

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

RECEIVED FILED
DEC 21 1993

93 DEC 21 PM 3:44

MADELLINE G. ELLIOTT
CLERK OF THE STATE
OFFICE OF CALIFORNIA



In re:

Request for Regulatory	)	1993 OAL Determination No. 5
Determination by MARSHA)	
ELAM and KAREN J.	)	[Docket No. 90-020]
KILPATRICK concerning the)	
STATE PERSONNEL BOARD's	)	December 14, 1993
voluntary affirmative action)	
program "HELP" and related	)	Determination Pursuant to
DEPARTMENT OF JUSTICE	)	Government Code Section 11347.5;
policies	)	Title 1, California Code of Regula-
	)	tions, Chapter 1, Article 3

Determination by: JOHN D. SMITH, Director
HERBERT F. BOLZ, Supervising Attorney
Regulatory Determinations Program

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

93 DEC 21 PM 3:44
OFFICE OF ADMINISTRATIVE LAW
STATE OF CALIFORNIA

In re:

Request for Regulatory	)	1993 OAL Determination No. 5
Determination by MARSHA)	
ELAM and KAREN J.	)	[Docket No. 90-020]
KILPATRICK concerning the)	
STATE PERSONNEL BOARD's	)	December 14, 1993
voluntary affirmative action)	
program "HELP" and related	)	Determination Pursuant to
DEPARTMENT OF JUSTICE	)	Government Code Section 11347.5;
policies ¹	)	Title 1, California Code of Regula-
	)	tions, Chapter 1, Article 3

Determination by: JOHN D. SMITH, Director
HERBERT F. BOLZ, Supervising Attorney
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not (1) the California State Personnel Board's Hispanic Employment Link Program ("HELP"), a voluntary affirmative action program involving creation of Hispanic-only civil service classifications, and (2) certain related affirmative action rules of the California Department of Justice are "regulations" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

Though expressing no opinion as to whether the challenged rules are either sound policy or consistent with other applicable law, the Office of Administrative Law has concluded (1) that all key provisions of HELP are "regulations," and (2) that two of the challenged Department of Justice policies are "regulations." If state agencies are to utilize these "regulations" *legally* within the context of the APA, the "regulations" must either be (1) adopted pursuant to the APA (public notice and comment, etc.) or (2) expressly exempted from the APA by the Legislature.²

THE ISSUE PRESENTED³

The Office of Administrative Law ("OAL") has been requested to determine⁴ whether (1) the California State Personnel Board's ("Board" or "SPB") Hispanic Employment Link Program ("HELP") and (2) related affirmative action rules of the California Department of Justice ("Department" or "DOJ") are "regulations" required to be adopted pursuant to the California Administrative Procedure Act ("APA").⁵ Requesters challenge the Board's entire HELP program. By contrast, requesters have challenged only the specific Department of Justice policies listed below; the Department's entire affirmative action program has *not* been attacked. Similarly, the State of California's entire affirmative action program has *not* been challenged, only the HELP rules and specified Department of Justice policies.

THE DECISION^{6, 7, 8}

OAL finds that:

1. Both the Board's and the Department's quasi-legislative enactments are generally required to be adopted pursuant to the rulemaking requirements of the APA;
2. The following challenged rules are "regulations" as defined in Government Code section 11342, subdivision (b):
 - In the Board's HELP plan⁹ (the Board-approved HELP Proposal and a Bulletin setting out procedures for implementing HELP);¹⁰
 - creation of Hispanic-only classifications;
 - definition of Hispanic;
 - use of "1980 labor force parity figure of 17.2%" as

threshold criterion in determining whether or not to create Hispanic-only classifications;

- use of the "available, qualified labor pool" criterion for determining Hispanic underrepresentation (or "underutilization") in *professional* classes;
- use of the "80% rule" criterion for determining whether Hispanics are "significantly underrepresented" (or "underutilized") in *nonprofessional* classifications;
- use of "historical recruitment difficulties" as a criterion for determining if a HELP class would be created;
- limiting HELP classifications to those that are the "entry-level in a class series";
- eleven Hispanic-only classifications;
- the Legal-Analyst-DOJ-Hispanic classification;
- the Quick Placement Program policies.
- certain specific Department of Justice affirmative action policies
 - *Part 6* of the affirmative action form (Form JUS 105) (requiring written justification of non-affirmative action hire);
 - Definition of "underrepresented."

3. The following challenged rules are not "regulations" as defined in Government Code section 11342, subdivision (b):

- In the Board's HELP plan;

December 14, 1993

- the designation of Legal *Analyst* rather than Legal *Assistant* as the entry level classification in the newly created HELP class "Legal Analyst-DOJ (Hispanic)";
 - oral examination scoring of minorities.
 - certain *specific* Department of Justice affirmative action policies
 - the remainder of the affirmative action form (Form JUS 105) (other than part 6)
 - "Hire Hispanic";
 - perception of ethnicity/race.
4. No exceptions to the APA requirements apply to either the Board or the Department concerning the items found to be "regulations"; and
 5. The rules listed above in finding 2 violate Government Code section 11347.5, subdivision (a).

TABLE OF CONTENTS

<u>Page</u>	
157	I. THE APA AND REGULATORY DETERMINATIONS BY OAL
158	II. THE RULEMAKING AGENCIES NAMED IN THIS PROCEEDING; BACKGROUND OF THIS REQUEST FOR DETERMINATION
158	THE RULEMAKING AGENCIES IN THIS PROCEEDING
158	California State Personnel Board
159	Personnel Board's APA Compliance History
161	California Department of Justice
162	THIS REQUEST FOR DETERMINATION
164	Background and Key Elements of the HELP Plan
168	III. ANALYSIS
168	A. IS THE APA GENERALLY APPLICABLE TO THE BOARD'S AND THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS?
170	B. DO THE CHALLENGED POLICIES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?
173	<u>Personnel Board</u>
176	Challenged Board rules are standards of general application.

III. ANALYSIS (Cont'd)

179 Do challenged SPB rules implement, interpret or make
specific the laws enforced by the agency?

180 HELP rule no. 1: Hispanic-only classifications

193 HELP rule no. 2: Definition of "Hispanic"

197 HELP rule no. 3: Labor Force Parity

203 HELP rule no. 4: Available, Qualified Labor Pool

204 HELP rule no. 5: 80% Rule

205 HELP rule no. 6: "Historical recruitment difficulties"

207 HELP rule no. 7: "Entry level in a class series"

208 HELP rule no. 8: Oral examination scoring of minorities

209 HELP rule no. 9: Eleven Hispanic-only Classifications

210 HELP rule no. 10: Legal Analyst-DOJ-Hispanic

211 HELP rule no. 11: Quick Placement Approach

211 Department of Justice

Two of four DOJ rules *are* standards of general application.

213 1. Affirmative Action Appointment Audit Form
(Form JUS 105)

213 3. Definition of "Underrepresented" in the Department's
Affirmative Action Plan

III. ANALYSIS (Cont'd)

- 213 The other two DOJ rules are *not* standards of general application
- 213 2. "Hire Hispanic"
- 215 4. Perception of Ethnicity/Race
- 216 Do challenged DOJ general rules implement, interpret or make specific law enforced by agency?
- 216 1. Affirmative Action Appointment Audit Form (Form JUS 105)
- 220 2. Definition of "Underrepresented" in the Department's Affirmative Action Plan
- 224 C. DO THOSE CHALLENGED POLICIES FOUND TO BE "REGULATIONS" FALL WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS?
- 225 1. *Both* Personnel Board & Department of Justice
- 225 (a) Internal Management Exception
- 226 Board's HELP Program
- 227 Department of Justice rules
- 228 2. Personnel Board *only*: the HELP Program
- 228 (a) *Prior* to expiration of demonstration project
- 229 Theory of exclusive constitutional jurisdiction over classifications

III. ANALYSIS (Cont'd)

243 Theory that demonstration project statute
"expressly" exempts projects from APA

263 (b) *After* expiration of demonstration project
New APA avoidance theories?

265 3. Department of Justice *only*

265 (a) Forms exception theory

268 **IV. CONCLUSION**

271 Endnotes

325 Attachment "A": Form JUS 105 (rev. 10/85)

327 Attachment "B": Form JUS 105 (rev. 8/89)

REASONS FOR DECISION

I. THE APA AND REGULATORY DETERMINATIONS BY OAL

In *Grier v. Kizer*, the California Court of Appeal described the APA and OAL's role in its 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.]¹¹

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. That section, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules that should have been, but were not, adopted pursuant to the APA. The section also provides OAL with the authority to issue a regulatory determination about whether or not a challenged state agency rule is a "regulation" as defined in the APA.¹² If a state agency rule is a "regulation," but not properly adopted in accord with the APA, the agency rule is invalid.

II. THE RULEMAKING AGENCIES NAMED IN THIS PROCEEDING; THIS REQUEST FOR DETERMINATION

The Rulemaking Agencies named in this Proceeding

California State Personnel Board

Created in 1934 when the people approved an initiative measure amending the California Constitution,¹³ the five-member State Personnel Board is responsible for administering various statutes pertaining to the state civil service system, including affirmative action statutes. The ballot argument supporting the initiative measure stated:

"The purpose of this constitutional amendment is to promote efficiency and economy in State government. The *sole aim of the acts [sic] is to prohibit appointments and promotion in State service except on the basis of merit, efficiency and fitness ascertained by competitive examination.* Appointments of inefficient employees for political reasons are thereby prohibited, thus eliminating the 'spoils system' from State employment. [Paragraph] . . . [T]his constitutional amendment provides: (1) *Employment in the classified service based solely on merit and efficiency;* (2) *a nonpartisan Personnel Board;* (3) prohibition against exemptions from the merit system of employment; (4) correction of the temporary political appointment evil [more than one-third of state employees then held 'temporary' appointments, limited in theory to three months].

"Having by constitutional mandate prohibited employment on any basis except merit and efficiency, thereby eliminating as far as possible the

December 14, 1993

'spoils system' of employment, *the Legislature is given a free hand in setting up laws relating to personnel administration for the best interests of the State*, including the setting up of causes for dismissal such as inefficiency, misconduct or lack of funds." (Emphasis added.)¹⁴

The Personnel Board once had broad authority over all aspects of personnel policy, but its authority was sharply curtailed in 1977 with enactment of the Dills Act (formerly the State Employer-Employee Relations Act),¹⁵ which established collective bargaining for state executive branch employees.¹⁶ Many policy areas for which the Board had previously been responsible--such as the setting of salaries--were transferred to the newly created Department of Personnel Administration, which was charged with serving as the Governor's representative in collective bargaining matters.¹⁷ The Board remains responsible, however, for "merit" issues, such as the establishment of job classifications.

Personnel Board's APA Compliance History

Executive Branch agencies have not always fully complied with the rulemaking requirements that were legislatively mandated in 1947, such as public notice and comment and publication in the California Code of Regulations.¹⁸ Indeed, APA compliance problems were the primary focus of a California Senate committee report issued several years after enactment of the APA. In 1955, the *First Report of the Senate Interim Committee on Administrative Regulations* sharply criticized agency "[a]voidance of required statutory procedures in adoption of regulations by use of 'house rules' or other such devices." (Emphasis added.)¹⁹ This Report continued:

"The committee is compelled to report to the Legislature that it has found *many agencies which avoid the mandatory requirements of the Administrative Procedure Act* of public notice, opportunity to be heard by the public, filing with the Secretary of State, and publication in the Administrative Code [now, 'California Code of Regulations']."

"The committee has found that some agencies did not follow the act's requirements because they were not aware of them; some agencies do not follow the act's requirements because they believe they are exempt; at

December 14, 1993

least one agency did not follow the act because it was too busy; some agencies feel that the act's requirements prevent them from administering the laws required to be administered by them; and many agencies which believe the function being performed was not in the realm of quasi-legislative powers. . . .

"The *manner of avoidance takes many forms*, depending on the size of the agency and the type of law being administered, *but they can all be briefly described as 'house rules of the agency.'*

"*They consist of rules of the agency, denominated variedly as 'policies,' 'interpretations,' 'instructions,' 'guides,' 'standards,' or the like, and are contained in internal organs of the agency such as manuals, memoranda, bulletins, or are directed to the public in the form of circulars or bulletins.*" (Emphasis added.)²⁰

The Report went on to single out particular agencies for criticism. One particular agency that was criticized was the Personnel Board. The Committee stated:

"In addition to the formal regulations of the Personnel Board as contained in the Administrative Code [now, California Code of Regulations], the board issues what is termed the '*State Personnel Board Transactions Manual,*' which is supplemented from time to time by *interdepartmental communications*. The contents of the manual are not filed as regulations nor are they adopted as regulations. The manual contains instructions concerning all the operations of the Personnel Board keyed to the various forms which are necessary in carrying out the work of the board. *Some of the material in the Personnel Board Transaction Manual is regulatory in nature, although not adopted in accordance with the Administrative Procedure Act.*" (Emphasis added.)²¹

Since 1955, three published appellate decisions and one OAL regulatory determination have found Personnel Board rules to violate the APA. Three cases involved manuals. One involved an administrative bulletin.

In 1959, the California Court of Appeal struck down as an underground regulation a rule appearing in the *Personnel Transactions Manual*.²² This manual provision interpreted the phrase "illness or injury," which appeared in a duly adopted Board regulation, as prohibiting an employee from using sick leave for an emotional disturbance unless the employee was physically incapacitated.

In 1978, the California Supreme Court found that an employee resignation rule contained in the Board's *Personnel Transactions Manual* was an underground regulation.²³ In this case, *Armistead v. State Personnel Board*, the Court quoted the two passages noted above from the 1955 Senate Report, and then stated that the Court could not uphold the challenged provision of the *Personnel Transactions Manual* because that would perpetuate a problem identified more than 20 years earlier in the legislative report.

In 1981, the California Court of Appeal struck down as an underground regulation a bulletin entitled "State Personnel Board Procedures Regarding Claims of Out-of-Class Experience" addressed to "All Personnel Officers" of state agencies.²⁴ Interpreting a statute, the bulletin outlined the circumstances in which state employees could utilize "out of class" experience to qualify for participation in promotional examinations. This bulletin was one of the "interdepartmental communications" mentioned in the 1955 legislative report quoted above.

In 1987, responding to a request for determination, OAL found the Board had violated the APA in issuing numerous rules used to implement a voluntary affirmative action program applying to situations in which state employees were threatened with layoff. These rules, the determination noted, appeared "to reflect provisions contained in an informally adopted '*AB 3001 Operations Manual*.'" (Emphasis added.)^{25, 26}

California Department of Justice

The California Department of Justice²⁷ is composed of two branches, the Office of the Attorney General and the Division of Law Enforcement.²⁸

December 14, 1993

The *Office of the Attorney General* provides litigation counsel²⁹ to state agencies and publishes legal opinions³⁰ at the request of state legislators, local government officials, and state agencies. The Attorney General generally represents the Board in both judicial and administrative proceedings. For instance, at the Board's request, the Attorney General is representing the Board in this administrative proceeding before OAL.

The *Division of Law Enforcement* administers a variety of programs, including narcotics enforcement, criminalistics laboratories, and several automated databases ranging from a parent locator service to a stolen vehicle service.

The head of the Department of Justice is the Attorney General, an elected official.³¹ The Attorney General is--subject to the powers and duties of the Governor--the chief law officer of the state, with supervisory powers over county district attorneys, sheriffs, and certain other law enforcement officers.³²

This Request for Determination

This Request for Determination was submitted May 19, 1990, by Marsha Elam and Karen J. Kilpatrick ("Requesters"), who, at the time of the Request, were employed by the Department as Legal Analysts. Requesters argued not only that the Hispanic Employment Link Program ("HELP") violated the APA, but also that it was "unconstitutional" under a leading U.S. Supreme Court case interpreting the Equal Protection Clause of the federal Constitution, *City of Richmond v. J.A. Croson Co.*³³ Prior to filing the Request for Determination with OAL, requesters had presented their concerns to the Department of Justice and (in a six-page memo with eight pages of attachments) to the Personnel Board.³⁴

The HELP program is contained in two 1987 Board documents. HELP was proposed in an undated nine-page document (apparently issued in May 1987)³⁵ titled "Proposed Demonstration Project-Hispanic Employment Link Program (HELP)," which the Board approved in a public hearing held June 2, 1987. On December 21, 1987, a second document was issued. This second document, directed to "All State Agencies and Employee Organizations," was titled "Initiation of the Hispanic Employment Link Program."³⁶ Traditionally

December 14, 1993

duplicated on pink paper (and thus called "pink memorandums" or "pinkies"), these administrative bulletins are a primary Board method of communicating with state agencies and other interested parties. These bulletins are also sometimes referred to as "interdepartmental communications" and "operational directives."

On July 27, 1990, the Board issued a 24-page "Memo To: All State Agencies, Employee Organizations and Advocate Groups."³⁷ In this Memorandum, Board staff stated that HELP, as a program designed to help Hispanics "exclusively," was a "race-based remedial action"³⁸ vulnerable to legal challenge under *City of Richmond v. J. A. Croson Co.* and other Equal Protection Clause cases. In this document, which will be referred to as the 1990 memorandum, Board staff urged that HELP be drastically scaled back.

On April 5, 1991, OAL published a summary of the request for determination in the California Regulatory Notice Register, along with a notice inviting public comment. On May 17, 1991, OAL received a response from the State Personnel Board. On May 20, 1991, OAL received a response from the Department of Justice.

On January 15, 1992, the Board issued a three-page memorandum "To: All State Agencies and Employee Organizations," entitled "Status of the Program Alternatives for Tradeswomen (PATH) and the Hispanic Employment Link Program (HELP) Demonstration Projects."³⁹ This 1992 memorandum stated that the HELP program would not be cut back, but rather that additional classes limited to one "gender or race/ethnic group" would be created if certain procedures were followed.

On February 1, 1993, the Board issued a 28-page pink memorandum headed "Memo To: All State Agencies and Employee Organizations," and entitled "Hearing on Proposed Changes to Affirmative Action Policies Affecting the Goals and Timetables Process and the Limited Examination and Appointment Program ("LEAP")."⁴⁰ This document will be referred as the 1993 memorandum. "The SPB," the document stated, ". . . is proposing changes to State affirmative action policies." In this 1993 memorandum, Board staff vigorously argued--with detailed legal analysis--that key HELP procedures⁴¹

were inconsistent with governing Equal Protection Clause cases of the U.S. Supreme Court and should be modified before the State of California was hit with costly lawsuits.

Background and Key Elements of the HELP Plan

From the applicant's point of view, obtaining a permanent full-time state job in California is often a slow, arduous process. For some positions, applications may be submitted for only one week every year or two. After written applications are submitted, there is often a delay of weeks or months until the oral examination is actually held. After the oral examination, it may be weeks or months until the results are made available. Some applicants will likely fail the examination; they are eliminated from further consideration. After the results are made available, it may be weeks, months, or even years before the hiring department calls in top-scoring applicants for a pre-employment interview. Hiring freezes or other budget difficulties often cause lengthy delays. After pre-employment interviews are completed, it may be weeks or months before a job offer is made to one of those called in for an interview. One or more of those offered the position may well decline.

Finally, one of the persons who initially responded to the notice of examination will be formally hired ("appointed") into state service. The total time elapsed may well be one, two, or more years. Some lists created by specific examinations are still in use up to six years⁴² later.⁴³ In examinations for certain higher paid positions, most applicants who pass the examination are nonetheless never called in for a pre-employment interview because there are many more "eligibles" than there are actual job openings. For instance, if there are three job openings and 250 eligibles distributed among six "ranks," those eligibles in the lower three ranks will likely face a long, fruitless wait. (Only those in the top three ranks are eligible for hiring.)⁴⁴ Against this bureaucratic backdrop, we will describe the HELP program, as created by the Personnel Board in 1987.

The Board felt that Hispanic representation in the state civil service was growing too slowly, that Hispanics were severely underrepresented, particularly in professional classes, in comparison to the Hispanic percentage in the general

December 14, 1993

California labor force.⁴⁵ The basic concept of the Board's response was twofold: (1) creation of new civil service classifications limited to Hispanics and (2) creation of "*expedited* examinations and appointment processes" for these Hispanic-only classes. (Emphasis added.)⁴⁶

The first element of the basic concept is self-explanatory. The second element--the "Quick Placement Approach"⁴⁷--requires some explanation. Three policies were adopted in order to speed up hiring of Hispanic job applicants.

First, for all of the new Hispanic-only classifications, examinations were to be conducted under the rule of "continuous testing."⁴⁸ Rather than facing a brief filing-period window each year or two during which applications would be accepted, HELP applicants could submit applications at any time throughout the year. Also, oral examinations for HELP classes would be given periodically throughout the year, rather than only once every year or two.

Second, immediately after each HELP oral examination, an "instant eligible list" was prepared.⁴⁹ This process is not fully explained in the HELP plan documents, but appears to mean that persons taking particular HELP examinations would be notified the day they took the examination whether or not they had passed. The normal civil service process was to notify applicants whether or not they had passed the examination (whether or they were "eligible" to be hired) weeks or months later. "Instant" preparation of an eligible list would appear to mean that pre-employment interviews could be held (and job offers could be made) the day of the HELP examination.

Third, the Personnel Board decided that, in HELP examinations, the "rule of the list" would prevail. As noted above, the normal state civil service process was for only the top-scoring applicants to be deemed eligible (the top three ranks). Under the rule of the list, everyone who passes is immediately eligible to be hired.

