

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

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SECRETARY OF STATE
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In re:)
 Request for Regulatory)
 Determination filed by)
 ALLIANCE OF TRADES AND) 1993 OAL Determination No. 2
 MAINTENANCE regarding the)
 DEPARTMENT OF PARKS AND) [Docket No. 90-017]
 RECREATION'S Departmental)
 Notice No. 90-12 (titled) April 7, 1993
 "Notification Policy"))
 requiring employees of the) Determination Pursuant to
 agency to report warrants) Government Code Section 11347.5;
 for arrests, criminal) Title 1, California Code of
 investigations, physical) Regulations, Chapter 1,
 arrests, convictions,) Article 3
 administrative actions, or)
 other violations related to)
 moral turpitude, theft or)
 illegal drugs¹)
 _____)

Determination by: John D. Smith, Deputy Director
 Herbert F. Bolz, Supervising Attorney
 Debra M. Cornez, Staff Counsel
 Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not a Department of Parks and Recreation administrative bulletin, which requires departmental employees to notify their supervisors of any criminal violations/proceedings or administrative actions that are job-related, is a "regulation" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

7

The Office of Administrative Law concludes that the administrative bulletin is a "regulation" required to be adopted pursuant to the Administrative Procedure Act.

THE ISSUE PRESENTED²

The Office of Administrative Law ("OAL") has been requested to determine³ whether or not the Department of Parks and Recreation's ("Department") Departmental Notice No. 90-12, titled "Notification Policy," requiring employees of the agency to report warrants for arrests, criminal investigations, physical arrests, convictions, administrative actions, or other violations related to moral turpitude, theft or illegal drugs, is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA")⁴.

THE DECISION^{5, 6, 7, 8}

OAL finds that:

- (1) the Department's quasi-legislative enactments are generally subject to the APA;
- (2) the challenged notification policy constitutes a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);
- (3) no exceptions to the APA requirements apply; and,
- (4) the challenged notification policy violates Government Code section 11347.5, subdivision (a).⁹

REASONS FOR DECISION

I. APA; RULEMAKING AGENCY; AUTHORITY; BACKGROUND

The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal described the APA and OAL's role in that Act's enforcement as follows:

"The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) . . . The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).

"In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.]¹⁰

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11347.5. Section 11347.5, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

The Rulemaking Agency Named in this Proceeding

The Department of Parks and Recreation ("Department"), a component of the Resources Agency, is responsible generally for the development of the state park system.¹¹ The State Park and Recreation Commission ("Commission"), a nine-member commission within the Department, establishes general policies for the guidance of the Director of the Department in the development, administration, and protection of the state park system.¹²

Authority¹³

The Department has been granted rulemaking authority in specific areas. Public Resources Code section 540, subdivision (b), authorizes the Director of the Department to adopt, as recommended by the Commission, a comprehensive recreational policy for the State. Section 5003 of that same Code provides that the Department may establish rules and regulations for the government and administration of the property under its jurisdiction.

Background: This Request for Determination

This Request for Determination was filed on May 18, 1990, by the Alliance of Trades and Maintenance ("Requester"), the authorized union representative for Bargaining Unit 12 (Craft and Maintenance)¹⁴ at the time of the Request. Pursuant to the Ralph C. Dills Act,¹⁵ which established collective bargaining for state employees, the state work force is divided up into 21 bargaining units.

April 7, 1993

The Requester asked OAL to "review the Department of Parks and Recreation's recently implemented policy requiring employees to report any arrests, convictions, or investigations of a criminal nature or any other action that would affect a job-related license, degree, or certificate." The Requester included a copy of the challenged policy which appears to be an update to the Department's Departmental Operations Manual (DOM). The policy, Departmental Notice No. 90-12, issued April 26, 1990, and titled "Notification Policy," (sometimes referred to below as the "challenged rule") states as follows:

"The Department is charged with the responsibility to predict and take necessary action for those job related circumstances that are likely to produce injury to employees, the public, or liability to the State. In order to carry out that charge, effective immediately:

"All Field Operations and OHMVR [Off Highway Motor Vehicle Recreation] Division personnel will notify their first or second level supervisor of any job related criminal investigation, physical arrest or conviction, or any administrative action that affects any job related license, certificate, degree, or qualification that involves themselves. Such notification must occur by the beginning of their next shift.

"For all employees, all proceedings related to moral turpitude, theft, or felony violation involving illegal drugs are deemed job related.

"For Peace Officers, being the subject of any misdemeanor citations for Health and Safety, Business and Professions or Penal Codes, warrant for arrest, criminal investigation, physical arrest, or conviction is deemed to be job related and must be reported within 24 hours.

"Notification shall be considered confidential. The Department will determine if a nexus to the job exists. If no nexus exists, no action will be taken. If a nexus exists, the Department may make temporary administrative changes in

schedule and work assignment, if necessary, to reduce Department liability. The Department may conduct an investigation in accordance with DOM Section 0430. The Department will not rely on the findings of any other agency. Appropriate administrative action will only be taken based upon the findings of the independent Department investigation. These actions will be independent of any criminal or judicial process."

On February 22, 1991, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,¹⁶ along with a notice inviting public comment. On March 22, 1991, the Requester submitted additional material as a public comment. A Response to the Request for Determination ("Response"), dated April 3, 1991, was submitted by the Department of Personnel Administration ("DPA") on behalf of the Department.

