal requirements to particular situations is not an exercise of quasi-legislative power. Take, for instance, this situation:

- o a state agency orders a particular lumber company to furnish gloves at company expense to certain employees.
- o the agency relies upon statutory and regulatory provisions which require employers to "furnish" hand protection to certain employees.
- o A published appellate opinion has earlier construed the statutory term "furnish" to mean furnish at the

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employer's expense.

- o the company challenges the agency order on the grounds that the "at company expense" requirement is an underground regulation./31

The above situation confronted the California Supreme Court in Bendix Forest Products Corporation v. Division of Occupational Safety and Health/32 (hereinafter "Bendix"). The Bendix court concluded that the order in question was not "a quasi-legislative judgment promulgating a new regulation or standard but rather a specific application of laws and existing regulations."/33 (Emphasis added.) In Bendix, the statute in question, as previously interpreted by an appellate court/34, required employers to furnish safety equipment at company expense. Thus, the agency, in requiring the lumber company to furnish gloves at company expense, was simply applying (or "enforcing") an existing legal requirement.

The challenge to the SPB memorandum of October 27, 1981 is strikingly similar in key respects to the Bendix case:

- o the Court of Appeal holds that a particular statute precludes SPB from allowing examination credit for out-of-class experience.
- o SPB notifies the various state agencies and employee organizations that it is legally precluded from allowing such credit.
- o Applying the notification memorandum of October 27, 1981, DFA denies such credit to Mr. Sallee.
- o Mr. Sallee challenges DFA's application of the SPB memorandum to him, arguing that such application constitutes an underground regulation.

Like the Bendix court, we conclude that the state agency whose action is under attack was in fact merely enforcing an existing legal requirement--not making new law. In the matter at hand, SPB did not add to or change the judicial interpretation of the statute, but merely informed interested parties of the decision and "its application." The enactment is thus simply "administrative" in nature, rather than "quasi-judicial" or "quasi-legislative."

A state agency may enforce a self-executing statute--that is, a statute that clearly and expressly requires certain cri-

teria to be followed--without violating the APA. A statute that was possibly not self-executing as enacted may be rendered substantially self-executing in light of subsequent judicial interpretation./35 In the case before us, the Board merely "republished" the rule set out by the court (i.e., its interpretation and application of section 19255).

We conclude that the October 27, 1981, issuance of the memorandum that announced the Ligon court decision and its application to State employees does not constitute an exercise of "quasi-legislative" power as that term has been judicially defined.

Whether the state agency in question has been granted pertinent quasi-legislative power.

As discussed above in Part I, the Legislature has granted the Board power to "prescribe, amend, and repeal rules in accordance with the law for the administration and enforcement of this part and other sections of this code over which the board is specifically assigned jurisdiction."/36 However, the memorandum under review was not enacted pursuant to delegated rulemaking authority. Rather, it was a straightforward notification of an existing legal provision. Further, the Ligon court held that the Board lacked "authority" to grant credit for out-of-class experience. We interpret this judicial holding to mean that the Board had not been granted pertinent quasi-legislative power.

Whether the rule in question meets the basic definition of "regulation" set out in Government Code section 11342.

In pertinent part, Government Code section 11342(b) defines regulation as:

". . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such 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 . . . ."  
[Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"No state agency shall issue . . . any guideline, criterion, bulletin [or] instruction . . . which is

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a regulation as defined in subdivision (b) of section 11342, unless the . . . guideline, criterion, bulletin [or] instruction . . . has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." [Emphasis added.]

Applying the definition found in Government Code section 11342(b) involves a two-part inquiry:

- (a) is the informal rule either (i) a rule or standard of general application or (ii) a modification or supplement to such a rule?
- (b) does the rule being enforced either (i) implement, interpret, or make specific the law enforced or administered by the Board or (ii) govern the Board's procedure?

The answer to both parts of this inquiry is "no."

First, the memorandum is a standard of general application. However, the standard is articulated in the statute as judicially construed. The memorandum does not modify or supplement the statute (i.e., the statute as construed by the Ligon court). The memorandum correctly reports the terms of the ruling and how the ruling impacts the affected public.