We have discussed the twofold basic concept of HELP: new classifications limited to Hispanics, along with expedited examination and appointment processes. There are also a number of other key elements of the HELP program. Some elements are complex and not easily capsulized. These will be

December 14, 1993

discussed more fully in the Analysis portion of this determination. Very briefly, some of the other key HELP elements are:

- * a definition of "Hispanic"
- * deciding that (at least in part) statistical comparisons would be made using the Hispanic representation in the general California civilian labor force, rather than Hispanic representation among the "qualified labor force," for instance, licensed professional electrical engineers.
- * creation of specific Hispanic-only classifications, such as Programmer I (Hispanic).

Staff recommended, and the Board agreed, to conduct the HELP program under the aegis of the demonstration project statute, Government Code sections 19600-19607. This statute authorized the Board to suspend the operation of certain Civil Service Act provisions which might otherwise prohibit operation of an innovative new project.⁵⁰

Thus far, three demonstration projects have been undertaken--HELP, PATH ("Program Alternatives for Tradeswomen Hiring") and LEAP ("Limited Examination and Appointment Program"). PATH was designed to facilitate the recruitment and hiring of women into blue-collar jobs. LEAP was designed to facilitate the hiring of persons with disabilities.⁵¹ This determination proceeding pertains *only* to HELP (and to related Department of Justice policies).

HELP initially involved the creation of eleven new separate "parenthetical" civil service classifications, such as "Legal Counsel (Hispanic)"--positions which only Hispanics could apply for or fill. Prior to this Board action, the entry level "house counsel" attorney classification was "Legal Counsel."

In the administrative bulletin formally establishing HELP, state agencies were invited to request the Board to establish new HELP classifications (in addition to the eleven initial classifications). Subsequently, the Department of Justice proposed a "Legal Analyst-DOJ (Hispanic)" classification, which was approved

December 14, 1993

by the Board on August 25, 1989.

A Board staff document dated July 27, 1990 indicates that, as of that date, there were 27 Hispanic parenthetical classifications, including Staff Psychiatrist (Hispanic), Registered Nurse (Hispanic), and Clinical Dietician (Hispanic).⁵²

These parenthetical classifications are only interim or transitional classifications. For example, a person appointed to a "Physician and Surgeon (Hispanic)" position is automatically transferred into the traditional "Physician and Surgeon" classification upon completion of the regular probationary period.⁵³

Persons seeking to take part in HELP examinations are required to indicate their ethnic group. Those applicants who decline to do so (or who are determined to be non-Hispanic) are eliminated from consideration.⁵⁴

In 1990, Board staff strongly recommended scrapping key elements of HELP on the grounds these elements were inconsistent with recent federal court cases interpreting the U.S. Constitution.⁵⁵

In 1991, replying to the present request for determination, the Board argued that the program was exempt from the APA on both constitutional and statutory grounds; that in any event the Board was merely carrying out statutory instructions; and that the rules challenged were not in fact underground regulations.

In a 1992 Board bulletin, the 1990 Board staff opposition to elements of HELP was rebutted and rejected. Indeed, the 1992 bulletin proposed expanding use of the concept underlying HELP to encompass additional preferential classifications restricted to members of particular gender or ethnic groups.⁵⁶ A 1993 bulletin which again called into question the constitutionality of the HELP program is the last communication we have received from the Board on this topic.⁵⁷

Having outlined the key elements of the HELP program, we will proceed to address the basic legal question raised by the request for determination: are the challenged rules "without legal effect" because of failure of the issuing agencies to comply with APA rulemaking requirements?

III. ANALYSIS

The Analysis portion of this Determination is divided into three parts:

- A. IS THE APA GENERALLY APPLICABLE TO THE BOARD'S AND THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS?
- B. DO THE CHALLENGED POLICIES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?
- C. DO THOSE CHALLENGED POLICIES FOUND TO BE "REGULATIONS" FALL WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS?

A.

IS THE APA GENERALLY APPLICABLE TO THE BOARD'S AND 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 Departments 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.

The State Personnel Board, a "state . . . board," is clearly a "state agency" as that term is defined in Government Code section 11000. The Department of Justice, a "state . . . department," is also clearly a "state agency" within the meaning of section 11000.

The APA somewhat narrows the broad reach of the term "state agency" as given in Government Code section 11000. Government Code section 11342, subdivision (a), provides that for purposes of the APA, the term "state agency" does *not* include agencies in the "judicial or legislative departments of the state government."⁵⁸ Neither the Board nor the Department are in the judicial or legislative "departments" (or branches) of state government (they are in the executive branch). Accordingly, we conclude that--*pursuant to the APA ex proprio vigore*⁵⁹--APA rulemaking requirements generally apply to quasi-legislative enactments of both the Board and the Department.^{60 61}

Furthermore, the Civil Service Act (specifically, Government Code section 18701) states that the Board "*shall prescribe . . . rules in accordance with law*" (Emphasis added.) Since statutes are one form of law, the Board must--under the Civil Service Act--comply with the statutes pertaining to rulemaking (the APA).⁶²

The APA, of its own force, requires the Board to adopt its substantive and procedural rules in compliance with the APA. The Civil Service Act independently requires the Board to follow the APA. Thus, both the APA and the Civil Service Act provide that the Boards' quasi-legislative enactments are subject to the APA.

When the Legislature intends that Board rules or regulations are to be deemed exempt from the APA, it *expressly* states this, as in Government Code section 19582.5, which provides that quasi-judicial decisions of the Board which have been designated as precedential are not subject to the APA. Section 19582.5 provides in part:

" . . . Precedential decisions *shall not be subject to* Chapter 3.5, (commencing with Section 11340) of Part 1 of Division 3 [the APA]." (Emphasis added.)

What about the Department of Justice? As was the case with the Personnel Board, the APA, of its own force, requires departmental compliance with the APA. We have not, however, located any additional statutory provisions which independently require departmental adherence to APA rulemaking requirements.

When the Legislature intends to exempt rules or regulations of the Department of Justice from the APA, it *expressly* states this, as in Penal Code 12276.5, subdivision (h), which provides that lists of firearms found to be "assault weapons" are not subject to the APA.⁶³ This Penal Code section provides in part:

"Chapter 3.5 (commencing with Section 11340) of Division 3 of Title 2 of the Government Code, pertaining to the adoption of rules and regulations [the APA], *shall not apply* to any list of assault weapons promulgated pursuant to this section." (Emphasis added.)⁶⁴

Thus, the APA is generally applicable to the quasi-legislative enactments of both the Board and the Department.

B.

DO THE CHALLENGED POLICIES CONSTITUTE "REGULATIONS" WITHIN THE MEANING 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,⁶⁵ 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* (1990),⁶⁶ the California Court of Appeal upheld OAL's two-part test concerning 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?⁶⁷

If an uncodified rule fails to satisfy either of the above two parts of the test, it is *not* a "regulation" and *not* subject to the APA. However, the *Grier* court also cautioned that:

*". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action [citing *Armistead*], 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.)

Three subsequent California Court of Appeal cases provide additional guidance on the proper approach to take when assessing claims that agency rules are *not* subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in "a statutory scheme which the Legislature has already established. . . ." ⁶⁸ But "to the extent that any of the [agency rules] depart from, or embellish upon express statutory authorization and language, the [agency] will need to promulgate regulations. . . ." ⁶⁹ Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations provisions) cannot legally be "embellished upon" in administrative bulletins. For example, *Union of American Physicians and Dentists v. Kizer* (1990) ⁷⁰ held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation. ⁷¹ Statutes may legally be amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* ("*SWRCB v. OAL*") (1993), made clear that reviewing authorities focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

" . . . the . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it 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. . . .*" (Emphasis added.) ⁷²

We will first apply the two-pronged statutory definition of "regulation" to the challenged Board rules--the HELP plan rules. After completing analysis of the Board's HELP rules, we will turn to the relatively minor rules of the Department of Justice that were challenged in the request for determination. ⁷³

Personnel Board

In applying the two-pronged "regulation" test to the HELP rules to see whether or not these provisions are "regulations," we will proceed as follows. First, we will list the HELP rules.⁷⁴ Second, we will determine whether or not the rules are "of general application." Third, we will determine whether or not the rules implement, interpret, or make specific laws administered by the Board.

HELP rule no. 1: Hispanic-only classifications

HELP rule no. 1 authorizes state agencies to request the Board to establish "parallel *Hispanic-only* classes for existing . . . classes" (emphasis added),⁷⁵ requires applicants for such Hispanic-only classifications to fill out a form revealing their ethnic background, and requires that applicants who are not Hispanic or who decline to reveal their ethnic background be given a disqualifying score in the examination.

HELP rule no. 2: Definition of "Hispanic"

HELP rule no. 2 mandates use of the U.S. Census Bureau's definition of "Hispanic" in the HELP program:

"'Hispanic' means persons whose origin is Mexico, Puerto Rico, Cuba, Spain, or the Spanish-speaking countries of Central or South America. It does not include persons of Portuguese or Brazilian origin, or persons who acquired a Spanish surname." (Emphasis added.)⁷⁶

HELP rule no. 3: Labor Force Parity

HELP rule no. 3 mandates use of 1980 census data showing that Hispanics composed 17.2% of the California civilian labor force⁷⁷ for purposes of determining in which entry level civil service classifications Hispanics "historically have been *underrepresented*" (emphasis added).⁷⁸

Shorthand expressions used by the Board for this critical benchmark include "1980 Labor Force Parity of 17.2%,"⁷⁹ "labor force parity,"⁸⁰ and "LFP." Under this rule, only in classifications in which Hispanics "historically have been *underrepresented*" (emphasis added) is it appropriate to create a new, parallel Hispanic-only classification. Hispanics are deemed to be "underrepresented" in classifications in which they have for some time constituted *less* than 17.2% of the classification. The purpose of the HELP plan is to bring "the representation of Hispanic persons in State civil service . . . closer to *labor force parity*." (Emphasis added.)⁸¹

HELP rule no. 4: Available, Qualified Labor Pool

HELP rule no. 4 provides that for classifications that "require a professional license/certificate or a college degree," departments may *not* use the HELP process to fill positions in the twelve HELP classifications approved by Board on June 2, 1987 (and the Board will not approve additional HELP classifications)⁸² *unless* the department can show Hispanic "underrepresentation" by comparing the "Hispanic representation in the civil service class and/or class series" with the "'available qualified Hispanic labor pool.'"⁸³

The following are acceptable sources of information (to the extent available) on the "available qualified Hispanic labor pool":

"(1) occupational labor force data; (2) college student representation by relevant discipline; and/or (3) Hispanic work force data for comparable classes in other public jurisdictions, i.e., cities or counties."^{84, 85}

HELP rule no. 5: 80% Rule

HELP rule no. 5 provides that for classes *not* requiring a professional license/certificate or a college degree, departments may not use *existing* (and the Board will not approve *new*) HELP classifications unless the department can demonstrate both of two things:

- (a) Hispanics are underrepresented in the specific classification, comparing actual Hispanic representation with "the general labor force (using the 1980 U.S. Census figure which is 17.2%),"⁸⁶ and,
- (b) Hispanics are "'significantly' underrepresented"⁸⁷ (in other words, the "extent of *underutilization*"⁸⁸ is significant):

"To make this determination, we [i.e., the Board] will use the '80% Rule' concept. We will look to see if Hispanic representation in a class and/or class series is at or below 13.8% (or 80% of 17.2%)." (Emphasis added.)⁸⁹

HELP rule no. 6: "Historical recruitment difficulties"

HELP rule no. 6 provides that, in deciding *which* classifications would qualify for creation of a parallel Hispanic-only class, the Board will consider the following factor: whether or not in the past it had proven difficult to recruit Hispanics into the class.⁹⁰

HELP rule no. 7: "Entry-level in a class series"

HELP rule no. 7 provides that a parallel Hispanic-only classification will be authorized only if the regular classification is "'entry' level, e.g., the first level in a class series." (Emphasis added.)⁹¹

HELP rule no. 8: Oral Examination Scoring of Minorities

HELP rule no. 8 provides that (1) the Board, as a matter of policy, advises members of panels conducting oral civil service examinations that if they are deliberating about the score to be given to an affirmative action candidate, they should award the higher score and (2) some panels ensure that all affirmative action candidates are assigned sufficiently high scores to make them "reachable."⁹²

HELP rule no. 9: Eleven Hispanic-only Classifications

HELP rule no. 9 provides that (as of late 1987) the following eleven Hispanic-only classifications are authorized for use by state agencies:

**Auditor I (Hispanic)
Correctional Counselor I (Hispanic)
Electrical Engineer (Hispanic)
Hazardous Materials Specialist (Hispanic)
Legal Counsel (Hispanic)
Medical Consultant I, Department of Health Services (Hispanic)
Programmer I (Hispanic)
Staff Counsel (Hispanic)
Staff Services Management Auditor (Hispanic)
Staff Toxicologist (Hispanic)
Waste Management Engineer (Hispanic).⁹³**

HELP rule no. 10 Legal Analyst-DOJ-Hispanic

HELP rule no. 10 provides that the Department of Justice is authorized (as of late 1989) by the Board to use the classification "Legal Analyst-DOJ-Hispanic."

HELP rule no. 11 Quick Placement Approach

HELP rule no. 11 provides that the following procedures shall apply to Hispanic applicants: continuous testing; instant eligible lists; and the rule of the list.

- Part One: Do the Challenged *HELP* Rules Constitute Standards of General Application *or* Modifications or Supplements to Such 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.⁹⁴

Detailed discussion of each of the HELP rules listed above is not necessary. These HELP rules clearly apply to all members of four discrete classes:

1. STATE AGENCIES

The rules set out mandatory procedures that apply to all persons who are involved in hiring matters on behalf of state agencies.⁹⁵

2. STATE EMPLOYEES

Some state employees seeking higher paid positions in the same line of work would be affected by HELP. For instance, Legal Assistants employed in state agencies typically aspire to be "promoted" to the higher paid "Legal Analyst" position. Persons currently employed as Legal Assistants would clearly be affected by establishment of a Legal Analyst (Hispanic) classification. Specifically, *non*-Hispanic state-employed Legal Assistants would be precluded from competing for a Legal Analyst position that the hiring agency determined would be filled through the HELP process.⁹⁶

3. NON-HISPANIC JOB APPLICANTS

Members of the general public are significantly affected by HELP rules. All non-Hispanic citizens are prohibited from competing for positions filled through the HELP process. According to a Board report, "[w]hen examinations for HELP classes are given, other [i.e., Non-Hispanic] groups have not always had an equal opportunity to compete for jobs."⁹⁷ In other words, agencies electing to fill positions through the HELP process have apparently on occasion scheduled *only* an examination for the parenthetical HELP class. For instance, in order to fill two electrical engineer positions, an agency might schedule an examination for "Electrical Engineer (Hispanic)," but not the regular "Electrical Engineer" classification, and then proceed to fill both open positions from the HELP list.

It is noteworthy that the category "non-Hispanic citizens" includes

not only whites, but also members of other protected groups, such as African-Americans, Native Americans, and Filipinos. This fact distinguishes the HELP program from the classic "reverse discrimination" scenario found in a case like *University of California Regents v. Bakke*,⁹⁸ in which a white male alleged that he had been adversely impacted by a medical school admissions program which reserved student slots for members of a number of minority groups. Here, it appears that not only whites, *but also members of other protected groups* have on occasion--in the Board's words--been "denied an equal opportunity to compete for jobs."⁹⁹

4. HISPANIC JOB APPLICANTS

The other side of the coin is that Hispanic job applicants would be advantaged in competing for particular positions filled through the HELP process, in that they would only have to compete against other Hispanics.¹⁰⁰

Thus, even in situations in which the hiring agency had scheduled examinations for *both* the regular and the parallel classifications, Hispanic competitors would in general be better off in that they would presumably receive higher scores than they would if lumped in with the non-Hispanic competitors. (The HELP proposal explained that the HELP program was necessary in part because "Hispanics were [often] not reachable on existing lists.")¹⁰¹

The regular state civil service examination practice is to assign each competitor a numerical score (e.g., 95) and to provide that only those in the top three ranks of scores (e.g., all those receiving 95, 90, or 85) are eligible to be hired. Another element of the HELP plan provides that, in lieu of the regular three-tier winnowing out method, the "rule of the list" applies to HELP examinations.¹⁰² According to the "rule of the list," all persons who receive passing scores in the examination are immediately eligible to be hired.

This differential eligibility policy would mean, on the one hand,

December 14, 1993

that a substantial number of competitors in the *regular* examination would not fall in the top three tiers (there might well be six tiers), while on the other hand, a substantial number of competitors in the *HELP* examination would be immediately "reachable," because only those who received a failing score would be eliminated. (The *HELP* proposal explained that the *HELP* program was necessary in part because "the examination timeframe is too lengthy.")¹⁰³ In regular examinations, competitors who pass--but fail to fall within the top three tiers--may well wait one or more years before receiving an invitation to a pre-hiring interview (higher ranking competitors must first be eliminated, generally because they are either (1) hired from the list or (2) no longer interested in the position).

Earlier appellate cases in which the Board was found to have violated the APA involved rules limited in application to state employees.¹⁰⁴ The *HELP* rules have much broader application than these earlier rules: they impact not only state employees, but also all members of the general public that might consider applying for an affected state civil service position.

Also, several Personnel Board affirmative action rules virtually identical to *HELP* rules nos. 2, 3, and 5 were found to be rules of general application in **1987 OAL Determination No. 5**. This 1987 OAL determination will be discussed in more detail below, under *HELP* rule no. 2.

Therefore, since there are at least four discrete classes¹⁰⁵ to which the HELP rules apply, the HELP rules constitute rules of general application.

Part Two: Do the Challenged *HELP* Rules Interpret, Implement or Make Specific the Law Which the Agency Enforces or Administers or Which Governs the Agency's Procedure?

We will review the challenged *HELP* rules one by one, determining if they interpret, implement, or make specific the constitutional, statutory, or regulatory provisions which the Board enforces or administers.

HELP rule no. 1: Hispanic-only classifications

HELP rule no. 1 authorizes state agencies to request the Board to establish "parallel *Hispanic-only* classes for existing . . . classes" (emphasis added),¹⁰⁶ requires applicants for such Hispanic-only classifications to fill out a form revealing their ethnic background, and requires that applicants who are not Hispanic or who decline to reveal their ethnic background be given a disqualifying score in the examination.

HELP rule no. 1 arguably interprets, implements, and makes specific a wide variety of laws, not only straightforward, noncontroversial provisions of substantive personnel law (e.g., "Board shall prescribe classifications"), but also provisions which arguably present harmonization problems (e.g., "no discrimination on basis of race, national origin or ancestry"). We will discuss the various laws implemented as follows. First, we will discuss how HELP rule no.1 interprets and implements provisions of law which authorize creation of classifications. Second, we will discuss how HELP rule no.1 interprets and implements a variety of general anti-discrimination provisions of law. Third, we will discuss how HELP Rule no.1 interprets and implements provisions of law which explicitly address the matter of making note of an applicant's ethnic background and using that factor as a selection criterion.

PROVISIONS OF LAW AUTHORIZING CREATION OF CIVIL SERVICE CLASSIFICATIONS

California Constitution

Section 3 of Article VII of the California Constitution provides in part that "[t]he Board . . . shall prescribe . . . *classifications* . . ." (Emphasis added.) Clearly, when the Board establishes a new civil service classification, it is implementing section 3 of Article VII. At some earlier time (not revealed in the record of this determination proceeding), the Board had "prescribed" the classification "Hazardous Materials Specialist." In the 1987 HELP proposal, the Board "prescribed" a new classification--"Hazardous Materials Specialist (*Hispanic*)." Clearly, establishing or prescribing this new classification implemented section 3 of Article VII. The Board also interpreted section 3 of Article VII by "prescribing" that the HELP classifications would be limited to

members of one racial or ethnic group.

Statute

In creating Hispanic-only classifications, the Board has also implemented Government Code section 18702, which provides in part that "[t]he Board shall *create and adjust classes of positions* in the state civil service" (Emphasis added.)

Thus, HELP rule no.1 implements two substantive personnel law provisions. Next, we will discuss how HELP rule no.1 interprets and implements a variety of general anti-discrimination provisions of law

PROVISIONS OF LAW GENERALLY ADDRESSING DISCRIMINATION ISSUES

After quoting all pertinent provisions of law generally addressing discrimination issues, we will summarize how these provisions are interpreted and implemented by HELP rule no. 1.

Federal Constitution: Equal Protection Clause

"*The Equal Protection Clause provides that '[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.'* U.S. Const., Amdt. 14, sec. 1. Its central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race. . . ." (Emphasis added.)¹⁰⁷

According to the U.S. Supreme Court, though state policies which expressly distinguish between individuals because of their race are "suspect," such policies may nonetheless be found valid by the court if the policies are narrowly tailored to further a "compelling" governmental interest. Though case law has recognized a significant state interest in eradicating the effects of past racial discrimination, race conscious state policies must be supported by a "strong basis in evidence" before it will be concluded that the remedial action was necessary.¹⁰⁸

California Constitution: Equal Protection Clause

Section 7 of Article I of the California Constitution provides that "(a) a person may not be . . . denied equal protection of the laws."