II. DISCUSSION

Government Code section 11347.5 governs OAL's response to requests for determinations. Subsection (b) of section 11347.5 states as follows:

"If . . . [OAL] is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to . . . [the APA], . . . [OAL] may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added.]

Note that OAL has simply been authorized to determine whether a challenged rule is or is not a "regulation" under the APA. OAL lacks authority either to prevent the use of a rule or policy declared to be an invalid "regulation" in violation of section 11347.5, or to impose penalties upon such use. Likewise, OAL lacks authority to enforce the

application of existing regulations properly adopted pursuant to the APA or to require an agency to adopt regulations on specific topics. Such authority rests with the courts.

In this determination, the key issues are:

- (1) **WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.**
- (2) **WHETHER THE CHALLENGED RULE IDENTIFIED IN THE REQUEST FOR DETERMINATION CONSTITUTES A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.**
- (3) **WHETHER THE CHALLENGED RULE FALLS WITHIN AN EXCEPTION TO APA REQUIREMENTS.**

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

Government Code section 11000 states in part:

"As used in this title [Title 2, 'Government of the State of California'] 'state agency' includes every state office, officer, department, division, bureau, board, and commission."
[Emphasis added.]

This statutory definition applies to the APA, i.e., it helps us determine whether or not a particular "state agency" is subject to APA rulemaking requirements. Section 11000 is contained in Title 2, Division 3 ("Executive Department"), Part 1 ("State Department and Agencies"), Chapter 1 ("State Agencies") of the Government Code. The rulemaking portion of the APA is also found in Title 2 of the Government Code; to be precise, it is Chapter 3.5 of Part 1 of Division 3.

April 7, 1993

The Department is clearly a "state agency" as that term is defined in Government Code section 11000. Further, the APA somewhat narrows the broad definition of "state agency" given in Government Code section 11000. In Government Code section 11342, subdivision (b), the APA provides that the term "state agency" applies to all state agencies, except those in the "judicial or legislative departments."¹⁷ Since the Department is not in the judicial or legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department's quasi-legislative enactments.¹⁸

The subject matter of this Request, however, requires that we go beyond this general conclusion. Two areas we need to examine are the statutory law governing relations between the state and its employees and the memorandum of understanding ("MOU") for Bargaining Unit 12.

The Dills Act¹⁹

Government Code sections 3512 through 3524, known as the Ralph C. Dills Act ("Dills Act"), set forth the statutory law governing relations between the state and its employees. One purpose of the Dills Act is "to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between the state and employee organizations."²⁰

Government Code section 3517.5 provides,

"If agreement is reached between the Governor and the recognized employee organization, they shall jointly prepare a written memorandum of such understanding [{"MOU"}] which shall be presented, when appropriate, to the Legislature for determination."

Section 3539.5 of the "Bill of Rights for State Excluded Employees," chapter 10.5 of the Government Code,²¹ sets forth an express exemption from the APA as follows:

April 7, 1993

"The Department of Personnel Administration may adopt or amend regulations to implement employee benefits for those state officers and employees excluded from, or not otherwise subject to, the Ralph C. Dills Act.

"These regulations²² shall not be subject to the review and approval of the Office of Administrative Law pursuant to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2).

These regulations shall become effective immediately upon filing with the Secretary of State." [Emphasis added.]

This express exemption, however, does not apply to the challenged rule at issue in this Determination since (1) the challenged rule was not adopted by DPA, and (2) the challenged rule affects employees that are not excluded from, but rather are subject to, the Dills Act.

We are aware of no specific statutory exemption which would permit the Department to issue the challenged notification policy governing employees covered by the Dills Act without complying with the APA.

MOU Provisions

Since the Requester was the authorized representative for Bargaining Unit 12 at the time the request was submitted, we will consider the effect of the MOU for Bargaining Unit 12 on the challenged rule. However, it is also important to note that the Request could have been submitted by anyone (see section 122 of Title 1 of the CCR), including someone in the private sector; the analysis of the challenged rule would be the same.

Section 24.1, subsection (b), of the MOU for Bargaining Unit 12, which covers the period from January 30, 1989, through June 30, 1991, states:

"The parties agree that the provisions of this Subsection shall apply only to matters which are not covered in this Agreement.

"The parties recognize that during the term of this Agreement, it may be necessary for the State to make changes in areas within the scope of negotiations. Where the State finds it necessary to make such changes, the State shall notify [the Alliance of Trades and Maintenance] of the proposed change 30 days prior to its proposed implementation.

". . . .

". . . If the parties are in disagreement as to whether a proposed change is subject to this Subsection, such disagreement may be submitted to the arbitration procedure for resolution. The arbitrator's decision shall be binding. In the event negotiations on the proposed change are undertaken, any impasse which arises may be submitted to mediation pursuant to Section 3518 of the Dills Act."

Based on the above-quoted MOU provision, DPA argues that "[t]he State may make changes in the terms and conditions of employment that are not subject to the MOU so long as the State negotiates the impact of such changes with the Union."²³ It adds:

". . . If the parties are unable to reach agreement, they may agree on the appointment of a mediator or either party may request the Public Employment Relations Board to appoint a mediator. (Gov. Code, § 3518) The employer is not required to reach an agreement but may implement its proposals if it meets and confers in good faith and participates in the mediation process in good faith.