Second, the rule being enforced is a rule issued by the Legislature (as that legislative "rule" was construed by the court), not a rule "issued" by the Board. The Board also did not "interpret" the court decision, it simply obeyed it. Therefore, the challenged memorandum does not meet the definition of "regulation" under Government Code section 11342(b).

We conclude that the initial issuance of the challenged memorandum did not constitute an exercise of quasi-legislative power by the Board. Therefore, since the rule-making portion of the APA applies only to the exercise of quasi-legislative power/37, the challenged memorandum is not subject to the APA.

DFA's issuance of the October 27, 1981 memorandum in response to Mr. Sallee's November 25, 1985, letter./38

We now turn to the question of whether the issuance of the challenged memorandum by the DFA, in response to Mr. Sallee's November 25, 1985 letter, reflects the exercise of quasi-legislative powers.

October 27, 1981, memorandum was superseded by section 212, of Title 2 of the CAC (Rule 212).

Returning to the matter at hand concerning DFA's use of the memorandum in late 1985, we conclude that DFA was in effect merely applying a legally binding judicial interpretation of a statute, even though this "rule" had been restated in an SPB memorandum.

In light of the above conclusion and the three above-noted elements, we conclude DFA was not acting in a quasi-legislative capacity:

- (1) it was merely applying an existing legal requirement;
- (2) it possessed no pertinent quasi-legislative power; and,
- (3) DFA did not modify or supplement the court's ruling when it enforced the Ligon directive; DFA merely complied with judicial construction of controlling statutes.

We conclude, therefore, that the issuance of the challenged memorandum did not constitute an exercise of quasi-legislative power by DFA. Since the APA applies only to the exercise of quasi-legislative power, DFA's use of the challenged memorandum is not subject to the APA.

### III. CONCLUSIONS

For the reasons set forth above, OAL finds that:

First, the memorandum issued by SPB (1) is not a regulation as defined in the APA, and (2) is not subject to the requirements of the APA.

Second, DFA's use of the memorandum (1) is not a regulation as defined in the APA, and (2) is not subject to the requirements of the APA.

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Before analyzing the issuance of the memorandum by DFA in light of the three above-noted elements, we must review the legislative changes to pertinent code sections that occurred subsequent to the ruling by the Ligon court and the impact, if any, on the legality of the memorandum.

As explained above in Part I, following the Ligon decision, section 19255 was amended to prohibit the assignment of an employee "to perform duties of any class other than that to which his or her position was allocated, except as permitted by section 19994.9." (Emphasis added.) Section 19994.9 was simultaneously amended to allow credit for out-of-class experience to meet minimum examination requirements.

Critical to our analysis here is one key feature of section 19994.9: the condition that credit for out-of-class experience not obtained in a manner specifically described in section 19994.9 could be given only if the experience "was properly verified under standards prescribed by State Personnel Board rule." [Emphasis added.]

Since Mr. Sallee does not allege that he falls within one of the circumstances listed in the first paragraph of section 19994.9, and since the record suggests that he in fact does not fall within one of those circumstances, we conclude that his experience was obtained in such a way as to require verification pursuant to Board rule (i.e., regulation).

At the time DFA applied the October 27, 1981 memorandum to Mr. Sallee in late 1985, the Board's "rule" had not yet been adopted pursuant to the APA, therefore the "condition" could not be satisfied.

We note that adoption of the 1982 amendments to the Government Code (see Part I) had a double effect. First, the amendments explicitly granted SPB the authority to credit out-of-class experience. Second, the amendments provided that out-of-class experience could not be credited until verification standards were set out in formal SPB regulations. The Legislature thus affirmed the judicial conclusion that rules governing out-of-class experience had to be contained in either statute or regulation.