According to the California Court of Appeal, a classification based solely on race is "suspect," and calls for the most exacting judicial scrutiny, but may be upheld if the classification is (1) justified by a "compelling" state interest, (2) is necessary for the furtherance of the compelling state interest, and (3) is designed so as to minimize its limiting effect upon the group to be burdened by the classification.¹⁰⁹ The word "classification" as used in this paragraph refers not to civil service job classifications, but to groupings such as "all women" or "all persons over the age of 40."

California Constitution: Discriminatory Disqualification Clause

Section 8 of Article I of the California Constitution provides:

"A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color or national or ethnic origin." (Emphasis added.)

General California Anti-Discrimination Statutes

The State of California, in its role as an employer, is subject to the California Fair Employment and Housing Act, Government Code sections 12900-12996.

Government Code section 12920 provides in part:

"It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of *race*, religious creed, *color*, *national origin*, *ancestry*, physical disability, medical disability, medical condition, marital status, sex or age.

"It is recognized that the practice of denying employment opportunity and

December 14, 1993

discriminating in the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general." (Emphasis added.)

Government Code section 12921 provides:

"The opportunity to seek, obtain, and hold employment without discrimination because of *race*, religious creed, *color*, *national origin*, *ancestry*, physical disability, mental disability, medical condition, marital status, sex, or age is hereby recognized as and declared to be a civil right." (Emphasis added.)

Government Code section 12940 declares that it is "an unlawful employment practice" for an employer: to refuse to hire any person because of that person's "race, . . . , color, national origin, [or] ancestry," ¹¹⁰

The State Civil Service Act¹¹¹ contains three general anti-discrimination provisions. First, Government Code section 18500, subdivision (c)(5), provides that one of the purposes of the Civil Service Act is:

"(c) To provide a comprehensive personnel system for the state civil service in which:

""

(5) *Applicants and employees are treated in an equitable manner without regard to political affiliation, race, color, sex, religious creed, national origin, ancestry, marital status, age, sexual orientation, disability, political or religious opinions or nonjob-related factors.*" (Emphasis added.)

Second, Government Code 19702, subdivision (a), provides that "[a] person shall not be discriminated against under this part [Part 2, "State Civil Service," of Division 5, "Personnel," of Title 2, "Government of the State of California"]

December 14, 1993

because of sex, race, religious creed, color, national origin, ancestry, marital status, physical disability, or mental disability." (Emphasis added.)

Third, Government Code section 19572, subdivision (w),¹¹² declares that anyone acting in the capacity of a state employee may be dismissed, demoted, suspended or otherwise disciplined for:

"Unlawful discrimination, including harassment, on the basis of race, religious creed, color, national origin, ancestry, physical handicap, marital status, sex, or age, against the public or other employees" (Emphasis added.)

Has the Board interpreted, implemented, or made specific the above noted provisions of law?

A recurrent theme in underground regulations cases is whether or not the state agency could have adopted *other* policies in the process of implementing applicable laws. The courts (and OAL) recognize that if there is only *one* reasonable way to interpret a statute (only one "legally tenable interpretation"), then an agency that issues a rule reflecting this interpretation is not violating the APA.¹¹³ By contrast, however, if the statute is subject to more than one interpretation, the APA requires that the agency propose this *selected* interpretation for adoption as a regulation and then proceed through the APA rulemaking process. The rationale for this requirement is that the agency is in effect making new law at this juncture and should involve the public in the policy formation process. For instance, one reasonable interpretation of a statute might lead to benefits being made *more* widely available (at greater cost to the State), while a second reasonable interpretation might lead to benefits being made *less* widely available (at lesser cost to the State). If the more expansive (and expensive) interpretation is adopted by the rulemaking agency through APA procedures, the Department of Finance will have the opportunity to check to ensure that funds have been appropriated to support this costlier alternative.¹¹⁴

Also, for ease of access for agency staff and regulated public alike, the agency interpretation should be printed in the California Code of Regulations. It should not be necessary to pore over manuals or to leaf through binders of

December 14, 1993

administrative bulletins ferreting out pertinent agency policies.

Thus, a fundamental issue in analyzing HELP rule no.1 is whether or not this rule reflects the *only* reasonable interpretation of governing law. Two contrasting positions on this fundamental issue are reflected in Board documents. In the HELP proposal, the Board essentially takes the position that governing law "requires" adoption of the HELP program, the key element of which is the Hispanic-only classification. (In other words, creation of Hispanic-only classifications is the only reasonable interpretation of governing law.) On the other hand, the 1993 bulletin takes the position that governing laws permit the Board to select other methods of attacking the Hispanic underrepresentation problem. (In other words, there are several reasonable interpretations of governing law.)

In the resolution approving the HELP proposal, the Board in substance took the position that it had no alternative under applicable statutes and Executive Order D-20-83¹¹⁵ but to institute the HELP program.¹¹⁶

According to the 1993 Board Bulletin, however, a wide variety of policies could be implemented to improve representation of various ethnic groups in the state civil service workforce. The Bulletin grouped the various policies into three categories:

"There are three aspects to the [affirmative action] process. First, there must be a policy of non-discrimination. This is required by both Federal and State law. It essentially means that an employer must provide equal employment opportunity, regardless of race or gender and must ensure that its employment practices are fair to everyone.

"Secondly, affirmative action involves making special efforts to review and revise existing employment policies and practices which represent artificial barriers to the employment of women and minorities. These efforts include such things as reviewing the minimum qualifications of jobs and eliminating any requirements that are not necessary to perform the job successfully; reviewing and rewriting examination questions to assure job relatedness; and undertaking recruitment efforts to increase the

December 14, 1993

numbers of women and minorities taking civil service examinations. Since these actions do not adversely impact any person's ability to apply for and compete with other individuals on an equal basis and to be hired, there are no legal limitations on them. The establishment of employment goals for the purpose of monitoring the results of these types of actions and the impact they have on achieving labor force representation for women and minorities does not appear to be a race/gender preferential affirmative action requiring special justification to be legal.¹¹⁷

"Finally, the third phase of the affirmative action process involves those special actions which provide preference to women and/or minorities in hiring, promotion, training, or any other employment practice. Hiring goals which mandate the preferential [¹¹⁸] hiring of women and minorities are included in this phase. Other actions in this phase include adjusting seniority based layoffs [AB 3001]; and administering special selection programs, such as the Hispanic Employment Link Program (HELP) and the Program Alternatives for Tradeswomen Hiring (PATH). This type of race/gender conscious affirmative action is only legal under very limited circumstances and is subject to [strict] scrutiny by the courts."¹¹⁹

OAL cannot accept the thesis that establishing Hispanic-only classifications was the only reasonable interpretation of governing law. The HELP program was not *mandated* by statute, duly adopted regulation, or final court decision. The only specific citation of legal authority for the "this is mandated" thesis is Executive Order D-20-83. It is quite clear, however, that this Executive Order (reprinted in note 115) does not expressly mandate creation of Hispanic-only classifications. Indeed, Executive Order D-20-83 clearly appears limited to what the 1993 bulletin refers to as the first and second aspects of affirmative action (a policy of non-discrimination; reviewing existing employment policies to remove artificial barriers to the employment of women and/or minorities)--in contrast to the third aspect, i.e., "providing preference to women and/or minorities."

The resolution establishing the HELP program also makes a vague reference to a statutory charge or mandate. The resolution states that the Personnel Board:

"has been *charged by statute* with the responsibility of ensuring that all

December 14, 1993

groups are *fully utilized* in classes of positions in the State civil service and are not excluded on a *nonjob-related* basis from employment." (Emphasis added.)

The resolution does not provide citations to particular statutory code sections. Reviewing the Government Code, however, it appears that by using the term "fully utilized," the resolution may have been referring to part of the Fair Employment and Housing Act, Government Code section 12920 (quoted above at pp.182-183). Section 12920 provides that it is the policy of this state to prevent employment discrimination on the basis of (among other things) race, color, national origin and ancestry because such discrimination foments strife and "deprives the state of the *fullest utilization* of its capacities for development and advance, and substantially and adversely affects the interests of employees, employers, and the public in general." (Emphasis added.) Read in the context of the Fair Employment and Housing Act (see pp. 182-183, above), it is clear that Government Code section 12920, though containing words very similar to "fully utilize," in no way mandates establishment of Hispanic-only classifications.

Various provisions of the Civil Service Act (Government Code sections 19790, 19791, 19792, and 19797) contain the word "underutilization." For instance, section 19790 requires all state agencies to develop goals and timetables "designed to overcome any identified *underutilization* of minorities and women in their respective organizations." (Emphasis added.) Section 19791, subdivision (c), defines "underutilization" as meaning "having fewer persons of a particular group in an occupation or at a level in a department than would reasonably be expected by their availability." Section 19792 directs the Personnel Board to "establish requirements for improvement or corrective action to eliminate the *underutilization* of minorities and women." (Emphasis added.) Section 19797 directs all state agencies to annually draw up affirmative action plans which:

"at least identify the areas of *underutilization* of minorities and women within each department by job category and level, . . . and include an explanation and specific actions for improving the representation of minorities and women." (Emphasis added.)

Government Code sections 19790-19792 and 19797 clearly demonstrate a strong

legislative intent that both state agencies in general and the Personnel Board in particular carry out a vigorous affirmative action program. These sections, however, obviously fall short of explicitly *mandating* establishment of a program which "provid[es] preference to women and/or minorities." And, of course, nothing in these sections explicitly mandates establishment of *Hispanic-only* classifications. In fact, section 19790 unequivocally directs agencies to establish goals and timetables designed to overcome "*any* identified underutilization." (Emphasis added.) No specific protected group¹²⁰ is targeted by the statute for priority action of any sort, much less for the sort of preferential program described in the 1993 Board Bulletin as "race/gender conscious affirmative action."

One additional phrase in the Board resolution establishing HELP requires discussion: the phrase "charged by statute with the responsibility of ensuring that all groups . . . are not excluded on a *nonjob-related* basis." Though no citation is provided in the resolution, it is possible that the Board is referring to Government Code sections 18500, subdivision (c)(5) (which is quoted above at p. 183). Section 18500, subdivision (c)(5), provides that one of purposes of the Civil Service Act is provide a comprehensive personnel system for the state civil service in which:

"Applicants and employees are treated in an equitable manner without regard to political affiliation, race, color, sex, religious creed, national origin, ancestry, marital status, age, sexual orientation, disability, political or religious opinions or nonjob-related factors." (Emphasis added.)

Government Code section 18500, subdivision (c)(5), does not *explicitly* mandate establishment of Hispanic-only classifications. This section requires that all persons applying for state civil service positions be treated in an equitable manner "without regard to . . . nonjob related factors" such as race, color, national origin or ancestry. HELP rule no.1 specifically requires that applicants for certain classifications be limited to members of one particular ethnic group. It is difficult to see how section 18500 could be interpreted to somehow even *by implication* mandate creation of Hispanic-only classes--it appears to prohibit them instead.

December 14, 1993

While the statutes analyzed above do not mandate Hispanic-only classifications (and some appear to prohibit them), it is important to note that the questions of whether the HELP rules are (1) constitutional or are (2) consistent with statute are not issue in this determination.¹²¹ We are concerned with whether HELP rule no.1 interprets, implements, or makes specific the noted statutory provisions.

HELP rule no.1 has the interpretive effect of informally amending, supplementing, or revising those duly adopted provisions of law which generally prohibit discrimination in employment. HELP rule no.1 has the effect of carving out uncodified *exceptions* to existing legal prohibitions and requirements. Indeed, for purposes of analysis under Government Code section 11342, subdivision (b), HELP rule no.1 should be read as an effort to create an exception to various constitutional and statutory provisions that appear to preclude employment policies restricting competition to members of one ethnic group.

For instance, Section 8 of Article I of the California Constitution unequivocally prohibits employers from disqualifying any person from "entering . . . employment because of . . . race, . . . color or national or ethnic origin." HELP rule no. 1 provides that applicants for Hispanic-only classifications who are not Hispanic or who decline to reveal their ethnic background be given a *disqualifying* score in the examination.¹²² The record before us does not contain an explicit rationale discussing section 8 of Article I. However, the Board has in effect attempted to create an exception to this constitutional provision by interpreting it to permit creation of Hispanic-only civil service classifications.

The HELP proposal approved by the Board in 1987 does list certain Government Code sections that the Board declared "waived pursuant to Government Code section 19600 [the demonstration project statute] for purposes of [the HELP] project." Those provisions declared "waived" were Government Code sections 18900 (examinations must be free, competitive and open to all persons) and 19801(b) (specifies order of certifying eligibles when new lists are created for same classification).¹²³ No mention was made in the HELP proposal of Government Code sections 18500; 19702, subdivision (a); or 19572, subdivision

December 14, 1993

(w), the three general anti-discrimination provisions in State Civil Service Act.¹²⁴ Government Code section 11347.5, the statutory prohibition against underground regulations, does not, however, require that the agency issuing an underground regulation mention explicitly (or even be aware of) all provisions of law which the regulation implements, interprets, or makes specific.

In any event, the apparent rationale applicable to the three above-noted anti-discrimination provisions would appear to be as follows: the degree of underrepresentation of Hispanics in state service, especially in professional classifications, is so severe, and progress in increasing representation has been so slow (despite strenuous efforts), that there is no alternative but to create an *exception* to otherwise applicable law.

One particular area of applicable law vividly illustrates the need to conceptualize HELP rule no.1 as creating an exception. Two statutes and two regulations place severe limitations on the use by employers of ethnic information for the purposes of weeding out applicants for jobs.

The two statutes are Government Code section 12940, subdivision (d), and Government Code section 19704.

Government Code section 12940, subdivision (d), declares that it is "an unlawful employment practice" for an employer (among other things) to "print or circulate or cause to be printed or circulated any publication, or to make any non-job-related inquiry, either verbal or through use of an application form, which *expresses, directly or indirectly, any limitation, specification, or discrimination as to race, . . . , color, national origin, [or] ancestry,*" except when the employer is specifically acting in accordance with federal equal employment opportunity guidelines¹²⁵ and regulations approved by the [California Fair Employment and Housing Commission]. (Emphasis added.)¹²⁶

The second statute restricts use of ethnic data in the state civil service application process. Government Code section 19704 provides:

"It is unlawful to require, permit or suffer any notation or entry to be made upon or in any application, examination paper or other paper, book,

December 14, 1993

document, or record used under this part *indicating* or in any wise suggesting or pertaining to *the race, color, religion, sex, or marital status of any person*. Notwithstanding the provisions of this section, subsequent to employment, ethnic, marital status, and gender data may be obtained and maintained for research and statistical purposes when safeguards preventing misuse of the information exist as approved by the Fair Employment and Housing Commission *except that in no event shall any notation, entry, or record of such data be made on papers or records relating to the examination, appointment, or promotion of an individual.*" (Emphasis added.)¹²⁷

Pursuant to HELP rule no. 1, when advertising examinations for HELP classifications, the Personnel Board and certain state agencies circulated examination bulletins (circulars inviting people to apply for the job) which expressly stated that "participation . . . is limited to 'Hispanics' . . ."¹²⁸ Though the applicability of Government Code section 12940 is not addressed in the documents creating the HELP program, the Board would presumably argue--as outlined above--that the HELP program should be treated as a special exception, due to the severe degree of underrepresentation of Hispanics in state service, etc.

HELP rule no. 1 requires applicants for Hispanic-only classifications to fill out a form revealing their ethnic background "at the time of, or prior to"¹²⁹ the oral examination. Government Code section 19704 (part of the Civil Service Act) unequivocally prohibits state agency employers from requiring that any sort of notation of race, color, etc. be made prior to employment. Though the applicability of Government Code section 19704 is not addressed in the documents creating the HELP program, the Board would presumably argue--as outlined above--that the HELP program should be treated as a special exception, due to the severe degree of underrepresentation of Hispanics in state service, etc.

Similar issues arise in the context of two duly adopted Board regulations which address the subject of gathering and use of ethnic information from job applicants. HELP rule no.1 interprets these two regulations, as well as the above noted statutes.

Title 2, California Code of Regulations, section 174.6 provides:

December 14, 1993

"The *executive officer* [of the Board] *may gather and maintain information regarding the success or failure of applicants by ethnic group, disability, and sex in State civil service examinations.* Such information may be *voluntarily* provided by the applicant on a detachable section of the application." (Emphasis added.)

Title 2, California Code of Regulations, subsection 174.7(a) provides:

"(a) *Ethnic, sex and disability information shall not be used in a discriminatory manner in the selection process.*¹³⁰ (Emphasis added.)

The two above regulations are interpreted by HELP rule no.1, which in effect creates an exception to the regulations. One of the HELP examination procedures¹³¹ enforces the Hispanic-only criterion by requiring that applicants for HELP examinations fill out a form certifying their ethnic background. If the answer reveals that the applicant is not Hispanic within the HELP definition, *or* if he or she refuses to complete the form, that person is given a disqualifying score. HELP procedures may in effect create an exception to section 174.6: they outline a circumstance in which furnishing of ethnic information is mandatory, rather than "voluntary." HELP procedures also implicitly interpret section 174.7 by outlining a circumstance in which ethnic information will be used to choose between applicants in the selection process.

Government Code section 11342, subdivision (b) in part defines "regulation" as every general rule "or the *amendment, supplement, or revision* of any such rule" (emphasis added) adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it. Clearly, the statute anticipates the possibility that agencies will seek to amend, supplement, or revise the laws they administer by issuing rules *without* first having complied with APA requirements. HELP rule no. 1 clearly has the effect of amending, supplementing or revising Title 2, California Code of Regulations, sections 174.6 and 174.7. Section 174.7 states the general rule: ethnic information shall not be used in a discriminatory manner in the selection process. HELP rule no. 1 in effect amends section 174.7 by providing an exception to that general rule.

Section 174.7 is in substance revised to read something like:

"(a) *Except as provided in subsection (x), ethnic . . . information shall not be used in a discriminatory manner in the selection process.*

. . . .

"(x) *Ethnic information may be used to prevent non-Hispanic applicants from improperly competing in Hispanic-only examinations duly established by the Board pursuant to"*

(Emphasis added to illustrate hypothetical amendment to regulation.)

We have already concluded that HELP rule no.1 constitutes a rule of general application, thus satisfying the *first* part of the two-part "regulation" test. (See above, pp. 177-179.) We now go on to conclude that HELP rule no. 1 also satisfies the *second* part of the two-part "regulation" test: it interprets, implements, and makes specific constitutional, statutory, and regulatory provisions enforced or administered by the Board. Thus, HELP rule no. 1 is a "regulation" as defined in the APA.

We now proceed to discuss the next HELP rule, focusing on the question of whether or not it interprets, implements, or makes specific the law enforced or administered by the Board (or whether it governs the Board's procedure).

HELP rule no. 2: Definition of "Hispanic"

HELP rule no. 2 mandates use of the U.S. Census Bureau's definition of "Hispanic" in the HELP program:

"'Hispanic' means persons whose origin is Mexico, Puerto Rico, Cuba, Spain, or the Spanish-speaking countries of Central or South America. It does not include persons of Portuguese or Brazilian origin, or persons who acquired a Spanish surname." (Emphasis added.)¹³²

December 14, 1993

This is not the only reasonable (or "legally tenable") definition of Hispanic. The dictionary definition of "Hispanic" states: "[o]f or pertaining to the language, people, and culture of Spain, Portugal, or Latin America." (Emphasis added.)¹³³

By contrast, Statutes of 1992, chapter 1329, section 2 (AB 486) provides in part:

"Minority," for the purposes of this section, means a citizen or lawful permanent resident of the United States who is an ethnic person of color and who is . . . *Hispanic (a person of Mexican, Puerto Rican, Cuban, or Central or South American culture or origin regardless of race)*. . . . *A person of Spanish or Portuguese culture or origin, other than Hispanic, shall constitute a minority* for purposes of this section only with respect to contracts fully or partially funded by the federal government." (Public Contract Code sec. 2051, subd. (c); emphasis added.)

The dictionary definition, Census Bureau definition, and Public Contract Code definition all differ from one another in some material respect. There are, for instance, obvious differences between the Census Bureau definition and the definition selected by the Legislature for use in the California Public Contract Code. Specifically, the Census definition includes persons "whose origin is . . . Spain." By contrast, the Public Contract Code provision fails to list persons originating from Spain as "Hispanic," although such persons are considered to fall within a separate, recognized minority *if* federal funding is involved. Also, the Census definition may treat "persons of . . . Brazilian origin" differently than does the statute. Finally, the Public Contract Code limits all "minorities"--including Hispanics--to "citizen[s] or lawful permanent resident[s] of the United States." The Census Bureau definition does not contain this limitation.

In any event, the Board's decision to adopt the Census Bureau definition of "Hispanic" interprets the following two provisions of law.

First, Government Code section 19792 directs the Board in part to:

"(b) Develop, *implement*, and maintain *affirmative action* and equal employment opportunity *guidelines*.

""

"(e) *Establish requirements for improvement or corrective action to eliminate the underutilization of minorities and women.*"
(Emphasis added.)

Clearly, HELP rule no. 2 makes specific the "guidelines" and "requirements" referred to in Government Code section 19792, as well as partially defining the word "minorities." Section 19792 gives the Board broad power to advance affirmative action polices. This grant of quasi-legislative power has been expressly conditioned,¹³⁴ however, on the Board complying with the APA.