"Unilateral implementation, after failure of the parties to agree, is an accepted practice in labor relations. In this case, the parties have agreed to specific contractual language which permits the State to make changes but requires the State to bargain only with respect to impact of these policy decisions and if the Dills Act mediation procedures are followed, to implement its decision unilaterally. OAL must thus face up to the question of whether the requestor has waived any rights to complain to OAL that a decision it disagrees with violates the APA.^[24] It is [the Department's]

position that the contract explicitly sanctions what [the Department] has done."²⁵

DPA misses the point. The Requester does not attack the challenged rule based on a breach of contract theory. Instead, the challenged rule is asserted to be invalid due to the Department's failure to comply with the requirements of the APA. The above-cited MOU provision does not provide an express exemption to the APA.

Our examination of both the Dills Act and the pertinent MOU provisions indicates that APA requirements apply to the challenged rule. We defer our discussion of the applicability of the APA to specific MOU provisions to a later section of this Determination.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IDENTIFIED IN THE REQUEST FOR DETERMINATION CONSTITUTES A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (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:

"(a) 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

subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

In Grier v. Kizer,²⁶ the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b):

First, is the challenged rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure^{27?}

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA. [Emphasis added.]²⁸

Furthermore, the California Court of Appeal in State Water Resources Control Board v. Office of Administrative²⁹ stated:

"[I]f [a regulatory measure] looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it."³⁰

A. Is the Challenged Notification Policy a Rule or Standard of General Application or a Modification or Supplement to Such Rules or Standards?

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.³¹

On behalf of the Department, DPA argues that the challenged notification policy is not one of general application because it does not apply to all employees within the agency. It states:

"It should be initially noted that this policy does not apply to all personnel of the [Department] but only to field operations personnel and off highway motor vehicle division personnel."³²

In making this argument, DPA appears to have ignored the third indented paragraph of the challenged notice which requires reporting by "Peace Officers" within a 24-hour period.

Although the application of the challenged notice is not as narrow as DPA presents, we nonetheless agree that it does not apply (as the Requester asserts) to all employees of the Department. That conclusion, however, does not preclude a finding that it is a rule of general application.

The challenged notice appears to contain two rules: one requiring reporting of specified occurrences by field operations and highway motor vehicle division personnel by the beginning of their next shift and another requiring reporting of other specified occurrences by peace officers

within 24 hours. Each rule, however, pertains to all employees of an open class³³ (i.e., the number of people in the class is not limited, and can be ever changing). It is not limited to a closed group and would be applicable to all persons entering the affected class at a later date. The first rule pertains to all of the Department's field operations and highway motor vehicle division personnel while the second rule pertains to all of the Department's peace officers.

We find that the challenged rule has general application.

B. Part Two - Does the Challenged Notification Policy Establish Rules or Standards Which Interpret, Implement, or Make Specific the Law Enforced or Administered by the Agency?

DPA contends that the challenged notice does not "interpret or implement a [State Personnel] Board rule [as the challenged rule did in Armistead v. State Personnel Board³⁴], rather it seeks to permit the agency to make an informed decision regarding whether an employee is fit to perform the duties they [sic] have been assigned."³⁵

The Requester indicates that the Department adopted the challenged notification policy in order to implement, interpret, or make specific, Government Code sections 19574 and 19585. Section 19574 outlines the circumstances under which an appointing power may take adverse action against an employee. Section 19585 describes requirements for continuing employment and the actions which may be taken by an appointing power against an employee who fails to meet such requirements.

Certainly, the challenged notice pertains to these and other similar statutes. Whether it implements, interprets, or makes specific these particular statutes or whether it implements, interprets, or makes specific some other statute concerning employee discipline, which the Department enforces or administers, is of no consequence.

Analysis under the two-part test leads us to conclude that the challenged notification policy is a "regulation" within the meaning of the key provision of Government Code section 11342, subdivision (b).

THIRD, WE INQUIRE WHETHER THE CHALLENGED NOTIFICATION POLICY, WHICH CONSTITUTES A "REGULATION," FALLS WITHIN AN EXCEPTION TO THE APA REQUIREMENTS.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.³⁶ Rules concerning certain activities of state agencies -- e.g., "internal management" -- are not subject to the procedural requirements of the APA.³⁷

DPA contends that the challenged notification policy falls within the three following APA exceptions which we will discuss below: (1) internal management, (2) contractual provisions previously agreed to by the parties, and (3) an implied exemption.

Internal Management Exception

Government Code section 11342, subdivision (b), contains the following specific exception to APA requirements:

"'Regulation' means every rule, regulation, order, or standard of general application . . . , except one which relates only to the 'internal management' of the state agency."
[Emphasis added.]

Grier v. Kizer, which provides a good summary of case law on internal management, states that this exception is "narrow."³⁸

After quoting Government Code section 11342, subdivision (b), the Grier Court states:

"Armistead v. State Personnel Board, *supra*, 22 Cal.3d at pages 200-201, 149 Cal.Rptr. 1, 583 P.2d 744, determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by

personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] "Respondents have confused the internal rules which may govern the department's procedure . . . and the rules necessary to properly consider the interests of all . . . under the . . . statutes. . . ." [Fn. omitted.]' (Id., at pp. 203-209, 149 Cal.Rptr. 1, 583 P.2d 744,) [emphasis added by Grier Court].