Also, as noted above in Part I, following DFA's disposition of Mr. Sallee's application, the Board adopted Rule 212--which prescribes procedures and rules concerning the use of out-of-class experience. These rules were filed with the Secretary of State pursuant to APA requirements, and became legally effective on June 13, 1986. Upon this later date, the

## NOTES

1. In this proceeding, Howard I. Sallee represented himself. The Board was represented by Laura M. Aguilera and Nancy L. Bohaty. The Department of Food and Agriculture was represented by Herbert L. Cohen, Shamin Khan and Bob McCarry.
2. The legal background of the regulatory determination process-- including a detailed survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (State Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-2, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.
3. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code. Sections 11340 through 11356, Chapters 4 and 5, also part of the APA, concern administrative adjudication rather than rulemaking.
4. As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-2, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 130 Cal.Rptr. 321. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "The Office's determination shall be published in the California Administrative Notice Register and be made available to . . . the courts." (Emphasis added.) Implementing this directive, this and other determinations are presently being mailed to the clerks of all state and federal courts in California.
5. One timely comment was received and considered. In this comment, the requestor submitted a second Board memorandum dated June 2, 1986. This second memorandum is not properly before us in this Determination and therefore will not be addressed.
6. A timely Response to the Request for Determination was received from the Board. This Response stated that use of the memorandum to inform state agencies and employee organi-

zations was appropriate. The Board also argued that since rules have been promulgated, in accordance with the APA, governing the use of out-of-class experience that the Request for Determination is moot. Since we have determined that the challenged memorandum was at no time an underground regulation, we need not address the Board's argument that the adoption of Rule 212 has mooted the Request.

DFA's Response was not received until after the legal deadline, and thus was not considered by OAL.

7. Note that OAL is not approving all SPB pink memorandums (also known as "pinkies"). In fact, regulatory "bulletins" were condemned in Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, were specifically outlawed in Government Code section 11347.5, and have been declared invalid and unenforceable by OAL in two previous opinions: 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, pp. B-18--B-34; and 1986 OAL Determination No. 4 (Board of Equalization, June 25, 1986, Docket No. 85-005), California Administrative Notice Register 86, No. 28-Z, July 11, 1986, pp. B-7--B-26; see also Ligon v. California State Personnel Board (1981) 123 Cal.App.3d 583, 176 Cal.Rptr. 717 (striking down a regulatory SPB "bulletin").
8. Formerly section 2 of article 24.
9. California Constitution, article 7, section 3(a).
10. All references to code sections in the Determination are to the Government Code.
11. We note that the APA applies to all state agencies, except those "in the judicial or legislative department." Government Code section 11342(a); see Government Code sections 11346 and 11343; see also 27 Ops.Cal.Atty.Gen. 56, 59 (1956). Since the Board is neither in the judicial nor the legislative "department," there can be no doubt that APA rulemaking requirements generally apply to the Board. See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
12. Stats. 1945, c. 123, p. 560, section 1; amended by Stats. 1982, c. 570, p. 2525, section 1; repealed by Stats. 1985, c. 1015, p. \_\_\_\_, section 10, urgency, effective September 26, 1985; see, now, Government Code section 19818.8.

13. Ligon v. State Personnel Board (1981) 123 Cal.App.3d 583, 587, 176 Cal.Rptr. 717, 718.
14. Id.
15. Id., 123 Cal.App.3d at p. 588, 176 Cal.Rptr. at p. 719.
16. Id., 123 Cal.App.3d at p. 589, 176 Cal.Rptr. at p. 719.
17. See Government Code sections 11349.1(a)(5) and 11349(e); title 1, CAC, section 14.
18. Id., 123 Cal.App.3d at p. 592, 176 Cal.Rptr. at p. 721.
19. See n.12, supra.
20. Section 19369 was repealed by Stats. 1981, c. 230, p. 1167, section 48.
21. We note that under section 19994.9 examination credit may also be granted by the Board for out-of-class experience obtained (1) for the training of employees, (2) for needed expertise, and (3) for facilitating the return of injured employees to work, without first obtaining verification under standards prescribed by Board rules.
22. According to Mr. Sallee, he has had applications for past examinations denied by DFA reportedly because his out-of-class experience as a Special Assistant was not considered.
23. See Government Code section 11346.4(b).
24. Title 1, CAC, section 123 provides in part:

". . . All requests for determination . . . shall be considered by the office [OAL] in the order in which they are received. The office shall commence active consideration of each request as soon as possible after its receipt within available program resources. . . ."
25. Board's Response to Request for Determination, p. 1.
26. Id.
27. Id.
28. Generally, there are four main issues to discuss in a Determination:

- (1) Whether the issuance of the challenged rule constitutes an exercise of quasi-legislative power by the state agency.
- (2) Whether the state agency's quasi-legislative enactments are generally subject to the requirements of the APA.
- (3) Whether the challenged rule is a regulation within the meaning of the key provision of Government Code section 11342.
- (4) Whether the challenged rule falls within any legally established exception to APA requirements.