Second, the Board did comply with the APA in adopting a definition of "Hispanic" in another context. Title 2, California Code of Regulations, subsection 470.1(b)(7), defines the word "Hispanic" by incorporating into California law the U.S. Census Bureau's definition:

"Hispanic" means persons whose origin is Mexico, Puerto Rico, Cuba, Spain, or the Spanish-speaking countries of Central or South America. It does not include persons of Portuguese or Brazilian origin, or persons who acquired a Spanish surname. (Emphasis added.)

This definition, however, does *not* apply to the HELP program.

This definition is expressly limited,¹³⁵ to Article 21 ("Layoff and Demotion") of Subchapter 1 ("General Civil Service Rules") of Chapter 1 ("State Personnel Board") of Title 2 of the California Code of Regulations. *In other words, it only applies in one special situation.* This definition of "Hispanic" only applies when the Board is implementing Government Code section 19798, which modifies the normal "last-hired-first-fired" principle if layoffs are necessary and if the Board finds "past discriminatory hiring practices" in the agency undergoing the layoff. The HELP bulletin states that the HELP program will use this definition.

It seems clear that HELP rule no. 2 interprets Title 2, California Code of Regulations, section 470.1. The HELP bulletin¹³⁶ explicitly instructs state

December 14, 1993

agencies to apply the section 470.1 definition *in the HELP context*. The bulletin, in effect, makes new "law."¹³⁷

The above noted California Code of Regulations definition of "Hispanic" was adopted by the Board following a regulatory determination issued by OAL in 1987. Requesters correctly point out that this 1987 determination (**1987 OAL Determination No. 5**) involved underground regulations strikingly similar to those involved in the matter under review today, including designation of certain groups as protected minorities.¹³⁸

1987 OAL Determination No. 5 made clear that *informally* designating particular ethnic groups as protected violated the APA. The Board acquiesced in this legal conclusion. It adopted regulations which listed protected groups and provided definitions. Duly adopted regulations are legally necessary in order to define the protected group targeted by the Personnel Board in the HELP program--for the same reasons formal regulations were needed to designate and define protected groups for purposes of indicating which groups were to be targeted for purposes of implementing Government Code section 19798 (affirmative action in order-of-layoff).

In summary, we conclude that HELP rule no. 2 implements, interprets, and makes specific not only Government Code 19792, but also Title 2, California Code of Regulations, section 470.1.

The HELP definition of Hispanic contained in rule no. 2 also implements, interprets, or makes specific virtually all of the legal provisions which we have previously concluded were implemented by HELP rule no.1 (Hispanic-only classifications), above, pp.180-193.

We have already concluded (above, pp. 176-179) that HELP rule no. 2 (definition of Hispanic) constitutes a rule of general application, thus satisfying the *first* part of the two-part "regulation" test. We now go on to conclude that HELP rule no. 2 also satisfies the *second* part of the two-part "regulation" test: it interprets, implements, and makes specific constitutional, statutory, and regulatory provisions enforced or administered by the Board. Thus, HELP rule no. 2 is a "regulation" as defined in the APA.

We now proceed to discuss the next HELP rule, focusing on the question of whether or not it interprets, implements, or makes specific the law enforced or administered by the Board (*or* whether it governs the Board's procedure).

HELP rule no. 3: Labor Force Parity

HELP rule no. 3 mandates use of 1980 census data showing that Hispanics composed 17.2% of the California civilian labor force¹³⁹ for purposes of determining in which entry level civil service classifications Hispanics "historically have been *underrepresented*" (emphasis added).¹⁴⁰

Shorthand expressions used by the Board for this critical benchmark include "1980 Labor Force Parity of 17.2%,"¹⁴¹ "labor force parity,"¹⁴² and "LFP." Under this rule, only in classifications in which Hispanics "historically have been *underrepresented*" (emphasis added) is it appropriate to create new, parallel Hispanic-only classifications. Hispanics are deemed to be "underrepresented" in classifications in which they have for some time constituted *less* than 17.2% of the classification. The purpose of the HELP plan is to bring "the representation of Hispanic persons in State civil service . . . closer to *labor force parity*." (Emphasis added.)¹⁴³

Requesters correctly point out that a strikingly similar "labor force parity" rule was found by OAL to violate the APA in **1987 OAL Determination No. 5** (see note 134).¹⁴⁴

After deciding (1) to create Hispanic-only classifications and (2) deciding how to define the term "Hispanic," the Board needed (3) to decide in implementing HELP which among several alternative numbers would be selected as the critical benchmark for determining whether or not Hispanics were indeed underrepresented within a particular classification in a particular agency.

The numbers considered by the Board determined the percentage of the California population and of the civilian labor force that was of Hispanic

December 14, 1993

ancestry. According to Board documents, these were the alternatives considered in 1987:

- * the 1980 U.S. Census figure--17.2% of the California civilian labor force
- * Department of Finance estimate that state *population* was 22% Hispanic
- * SPB staff estimate: state civilian labor force 19.7% Hispanic
- * 1980 Census figure--19.2% of state *population*.¹⁴⁵

The Board apparently first decided that labor force figures were more appropriate than general population figures. The Board then apparently rejected the SPB staff estimate of the Hispanic share of the 1987 civilian labor force. The Board ultimately selected the 17.2% 1980 census figure as the basis of comparison: "labor force parity" for short.

Requesters argue that the Board selected the wrong figure. Requesters contend that 17.2% is a statewide number, "skewed" by the 24.55% Hispanic representation in the Los Angeles County civilian labor force. A better comparative figure (from 1980 census data) requesters argue, would have been the 9% "Hispanic civilian labor force in the Sacramento SMSA [Standard Metropolitan Statistical Area] (which includes the Counties of Sacramento, Yolo and Placer), where the majority of the state jobs are" ¹⁴⁶

For present purposes, it makes no difference which was the "correct" figure. What matters here is that the Board was making a policy decision, it was selecting from among several alternative interpretations of applicable laws. In the words of the APA, the Board was exercising "quasi-legislative power conferred by . . . statute" (Government Code section 11346; emphasis added). According to Government Code section 11346, the APA is "applicable to the exercise of *any* quasi-legislative power conferred by *any* statute . . ." (Emphasis added.)

December 14, 1993

Clearly, HELP rule no. 3 (labor force parity) interprets, implements, and makes specific various constitutional, statutory, and regulatory provisions enforced or administered by the Board. Many of the legal provisions quoted above in the discussions of HELP rule nos. 1 and 2 have been interpreted, implemented, or made specific by the Board in adopting HELP rule no. 3.¹⁴⁷

In addition, HELP rule no. 3 interprets Government Code section 19791, subdivision (c). Section 19791, subdivision (c), defines one key term ("underutilization") and mentions a second key term ("availability"):

"Underutilization' means having fewer persons of a particular group in an occupation or at a level in a department than would reasonably be expected by their availability." (Emphasis added.)

HELP rule no. 3 interprets the statutory term "underutilization." Rule no. 3 selects from among several alternative statistical measures of Hispanic "availability" in order to determine whether or not "underutilization" has been demonstrated. As will be shown below, more alternative statistical measures are available, even beyond those considered by the Board. Since the Board has clearly selected from among several alternative ways of interpreting Government Code section 19791, subdivision (c), it cannot convincingly argue that HELP rule no. 3 was mandated by governing law (or represents the only legally tenable interpretation of applicable law).

In its Agency Response, the Board defends its use of "civilian labor force statistics" on various grounds, some of which will be discussed in Part C, below. One element of the Agency Response bears upon the recurrent "this is mandated" argument. Therefore, we will quote and then analyze this Board defense. The Board argues:

"Under [Government Code] section 19790 each agency and department is responsible for establishing its own affirmative action program. These programs are submitted to SPB for review, but the responsibility for preparing them and for implementing them rests with the individual department. To facilitate the process Government Code section 19792 requires SPB to provide specific statistical information, including but not

December 14, 1993

limited to a breakdown of the state civil service work force by race, sex, age, etc. and current local and regional work force and population data of women and minorities. *The statute further imposes specific requirements for the analysis of this data.*

"The compilation of civil [sic] labor force statistics by SPB, then, is *simple compliance with the statutory mandate.* The use of the information in determining affirmative action goals is the responsibility of the individual departments. SPB submits that requestors [sic] have not shown the existence of any underground regulation in this matter." (Emphasis added)¹⁴⁸

This defense can be read as supporting the argument that the Board's use of the 17.2 % labor force parity figure "is simple compliance with the statutory mandate" of Government Code section 19792 that the Board maintain and analyze statistical data including "data relating to the utilization by department of minorities in women compared to their availability in the labor force." (Government Code section 19792, subdivision (i)(1). Insofar as the Board is indeed arguing that HELP rule no. 3 (labor force parity) "is simple compliance with the statutory mandate," we must reject this argument. For the following reasons, we find this argument unpersuasive.

First, as outlined above, the policy decision to select 17.2% as the key benchmark figure was clearly more than "simple compliance with the statutory mandate." This figure was used to determine which regular classifications¹⁴⁹ needed parallel classifications¹⁵⁰ due to Hispanic "underrepresentation." Use of the 17.2% figure had a real-world impact: some proposed parallel classifications failed to make the cut.

Other parallel classifications *were* created because they had a Hispanic representation below the 17.2% level. Take the "Legal Counsel/Staff Counsel" classification, for instance, using detailed statistics from a Board memorandum dated July 27, 1990.¹⁵¹ The classification was 10.2% Hispanic. Subtracting 10.2% from 17.2%, we get a 7.0% representation shortfall. It is clear from the record that such calculations led the Board to create two new classes--Legal Counsel (Hispanic) and Staff Counsel (Hispanic).

December 14, 1993

Consider by contrast the outcome if the benchmark figure had been the "relevant labor force"--which is defined in the 1990 Board Memo as "those in the labor force who possess the relevant qualifications."¹⁵² The relevant qualification for lawyers would presumably be having passed the Bar Exam. According to the Board Memo, the *relevant* labor force for the counsel positions is 6.5% Hispanic. Subtracting 10.2% from 6.5%, we arrive at figure of -3.7% (minus 3.7%), indicating that the Hispanic representation in the class is substantially *higher* than Hispanic representation in that portion of the California labor force licensed to practice law. If the Board had initially¹⁵³ used the relevant labor force as the benchmark (and if the pertinent statistics were as stated above in this paragraph), it seems clear that the Board would not have taken the next step and created new parallel lawyer classes.

Second, the Board has considerable power to require agencies to comply with Board policies. This power is derived from statute and duly adopted regulation. The Board's position is also bolstered by (1) provisions of the informally adopted *Affirmative Action Manual* and (2) a criterion used in the performance reports and promotional examinations of agency supervisors and managers.¹⁵⁴

Government Code section 19790 provides:

"Each agency and department is responsible for establishing an effective affirmative action program. The State Personnel Board shall be responsible for providing statewide advocacy, coordination, *enforcement, and monitoring* of these programs.

"Each agency and department shall establish goals and timetables designed to overcome any identified underutilization of minorities and women within their respective organizations. Agencies and departments shall determine their annual goals and timetables by June 1 of each year beginning in 1978. These goals and timetables shall be made available to the public upon request. All goals and timetables shall then be submitted to the board for *review and approval or modification* no later than July 1 of each year." (Emphasis added.)

Government Code section 19792, subdivision (e), empowers the Board to

December 14, 1993

"[e]stablish *requirements for improvement or corrective action* to eliminate the underutilization of minorities and women." (Emphasis added.)

The Board's *Affirmative Action Manual* (section 3300) states that "sanctions" may be taken against agencies which fail to make acceptable progress toward realization of goals and timetables. According to *Manual* section 2200, "sanction" is a term which can "mean . . . the taking of coercive action to force compliance with a law or a demand." Sanctions are a last resort after all other methods of working with department have failed: the Board can take "direct coercive action to force a recalcitrant department to act in good faith with law or clearly perceived and agreed to needs of State citizens."¹⁵⁵ The *Affirmative Action Manual's* formal definition of "sanctions process" in section 6600 reads as follows:

"A process by which the State Personnel Board, after a public hearing, orders remedial personnel actions to accelerate the reaching of a *labor force parity* for specific classes or occupations." (Emphasis added.)

Finally, throughout the executive branch of state government, each time an agency manager or supervisor is evaluated in a performance report or in a promotional examination, the agency reviewer must rate the manager's (or supervisor's) "success in achieving the department's affirmative action goals."¹⁵⁶ Similarly, hiring criteria for quasi-civil service managerial positions contain two elements relating to agency affirmative action programs.¹⁵⁷

In summary, given the enforcement provisions quoted directly above, it is difficult for us to accept the Agency Response's characterization of the relationship between the Board and hiring agencies as one in which each agency implements "its own affirmative action program" in relatively autonomous fashion.

We have already concluded that HELP rule no. 3 (labor force parity) constitutes a rule of general application, thus satisfying the *first* part of the two-part "regulation" test (pp. 176-179). We now go on to conclude that HELP rule no. 3 also satisfies the *second* part of the two-part "regulation" test: it interprets, implements, and makes specific constitutional, statutory, and regulatory

December 14, 1993

provisions enforced or administered by the Board. Thus, HELP rule no. 3 is a "regulation" as defined in the APA.

We now proceed to discuss the next HELP rule, focusing on the question of whether or not it interprets, implements, or makes specific the law enforced or administered by the Board (*or* whether it governs the Board's procedure).

HELP rule no. 4: Available, Qualified Labor Pool

HELP rule no. 4 provides that for classifications that "require a professional license/certificate or a college degree," departments may *not* use the HELP process to fill positions in the twelve HELP classifications approved by Board on June 2, 1987 (and the Board will not approve additional HELP classifications)¹⁵⁸ *unless* the department can show Hispanic "underrepresentation" by comparing the "Hispanic representation in the civil service class and/or class series" with the "available qualified Hispanic labor pool."¹⁵⁹

The following are acceptable sources of information (to the extent available) on the "available qualified Hispanic labor pool":

"(1) occupational labor force data; (2) college student representation by relevant discipline; and/or (3) Hispanic work force data for comparable classes in other public jurisdictions, i.e., [sic] cities or counties."^{160 161}

HELP rule no. 4 implements, interprets, and makes specific the statutory term "availability." Government Code section 19791, subdivision (c), defines "underutilization" as meaning "having fewer persons of a particular group in an occupation or at a level in a department than would reasonably be expected by their *availability*." (Emphasis added.) HELP rule no. 4 specifies that the appropriate basis for comparison is not Hispanic representation in the *general* California labor force, but rather the "available *qualified* Hispanic labor pool." (Emphasis added.) For instance, only persons that have passed the Bar Exam are "available" to serve in state lawyer classifications which require membership

in the State Bar of California. In other words, only persons who "qualify" as members of the State Bar of California are "available" to fill state lawyer jobs.

We have already concluded that HELP rule no. 4 constitutes a rule of general application; thus satisfying the *first* part of the two-part "regulation" test. (See, above, pp. 176-179.) We now go on to conclude that HELP rule no. 4 also satisfies the *second* part of the two-part "regulation" test: it interprets, implements, and makes specific constitutional, statutory, and regulatory provisions enforced or administered by the Board. Thus, HELP rule no. 4 is a "regulation" as defined in the APA. We now proceed to discuss the next HELP rule, focusing on the question of whether or not it interprets, implements, or makes specific the law enforced or administered by the Board (*or* whether it governs the Board's procedure).

HELP rule no. 5: 80% Rule

HELP rule no. 5 provides that for classes *not* requiring a professional license/certificate or a college degree, departments may not use *existing* (and the Board will not approve *new*) HELP classifications unless the department can demonstrate both of two things:

- (a) Hispanics are underrepresented in the specific classification, comparing actual Hispanic representation with "the general labor force (using the 1980 U.S. Census figure which is 17.2%),"¹⁶² and,**
- (b) Hispanics are "'significantly' underrepresented"¹⁶³ (in other words, the "extent of *underutilization*"¹⁶⁴ is significant):**

"To make this determination, we [i.e., the Board] will use the '80% Rule' concept. We will look to see if Hispanic representation in a class and/or class series is at or below 13.8% (or 80% of 17.2%)." (Emphasis added.)¹⁶⁵

HELP rule no. 5 interprets, implements, and makes specific the statutory term

December 14, 1993

"underutilization." The term "underutilization" appears in Government Code sections 19790, 19791, 19792, and 19797. (Sections 19790 and 19792 are quoted in part at p.201, above; also see p.187, above.)

We have already concluded that HELP rule no. 5 constitutes a rule of general application, thus satisfying the *first* part of the two-part "regulation" test. (See, above, pp. 176-179.) We now go on to conclude that HELP rule no. 5 also satisfies the *second* part of the two-part "regulation" test: it interprets, implements, and makes specific constitutional, statutory, and regulatory provisions enforced or administered by the Board. Thus, HELP rule no. 5 is a "regulation" as defined in the APA. We now proceed to discuss the next HELP rule, focusing on the question of whether or not it interprets, implements, or makes specific the law enforced or administered by the Board (*or* whether it governs the Board's procedure).

HELP rule no. 6: "Historical recruitment difficulties"

HELP rule no. 6 provides that, in deciding *which* classifications would qualify for creation of a parallel Hispanic-only class, the Board will consider the following factor: whether or not in the past it had proven difficult to recruit Hispanics into the class.¹⁶⁶

HELP rule no. 6 implements, interprets, and makes Government Code section 19792, subdivision (a), which directs the Personnel Board to "develop, implement and maintain affirmative action . . . *guidelines*." (Emphasis added.) One of "guidelines" or "criteria" the Board follows in processing agency requests for creation of new HELP classifications is whether or not the submitting agency has demonstrated the existence of "historical [Hispanic] recruitment difficulties." This guideline or criterion clearly relates to affirmative action.

The Board bulletin setting up the HELP program stated:

"The decision with respect to whether or not a class will qualify for inclusion in [HELP] will depend on a number of factors, including . . .

historical recruitment difficulties . . .

"The thrust of the [HELP] program will be to focus on entry-level professional, *hard-to-recruit-for* classes". (Emphasis added.)¹⁶⁷

Requesters point out that the two emphasized terms are not defined.¹⁶⁸ True, they are not defined in detail. In its response, the Board argues that mere absence of definitions "does not in itself create regulations."¹⁶⁹ This also is true.

It must be noted, however, that Government Code section 11347.5 expressly prohibits agencies from issuing "any . . . *criterion* . . . which is a regulation" (emphasis added) as defined in the APA, unless the criterion has been duly adopted as a regulation and filed with the Secretary of State. Existence of "historical recruitment difficulties" is clearly of one the criteria upon which the Board based its decisions to create or not create parallel Hispanic-only classes. Under Government Code section 11347.5, this is sufficient to show that "historical recruitment difficulties" is a "regulation" within the meaning of the APA.

The Board's Response is in part correct, however. Requesters' attacks on the degree of specificity (or lack of accompanying definitions) in the wording of the criterion are indeed not directly pertinent to the question of whether *the criterion itself* was issued in violation of the APA. Nonetheless, there is no requirement that a criterion used by an agency be detailed and clear before it can violate the APA. Indeed, many agency criteria found to constitute underground regulations *are* fuzzy.

One of the advantages of the public participation requirements built into the APA is that the first draft of the agency rule can be improved upon. In conducting a rulemaking under the APA, the agency must run a gauntlet of public criticism. Comments frequently point out lack of clarity, lack of specificity, lack of definitions, etc. Fuzzy criteria are brought into sharper focus during the dialogue between agency and public. Unclear terms can thus be fixed *before* the regulation goes into legal effect. In this way, litigation can be avoided.

We have already concluded that HELP rule no. 6 constitutes a rule of general application, thus satisfying the *first* part of the two-part "regulation" test. (See, above, pp. 175-178.) We now go on to conclude that HELP rule no. 6 also satisfies the *second* part of the two-part "regulation" test: it interprets, implements, and makes specific constitutional, statutory, and regulatory provisions enforced or administered by the Board. Thus, HELP rule no. 6 is a "regulation" as defined in the APA. We now proceed to discuss the next HELP rule, focusing on the question of whether or not it interprets, implements, or makes specific the law enforced or administered by the Board (*or* whether it governs the Board's procedure).

HELP rule no. 7: "Entry-level in a class series"

HELP rule no. 7 provides that a parallel Hispanic-only classification will be authorized only if the regular classification is "'entry' level, e.g., the first level in a class series." (Emphasis added.)¹⁷⁰

For the reasons discussed in analyzing the HELP rules already covered (especially HELP rule no. 6), the requirement that the classification under review with an eye toward possible creation of a parallel Hispanic-only classification be an "entry-level" classification is obviously a "regulation" within the meaning of the APA. (See, above, pp. 204-207.)

By way of background, we note that the term "class series" is defined in a duly adopted regulation--Title 2, California Code of Regulations, section 432:

"For the purpose of this article [Article 19 ('Transfer'), of Subchapter 1 ('General Civil Service Regulations'), of Chapter 1 ('State Personnel Board'), of Division 1 ('Administrative Personnel'), of Title 2 ('Administration')], a *class series* is any vertically related group of classes, covering the same occupational specialty and same program area, which constitute a primary promotional pattern for a specifically identifiable group of employees." (Emphasis added.)

A class series formerly used in many state law offices was Legal Counsel; Staff

December 14, 1993

Counsel I; Staff Counsel II; Staff Counsel III. "Legal Counsel" was the entry level class. Persons holding "Legal Counsel" positions could compete for promotion to Staff Counsel I, etc.