"Armistead cited Poschman v. Dumke (1973) 31 Cal.App.3d 932, 942-943, 107 Cal.Rptr. 596, which similarly rejected a contention that a regulation related only to internal management. The Poschman court held: "'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.'" (Armistead, supra, 22 Cal.3d at p. 204, fn. 3, 149 Cal.Rptr. 1, 583 P.2d 744.) [³⁹]

"Relying on Armistead, and consistent therewith, Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 736, 188 Cal.Rptr. 130, held a Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,] and embodied 'a rule of general application significantly affecting the male prison population' in its custody.'

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by Armistead's holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception."

In the matter before us, it is undisputed that the challenged rule affects only employees of the Department. Thus, the key question is whether the challenged rule addresses a matter of serious consequence involving an important public interest. We find that it does.

The challenged Departmental Notice states that the provisions were adopted in order for the Department to carry out its charge to "take necessary action for those job related circumstances that are likely to produce injury to employees, the public, or liability to the State." (Emphasis added.) Protection of the public from injury and the state from liability is certainly an important public interest and the challenged rule was adopted to address that issue.

Another important public interest affected by the challenged rule relates to individual livelihood. In Armistead v. State Personnel Board, the court determined that a provision of a State Personnel Manual concerning the termination of employment was a "matter of import to all civil service employees."⁴⁰ DPA attempts to distinguish that case by pointing out that "the policy does not concern termination of employment, it simply gives notice to the employer that an investigation may be in order." DPA understates the effect of the challenged rule; it appears that the challenged rule may have quite serious consequences on employees. The challenged rule states:

". . . the Department may make temporary administrative changes in schedule and work assignment, Appropriate administrative action will only be taken based upon the findings of the independent Department investigation."

While the challenged rule does not spell out what constitutes "appropriate administrative action," it is conceivable that termination of employment may be considered appropriate in certain instances.

Even if one's employment were not jeopardized by the reporting requirement contained in the challenged rule, the requirement to report certain occurrences may constitute an infringement upon an employee's state and federal constitutional rights to privacy. Such an infringement is

certainly a matter of serious consequence involving an important public interest.

Contractual Provisions Previously Agreed to by the Parties⁴¹

In its Response, DPA states:

"The Dills Act does not contemplate that the parties negotiate and then have their decisions blessed by OAL, an executive branch agency. This argument has been made in a response to another request for determination and this letter hereby incorporates arguments made by DPA in Docket No. 89-023 and makes them part of the response in this proceeding."⁴²

In 1990 OAL Determination No. 16 (Docket No. 89-023),⁴³ DPA argued that contractual provisions previously agreed to by the parties do not violate the APA. The challenged rule in that Determination, as in this case, was not part of the MOU. For the reasons explained in that Determination, we reject DPA's argument.

The Implied Exemption Argument

In its Response, DPA apparently recognizes that there is no express provision exempting the agreements made under the Dills Act from the requirements of the APA. DPA, however, boldly takes the position that the circumstances of this case warrant a finding of an implied exemption from the APA. A short review of the pertinent law on the exemption issue is necessary to frame the issues.

Legislative Background to Government Code Section 11346

In 1947, the Legislature enacted the following APA provision:

"It is the purpose of this article 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

April 7, 1993

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.]

In 1947, the above provision was numbered Government Code section 11420. In the 45 years since the enactment of that statute, the question of when an exemption from the APA exists has been dealt with numerous times, by the Legislature and the courts. An overview of these events follows, with a common thread: "expressly" means "expressly."

Subsequent Legislative Developments

Despite the dramatic rewriting of the APA in 1979 which led to the creation of OAL, the section quoted above (former section 11420) was reenacted unaltered, except for renumbering as section 11346. Section 11346 thus represents a clear and strong legislative policy of several decades' standing, which was reaffirmed and underscored by the determined 1979 legislative effort to establish a central quality control authority to review state agency rules.

Since 1979, the Legislature has amended the APA several times⁴⁴ and without altering the "express exemption" language of section 11346. This is especially noteworthy in view of the fact that OAL has consistently interpreted this code section as disallowing implied APA exemptions except in the case of irreconcilable statutory conflicts. Thus, the Legislature, although fully informed concerning OAL's construction of the statute,⁴⁵ has never revised the statute to counteract OAL's interpretation.

Legislative Intent

What did the Legislature mean by the word "expressly" in section 11346? According to settled principles of statutory interpretation, we are to look to the ordinary meaning of the word. Many examples can be found.

In the American Heritage Dictionary,⁴⁶ "expressly" means "definitely and explicitly stated." It also means "in an express or definite manner; explicitly." In a usage note under the word "explicit," the American Heritage Dictionary states:

"Explicit and express both apply to something that is CLEARLY STATED RATHER THAN IMPLIED. Explicit applies more particularly to that which is carefully spelled out: explicit instructions. Express applies particularly to a clear expression of intention or will: an express promise or an express prohibition." [Capitalized emphasis added.]

Black's Law Dictionary defines "express" as:

"clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. . . . Made known distinctly and explicitly, and not left to inference. . . . The word is usually contrasted with 'implied.'"⁴⁷

When the Legislature wants to expressly exempt an agency from the APA, it knows what to say. For instance, Labor Code section 1185 expressly exempts rules concerning the minimum wage and similar matters:

"The orders of the [Industrial Welfare Commission (IWC)] fixing minimum wages, maximum hours, and standard conditions of labor for all employees, when promulgated in accordance with the provisions of this chapter, shall be valid and operative and such orders are hereby expressly exempted from the provisions of Article 5 (commencing with Section 11346) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code." [Emphasis added.]