See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (points 1 and 3); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1, 3, and 4); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 of today's Determination.

However, since in this case the first issue is dispositive, the other three issues need not be addressed.

29. See Government Code section 11346, which provides:

"It is the purpose of this article [Article 5 of Chapter 3.5] to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." [Emphasis added.]

30. Pacific Legal Foundation v. California Coastal Commission (1982) 33 Cal.3d 158, 168, 188 Cal.Rptr. 104; as cited in 1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, 20-2, May 16, 1986, p. B-34 and n. 14; typewritten version, p. 7 and n. 14.
31. The term "underground regulation" refers to the enactments outlawed in Government Code section 11347.5: agency rules of

a regulatory nature which have been issued or enforced absent compliance with APA requirements.

32. Bendix Forest Products Corporation v. Division of Occupational Safety and Health (1979) 25 Cal.3d 465, 158 Cal.Rptr. 882.
33. Id., 25 Cal.3d at p. 471, 158 Cal.Rptr. at p. 886.
34. Oakland Police Officers Association v. City of Oakland (1973) 30 Cal.App.3d 96, 106 Cal.Rptr. 134, as cited in Bendix, n. 32, supra, 25 Cal.3d at p. 472, 158 Cal.Rptr. at p. 886.
35. California Coastal Commission v. Quanta Investment Corporation (1981) 113 Cal.App.3d 579, 170 Cal.Rptr. 263; Bendix cited supra in n. 32.
36. Government Code section 18701.
37. See n. 29, supra. The exceptions provided in section 11346.1 are not pertinent here.
38. We are concerned with DFA's initial use of the memorandum denying Mr. Sallee's application as well as DFA's issuance of it in response to Mr. Sallee's November 21, 1981, letter. The analysis applies to both.

**CALIFORNIA STATE PERSONNEL BOARD**

Date of Issue: October 27, 1981  
Destroy After: Retain Indefinitely

MEMO TO: ALL STATE AGENCIES AND EMPLOYEE ORGANIZATIONS

SUBJECT: Use of out-of-class experience.

In the past, State civil service employees have been able to use out-of-class experience to meet minimum qualification requirements in State promotional examinations provided that the experience was verified under State Personnel Board requirements.

A recent California Court of Appeals decision (Ligon vs. State Personnel Board) has held that out-of-class service cannot be utilized as experience in qualifying for a promotional examination in California State Civil Service. In arriving at this decision, the Court cited Government Code Section 19255 which provides "A person shall not be assigned to perform the duties of any class other than that to which his position is allocated." The Court further stated that "We find no authority which would permit out-of-class work experience to be substituted for the actual minimum time experience in the job classification."

As a result of the court decision and advice of the Attorney General's Office, it has been determined that claims of out-of-class experience will no longer be recognized in the examination process for any examination which has a final file date on or after November 13, 1981. This decision impacts all merit system selection processes including those application review processes delegated to State agencies.

The Board is not planning to appeal this decision. The Policy and Standards Division has been asked to determine whether a need exists for additional statutory authority in this area. However, if a legislative effort is deemed necessary and is successful, policy changes could not be effective until early 1983. Employees should therefore not plan on the use of out-of-class experience in the foreseeable future.

The provisions of the Court decision do not impact the State Personnel Board's authority under Government Code Section 18715 to review and award reimbursement for employee's claims for the performance of out-of-class duties as set forth in State Personnel Board memorandum to All State Agencies and Employee Organizations dated January 2, 1981. Also, for examination purposes, recognition of experience gained in formal Training and Development Assignments under Government Code Section 19369, as set forth in State Personnel Board memorandum to All State Agencies dated August 5, 1976, will be continued without change.