A significant feature of Title 2, California Code of Regulations, section 432 is that this regulatory definition applies by its terms solely to Article 19, and *not* to any of the other 21 articles contained in subchapter 1. By using the "class series" concept in the HELP context, the Board is thus illegally supplementing and interpreting duly adopted section 432.

Requesters also charge that the Board has improperly designated Legal *Analyst* rather than Legal *Assistant* as the entry level classification in the newly created HELP class "Legal Analyst-DOJ (Hispanic)." We understand requesters' concerns. However, OAL is not the proper forum for resolution of this claim, which seems in essence to allege misapplication of an underground regulation. This is a matter for the courts.

We thus conclude (1) that use of the criterion "entry-level in a class series" violates the APA, but that (2) designation of Legal Analyst as the entry level classification is not itself an "underground regulation."

We have already concluded that HELP rule no. 7 constitutes a rule of general application, thus satisfying the *first* part of the two-part "regulation" test. (See, above, pp. 176-179.) We now go on to conclude that HELP rule no. 7 also satisfies the *second* part of the two-part "regulation" test: it interprets, implements, and makes specific constitutional, statutory, and regulatory provisions enforced or administered by the Board. Thus, HELP rule no. 7 is a "regulation" as defined in the APA. We now proceed to discuss the next HELP rule, focusing on the question of whether or not it interprets, implements, or makes specific the law enforced or administered by the Board (*or* whether it governs the Board's procedure).

HELP rule no. 8: Oral Examination Scoring of Minorities

HELP rule no. 8 provides that (1) the Board, as a matter of policy, advises

December 14, 1993

members of oral panels conducting civil service examinations that if they are deliberating about the score to be given to an affirmative action candidate, they should award the higher score and (2) some panels ensure that all affirmative action candidates are assigned sufficiently high scores to make them "reachable."¹⁷¹

The Board "flatly and unequivocally" denies these allegations.

Under the circumstances presented in this proceeding, OAL declines to make a finding on these alleged rules. If, however, such rules did exist, they would clearly satisfy both prongs of the two-part "regulation" test.

HELP rule no. 9: Eleven Hispanic-only Classifications

HELP rule no. 9 provides that (as of late 1987)¹⁷² the following eleven Hispanic-only classifications are authorized for use by state agencies:

- Auditor I (Hispanic)**
- Correctional Counselor I (Hispanic)**
- Electrical Engineer (Hispanic)**
- Hazardous Materials Specialist (Hispanic)**
- Legal Counsel (Hispanic)**
- Medical Consultant I, Department of Health Services (Hispanic)**
- Programmer I (Hispanic)**
- Staff Counsel (Hispanic)**
- Staff Services Management Auditor (Hispanic)**
- Staff Toxicologist (Hispanic)**
- Waste Management Engineer (Hispanic).¹⁷³**

A "regulation" is (among other things) "every rule . . . adopted by any state agency to . . . *make specific* the law enforced or administered by it" (Government Code section 11342, subdivision (b).) Clearly, by specifying the particular Hispanic-only classifications that were to be created, the Board exercised its quasi-legislative power.¹⁷⁴ An analogous exercise of *legislative* power is the statute specifying which civil service classifications are to be

categorized for retirement benefit purposes, etc., as "peace officer" classifications.¹⁷⁵

HELP rule no. 9 implements, interprets, and makes specific Government Code section 19792, subdivision (a), which directs the Personnel Board to "develop, implement and maintain affirmative action . . . *guidelines*." (Emphasis added.) HELP rule no. 9 also implements the demonstration project statute, Government Code section 19600.

We have already concluded that HELP rule no. 9 constitutes a rule of general application, thus satisfying the *first* part of the two-part "regulation" test. (See, above, pp. 176-179.) We now go on to conclude that HELP rule no. 9 also satisfies the *second* part of the two-part "regulation" test: it interprets, implements, and makes specific constitutional, statutory, and regulatory provisions enforced or administered by the Board. Thus, HELP rule no. 9 is a "regulation" as defined in the APA.

We now proceed to discuss the next HELP rule, focusing on the question of whether or not it interprets, implements, or makes specific the law enforced or administered by the Board (*or* whether it governs the Board's procedure).

HELP rule no. 10 Legal Analyst-DOJ-Hispanic

HELP rule no. 10 provides that the Department of Justice is authorized (as of late 1989) by the Board to use the classification "Legal Analyst-DOJ-Hispanic."

HELP rule no.10 is a "regulation" for the same reasons rule no. 9 is a "regulation."

We now proceed to discuss the next HELP rule, focusing on the question of whether or not it interprets, implements, or makes specific the law enforced or administered by the Board (*or* whether it governs the Board's procedure).

HELP rule no. 11 Quick Placement Approach

HELP rule no. 11 provides that the following procedures shall apply to Hispanic applicants: continuous testing; instant eligible lists; and the rule of the list.

The "Quick Placement Approach" is fully described on p. 165. This rule is clearly a standard of general application, in that it applies to all applicants who fall within the informally adopted definition of Hispanic. HELP rule no.11 has clearly been adopted by the Board to "govern its procedure," within the meaning of Government Code section 11342, subdivision (b).

Further, Government Code section 18701 provides in part that the Board "shall prescribe . . . rules" to administer and enforce specified personnel statutes. HELP rule no. 11 clearly is a rule adopted in order to administer personnel statutes. HELP rule no. 11 was clearly adopted in order to implement section 18701.¹⁷⁶

Thus, HELP rule no. 11 is a "regulation."

Having concluded discussing the Personnel Board's HELP rules, we turn to the Department of Justice rules challenged in the request for determination.

Department of Justice

In applying the two-pronged "regulation" test to the challenged Department of Justice rules to see whether or not these provisions are "regulations," we will proceed as follows. First, we will list the challenged rules. Second, we will determine whether or not the rules are "of general application." Third, we will determine whether or not the rules found to be of general application also implement, interpret, or make specific laws administered by the Department.

DOJ rule no. 1: Affirmative Action Form

DOJ rule no. 1 requires that supervisors and managers provide ethnic and

gender information on all persons applying for, interviewing for, and selected for all departmental vacancies. Non-affirmative action hires must be justified in writing. This information must be entered onto a form, JUS 105, which is then forwarded to the appropriate division chief, who must sign the form to indicate his or her approval of the hire. If the hire is approved, it appears the statistical data on the form is then entered into a database which produces reports in compliance with federal and state legal mandates.

DOJ rule no. 2: "Hire Hispanic"

DOJ rule no. 1 provides that DOJ supervisors are being told they must "hire Hispanic" and that hiring personnel must justify why a Hispanic is not hired.

DOJ rule no. 3. Affirmative Action Plan's Definition of
"Underrepresented"

DOJ rule no. 3, found in the departmental Affirmative Action Plan, states that "underrepresented" means

"[i]nadequately represented in the work force of a particular activity. This term is used to describe the extent to which women and minorities are represented in particular grade levels and job categories. The percentage of women and minorities in the labor market is used as a standard to determination representation. For example, suppose there are 100 agents at an activity and 3% are black. However, the black labor market for agent positions at that particular activity is 6.6%. In this case, blacks are underrepresented in the agent classification."

DOJ rule no. 4: Perception of Ethnicity/Race

DOJ rule no. 4 provides that DOJ hiring personnel may, if necessary, make an educated guess concerning whether or not an applicant is an affirmative action candidate.

- Part One: Do the Challenged *DOJ* Rules Constitute Rules or Standards of General Application *or* Modifications or Supplements to Such Rules or Standards?

As stated earlier, 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.¹⁷⁷

In analyzing the challenged Personnel Board rules (above, pp. 176-179), we concluded that they constituted rules or standards of general application. For essentially the same reasons, we conclude that two of the four challenged Department of Justice rules are standards of general application. The other two challenged Department of Justice rules, we conclude, are *not* standards of general application. The reasons for these conclusions will be outlined immediately below. Concerning the two Justice rules determined to constitute standards of general application, we note that the related question of whether or not these rules are exempt from the APA *under the internal management exception* will be discussed below, at pp. 224-227.

DOJ rule nos. 1 and 3 are standards of general application: they apply to all members of several classes--all DOJ hiring officials, all DOJ employees, and all persons applying for DOJ positions. DOJ rule nos. 2 and 4 are not standards of general application: there is no general rule.

DOJ rule no. 2: "Hire Hispanic"

DOJ rule no. 1 provides that DOJ supervisors are being told they must "hire Hispanic" and that hiring personnel must justify why a Hispanic is not hired.

Requesters allege that, at the Department, affirmative action "goals" have

December 14, 1993

become "quotas," and that "supervisory personnel are being told that they must hire Hispanic."

Requesters cite as evidence:

- (1) a memorandum dated September 19, 1988, from Nelson Kempsey, Chief Deputy Attorney General, to Alfredo Terrazas, Chair, Hispanic Employees Advisory Committee, a body provided for in the Department Affirmative Action Plan (6/87), on the subject "Training and Development Assignment," and,
- (2) "the Department's requirement that hiring personnel justify why a Hispanic is not hired (see [Request's discussion of "Affirmative Action Appointment Audit Form])."¹⁷⁸

Specifically, Requesters argue that the following language in the memo constitutes an underground regulation:

"I have discussed this opportunity [to hire Hispanics from the legal analyst list] with the legal division chiefs, and have asked them to see that all interested Hispanic-surnamed applicants are interviewed for any vacancies to be filled, along with the *strongest possible encouragement to improve our situation.*" (Emphasis added.)

This rule has two separate parts. First, there is the material from the 1988 memo. Second, there is the justification element of the affirmative action form. This justification element of the form will be discussed under the heading "DOJ rule no. 1," below. Accordingly, we will limit our discussion here to the memo material.

According to Government Code section 19790, "[e]ach agency and department is responsible for establishing an effective affirmative action program." According to Government Code section 19794, ". . . the director of each department shall have the major responsibility for monitoring the effectiveness of the affirmative action program." Clearly, the Chief Deputy Attorney General, the second in command of the Department, cannot monitor the affirmative action

December 14, 1993

program without having the flexibility to communicate with departmental employees concerning duly-adopted affirmative action policies.

The Chief Deputy's use of the phrase "strongest possible encouragement to improve our situation" merely states a goal or aspiration. It is not a rule of general application. Therefore, the quoted language in the memorandum cannot constitute a "regulation"

DOJ rule no. 4: Perception of Ethnicity/Race

DOJ rule no. 4 provides that DOJ hiring personnel may, if necessary, make an educated guess concerning whether or not an applicant is an affirmative action candidate.

Requesters state that, at a meeting with representatives of the Attorney General's Office, they were "advised that the prohibitions on ascertaining race/ethnicity information did not preclude hiring personnel from rendering an educated guess as to whether the applicant was an affirmative action candidate and to make a hiring decision based thereon."¹⁷⁹ Requesters allege that this amounts to a statement of departmental policy which violates Government Code section 11347.5.

The Department responds:

"Because of requestors' views on affirmative action, it is difficult to be sure exactly what they were told. Beyond that, however, the language is *no more than a description of what actually takes place* in the mind of a person making a hiring decision. If he or she is interviewing an applicant with an Hispanic surname, the interviewer is likely to guess that the person is Hispanic and is an affirmative action candidate." (Emphasis added.)¹⁸⁰

We agree with the Department. Though requesters' allegations on this point are rather nebulous, rule no. 4 seems to be a factual statement. Federal and state employment discrimination law require employers to keep track of the ethnic and gender characteristics of their employees, applicants, etc. There would, of

December 14, 1993

course, be APA compliance problems (and other legal problems) if an agency adopted a uniform policy of solely hiring persons who were determined to be of a certain ethnic background (or backgrounds).

We conclude that DOJ rule no. 4 is not a standard of general application. It thus cannot be a "regulation."

Part Two: Do the Challenged *Department of Justice* Rules Interpret, Implement or Make Specific the Law Which the Agency Enforces or Administers or Which Governs the Agency's Procedure?

We will review challenged Department of Justice rule nos. 1 and 3, determining if they interpret, implement, or make specific the provisions of law which the Department enforces or administers.

DOJ rule no. 1: Affirmative Action Form

DOJ rule no. 1 requires that supervisors and managers provide ethnic and gender information on all persons applying for, interviewing for, and selected for all departmental vacancies. Non-affirmative action hires must be justified in writing. This information must be entered onto a form, JUS 105, which is then forwarded to the appropriate division chief, who must sign the form to indicate his or her approval of the hire. If the hire is approved, it appears the statistical data on the form is then entered into a database which produces reports in compliance with federal and state legal mandates.

Requesters claim that DOJ Form JUS 105, entitled "Affirmative Action Appointment Audit," not only constitutes an underground regulation, but also violates various statutes and regulations.¹⁸¹ The question of whether or not the form is inconsistent with various statutes and regulations will *not* be considered here: it is beyond the scope of this administrative proceeding under Government Code section 11347.5. OAL is required, however, to address the issue of whether or not Form JUS 105 violates the APA.

December 14, 1993

By way of background, we note that the form was created by the Department's Affirmative Action office to be used by supervisors and managers requesting final approval to hire a specific person to fill a vacancy. According to the Department's Affirmative Action Plan:

"Supervisors are *required* to submit this form in conjunction with a *Request for Personnel Action Form, JUS 103, for all personnel actions within the Department.*" (Emphasis added.)¹⁸²

After the division chief has approved the hire (it appears),¹⁸³ data from the form is entered into the Affirmative Action Information System, which "provide[s] the Affirmative Action Officer with the necessary data to *evaluate the performance of Division/Branches* in achieving their affirmative action goals." (Emphasis added.)¹⁸⁴ It thus appears that the form has three purposes. First, the form provides division chiefs with the sex, ethnicity, and disability (if any) of all persons who have applied for, been interviewed for, and been selected to fill all departmental vacancies. Second, the form requires division chiefs to approve each new hire by signing the form. Third, the form gathers hiring data for "statistical reporting purposes." The departmental Affirmative Action Officer uses the data to prepare quarterly reports indicating the number of new hires, etc., by classification, sex, and ethnicity.¹⁸⁵ These quarterly reports are routed to "Division/Branch chiefs" and to the Attorney General. Statistical reports required by state or federal law are also prepared, using data drawn from the forms.

The required form is printed on page 22 of the Affirmative Action Plan; instructions appear on page 23. The form appearing in the Plan is titled "Affirmative Action Appointment Audit" and bears the revision date 10/85. Requesters have included as Exhibit I to their request for determination a photocopy of pp. 22-23 of the Plan. They thus attack the 10/85 version of the form as an underground regulation. The 10/85 version of this form is included as Attachment A of this determination, following the endnotes.

The Department's response to the request states that the version of the form currently in use bears the title "Affirmative Action Information and Monitoring Form" and the revision date 5/89. This 5/89 version of the form is included as

Attachment B of this determination, following the endnotes. The 1985 and 1989 versions of the form appear very similar. The primary difference appears to be that the 1989 version requires more information, most notably in the area of written justification for certain appointments. Part 6 of the 1985 version is headed "*Justification* for non-affirmative action hire in a targeted classification (See instructions)." (Emphasis added.)¹⁸⁶ Part VI of the 1989 version is headed simply "Justification." Instructions on the reverse side of the 1989 form read "An explanation [sic] is *required* if the selection does not enhance the department's Affirmative Action goals." (Emphasis added.)

We note two differences between the 1985 and 1989 versions of the form. In contrast to the 1985 version of the form, the 1989 revision requires the supervisor to indicate if the proposed appointee originated from "Special programs (i.e., . . . HELP)." The 1985 justification blank (Part 6) provides a space approximately a quarter (1/4) inch high in which to provide the written justification. The 1989 justification blank (Part VI) provides a space about 3 inches high in which to write out the justification.

Several aspects of the form warrant discussion. First, the form requires departmental managers to justify *in writing* each hiring decision if (1) a targeted classification is involved (one in which labor force parity for any protected group has not been reached) and (2) the person selected is not a member of a protected group.¹⁸⁷ According to the departmental Affirmative Action Plan,¹⁸⁸ all supervisors filling vacancies have a continuing responsibility--"in those instances in which a decision is made *not* to hire an Affirmative Action candidate where there is an underrepresentation,¹⁸⁹ [to provide an] explanation for the selection. . . ." (Emphasis added.) The Plan continues: "The justification should explain why the Affirmative Action candidate was *not* selected." (Emphasis added.)

In *Union of American Physicians and Dentists v. Kizer*, the California Court of Appeal stated that "an informal rule which creates a presumption and then indicates how to rebut it is a regulation within the meaning of the APA."¹⁹⁰ The case from which this quotation is drawn involved a Medi-Cal rule which spelled out which level of payment physicians received when treating patients during return office visits. The informal (or "uncodified") Medi-Cal rule created a

presumption that physicians were, under these circumstances, ordinarily entitled only to the *lower* "limited examination" fee. This presumption, however, could be rebutted if the physician documented "a substantial change in condition or a substantial new illness or other circumstances requir[ing] extensive re-evaluation."¹⁹¹ If this documentation could be produced, the physician was entitled to the *higher* fee for an "intermediate examination." The *Kizer* Court held that this rebuttable presumption was a "regulation."

How does the *Kizer* rebuttable presumption principle apply to Form JUS 105? It seems to us that the informal (i.e., uncodified) rule reflected in this form involves two related presumptions. First, a hiring decision producing an "affirmative action hire" is presumed to be correct. If a Medi-Cal physician claims that she is entitled to the lower "limited examination" fee after treating a returning Medi-Cal patient, no additional documentation is required. If a Department of Justice manager proposes to make an "affirmative action hire", no additional documentation is required. The second presumption reflected in Form JUS 105 is as follows. If a hiring decision produces a "non affirmative action hire," however, then the manager is required to document the reasons for selecting that person. In the words of the *Kizer* Court, the departmental rule "creates a presumption and then indicates how to rebut it."

We conclude that this written justification rule is a "regulation." It is a standard of general application: it applies directly to all departmental managers and indirectly to all members of the general public seeking Department of Justice jobs. It has been adopted to implement, interpret, and make specific employment discrimination laws enforced by the Department. As stated in the Department's Response to the Request:

"The instructions on the back of JUS 105 state its purpose. 'In order to comply with Equal Employment Opportunity Commission guidelines on employment selection procedures, the Department [DOJ] must maintain records on sex and ethnic composition of its employees.'"

Similarly, the requirement that each manager justify in writing each "*non-affirmative action hire*" (emphasis added) implements state and federal equal

opportunity and affirmative action statutes and regulations. For instance, the requirement implements Government Code section 19790, which provides in part that "[e]ach agency and department is responsible for establishing an effective *affirmative action* program." (Emphasis added.)

Our conclusions concerning form JUS 105 may be summarized as follows. OAL takes no position on whether or not requiring use of the form was a sound policy decision. OAL takes no position on whether or not requiring the form conflicts with any provision of state or federal law.¹⁹² Indeed, collection of ethnic/gender data appears to be required by governing law. OAL does conclude, however, that *the written justification portion* of the form constitutes a "regulation" within the meaning of the two-pronged test spelled out in the key provision of Government Code section 11342, subdivision (b). The remainder of the form does not constitute a "regulation."

**DOJ rule no. 3. Affirmative Action Plan's Definition of
"Underrepresented"**

DOJ rule no. 3, found in the departmental Affirmative Action Plan, states that "underrepresented" means

"[i]nadequately represented in the work force of a particular activity. This term is used to describe the extent to which women and minorities are represented in particular grade levels and job categories. The percentage of women and minorities in the labor market is used as a standard to determine underrepresentation. For example, suppose there are 100 agents at an activity and 3% are black. However, the black labor market for agent positions at that particular activity is 6.6%. In this case, blacks are underrepresented in the agent classification."

Requesters state:

"This definition mixes apples and oranges. On the one hand it implies that one looks at the percentage of blacks in the labor market who [sic] could fill the job, but then states that the percentage is 6.6%. This

December 14, 1993

percentage [6.6%] is based on the civilian labor force, not on a determination of the percentage of blacks available for the occupation in issue [the qualified labor force]. This definition has not been promulgated as a regulation and therefore constitutes an underground regulation. Also, by use of the example, it is in conflict with section 547.31(f) of title 2 [of the California Code of Regulations]. . . ."¹⁹³

Subsection 547.31(f) provides:

"Substantial underutilization," means having a substantially disproportionate level of minorities, women, or disabled persons in a civil service classification, occupation, department or program area than would reasonably be expected by their availability. In determining substantial underutilization, the [State Personnel Board] shall consider the availability of minorities, women, or disabled persons *having the requisite skills* in those areas of California where the appointing powers can reasonably be expected to recruit [i.e., the qualified labor force]." (Emphasis added.)

The Department responds:

"Requestors [sic] complain about the definition of 'underrepresented' in DOJ's affirmative action plan. . . .

"Requestors [sic] disagree with the contents of the definition. The correctness of those contents is beyond the scope of this proceeding.

"More important, the definition is part of the DOJ affirmative action plan which was approved by the State Personnel Board pursuant to Government Code section 19792. . . . The purpose of the definition is to explain the term "underrepresented" used in the statement of goals and timetables found of pages 16 and 17 [of the Affirmative Action Plan]. The definition has no regulatory effect."

We agree with much of what both requesters and the Department have to say.