Other examples of express exemption provisions include:

"The determination of the facility fee pursuant to this section . . . is exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code [the

rulemaking portion of the APA].” (Emphasis added.) -- Health and Safety Code section 25205.4, subdivision (b)

“ . . . Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, any emergency regulation adopted by the board pursuant to this section shall be filed with, but not repealed by, the Office of Administrative Law, and shall remain in effect until revised by the board.” (Emphasis added.) -- Health and Safety Code section 25299.77

Furthermore, in several statutes the Legislature has made specific references to governmental entities to which the APA does not apply. For example, Government Code section 11351 specifically provides that the APA’s procedures for adopting regulations “shall not apply” to the Public Utilities Commission, the Industrial Accident Commission, the Workers’ Compensation Appeals Board, and the Division of Industrial Accidents, although those agencies’ rules of procedure must still be published in the California Code of Regulations. Numerous other examples of express exemptions exist.⁴⁸

Case Law on Meaning of "Express"

In case law, “expressly” has been defined as “in an express manner; in direct or unmistakable terms; explicitly; definitely; directly.”⁴⁹

More specifically, the recent case of Engelmann v. State Board of Education et al.,⁵⁰ which involved the precise issue of the meaning “expressly” for purposes of Government Code section 11346, makes it clear that California courts are not willing to imply exemptions to the APA.

In Engelmann, Siegfried Engelmann, a provider of DISTAR, an elementary level instructional program, argued that the State Board of Education (Board) applied invalid procedures and criteria in its evaluation of DISTAR. He claimed that these procedures and criteria, under which DISTAR was disapproved, were void for failure to comply with the APA. The Board asserted that its constitutionally delegated authority to

select textbooks was not subject to the APA, either because (a) the APA by its own terms does not apply to such authority, or (b) the Education Code exempts it from the APA, or (c) even if the APA is applicable, it violates the separate of powers doctrine.

The court held that the Board's constitutional power was limited to the ultimate selection among texts; the APA applied to the Board's development of procedures and criteria leading up to that point, and the state Constitution posed no barrier to enforcement of the APA.

In the clearest possible language, after identifying the dichotomy between the Board's constitutional authority and statutory powers, the Engelmann court held that ". . . Government Code [section 11346] allows other statutes to preempt it only where they are subsequently enacted and do so expressly."⁵¹ Thus, after Engelmann, it is difficult to conceive of a situation where an implied exemption to the APA would be upheld absent an irreconcilable conflict between the APA and the agency's enabling statute.

Applying section 11346 to the challenged rule presented in this Determination, it is clear that the challenged rule is not impliedly exempt from the APA. DPA has not demonstrated irreconcilable statutory conflicts. In fact, DPA has not made any argument at all, other than to contend that an implied exemption should apply "under the circumstances of this case." We cannot find that an implied exemption exists based solely upon an unreasoned contention or plain assertion. Additionally, OAL finds that there is simply no express exemption from the APA provided for the MOU provisions in general and for the challenged rule in particular.

It is far beyond the proper scope of our inquiry to state whether or not collective bargaining agreements are exempt from the provisions of the APA. We point out that neither the entire collective bargaining agreement nor a specific provision in the collective bargaining agreement is the challenged rule in this Determination. The Requester did not challenge the MOU as a document. Therefore, we do not need to analyze the issues raised by such an argument.⁵²

April 7, 1993

We do not consider (1) whether an MOU negotiated pursuant to the Dills Act is exempt from the APA because it cannot be harmonized pursuant to the pertinent case law⁵³ or (2) whether the Dills Act has repealed by implication the express requirement contained in Government Code section 11346.⁵⁴

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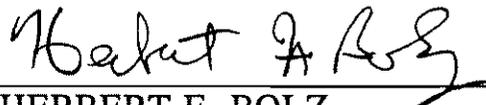
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III. CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) the Department's quasi-legislative enactments are generally subject to the APA;
- (2) the challenged notification policy constitutes a "regulation" as defined in the key provision of Government code section 11342, subdivision (b);
- (3) no exceptions to the APA requirements apply;
- (4) the challenged notification policy, which constitutes a "regulation," violates Government Code section 11347.5, subdivision (a).

DATE: April 7, 1993



HERBERT F. BOLZ
Supervising Attorney



DEBRA M. CORNEZ
Staff Counsel

Regulatory Determinations Program⁵⁵

Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 323-6225, CALNET 473-6225
Telecopier No. (916) 323-6826
Reference Atty. (916) 323-6815

1. This Request for Determination was filed by Mark Schneringer, Field Services Coordinator, on behalf of Alliance of Trades and Maintenance ("ATAM"), the authorized union representative for Bargaining Unit 12 at the time of the Request. Since the filing of the Request, ATAM has been replaced by International Union of Operating Engineers ("IUOE") as the authorized union representative for Bargaining Unit 12. The contact person for IUOE is Walt Norris, Director of Employees for Local 39, 2211 Royale Road, Sacramento, CA 95815, (916) 927-3399 or (415) 861-1135. The Department of Parks and Recreation was represented by Jeffrey Fine, Department of Personnel Administration, Legal Office, 1515 "S" Street, North Building, Suite 400 Sacramento, CA 95814-7243, (916) 327-0568.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "57" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process--including a survey of governing case law--is discussed at length in note 2 to **1986 OAL Determination No. 1** (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, review denied (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a second survey of governing case law was published in **1989 OAL Determination No. 13** (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a third survey of governing case law was published in **1990 OAL Determination No. 12** (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

In January 1992, a fourth survey of governing case law was published in **1992 OAL Determination No. 1** (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be enforced unless duly adopted.