Memo re: Use of out-of-class experience.  
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Please give this information wide distribution to assure that all employees are aware of the policy change. If there are any questions or comments about the acceptance of out-of-class experience, please contact Bob Painter of my staff at ATSS 485-3721 or (916) 445-3721.

A handwritten signature in black ink, appearing to read "Duane D. Morford". The signature is written in a cursive style with a large, prominent initial "D".

DUANE D. MORFORD, Chief  
Policy and Standards Division

212. Use of Out-of-Class Experience in Meeting Minimum Qualifications for an Examination.

(a) Definition—Out-of-class experience is that work experience gained by the performance of duties outside the class concept of the employee's class of appointment.

Nothing in this part shall be deemed to condone or encourage the assignment by management or the performance of out-of-class work by an employee not authorized by law.

(b) Verification of out-of-class experience. An employee shall be eligible to receive credit for out-of-class experience in meeting the minimum qualifications for a civil service examination when all of the following criteria are met:

(1) The employee shall submit a written request that the appointing authority, or his/her designee, certify that the employee accepted and performed duties assigned by the appointing authority that were not consistent with the employee's class of appointment. Requests shall not be made prior to performing out-of-class duties a minimum of 30 consecutive calendar days, nor later than 180 calendar days after the ending date of the out-of-class duties. On a one-time basis only, and within six months of the effective date of this rule,

employees may submit a request to their appointing authority for credit for out-of-class work performed prior to the effective date of this rule. Thereafter, the six month time limitation is mandatory.

(2) The appointing authority or his/her designee under whom the claimed out-of-class experience was gained shall document by a written statement the employee's request for certification of out-of-class experience. The department's statement shall include a description of the type and level of duties performed; a conclusion regarding whether the duties are or are not consistent with the employee's class of appointment and, if not consistent, an identification of the class to which such duties are appropriate; the beginning and ending dates of the out-of-class experience; the title of the examination for which the employee is applying, if applicable; and any further information required by the executive officer. A copy of the department's statement shall be filed with the Board.

(3) The applicant shall attach a copy of the verification statement to the application form for any examination for which he/she is applying.

(4) The out-of-class experience shall not be used to progress from the trainee to the journey level in a class series or deep class as a rate faster than that permitted for persons appointed to such classes. If the employee's class of appointment has a transfer relationship, as defined by Rule 433, to the class series or deep class in which out-of-class was gained and verified, and the out-of-class experience gained was at the trainee through journey level, the experience shall be credited for examination purposes on a cumulative basis starting at the level to which the employee could have transferred.

Where a promotional relationship, as defined in Section (b) of Rule 431, exists between the employee's class of appointment and the class series or deep class in which out-of-class experience is claimed and verified, the experience will be credited on a cumulative basis starting at the entry level of the class series or deep class.

For the purposes of this rule:

A "class series" is any vertically related group of two or more classes in the same occupational speciality or program area but different in level of responsibility, which constitutes a primary promotional pattern for a specifically identifiable group of employees; and

A "deep class" is a class which has more than one salary range and where, by Board resolution, a salary range other than the lowest range of the class may be used for determining employee status.

(5) The out-of-class duties were performed for a minimum time period generally required to assume the full range of responsibilities of the class being claimed by the employee. Under this requirement, the minimum verifiable length of out-of-class experience is 30 consecutive calendar days.

(c) Once out-of-class experience is credited under this rule, such experience may be used for any other examination with a final filing date on or after the effective date of this rule, without the need for reverification.

(d) All verification statements will remain on file with the State Personnel Board for audit purposes for a period not less than five years or until ordered destroyed by the executive officer.

(e) The employee may appeal to the Board from the appointing authority's denial of a request for use of out-of-class experience for meeting minimum qualifications in an examination pursuant to Rules 63 and 64.

NOTE: Authority cited: Sections 18701 and 19994.9, Government Code. Reference: Section 19994.9, Government Code.

HISTORY:

1. New section filed 5-14-86; effective thirtieth day thereafter (Register 86, No. 20.)