First, we agree with requesters that the definition seems to merge two legal

December 14, 1993

concepts that are properly kept distinct. As discussed above at some length, "qualified labor force" and "general work force" (or "civilian labor force") are two very different concepts, leading to dramatically different outcomes when applied to some particular situations, such as the availability of Hispanics qualified to fill state attorney positions. Some words and phrases in the plan's formal definition of "underrepresented" seems to presuppose applicability of the "qualified labor force" concept.

However, requesters correctly point out a significant discordant note: the definition cites the figure 6.6% as representing the "black labor market at [a] particular activity." As requesters suggest, 6.6% is exactly the 1980 U.S. Census figure showing the black percentage of the *general* California labor force. Should this example be read to mean that the general California labor force figure is the standard to be used in all instances to determine if a particular ethnic group is "inadequately represented in the work force of a particular [departmental] activity"? If the intent were to illustrate the contrasting characteristics of various regional, qualified labor forces, it might have been better to cite the segment of the labor force consisting of that portion of the African-American population legally qualified as peace officers in (1) Alameda County in contrast to (2) Modoc County.

Read in isolation, the definition is indeed subject to two contrasting interpretations. One interpretation would indicate that use of the *qualified* labor force concept is basic to determining whether or not underrepresentation exists. The second interpretation would indicate that, in all instances, the only proper basis for determining if underrepresentation exists is "labor force parity," that is, whether protected group representation in the office, classification, etc., faithfully mirrors that same group's representation in the *general* California labor force.

Second, we agree with the Department that we need to review the definition of underrepresented in the context in which it is used in the Plan. Careful review of pages 16-20 of the Plan leads to the conclusion that "the Department's long range goal is to obtain *California labor force parity* at *all* occupational levels." (Emphasis added.)¹⁹⁴ Specific goals have been established for various occupational categories, such as "professional." The Plan's statement of goals

December 14, 1993

and timetables, as approved by the State Personnel Board for 1986-87, indicates that there an LFP (labor force parity) deficiency of 7.1% for Hispanic males in the "professional" job category and an LFP deficiency of 5.1% for Hispanic females. The paragraph in the Plan which introduces the goals and timetables document further states:

"Note that where three or less persons are needed to reach *parity*, no annual percentage goals have been established. However, program managers and supervisors should be made aware of these deficiencies and make every effort to attain *labor force parity* for these groups."

Page 59 of the Plan states unequivocally that the "Department of Justice measures parity for an ethnic/sex group by comparing the group's percentage of the *statewide labor force* with its representation in an occupational category." (Emphasis added.) This same page lists Hispanic labor force parity as 17.2 % (the same figure used in the HELP program) and black labor force parity as 6.6%.

Thus, although the Plan's definition of "underrepresented" is not a model of clarity, it appears that when read in context it probably has the effect of designating general California "labor force parity" as the touchstone for determining whether a protected group is "underrepresented." Government Code section 19797 requires state agencies to prepare affirmative action plans. Clearly, by adopting its Affirmative Action Plan, the Department was implementing section 19797. Similarly, by formally defining the term "underrepresentation" in its Plan, the Department was interpreting, implementing and making specific the statutory term "underutilization" (as used in Government Code section 19791, subdivision (c)).

Third, we cannot agree with the Department that the Plan's definition of "underrepresented" has "no regulatory effect." The Department admits that the purpose of the definition is to explain the meaning of the term "underrepresented" as that term is used in the Plan. As noted above in the discussion of DOJ rule no. 1 (affirmative action form), pp.216-219, the term "underrepresented" is critical in the application of the requirement that supervisors provide written justification for their failure to hire an "Affirmative

December 14, 1993

Action candidate." Only in classifications, etc., in which a protected group is "underrepresented" does the written justification requirement come into play.

The definition of this key term thus *does* have regulatory effect. Whether a state agency rule constitutes a regulation within the meaning of Government Code section 11342, subdivision (b), depends not on the label the agency places on the rule, "but rather on its effect and impact on the public."¹⁹⁵ And, as noted above, it is well settled that creation of a presumption (and a method of rebutting it) is regulatory in nature. A member of the public who is a member of a protected group deemed by DOJ to be "underrepresented" in a particular classification is presumed to have been appropriately selected to fill a vacancy. On the other hand, selecting a member of the public who is *not* a member of a protected group that is deemed to be underrepresented means that the supervisor must take time to draft a written justification and be willing to run the risk that this justification will not be accepted by the reviewing authority.

We thus conclude that DOJ rule no. 4 is a "regulation."

The next section of this determination will discuss whether any exceptions to the APA apply to either the Board or the Department with regard to the challenged agency rules *which have been found to constitute "regulations."*

C.

DO THE CHALLENGED POLICIES FOUND TO BE "REGULATIONS" FALL WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS?

First, we will discuss exemption¹⁹⁶ issues which apply to both the Personnel Board and the Department of Justice. Then, we will discuss exemption issues which apply solely to the Personnel Board. Finally, we will discuss exemption issues which apply solely to the Department of Justice.

1. BOTH PERSONNEL BOARD AND DEPARTMENT OF JUSTICE

(a) Internal Management Exception

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.¹⁹⁷ However, rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.

Government Code section 11342, subdivision (b), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

"'Regulation' means 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, *except one which relates only to the internal management of the state agency.*" (Emphasis added.)¹⁹⁸

Grier v. Kizer provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (b), the *Grier* court states:

"*Armistead v. State Personnel Board* [citation] 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.] . . . [Citation; emphasis added by *Grier* court.]

December 14, 1993

"*Armistead* cited *Poschman v. Dumke* [citation], 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.' . . . [Citation.][¹⁹⁹]

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] 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. . . . "²⁰⁰

Board's HELP Program

The Board rules constituting the HELP program do not fall within the internal management exception. The *Armistead* Court held that a Board rule which applied solely to state employees did not fall within this exception. In the matter at hand, we are confronted with a Board rule which substantially impacts a much broader segment of the population.

Like the personnel rule at issue in *Armistead* (discussed previously), the HELP plan is designed for use by personnel officers and their colleagues in the various state agencies throughout the state, yet the HELP plan also touches a much broader population--that part of the *general* public that might want to apply for jobs in classifications covered by HELP program. Insofar as the HELP program

is functioning as intended, it is having an impact on hiring. For example, use of these procedures could cause [Hispanic] Applicant A to get a job rather than [a theoretically equally-qualified, but [non-Hispanic] Applicant B. Indeed, according to a recent Board report, non-Hispanic job applicants have sometimes been precluded from even *applying* for particular state jobs because the hiring agency failed to schedule a parallel open-to-all-comers examination at the time the Hispanic-only examination was scheduled.²⁰¹

Poschmann held that a rule limited in its direct effect to employees of one state agency was nonetheless subject to the APA because the rule concerned "a matter of *serious* consequence involving an *important public* interest." (Emphasis added.) In the HELP case, several matters of serious consequence involving important public interests are at stake: (1) remedying past discrimination against Hispanics;²⁰² (2) protecting the legitimate interests of non-Hispanic²⁰³ protected groups; (3) according appropriate weight to the interests of job applicants who are not members of protected groups; and (4) insuring domestic tranquility throughout California by avoidance of employment practices that "foment[] domestic strife and unrest."²⁰⁴

Department of Justice rules

The Department of Justice rules found to be "regulations" do not fall into the internal management exception for basically the same reasons that the HELP program does not fall within that narrow APA exception. The *Poschmann* case teaches that a rule directly affecting employees of only one agency does not fall within the internal management exception *if the rule concerns a matter of serious consequence involving an important public interest*. The affirmative action policies underlying the Department of Justice rules are matters of serious consequence involving important public interests: substantially the same interests identified above. As *Grier* states, ". . . even internal administrative matters do not per se fall within the internal management exception. . . ."

Furthermore, the Department of Justice rules effect not only DOJ employees, *but also members of the general public* who apply for positions at the Department. This key fact means that the DOJ rules cannot reasonably be characterized as relating "*only* to the internal management of the state agency." (Government

December 14, 1993

Code section 11342, subdivision (b).) Rules which impact a segment of the general public have, by definition, an *external* effect.

If the Department elects to adopt the challenged rules pursuant to the APA, this will give the public an opportunity to comment on the rules. If the rules are duly adopted, they then will be printed in the California Code of Regulations. Formal publication in this official compilation of state regulations will make it more likely that persons applying for jobs at DOJ will be aware of the existence of such rules.

This concludes the discussion of exemption issues which apply to both the Personnel Board and the Department of Justice.

2. PERSONNEL BOARD ONLY: THE HELP PROGRAM

Central to our analysis of the APA exemption issue is the fact that the legal status of the Personnel Board's HELP rules underwent a dramatic change on December 21, 1992. Pursuant to the demonstration project statute (Government Code section 19603), *the five-year HELP demonstration project expired on December 21, 1992.*²⁰⁵ The Board had previously, however, made the decision to continue to use the Hispanic-only classifications that were the key ingredient of HELP despite the fact that the demonstration project had expired by operation of law.²⁰⁶ Thus, we must divide our legal analysis into two parts.

First, we must determine whether or not HELP was effectively exempted from APA rulemaking requirements prior to December 21, 1992. Second, we must determine whether or not the rules contained in the HELP proposal and bulletin have been exempt from the APA during the period between December 22, 1992 and the date this determination is issued. The main difference between the two inquiries is that the Board's contention that the demonstration project statute "expressly" exempted the HELP rules from the APA is *not* pertinent to the post-expiration period (after December 21, 1992).

(a) Prior to Expiration of Demonstration Project

Government Code section 11346 provides that APA exceptions, to be valid,

must be expressly stated in statute. The Board argues that both section 3 of Article VII of the California Constitution and the demonstration project statute exempt HELP from the APA.

Theory of Exclusive Constitutional Jurisdiction over Classifications

In its Agency Response, the Board makes two closely related APA exemption arguments. The first argument centers on the Board's *constitutional* authority to prescribe civil service classifications. This first argument is a syllogism, consisting of a major premise, a minor premise, and a conclusion.

MAJOR PREMISE: All civil service classifications created by the Board are exempt from APA rulemaking requirements.²⁰⁷

MINOR PREMISE: The HELP program consists of a series of newly created classifications.

CONCLUSION: Therefore, the HELP program is exempt from the APA.

Though this syllogism appears logically correct, it cannot withstand close scrutiny. As will be discussed in more detail below, neither premise is true. A strikingly similar argument was rejected by the California Court of Appeal in 1991 in *Engelmann v. State Board of Education*.

As will be discussed in more detail below, the second exemption argument focuses on the demonstration project *statute*. This statute, the Board argues, "expressly" exempts duly announced demonstration projects not only from Civil Service Act provisions, but from *all* provisions of the Government Code, including the APA.

The first exemption argument states that the HELP program is exempt from the APA because the California Constitution grants *exclusive* authority over personnel classifications to the State Personnel Board. This argument states:

"Section 3 of Article VII of the California Constitution states in pertinent part: 'The [State Personnel Board] shall enforce the civil

December 14, 1993

service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications...' 'Classifications' means the classes of positions in the state civil service. (Gov. Code, Section 18800.)

"As requestors [sic] have noted, HELP consists of a new series of civil service classes to be filled by Hispanics. These classifications were adopted by a majority vote of the Board on June 2, 1987.

"In two cases the courts have found that certain regulations of the State Personnel Board were subject to the Administrative Procedures [sic] Act. *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198 held that the Administrative Procedures Act [sic] covered a section in the SPB Personnel Transactions Manual. *Ligon v. State Personnel Board* (1981) 123 Cal.App.3d 583, 588 held that the Act applied to a document entitled 'State Personnel Board Procedures Regarding Claims of Out-of-Class Experience.' Neither of these cases involved the adoption of classifications, and neither had reasons to consider the constitutional authority of SPB.

"A formal opinion of the Attorney General's office has concluded that the jurisdiction of the State Personnel Board is 'primary and exclusive' under the California Constitution in any matter involved in the examination and selection of civil service personnel. (56 Ops.Cal.Atty.Gen. 217 (1973).) Prior to 1970, the California Constitution provided that the State Personnel Board 'is vested with all of the powers, duties, purposes, functions, and jurisdiction which are now or hereafter may be vested in any other state officer or agency under...any and all...laws relating to the State civil service as said laws may now exist or may hereafter be enacted....' The Attorney General found that the 1970 constitutional amendment which replaced the language with the present language made no substantive change in the authority of the SPB.

"The California Supreme Court has acknowledged SPB's constitutional jurisdiction over classifications. (*Pacific Legal*

December 14, 1993

Foundation v. Brown (1981) 29 Cal.3d 168, 187, 192.)
State Personnel Board civil service classifications are not and have never been considered to be regulations subject to the Administrative Procedure Act. The State Personnel Board submits that nothing in the HELP program gives it a different legal status."

We must reject this argument for the following reasons:

- (1) Section 3 of Article VII of the California Constitution requires the Board to adopt "rules" (or "regulations") when enforcing civil services statutes; this section requires the Board's Executive Officer to administer civil services statutes under "the rules [regulations] of the board." No exception is made for rules prescribing classifications.
- (2) The fact that an agency has constitutional authorization to perform particular functions does not *ipso facto* exempt all aspects of the performance of these functions from APA compliance requirements. This "constitutionally exempt" argument was made recently to the California Court of Appeal. The Court firmly rejected the argument.
- (3) The theory that the Board has "primary and exclusive" jurisdiction over selection of civil service personnel (i.e., neither the Legislature nor any other agency can act in this area) has been rejected by the California Supreme Court. In addition, well-established rules of constitutional construction require that California constitutional provisions that allegedly restrict the plenary law-making authority of the Legislature be strictly construed so as to preserve the power of the Legislature.
- (4) According to the California Court of Appeal, the fact that the Board feels that classifications are not and have never been considered to be regulations subject to the APA is to be accorded "no significance."

December 14, 1993

- (5) Assuming for the sake of argument that classifications as such were exempt from the APA, this conclusion is of no assistance to the Board concerning numerous features of HELP which are clearly not classifications, such as the Quick Placement Program.

Reason No. 1: Section 3 of Article VII of the California Constitution

The Board's interpretation of Section 3, Article VII is without merit. Indeed, this imaginative interpretation would stand section 3 on its head. Significantly, the Board's Response did not quote the concluding phrases of the section 3. Read in its entirety, the thrust of section 3 is to *require* the Board to administer the civil service statutes by rule (i.e., by regulation).

Section 3 of Article VII of the California Constitution provides:

"(a) The board shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, adopt *other rules* authorized by statute, and review disciplinary actions.

"(b) The executive officer shall administer the civil service statutes under *the rules of the board.*" (Emphasis added.)

Section 3, subdivision (a), deftly outlines the three facets of the Board's power: (1) administrative, (2) quasi-legislative, and (3) quasi-judicial.

Administrative

Enforcing express statutory provisions can be described as "administrative" (or "executive") action. For instance, according to Government Code section 19574, a disciplinary action filed against a civil service employee "is valid only if a *written* notice is served on the employee prior to the effective date of the action" (Emphasis added.) The Board enforces this statutory requirement by requiring that agencies undertaking disciplinary action against employees provide employees with prior written notice. In this example of "administrative"

action, the Board simply enforces the express terms of an unambiguous statute.

Quasi-legislative

Both the California Constitution and the Government Code explicitly recognize, however, that the Board will frequently need to adopt regulations in order to interpret, implement, and make specific the statutes the Board is mandated to administer. The California Constitution, Article VII, section 3 expressly states that the Board "shall *prescribe* probationary periods and classifications [*and*] *adopt other rules . . .*" (Emphasis added.) The structure of this sentence--and similar language used in statutes--indicates that "prescribe" is intended to be synonymous with "adopt."²⁰⁸ In other words, the Board is expressly granted the power to adopt rules which prescribe probationary periods and classifications. Use of the word "shall" indicates that adoption of rules prescribing *probationary periods and classifications* is mandatory. The Board is also empowered to adopt rules on other civil service topics, subject to three conditions:

- (1) These "other" rules can be adopted (or prescribed) only if three of the five Board members vote in favor of them.
- (2) They can be adopted only if "authorized by statute." Rules concerning probationary periods and classifications are expressly authorized *by the Constitution*. The drafters of section 3, Article VII foresaw that rules on additional topics would be necessary. Rules on certain topics have been expressly forbidden by statute. For instance, Government Code section 19700 provides:

"The board, its executive officer, or any appointing power shall not adopt any rule, either written or unwritten,²⁰⁹ prohibiting the employment of any person in any state position who is otherwise qualified therefor, *solely because* of his or her *age*, except as provided in section 18932." (Emphasis added.)²¹⁰

- (3) These "other" standards/guidelines, etc. *must* be "adopted." The legal context in which the phrase "shall . . . adopt" appears

December 14, 1993

indicates that formal adoption of rules is what the drafters had in mind--adoption after public notice and comment and publication in the California Code of Regulations. True, the APA had not yet been enacted when the constitutional provision creating the Board was passed by the voters in 1934. Enacted in 1947, the APA was, however, a familiar feature of the legal landscape when the key constitutional provision was re-numbered and re-enacted by the voters in 1976.

As noted elsewhere, according to Government Code 11346, quasi-legislative actions taken by state agencies are subject to APA rulemaking requirements unless expressly exempted by statute. Creation of civil service classifications by the Board is a quasi-legislative action.²¹¹ The Board has not cited and we have not located any statute expressly exempting classifications in general from the APA. Absent an express exemption, there is no alternative but to conclude that creation of classifications is subject to the APA. The Public Utilities Commission and the Industrial Welfare Commission obtained express statutory exemptions from the newly enacted APA in 1946 and 1947, respectively. The Personnel Board did not.

Quasi-judicial

Finally, the Board is charged with reviewing disciplinary actions taken by particular agencies against individual employees.

Reason No. 2: *Engelmann* case rejected "constitutionally exempt" argument

The fact that an agency has constitutional authorization to perform a particular function does not *ipso facto* exempt all aspects of the performance of this function from APA compliance requirements. This "constitutionally exempt" argument was made recently to the California Court of Appeal in *Engelmann v. State Board of Education*. The State Board of Education argued that because the California Constitution authorized it to *select* public school textbooks, that the Legislature could not require the Board of Education to follow the APA in developing rules and procedures for selecting textbooks. The Court firmly rejected the argument.

December 14, 1993

The Personnel Board in this proceeding--like the State Board of Education in *Engelmann*--has argued that because it has constitutional authority to perform a particular function (in SPB's case, to "prescribe civil service classifications"), its authority is "primary and exclusive" and, therefore, the APA cannot apply to the exercise of this constitutionally granted power. The *Engelmann* Court rejected a remarkably similar contention. The Court distinguished the Board of Education's constitutional authority to make the ultimate selection of textbooks from *adopting rules for the selection of textbooks*. As the court stated:

" . . . once the Legislature does act to provide a procedure for textbook adoption [in the Education Code], the Board [of Education] must act under authority of those statutes. . . . [T]he Board is acting under the Education Code, not the California Constitution, when it adopts rules for the evaluation of textbooks. . . . [These textbook selection procedures and criteria] . . . consequently come within the APA definition of regulations."²¹²

The fundamental distinction here is between actually choosing textbooks (or actually creating classifications) and the procedures following in choosing textbooks (or creating classifications). The distinction is easy to see when one considers what the Personnel Board is really doing in this case. The Personnel Board is doing more here than merely adopting classifications. It is also implementing various Government Code provisions on demonstration projects *and affirmative action*, which incidentally involves the creation of classifications. The Legislature clearly has plenary power to require the Personnel Board to follow APA procedures when either (1) developing demonstration projects or (2) implementing affirmative action statutes. The Legislature clearly has plenary power to require the Personnel Board to follow APA procedures when creating new classifications. The Legislature has exercised this power by enacting the APA. The Personnel Board has a clear legal duty to comply with the APA.

In the *Engelmann* case, the Legislature did not actually choose any textbooks. In the matter at hand, the Legislature has not actually prescribed any classifications. *These fundamental and unavoidable facts compel the conclusion that no constitutional violation has occurred in either case.*

Reason No. 3: "Primary and exclusive" theory rejected by California Supreme Court; Constitutional limitations on legislative power strictly construed

The theory that the Board has "primary and exclusive" jurisdiction over selection of civil service personnel (i.e., neither the Legislature nor any other agency can act in this area) has been rejected by the California Supreme Court. In addition, well-established rules of constitutional construction require that California constitutional provisions that allegedly restrict the plenary law-making authority of the Legislature be strictly construed so as to preserve the power of the Legislature.

We will first discuss how the California Supreme Court has rejected the "primary and exclusive" jurisdiction thesis.²¹³ Then, we will discuss how constitutional limitations on legislative power are strictly construed.

In *State Personnel Board v. Fair Employment and Housing Commission*, the California Supreme Court ruled (1) that the California Fair Employment and Housing Act authorized the Fair Employment and Housing Commission to exercise jurisdiction over state civil service employees concurrently with the Personnel Board and (2) that such concurrent jurisdiction was not unconstitutional.^{214, 215} The Personnel Board had *unsuccessfully* argued that "article VII of the California Constitution affords it exclusive jurisdiction over all aspects of the examination and selection of civil service employees," and that this "jurisdiction cannot be shared concurrently with [the Department of Fair Employment and Housing and the Fair Employment and Housing Commission]"²¹⁶

The holding had the result of allowing two applicants for civil service positions to continue to pursue complaints filed with the Department of Fair Employment and Housing to the effect that they had been denied state civil service positions because of discrimination on the basis of physical handicap. The Court pointed out that the Commission would play the role of ". . . a neutral body, disinterested in the controversy between employer and employee," in situations in which Personnel Board ". . . standards are challenged as discriminatory. . . ."²¹⁷ If the

December 14, 1993

Court were to find the Commission's assigned statutory role unconstitutional, this would have the effect of allowing the Personnel Board to serve as both defendant and judge when Personnel Board rules were challenged.