Authorities discovered since fourth survey

One case and one statute underscore the basic principle that all state agency rules which meet the statutory definition of "regulation" must either be (1) expressly exempted by statute or (2) adopted pursuant to the Administrative Procedure Act and printed in the California Code of Regulations. In Engelmann v. State Board of Education (1991) 2 Cal.App.4th 47, 3 Cal.Rptr.2d 264, review denied, the California Court of Appeal, Third District, held that state textbook selection guidelines were "regulations" which had to be adopted in compliance with the APA. In Engelmann, the Third District expressly overruled its 1973 decision in American Friends Service Committee v. Procnier insofar as the 1973 decision suggested that "specific" provisions in agency enabling acts could be held to control over the "general" APA (Government Code section 11346). In section 11346, the Court noted, there is an express basis for applying the APA to every other statute.

The second recent development is the legislative response to 1990 OAL Determination No. 12, which concluded that certain rules issued by the Department of Finance violated the APA. In urgency legislation (SB 327/1991), the Legislature expressly exempted such Department of Finance rules from APA rulemaking requirements. See Government Code section 11342.5.

Third, in State Water Resources Control Board v. Office of Administrative Law (Bay Planning Coalition) (1993) 12 Cal.App.4th 697, 16 Cal.Rptr.2d 25, rehearing denied, Feb. 19, 1993, the California Court of Appeal upheld **1989 OAL Determination No. 4**, which found that regulatory portions of regional water quality control plans (or "basin plans") were subject to the APA. Fourth, in Department of Water and Power v. State of California Energy Resources and Conservation Commission (1991) 2 Cal.App.4th 266, 3 Cal.Rptr. 289, 301, the Court found the challenged interpretations inconsistent with the statute, avoiding the APA compliance issue.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

"'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(b), which is invalid and unenforceable unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA."
[Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370) and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act." (Emphasis added.)

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.

The rulemaking portion of the APA and all OAL regulations are both reprinted and indexed in the annual APA/OAL regulations booklet "**California Rulemaking Law**," which is available from OAL (916-323-6225). The February 1993 revision is \$3.50 (\$5.80 if sent U.S. Mail).

5. OAL Determinations Entitled to Great Weight In Court

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section

11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion, stating that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted to the court for consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." [*Id.*; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of **1990 OAL Determination No. 4** (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

6. Note Concerning Comments and Responses

In order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response."

If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

7. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) Of course, an agency rule found to violate the APA could also simply be rescinded.
8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
9. Government Code section 11347.5 provides:

"(a) 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 subdivision (b) of Section 11342, 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.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is

a [']regulation['] as defined in subdivision (b) of Section 11342.

- "(c) The office shall do all of the following:
- "1. File its determination upon issuance with the Secretary of State.
 - "2. Make its determination known to the agency, the Governor, and the Legislature.
 - "3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
 - "4. Make its determination available to the public and the courts.
- "(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.
- "(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:
- "1. The court or administrative agency proceeding involves the party that sought the determination from the office.
 - "2. The proceeding began prior to the party's request for the office's determination.

"3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Grier v. Kizer, (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249, review denied.
11. Public Resources Code sections 501 and 5001.
12. Public Resource Code sections 500, 530, and 539.
13. OAL does not review alleged underground regulations for compliance with APA's six substantive standards

We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

14. On the date this Determination was issued and filed with the Secretary of State (April 7, 1993), the authorized union representative for Bargaining Unit 12 was International Union of Operating Engineers (IUOE).
15. Government Code sections 3512 - 3524.
16. California Regulatory Notice Register 91, No. 8-Z, February 22, 1991, p. 307.
17. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a thorough discussion of the rationale for the "APA applies to all agencies" principle, see **1989 OAL Determination No. 4** (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

1989 OAL Determination No. 4 was upheld by the California Court of Appeal in State Water Resources Control Board v. Office of Administrative Law (1993) 16 Cal.Rptr.2d 25 (Cal.App. 1 Dist. 1993), rehearing denied, February 19, 1993.

18. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746- 747 (unless

"expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

19. We are drawing no conclusions as to whether APA rulemaking requirements apply generally to the Dills Act.
20. Government Code section 3512.
21. Chapter 10.5, sections 3525-3539.5, cited to as the "Bill of Rights for State Excluded Employees," governs state supervisory, managerial, confidential, and employees otherwise excepted from coverage under the Dills Act by section 3513, subdivision (c), of their rights and terms and conditions of employment.
22. Section 599.745.1 of title 2 of the CCR is a sick leave regulation adopted pursuant to Government Code section 3539.5.
23. Response, p. 1.
24. The provisions of the MOU do not speak of the APA. Further, the parties did not agree to the challenged rule. Accordingly, we find that the Requester did not waive its right to request review of the challenged rules under the APA. Even assuming that the Requester has waived such a right, OAL may nonetheless proceed on its own accord. (Gov. Code, sec. 11347.5.)
25. Response, p. 2.
26. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
27. The history note to Chapter 5 ("Administrative Adjudication," sections 11500 et seq.; emphasis added) of Title 2, Division 3, of the Government Code, contained in West's annotated codes, reveals that Chapter 5 was originally added under the heading "Administrative Procedure." (Emphasis added.) Thus, the word "procedure" as used in Government Code section 11342(b) would at a minimum appear to encompass the types of rules governing administrative adjudication (i.e., administrative

hearings on such matters as license revocation) that are found in Chapter 5.

28. Supra, 219 Cal.App.3d at p. 438, 268 Cal.Rptr. at p. 253.
29. 16 Cal.Rptr.2d 25 (Cal.App. 1 Dist. 1993).
30. Id., at p. 28.
31. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324.
32. Response, p. 1.
33. Faulkner v. California Toll Bridge Authority, supra, 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
34. 22 Cal.3d 198, 149 Cal.Rptr. 1.
35. Response, p. 4.
36. Government Code section 11346.
37. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
 - c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a specifically named person or group of

persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

- f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, CRNR, 91, No. 43-Z, p. 1451, pp. 1458, 1461; typewritten version, pp. 175-177. Like Grier v. Kizer, **1991 OAL Determination No. 6** rejected the idea that City of San Joaquin (cited above in this note) was still good law.

April 7, 1993

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The annual Determinations Index is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Melvin Fong), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814-4602, (916) 323-6225, CALNET 8-473-6225. The price of the latest version of the Index is available upon request. Two indexes are currently available. One covers calendar years 1986-1988, the second covers 1989-1990. The 1991-1992 index should be available in mid-April 1993. Also, regulatory determinations are published in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$162.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

38. It has been argued that Americana Termite Co. v. Structural Pest Control Board (1988) 199 Cal.App.3d 230, 244 Cal.Rptr. 693, supports the proposition that an agency's policy decisions fall within the "internal management" exception. As we discussed at some length in 1990 OAL Determination No. 18 ((Board of Podiatric Medicine, December 26, 1990, Docket No. 90-001), CRNR 91, No. 2-Z, p. 82, 86-88), the dictum in Americana Termite is misleading and should not be relied upon.
39. Armistead disapproved Poschman on other grounds. (Armistead, supra, 22 Cal.3d at p. 204, fn. 2, 149 Cal.Rptr 1, 583 P.2d 744.)
40. Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 203, 149 Cal.Rptr. 1, 3.
41. The Request for Determination states:

"The Department of Parks and Recreation attempted to justify implementation of [the challenged rule] under the pretense that this was a negotiable item under the [MOU] between the state of California and [the Alliance of Trades and Maintenance], but this policy involves constitutional rights to privacy and therefore the Union has no authority to negotiate any agreements that would affect these rights.

The Requester cites Phillips v. California State Personnel Board (1986) 184 Cal.App.3d 651, 229 Cal.Rptr. 502, for the proposition that "an exclusive representative could not negotiate away employees' constitutional rights without express authority of every member of the bargaining unit." In Phillips, a public employee was discharged pursuant to a provision of a collective bargaining agreement executed between the Board of Trustees for California State University and the labor union representing the appellant.

In Phillips, the pertinent MOU provision provided that an employee's absence of five consecutive workdays without securing authorized leave was considered an automatic resignation. The MOU, by its own terms, stated that it superseded Education Code section 89541, which would otherwise have been the controlling

authority over the appellant's termination. This Education Code section established a process by which an employee could request reinstatement and also provided that the MOU would control if any MOU provisions conflicted with the statute.

The court in Phillips did note that "parties to a collective bargaining agreement may supplant statutory procedures and remedies whereby covered public employees may challenge disciplinary action taken against them and may substitute alternate methods therefor. [Citations omitted.]" (Phillips v. State Personnel Board, supra, 184 Cal.App.3d at 658, 229 Cal.Rptr. at 507.) The court also stated, however, that collective bargaining agreements cannot waive an employee's right to due process. (Id., 184 Cal.App.3d at 660, 229 Cal.Rptr. at 509.) The Requester also cites Bagley v. Washington Township District (1966) 65 Cal.2d 499, 55 Cal.Rptr. 401, in arguing that there was no waiver of constitutional rights.

In Response to the Requester's claim, DPA argues that the Bagley case does not support the Requester's position and that in any event, OAL is not authorized under Government Code section 11349.1 to base any conclusion regarding the determination on the "constitutional" argument.

We first point out that review of determination requests are not governed by section 11349.1, but rather, are governed by section 11347.5. DPA is correct, however, in recognizing that a review of a determination request under Government Code section 11347.5 need not resolve the constitutional issues that the challenged rule may present.

If the Department submits the challenged rules to OAL for review, OAL will review, pursuant to Government Code section 11349.1, the proposed regulations for compliance with the APA's procedural and substantive requirements. The APA requires all proposed regulations to meet the six substantive standards of necessity, authority, clarity, consistency, reference, and nonduplication.

[We note that in footnote 8 of Coleman v. Department of Personnel Administration (1991) 52 Cal.3d 1102, 1123, 278 Cal.Rptr. 346, 358, the

Supreme Court ruled that statements in Phillips, inconsistent with the Court's ruling in Coleman that an automatic resignation is not equivalent to a discharge for cause and, therefore, no postseverance evidentiary hearing is necessary, are disapproved.]