We will now turn to the issue of how constitutional limitations on legislative power are *strictly* construed.

Well-established rules of constitutional construction require that California constitutional provisions that allegedly restrict the plenary law-making authority of the Legislature be strictly construed so as to preserve the power of the Legislature. According to the California Court of Appeal in a 1993 case:

"Our analysis of these constitutional issues is guided by well-established rules of constitutional construction in addition to the principles of statutory construction we have already described. ' " 'Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum is vested in the Legislature, and that body may exercise any and all legislative powers *which are not expressly, or by necessary implication denied to it by the Constitution....* [¶] Secondly, all intendment favors the exercise of the Legislature's plenary authority: If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. *Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language.* ' " ' (*California Teachers Assn. v. Huff*, supra 5 Cal.App.4th at p. 1531-1532, 7 Cal. Rptr.2d 699, quoting *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180, 172 Cal.Rptr. 487, 624 P.2d 1215; citations omitted; italics in original (PLF).)

"Moreover, there is a strong presumption in favor of the Legislature's interpretation of the Constitution. (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 692, 97 Cal.Rptr. 1, 488 P.2d 161.)

' "[W]here a constitutional provision may well have either of two

meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well nigh, if not completely, controlling. . . . [A]nd the courts should not and must not annul, as contrary to the constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the constitution." ' (*Ibid.*, quoting *San Francisco v. Industrial Acc. Com.* (1920) 183 Cal. 273, 279, 191 P. 26.)²¹⁸

Applying these principles to the Board's interpretation of Section 3, Article VII of the California Constitution, three conclusions emerge.

First, the words used in Section 3, Article VII do not expressly or by necessary implication strip the Legislature of the power to pass laws in the area of examination and selection of civil service personnel (including procedural requirements pertaining to the adoption of "rules" (or "regulations")). Significantly, the pivotal words "primary and exclusive" do not even appear in the constitutional provision. On the contrary, the Board's "primary" duty (primary in that it is listed first) is to "enforce the civil service *statutes*. . . ." (Emphasis added.)²¹⁹ Finally, there is no difficulty in harmonizing the APA with Section 3, Article VII. In *Engelmann*, the Court held that the Legislature could properly require the State Board of Education to follow APA rulemaking procedures in the adoption of textbook selection guidelines, so long as the actual selection of textbooks was left to the Board of Education. Similarly, in the matter at hand, it is wholly correct for the Legislature to require the State Personnel Board to adopt the HELP rules pursuant to the APA. Indeed, significant public interests are furthered by requiring the Personnel Board to comply with APA requirements, including public notice and comment, review by OAL, and publication in the California Code of Regulations.

Second, according to the 1934 ballot argument, ". . . the Legislature is *given a free hand* in setting up laws relating to personnel administration for the best interests of the State." (Emphasis added; quoted at greater length above, at pp. 158-159) This 1934 statement provides critical insight into the intent of the electorate in approving the constitutional amendment, which includes Section 3, Article VII. Clearly, the intent was to provide maximum flexibility to the Legislature in promoting efficiency and economy in state government, following

December 14, 1993

elimination of the "spoils system." Since 1934, a number statutes have been enacted which were designed to further the public interest.

In creating OAL in 1979, for instance, the Legislature declared the following:

"The language of many regulations is frequently *unclear* and unnecessarily complex. . . ."

"Substantial time and public funds have been spent adopting regulations, the *necessity for which has not been established.*"

"There exists no central office in state government with the power and duty to review regulations to ensure that they are written in a *comprehensible* manner, are *authorized by statute* and are *consistent with other law.*" (Government Code section 11340; emphasis added.)

Thus, the Legislature determined that it was in "the best interests of the State" that all Executive Branch agency regulations be subject to review for clarity, necessity, authority, and consistency.²²⁰

Since 1934, numerous remedial statutes providing for more open and responsive government have been enacted. These statutes include the Administrative Procedure Act, the Open Meetings Act²²¹ and the Public Records Act.²²² A common feature of these acts is that they open up the processes of governmental decision-making to the public. Surely, the Personnel Board would not contend--based upon this "primary and exclusive" constitutional jurisdiction thesis--that Board meetings concerning classification (and other matters involving the examination and selection of civil service personnel) are exempt from compliance with the Open Meetings Act, or that Board documents bearing on these subjects are exempt from disclosure under the Public Records Act! We are left with no reasonable alternative but to conclude that these Board matters *are* subject to the Open Meetings Act and the Public Records Act. And, if these other two remedial statutes apply, then the APA applies as well.

Third, the 1993 appellate opinion quoted above states that when the Legislature has by statute interpreted a particular constitutional provision, the meaning thus

given by the statute to the constitutional provision should be deemed "well-nigh, if not completely, controlling. . . ." Applying this principle to the matter before OAL, we observe that the Legislature has, in adopting the APA, in substance stated that Board rules interpreting, implementing, or making specific the laws enforced by the Board are subject to APA rulemaking requirements.

Legislative history documents associated with the enactment of Government Code 11347.5 make clear that the Legislature intended that section to codify the decision in *Armistead v. State Personnel Board*. *Armistead* held that *Personnel Board* rules were generally subject to the APA. APA compliance, *Armistead* continued, was not waived on the grounds the rules fell within the internal management exception if the rules (1) were designed for use by personnel officers in the various state agencies throughout the state and (2) concerned a matter of import to all civil service employees.²²³ Since they affect the general public, the HELP rules present an easier APA compliance question than did the termination rule in *Armistead*, which affected solely state employees.

There are additional indications that the Legislature does *not* interpret Section 3, Article VII as precluding legislative action in the area of "examination and selection of civil service personnel." First, the Board's Agency Response cites Government Code section 18800 as authority for the proposition that "classifications" means the classes of positions in the state civil service. Section 18880 (added by Statutes of 1945, chapter 123, p. 548, sec.1) goes on to provide that

"[t]he classes adopted by the Board *shall* be known as the Personnel Classification Plan of the State of California. The classification plan *shall* include a descriptive title and a definition outlining the scope of the duties and responsibilities for each class of positions." (Emphasis added.)

The Board correctly cites Government Code 18800 as in effect defining the term "classification." Section 18800 also instructs the Board as to what each classification prescribed by the Board shall contain: a descriptive title and a definition. Clearly, since 1945, the Board has been "prescribing" classifications in conformity with section 18800. The existence of section 18800--which tells the Board what to include in classifications--cannot be reconciled with the

December 14, 1993

contention that Section 3, Article VII *precludes* legislative action in the area of examination and selection of civil service personnel. The Board implicitly admits that the Legislature can act in this area by citing its obligation to comply with section 18800.

Also, Government Code section 18701 provides in part:

The board shall prescribe, amend, and repeal rules *in accordance with law* for the administration and enforcement of this part and other sections of this code over which the board is specifically assigned jurisdiction."
(Emphasis added.)

The emphasized phrase must be read to refer to statutory procedures concerning the adoption, amendment and repeal of agency rules (the APA). In adopting the HELP rules, the Board has clearly prescribed rules administering and enforcing Government Code section 18800. Under Government Code section 18701, such supplementary rules may only be adopted "in accordance with law [i.e., the APA]." As the California Supreme Court recognized in 1946, the Board will periodically need to revise its rules to reflect its experience in administering the Civil Service Act:

"It is to be expected, and *it is a fundamental and desirable purpose of delegated rule-making power, that the board, as it gains experience in the practical operation of its rules, will from time to time amend such rules, better to effectuate the purposes of the act.*"²²⁴

We conclude this portion of the analysis as follows. Applying the principles contained in the 1993 Court of Appeal opinion, we conclude that California Constitution Section 3, Article VII cannot reasonably be read to preclude legislative action in "any matter involving the examination and selection of civil service personnel" (including creation of classifications). The plain language of section 3, Article VII fails to support this Board contention. The 1934 ballot argument supporting section 3, Article VII belies the contention. And, the Legislature has enacted statutes which in effect adopt an interpretation of section 3, Article VII which permits legislative action construing the constitutional terms and requiring the Board to follow particular procedures when adopting

rules implementing the Civil Service Act (i.e., the APA, the Open Meetings Act, etc.).

Reason No. 4: Rulemaking agency's administrative interpretation that APA does not apply entitled to no weight

The Board asserts: ". . . State Personnel Board civil service classifications *are not and never have been considered* to be regulations subject to the Administrative Procedure Act." (Response, p. 2; emphasis added.) A strikingly similar contention was dealt with in *Engelmann v. State Board of Education*.

According to the *Engelmann* Court, the State Board of Education asserted that:

" . . . since '*nobody*' has ever considered the Board's procedure for selecting textbooks to be covered by the APA, we should defer to this inchoate administrative '*noninterpretation*.' [Citation omitted.]"²²⁵
(Emphasis added.)

The Court rejected this contention, stating:

" . . . we accord no significance to the Board's '*administrative interpretation that the APA is inapplicable, since that is the very problem the Legislature sought to remedy with the APA. (Armistead, supra, 22 Cal.3d at p. 205, 149 Cal.Rptr. 1, 583 P.2d 744.)*'"²²⁶

Following *Engelmann*, we reject this contention was well. The Personnel Board's "*inchoate administrative 'noninterpretation'*" that classifications are not subject to the APA is entitled to no weight.

Reason No. 5: Even if true, "classifications are exempt" theory does not immunize non-classification elements of HELP from APA

Assuming for the sake of argument that classifications as such were exempt from the APA, this conclusion is of no assistance to the Board concerning numerous features of HELP which are clearly not classifications, such as the Quick Placement Program.

Theory that demonstration project statute "expressly" exempts projects from APA

The second exemption argument states that the HELP program is exempt from the APA because, in addition to SPB's constitutional authority, *the statute authorizing the HELP program exempts it from the APA*. The Board states:

"In 1980 the Legislature authorized the State Personnel Board to create certain demonstration projects consistent with its constitutional authority. The Legislature took care to provide that nothing in this legislation or in the demonstration projects shall 'infringe upon or conflict with the merit principle as embodied in Article VII of the California Constitution' or upon 'the merit principles of the civil service system.' (Government Code section 19600.) The Legislature then sets out in detailed terms how these demonstration projects were to be developed and approved. (Government Code section 19600 et seq.)

"As part of its grant of authority, the Legislature exempted these demonstration projects from other provisions of the Government Code. The specific language, in Government Code section 19600, states: '[T]he conducting of demonstration projects shall not be limited by any lack of specific authority under this code to take the action contemplated, or by any provisions of this code or any rule or regulation prescribed under this code which is inconsistent with the action....' This language was enacted after Government Code section 11342, and well after its predecessor section 11371. Thus, the exemption is clearly applicable to the Administrative Procedure Act.

"The HELP program is, of course, one of the demonstration projects developed pursuant to this statute. (Requestors' [sic] Exhibit A.) HELP is exempt from the Administrative Procedure Act under this statute as well as the Constitution.

December 14, 1993

"SPB also notes that Government Code section 11346 provides for exemptions from the Administrative Procedure Act if stated 'expressly.' The State Personnel Board submits that the language of section 19600 constitutes a very express exemption from not only the Administrative Procedure Act, but also from any other provision of the Government Code.

"Government Code section 19600 et seq. also provides for its own hearing procedure. In both cases in which the courts have applied the Administrative Procedure Act to SPB regulations, the courts were concerned that without the Act there would be no procedure whereby the people to be affected could be heard on the merits of the proposed rules. (*Armistead v. State Personnel Board*, supra. 123 Cal.App.3d at 588.) Government Code section 19602, however, requires that for demonstration projects such as HELP there be both notification of affected employees six months in advance and public hearings before the projects goes into effect. In addition the plan must be submitted to the Legislature. SPB complied with these requirements in establishing the HELP project.

"The existence of this notice and hearing procedure justifies the Legislature's exemption of these demonstration projects from the Administrative Procedure Act. Without the exemption, each project would be subjected to duplicate notice and hearing procedures, for no purpose and with great loss of time. In Government Code section 19602, however, the Legislature gave the protection, otherwise afforded by the Administrative Procedure Act, to interested parties and the public. The State Personnel Board submits that the Legislature's intent in this matter is unmistakable, and that these projects are not subject to review under the Administrative Procedure Act."

OAL cannot accept this *second* exemption argument, either. The cited demonstration project statutory language does not constitute an "express" exemption. The statutory argument proves too much: if the cited language is read to exempt demonstration project activities from the APA, it must also be

December 14, 1993

read to exempt project-related activities from the Public Records Act and the Open Meetings Act! A strikingly similar argument was rejected by the California Court of Appeal in 1993, in *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Coalition)*.

We reject this argument for the following specific reasons:

- (1) Government Code section 19600 does not "expressly" exempt demonstration projects from the APA within the meaning of Government Code section 11346.
 - (a) It does not contain explicit APA exemption language.
 - (b) Read in context, the legislative intent underlying the demonstration project statute was to exempt demonstration projects from *personnel* statutes--not from numerous often unrelated Government Code sections.
 - (c) Taken seriously, the Board's argument would lead to the absurd consequence that Board activities related to demonstration projects are exempt, not only from the APA, *but also from the Open Meetings Act and the Public Records Act*.
- (2) Construing the APA in such a way as find the HELP rules exempt from public notice and comment requirements, etc., would defeat the two primary purposes of the APA, *meaningful* public participation and *effective* judicial review.
- (3) Under Government Code section 11346, the presence of additional notice and hearing procedures in section 19600 *cannot* be interpreted as evidence of legislative intent to exempt demonstration projects from the APA.
- (4) The Personnel Board has acquiesced in the idea that demonstration projects are subject to the APA by adopting demonstration projects

December 14, 1993

rules pursuant to the APA; it has acquiesced in the idea that *affirmative action* guidelines are subject to the APA by adopting AB 3001 (affirmative action in order of layoff) rules pursuant to the APA.

Reason no. 1 No "express" exemption in Government Code section 19600

The governing statute here is Government Code section 11346, which provides:

"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 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.)²²⁷

The APA applies unless a statute "expressly" supersedes or modifies it. In other words, APA exemptions must "express" in order to be legally effective.

According to the California Court of Appeal, "expressly" means "in an express manner; in direct or unmistakable terms; explicitly; definitely; directly."²²⁸

Similarly, "express" is defined by the California Court of Appeal to mean:

"Clear; definite; explicit; unmistakable; not dubious or ambiguous. . . .
Declared in terms; set forth in words. Directly and distinctly stated. . . .
Made known distinctly and explicitly, and not left to inference. . . .
Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with 'implied.'²²⁹

Black's Law Dictionary defines "express authority" as:

December 14, 1993

"authority given in direct terms, definitely and explicitly, and *not left to inference or implication*, as distinguished from authority which is general, implied, or not directly stated or given." (Emphasis added.)

If the Legislature had intended to grant the Board an exemption from APA rulemaking requirements, the idea, as Justice Frankfurter said, "is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it."²³⁰

When the Legislature wants to expressly exempt an agency from the APA, it knows what to say.²³¹ As an example of an express APA exemption, the California Court of Appeal has cited Labor Code section 1185, which provides:

"The orders of the [Industrial Welfare Commission] 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.*"²³² [Emphasis added.]

For an example closer to home, we recall a provision of the Board's own enabling act, Government Code section 19582.5, which provides in part:

". . . Precedential decisions [of the Personnel Board] *shall not be subject to Chapter 3.5, (commencing with Section 11340) of Part 1 of Division 3 [the APA].*" (Emphasis added.)

The 1991 case of *Engelmann v. State Board of Education*, which involved the precise issue of the meaning of "expressly" for purposes of Government Code section 11346, makes it clear that California courts will strictly enforce this APA provision.

The *Engelmann* court held that:

". . . Government Code [section 11346] allows other statutes to preempt it

December 14, 1993

only where they are subsequently enacted and do so expressly."²³³

Having generally reviewed the meaning of "expressly" in Government Code section 11346, we will turn to the Board's specific argument: that one of the demonstration project statute provisions contains an express APA exemption.

The Agency Response quoted part of one sentence from Government Code section 19600, the provision which allegedly exempts demonstration project activities from the APA. Quoted in full, section 19600 provides as follows:

"The board may, directly or through agreement or contract with one or more agencies and other public and private organizations, conduct and evaluate demonstration projects.

"Nothing in this section shall infringe upon or conflict with the merit principle as embodied in Article VII of the California Constitution, nor shall any project undertaken pursuant to this act conflict with, or infringe upon the merit principles of the civil service system.

"Subject to the provisions of this section, the conducting of demonstration projects shall *not be limited by* any lack of specific authority under this code to take the action contemplated, or by *any provision of this code* or any rule or regulation prescribed under this code *which is inconsistent with the action*, including any law or regulation relating to any of the following:

- "(a) The methods of establishing qualification requirements for, recruitment for, and appointment to positions.
- "(b) The methods of classifying positions and compensating employees.
- "(c) The methods of assigning, reassigning, or promoting employees.
- "(d) The methods of disciplining employees.

December 14, 1993

- "(e) The methods of providing incentives to employees, including the provision of group or individual incentive bonuses or pay.
- "(f) The hours of work per day or per week.
- "(g) The methods of involving employees, labor organizations, and employee organizations in personnel decisions.
- "(h) The methods of reducing overall agency staff and grade levels." (Emphasis added.)

Having read the section in its entirety, two points immediately become clear: (1) the typical express exemption language cited by the California Court of Appeal is missing; (2) the focus instead appears to be on freeing the Board from the substantive legal restrictions imposed by existing personnel statutes and regulations. The legislative intent to free the Board from existing laws governing the substance of personnel policy is underscored by the concluding provision, items (a) through (h), *all of which are substantive personnel provisions*.

True, the section uses the phrase "under this code." However, the Code involved is the California Government Code, a very large component of California statutory law, which takes up *twenty* volumes of West's Annotated California Codes. The phrase "under this code" is thus not much different in effect than the phrase "notwithstanding the conflicting provisions of any other state law." The meaning of this latter phrase--found in former Government Code section 54958--was litigated in the case *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*.²³⁴ Former Government Code section 54958 had the literal effect of forbidding local government agencies from meeting *privately* with their attorneys on litigation matters. It conflicted directly with Evidence Code provisions assuring confidential lawyer-client conferences. Interpreted with wooden literalism, the former Government Code provision meant that local agencies could not meet confidentially with their lawyers: it appeared to override "conflicting provisions" in the Evidence Code.

The court stated the issue as follows:

December 14, 1993

"whether the public meeting requirement of [Government Code] section 54953 abrogates by implication the statutory policy assuring opportunity for private legal consultation by public agency clients; or in equivalent terms, whether the Brown Act [including section 54953] supplies *unmistakable evidence of legislative intent* to abolish the statutory policy." (Emphasis added.)

The following analysis in *Sacramento Newspaper Guild*, though technically applying the doctrine of repeal by implication, is pertinent here in that it is instructive in how to discern the true legislative intent underlying sweeping phrases such as "under this code" or "notwithstanding the conflicting provisions of any other state law." The *Sacramento Newspaper Guild* court stated:

"When a later statute supersedes or substantially modifies an earlier law but without expressly referring to it, [courts have often said that] the earlier law is repealed or partially repealed by implication. The courts [at the same time] assume that in enacting a statute the legislature was aware of existing, related laws and intended to maintain a consistent body of statutes. [Citations.] Thus [reconciling these two principles, courts have concluded that] *there is a presumption against repeals by implication; they will occur only where the two acts are so inconsistent that there is no possibility of concurrent operation, or where the later provision gives undebatable evidence of an intent to supersede the earlier*; the courts are bound to maintain the integrity of both statutes if they may stand together. [Citations.]" (Emphasis and brackets added.)

The *Sacramento Newspaper Guild* Court decided that it could not hold that the Legislature had intended to abrogate the Evidence Code provisions unless convinced that the Legislature had "indulged in a knowing choice between two competing public interests; that it adopted the Brown Act with *unmistakable intent* to abolish the values inherent in the lawyer-client privilege of local boards of government." (Emphasis added.)²³⁵ The Court determined that the language of the Brown Act was insufficient to evidence unmistakable legislative intent to override the Evidence Code. Also, the legislative history of the Brown Act "gave no clue" that the Legislature had even considered its interplay with the statutory lawyer-client privilege. Finally, the Court noted, the two enactments

December 14, 1993

were capable of concurrent operation: it was possible to carry out both statutes.

The APA exemption issue involving Government Code section 19600 is remarkably similar in its essentials to the facts of the *Sacramento Newspaper Guild* case. Evidence of legislative intent to exempt the Board's demonstration project activities from the APA is "far too thin." Nothing in section 19600 itself supports the exemption contention. Indeed, reading all of section 19600 suggests legislative focus was limited to substantive personnel laws. Other provisions in the demonstration project chapter underscore the limited scope of legislative intent. For instance, Government Code section 19600.1 defines "demonstration project" as follows:

". . . a project conducted by the State Personnel Board, or under its supervision, to determine *whether a specified change in personnel management policies or procedures* would result in improved state personnel management." (Emphasis added.)