42. Response, p. 2.
43. 1990 OAL Determination No. 16 (Department of Personnel Administration, December 18, 1990, Docket No. 89-023), California Regulatory Notice Register 91, No. 1-Z, p. 40.
44. See, e.g., Stats. 1987, ch. 1375, sec. 17.
45. In 1986 OAL Determination No. 8 ((Department of Food and Agriculture, October 15, 1986, Docket No. 86-004), California Administrative Notice Register 86, No. 44-Z, October 31, 1986, p. B-21), OAL rejected an argument that a statute concerning pesticide health effects studies impliedly exempted certain directives of the Department of Food and Agriculture.

Government Code section 11347.5 requires OAL to "make its determination known to the . . . Legislature." Each determination issued by OAL is sent to the Governor, the Lieutenant Governor, the Attorney General, the Speaker of the Assembly, the President pro Tempore of the Senate, the Minority Floor Leader of the State Assembly, the Minority Floor Leader of the State Senate, and several legislative committees, such as, Governmental Efficiency and Consumer Protection Committee, Judiciary Committee, and Governmental Organization Committee. Each determination is also sent to the Assembly Office of Research, Senate Office of Research, Secretary of the Senate, Chief Clerk of the State Assembly, and Office of the Legislative Analyst.

46. 2d College Ed. (1982), pp. 478-79.
47. 5th ed., 1979, p. 521.
48. See, e.g., Public Resources Code section 30333 (Coastal Commission rules and regulations generally required to be adopted pursuant to the APA, but "guidelines", adopted pursuant to Public Resources Code section 30620, subdivision (a), are expressly exempt, according to Pacific

- Legal Foundation v. California Coastal Comm'n. (1982) 33 Cal.3d 158, 169 n. 4; California Coastal Comm'n v. Office of Admin. Law (1989) 210 Cal.App.3d 758).
49. Le Ballister v. Redwood Theatres, Inc. (1934) 1 Cal.App.2d 447, 448; R.J. Cardinal Co. v. Ritchie (1963) 218 Cal.App.2d 124, 135.
50. (1991) 2 Cal.App.4th 47, 3 Cal.Rptr. 2d 264 (petition for rehearing denied 1/27/92; petition for review in California Supreme Court denied 3/19/92).
51. 2 Cal.App.4th 47, _____, 3 Cal.Rptr. 2d 264, _____ (91 Daily Journal D.A.R. 16090, 16094).
52. Although case law on this subject is sparse, it is worthwhile to note that in the Association of California State Attorneys and Administrative Law Judges (ACSA) v. State of California, Department of Personnel Administration (DPA) and State Personnel Board (SPB) (Super. Ct. Sacramento County, 1986, No. 337747) the trial court ruled that an attorney staffing ratio contained in an MOU was invalid because the state had failed to comply with the APA, even though the state in its brief made arguments about the disharmony between the APA and the Dills Act. (Respondents' Motion to Reconsider Tentative Decision (Interim Order) Overruling Demurrer and Granting Writ of Mandate; Supporting Memorandum Points and Authorities at pages 9-12.) It is an open question on the appellate level whether a specific MOU provision is exempt from the APA, and we do not need to reach this issue since the challenged rule is not a specific provision.
53. In Natural Resources Defense Council v. Arcata National Corporation (1976) 59 Cal.App.3d 959, 131 Cal.Rptr. 172 ("Natural Resources Defense Council"), the court looked at the interaction between general and specific statutes concerning the same subject matter.

According to the Natural Resources Defense Council court:

"Broadly speaking, a specific provision relating to a particular subject will govern in respect to that subject

as against the general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate. However, it is well settled that the statutes and codes blend into each other and are to be regarded as constituting but a single statute. ONE SHOULD SEEK TO CONSIDER THE STATUTES NOT AS ANTAGONISTIC LAWS BUT AS PARTS OF THE WHOLE SYSTEM WHICH MUST BE HARMONIZED AND EFFECT GIVEN TO EVERY SECTION. Accordingly, statutes which are in pari materia [concerning the same subject matter] should be read together and harmonized if possible. Even when one statute merely deals generally with a particular subject while the other legislates specially upon the same subject with greater detail and particularity, THE TWO SHOULD BE RECONCILED AND CONSTRUED SO AS TO UPHOLD BOTH OF THEM IF IT IS REASONABLY POSSIBLE to do so. (Id., 59 Cal.App.3d at 965, 131 Cal.Rptr. 175-176.)

". . . [A]s a matter of statutory interpretation the various statutes must be harmonized if it is reasonably possible. As stated [by the California Supreme Court], 'even though, in some particular or particulars, the provisions of two or more statutes apparently are in conflict one with the other, nevertheless, if possible and practicable, such SEEMING INCONSISTENCIES SHOULD BE RECONCILED to the end that the law as a whole may be given effect.'" (Id., 59 Cal.App.3d at 971, 131 Cal.Rptr. at 180.) [All citations omitted; capitalized emphasis added; Latin term italicized in original, underlined here].

54. The legal standard for resolving claims of implied repeal is found in In re Thierry S. (1977) 19 Cal.3d 727, 139 Cal.Rptr. 708. In this case the court determined that there was no rational way to

reconcile two statutes in which the first statute imposed a requirement that warrantless juvenile misdemeanor arrests could only be made for offenses committed in the presence of the arresting officer and the second statute contained no such limitation. According to Thierry, repeals by implication are recognized only when there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts, Thierry states, are bound, if possible, to maintain the integrity of both statutes if the two may stand together.

55. Mathew Chan, Staff Counsel, prepared the first draft of this Determination.