Further, the Board cites nothing in section 19600's legislative history which would tend to support the exemption contention. OAL's independent review of the pertinent legislative history documents yielded nothing supportive of the Board's contention. On the contrary, the legislative history documents tend to support the perception that the bill's intent was to allow the Board to design innovative demonstration projects, free of the constraints ordinarily imposed by substantive personnel statutes and regulations.

In short, the Board's arguments concerning section 19600 fall far short of demonstrating "unmistakable" or "undebatable" legislative intent to exempt demonstration projects from the APA.

Finally, the Board has failed to demonstrate that the APA and the demonstration project statute are "so inconsistent that there is no possibility of concurrent operation." Since the Board has, as will be noted below, adopted regulations to implement a different demonstration project, there is obviously a possibility of concurrent operation of the APA and the demonstration project statute.

Finishing our discussion of "Reason no. 1 (no"express" exemption in

Government Code section 19600), we conclude that the demonstration project statute does not constitute an "express" APA exemption.

Reason no. 2 Finding Exemption Would Defeat General APA Goals

Construing the APA in such a way as find the HELP rules exempt from APA public notice and comment requirements, etc., would defeat the two primary purposes of the APA, *meaningful* public participation and *effective* judicial review.

According to the California Court of Appeal, a statute should be construed with a view toward promoting rather than defeating its general purposes.²³⁶ Also, the court states that it is proper consider the consequences that will flow from a particular interpretation. Here, we are (in part) construing the rulemaking portion of the APA.

What are the general purposes of the APA? The California Court of Appeal describes the APA as having "dual objectives--meaningful public participation and effective judicial review."²³⁷ Meaningful participation and effective judicial review "rest upon the assumption that a body of relevant evidentiary material will be compiled at the hearing, considered by the agency in formulating its order, preserved by it and transmitted to the court for the latter's use when and if review is sought."²³⁸

First, we will discuss the APA objective of meaningful public participation in agency rulemaking. Would this objective be promoted--or would it be frustrated--if we were to find the HELP program exempt from APA rulemaking requirements? At this point, we should also recall 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 [citing Armistead], . . . any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." (Emphasis added.)*²³⁹

In order to determine whether or not finding HELP exempt would promote or (on the other hand) frustrate the objective of meaningful public participation, we need to look closely at the features of the HELP program and at the employment discrimination laws which govern such programs. One element of governing employment discrimination law is particularly pertinent. To be specific, decisional law applying the California Constitution's Equal Protection Clause requires that a "race conscious" classification be designed so as to minimize its effect upon "the class to be *burdened* by the classification." (Emphasis added.)²⁴⁰

A key advantage of the APA rulemaking process is full involvement by the public in the policy formation process. The APA requires public notice of the proposed agency action by publication in the California Regulatory Notice Register²⁴¹ a full 45 days in advance of the public hearing.²⁴² This statewide official publication is then picked up by private legal publishers and database services for even wider distribution to additional members of the public. By contrast, notice concerning items on the agenda of the Personnel Board is *not* published in the Notice Register. Neither legal research nor the record before us in this determination proceeding has revealed the notice period ordinarily followed by the Personnel Board in adopting non-APA rules, guidelines, etc. The customary public notice period may, however, be as short as 10 days.

The APA requires each agency to make the following declaration in the 45-day public notice:

". . . the adopting agency must determine that no alternative considered by the agency would be more effective in carrying out the purpose for which the action is proposed or would be as effective and *less burdensome to affected private persons* than the proposed action." (Emphasis added.)²⁴³

This statutory provision is intended to focus the attention of both agency and public on development of less burdensome alternatives to the proposed regulation which would accomplish the same policy objective. Often, members of the public submit comments suggesting alternative methods of attacking the problem. Then, at the conclusion of the APA adoption process, the agency is

required to include in the Final Statement of Reasons:

"A determination with supporting information that *no alternative considered by the agency* would be more effective in carrying out the purpose for which the regulation is proposed or *would be as effective and less burdensome to affected private persons* than the adopted regulation." (Emphasis added.)²⁴⁴

The APA's *post*-hearing change requirements also significantly benefit the public. Substantive changes to the text of the rule proposed in the original 45-day notice cannot be adopted by the rulemaking agency until the public has been afforded an additional 15-day comment period. Since *post*-hearing changes often materially alter the proposed rule, this additional notice requirement does much to promote meaningful public participation.

Let us assume that the HELP program had been proposed pursuant to the APA (45 days notice, etc.). If this had occurred, representatives of any groups that felt burdened by creation of Hispanic-only civil service classifications (possibly other minority groups), could have voiced their concerns to the State Personnel Board, possibly requesting re-design of the proposal to accommodate their interests.

Under the APA's administrative record requirements, the adopting agency must summarize and respond in writing to each public comment.²⁴⁵ Acting under the APA, the adopting agency must either modify the proposal to accommodate public concerns or provide written reasons for rejecting the comment.²⁴⁶ After the rulemaking proposal is filed with OAL by the adopting agency, OAL is charged with reviewing these public comment summary-and-response documents.²⁴⁷

If the agency fails to respond to a public comment that raises a significant legal problem pertinent to the proposed regulation (such as alleged inconsistency with a statute), OAL will disapprove the regulatory proposal for lack of compliance with the summary-and-response requirement, returning the proposal the adopting agency to remedy the problem (i.e., furnish a response). If the adopting agency then adequately responds to the public comment and no other APA problem is

December 14, 1993

present, OAL will approve the regulatory proposal.

If a public comment has alleged that an element of the regulatory proposal cannot be reconciled with (for instance) a statute, and the agency *has* properly summarized and responded to the comment, OAL will analyze the legal question. If OAL then determines that the commenter has correctly identified a consistency problem, OAL will disapprove the proposed regulatory action. At this juncture, the adopting agency has the options of (1) dropping the provision found to be inconsistent with governing law and proceeding with the remainder of the proposal or (2) seeking review of OAL's disapproval by the Governor²⁴⁸ or by the courts.²⁴⁹ One purpose of the APA public comment and OAL review requirements, however, is to decrease the likelihood of litigation over a newly adopted regulation by increasing the chances that important public concerns and significant legal issues are fully considered *before* the new regulation takes effect.

WE CONCLUDE THAT FINDING THE HELP PROGRAM EXEMPT FROM APA RULEMAKING REQUIREMENTS WOULD *NOT* PROMOTE THE "MEANINGFUL PUBLIC PARTICIPATION" GOAL OF THE APA. Finding the HELP program to be exempt would make it more difficult for a group which perceived itself to be burdened by the HELP program to fully present and obtain careful consideration of objections, alternative proposals, etc.²⁵⁰

Further, we note that significant changes were made to the HELP program *at the Board's adoption hearing*. So far as we can tell from the record before us, no additional notice to the general public was provided concerning these post-hearing changes.²⁵¹ Had APA procedures been followed, a 15-day public notice period would have followed. Interested parties would have had two weeks to analyze the proposed changes, and to prepare written comments. The Board would then have been required to summarize and respond to these comments. This additional public comment opportunity would very likely have improved the quality of the HELP rules.

Especially when dealing with sensitive and complex topics such as affirmative action, it is desirable for government agencies to obtain the maximum degree of

December 14, 1993

input from all segments of the effected public. As Justice Friedman stated in *California Optometric Association v. Lackner*:

"Aside from statutory procedural directions, *most mortals, including those in government, need all the wisdom they can get.* Administrators may indulge in rulemaking with fair assurance of procedural legality by inviting as much public participation as time and staff permit." (Emphasis added.)²⁵²

Underlying the HELP program are complex, controversial²⁵³ policy and legal issues. For instance, some observers would attack the program as "reverse discrimination." On the other hand, as the leading treatise on employment discrimination law pointed out in 1983:

"[t]he rubric of 'reverse discrimination' begs the very question at issue: May employers lawfully consider race, sex, religion, national origin when making hiring and promotion decisions? Once this question is asked, others immediately arise: If race may be considered, may it be considered only to remedy identified past discrimination? Must such discrimination have been committed by the employer in question, or can the discrimination have been committed by society in general? May racial preferences be used by an employer or institution, with no record of discrimination itself, to remedy societal discrimination by giving preferential treatment to people who were never themselves the judicially determined victims of discrimination? And, finally, if race may be a factor in employment decisions, how much of a factor? For how long? In what situations?

"The complexity of these issues is reflected in the opacity and multiplicity of the legal decisions involving them. But because the reverse discrimination area is one where law, morality and public policy converge,^[254] it is to be expected that judges are no more able to deliver a final verdict than are we. [Fn. omitted.]"²⁵⁵

APA rulemaking procedures are well adapted to maximizing public participation in sensitive and complex administrative policy making efforts. Indeed, it is

December 14, 1993

precisely in these particularly complicated and controversial rulemaking projects that is most important to utilize full-dress public notice and comment procedures. Maximizing public participation not only serves basic democratic values, but also often facilitates enforcement of the rules ultimately adopted.

The significant advantages of public participation in rulemaking are well summarized in an opinion of the United States Court of Appeals for the District of Columbia Circuit, a court recognized for expertise in administrative law.²⁵⁶ The case before the court involved an informally issued agency rule which was inconsistent with prior judicial interpretation of the underlying statute. The federal appeals court stated:²⁵⁷

"The Assistant Secretary should not treat the procedural obligations under the APA as meaningless ritual. Parties affected by the proposed legislative rule are the obvious beneficiaries of proper procedures. Prior notice and an opportunity to comment permit them to voice their objections before the agency takes final action. Congress enacted 5 U.S.C. section 553 in part to "afford adequate safeguards to private interests." H.R. 1203, 79th Cong., 1st Sess. (Comm. Print June, 1945) (quoting S. Doc. 8, 77th Cong., 1st Sess. 103 (1941) (Final report of Att'y General's Comm. on Ad. Proc.)), reprinted in S. Doc. 248, 79th Cong., 2d Sess. 20 (1946) (official legislative history of the Administrative Procedure Act). Given the lack of supervision over agency decisionmaking that can result from judicial deference and congressional inattention, see Cutler & Johnson, *Regulation and the Political Process*, 84 Yale L.J. 1395 (1975), this protection, as a practical matter, may constitute an affected party's only defense mechanism.

"An agency also must not forget, however, that it too has much to gain from the assistance of outside parties. Congress recognized that an agency's "knowledge is rarely complete, and it must learn the . . . viewpoints of these whom the regulation will affect. . . . [Public] participation . . . in the rule-making process is essential in order to permit administrative agencies to inform themselves" H.R. 1203, 79th Cong., 1st Sess. (Comm. Print June, 1945) (quoting S. Doc. 8, 77th Cong., 1st Sess. 103 (1941) (Final report of Att'y General's Comm. on Ad.

Proc.)), reprinted in S. Doc. 248, 79th Cong., 2d Sess. 20 (1946). Comments from sources outside of the agency may shed light on specific information, additional policy considerations, weaknesses in the proposed regulation, and alternative means of achieving the same objectives. See *National Petroleum Refiners Association v. FTC*, 482 F.2d 672, 683 (D.C.Cir.1973), *cert. denied*, 415 U.S. 951, 94 S.Ct. 1475, 39 L.Ed.2d 567 (1974). By the same token, public scrutiny and participation before a legislative rule becomes effective can reduce the risk of factual errors, arbitrary actions, and unforeseen detrimental consequences. See Freedman, *Summary Action by Administrative Agencies*, 40 U.Chi.L.Rev. 1, 27-30 (1972).

"Finally, and most important of all, highhanded agency rulemaking is more than just offensive to our basic notions of democratic government; a failure to seek at least the acquiescence of the governed eliminates a vital ingredient for effective administrative action. See Hahn, *Procedural Adequacy in Administrative Decisionmaking: A Unified Formulation* (pt. 1), 30 Ad.L.Rev. 467, 500-04 (1978). Charting changes in policy direction with the aid of those who will be affected by the shift in course helps dispel suspicions of agency predisposition, unfairness, arrogance, improper influences, and ulterior motivation. Public participation in a legislative rule's formulation decreases the likelihood that opponents will attempt to sabotage the rule's implementation and enforcement. See Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U.Pa.L.Rev. 540, 541 (1970). See generally *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 & n. 19, 71 S.Ct. 624, 648-649, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring)."²⁵⁸ (Emphasis added.)

We now turn to the second APA objective, "effective judicial review." If we were to find the HELP program exempt from the APA, would that finding promote--or frustrate--this second APA goal? Again, we look closely at HELP, in its legal context. As noted above, effective judicial review depends primarily upon whether or not a full administrative record has been developed by the adopting agency. As the Board has pointed out in its February 1993

December 14, 1993

Memorandum, U.S. Supreme Court decisions applying the federal Equal Protection Clause require race conscious affirmative action plans to have a "firm basis."

This past summer, in *Shaw v. Reno*, the U.S. Supreme Court reiterated that--for an express racial classification to pass muster under the federal Equal Protection Clause--the State must "have a *strong* basis in evidence" (emphasis added).²⁵⁹ In the administrative regulation context, such evidence is ordinarily found in the administrative (or rulemaking) record. Indeed, the current APA requires a fully developed administrative record. Thus, a California state affirmative action program including an express racial classification is *more* likely to survive judicial review if adopted pursuant to the APA than is such a program adopted under less rigorous administrative record requirements.

Similarly, an agency regulatory program is less likely to become embroiled in litigation if it has undergone extensive public scrutiny,²⁶⁰ been modified to accommodate public concerns, been subjected to legal review at OAL,²⁶¹ and been approved by OAL. Consider by contrast the unexpurgated "rough draft" proposal that may not only (1) never have been subject to legal review, but which may also (2) catch most interested advocacy groups by surprise.²⁶² This latter type of program often ends up in court, at great expense to all concerned, including those who pay taxes to fund the judicial system.

On the other hand, several years ago, the Personnel Board successfully adopted formal regulations on another sensitive and complex issue, drug testing of persons applying for state jobs. These pre-employment drug testing regulations were adopted *pursuant to the APA*.²⁶³ Under the discipline of the APA, the Board made numerous changes in response to public comments. Many of these comments were submitted by other state agencies, including the Department of Justice. OAL required further changes before it could approve the regulations. Though this process took time, the result is a set of regulations which--so far as we know--gets the job done, is fully consistent with applicable law, is supported by a complete administrative record, and which has not been challenged in court. In sharp contrast, the Board's mostly *uncodified* rules implementing affirmative action in the layoff context (the subject of **1987 OAL Determination No. 7**), as well as the Board's HELP rules, have been the subject

of litigation.

WE CONCLUDE THAT FINDING THE HELP PROGRAM EXEMPT FROM APA RULEMAKING REQUIREMENTS WOULD *NOT* PROMOTE THE "EFFECTIVE JUDICIAL REVIEW" GOAL OF THE APA. Even if a duly adopted regulation were to end up in court, a complete administrative record would likely simplify and shorten the litigation.

Reason no. 3 Additional non-APA notice and hearing provisions

Under Government Code section 11346, the presence of additional notice and hearing procedures in Government section 19600 (demonstration projects) *cannot* be interpreted as evidence of legislative intent to exempt demonstration projects from the APA.

The Legislature, in a statute enacted in 1947, and reenacted without change in 1979, has provided clear guidelines for dealing with APA exemption claims such as that found in the Agency Response. Government Code section 11346 provides:

"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 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.)

The message of section 11346 is clear. The APA sets up "*basic minimum procedural requirements*" for adoption of quasi-legislative enactments. The Legislature recognized that other statutes might impose *additional* rulemaking requirements. If another statute imposes additional requirements, then these additional requirements must be obeyed--along with the "basic minimum" APA

rulemaking requirements.²⁶⁴

Other APA provisions underscore the point that additional rulemaking requirements contained in statutes other than the APA apply in addition to the basic minimum APA requirements. For instance, Government Code section 11346.4, subdivision (f)--applying to additional *notice* provisions-- provides in part:

"Where the form or manner of notice is prescribed by statute in any particular case, *in addition to* filing and mailing notice as prescribed by this section, the notice shall be published, posted, mailed, filed, or otherwise publicized as prescribed by that statute." (Emphasis added.)

Thus, the Board's theory that demonstration project notice and hearing procedures demonstrate legislative intent to exempt rules associated with such projects from the APA cannot be reconciled with the express provisions of the APA. Further, as the above discussion of the two primary purposes of the APA indicates, the contention that the demonstration project notice and hearing requirements provide the public with the *same* protections as does the APA is wholly without merit. And, of course, not only is meaningful public participation and effective judicial review lacking, we also note that the HELP rules were not subject to independent legal review by OAL (a third APA purpose) or to publication in the California Code of Regulations (a fourth APA purpose).

Reason no. 4 Acquiescence

The Personnel Board has acquiesced in the idea that *demonstration projects* are subject to the APA by adopting demonstration project rules pursuant to the APA; it has acquiesced in the idea that *affirmative action* guidelines are subject to the APA by adopting AB 3001 (affirmative action in order of layoff) rules pursuant to the APA.

Notwithstanding the Board's exemption arguments, it has promulgated numerous regulations under the APA, some of which deal with demonstration projects such as HELP. Acquiescence by an agency in the applicability of the APA to

December 14, 1993

its rulemaking activities has been recognized by the courts as an additional factor in favor of requiring compliance. For example, the court in *Grier v. Kizer* noted that:

". . . the Department [of Health Services] *acquiesced* in the OAL's adverse 1987 determination. Following that determination, it formally promulgated a regulation under the APA. . . its failure to object to the OAL's adverse 1987 determination, compounded by its subsequent compliance with the APA, in effect constitutes an *acquiescence* in the OAL's determination."²⁶⁵ (Emphasis added.)

Like the Department of Health Services in *Grier*, the Board has promulgated regulations under the APA following an OAL determination²⁶⁶ which confirmed the applicability of the APA to the Board's activities.

As noted above, in April 1987, **1987 OAL Determination No. 5** concluded that Board rules regarding the AB 3001 affirmative-action-in-layoff program constituted underground regulations.

In July 1987, in response to the determination, the Board adopted emergency regulations codifying the challenged rules, including the definition of "Hispanic."²⁶⁷

Other Board regulations actually involve a demonstration project, LEAP. In January 1992, the Board adopted proposed amendments to sections 547.51, 547.56 and 547.57, Title 2 to "regulate the Limited Examination and Appointment Program (LEAP)." LEAP, which is an alternative civil service employment for persons with disabilities, is one of the demonstration projects authorized under the same enabling statute as HELP. The LEAP regulations, which amended the eligibility criteria and established an appeals procedure, were approved by OAL on February 21, 1992 (OAL File No. 92-0121-01S).

In its Final Statement of Reasons in that file, the Board states that LEAP [formerly called AEAP] is "a demonstration project pursuant to Government Code Section 19600. . . . On June 1, 1989, California Code of Regulations Sections 547.50 through 547.57 became effective to govern implementation of

LEAP." (page 2, Final Statement of Reasons).

The Board has thus acquiesced in OAL's determination that both affirmative action regulations *and* demonstration project regulations are subject to the APA. The puts the Board in a difficult position in the matter at hand, in which it has argued that the HELP rules--rules adopted to implement *affirmative action* statutes under the aegis of a *demonstration project*--are totally exempt from the APA.

(c) *After Expiration of Demonstration Project*

New APA Avoidance Theories?

The demonstration project statute was clearly designed to permit temporary suspension of otherwise applicable statutory and regulatory requirements. The concept underlying it is clearly that governing statutory or regulatory law will be modified following expiration of the project--if it is determined that "the specified *change* in personnel management policies or procedures would result in improved state personnel management." (Government Code section 19600.1; emphasis added.)

As noted above (p. 228), the HELP demonstration project expired by operation of law on Dec. 21, 1992. The record does not indicate that any new statutes or regulations have taken effect or are in the pipeline. The Board, however, has taken affirmative action to make clear that it intends to continue to use the Hispanic-only classifications that constituted the heart of the HELP project.²⁶⁸ In an official administrative bulletin (in the traditional "pink memorandum" format) dated January 15, 1992, the Board stated:

"All parenthetical specialty classes [e.g., Staff Toxicologist (Hispanic)], which have been an essential element of . . . HELP will be retained following expiration of the demonstration project[]. No new statutes or SPB regulations are required to either retain or expand use of the parenthetical specialty classes. Government Code section 18931 permits the SPB to establish classes with unique qualifications/eligibility criteria..

December 14, 1993

Also, Government Code section 19792(e) also the SPB to 'establish corrective action to eliminate underutilization of minorities and women.' Based upon this statutory authorization, the SPB has adopted regulations [California Code of Regulations (CCR) Section 547.30-.33] which afford a means 'to eliminate and rectify present effects of past discriminatory employment practices by facilitating use of affirmative action programs and issuing remedial orders.'" (Emphasis added.)

According to the January 1992 bulletin, departments may utilize this "remedial order" procedure to apply for additional classifications limited to *any* "race/ethnic group" or gender.

"Keep in mind"--the bulletin advises--"that parenthetical specialty classes can be established in *any* occupation, *at any level* in the classification plan *and for any race/ethnic group.*" (Emphasis added.) According to the bulletin, applications from agencies for establishment of new classifications along these lines would be evaluated under six criteria listed in a Board regulation.

The bulletin continues:

"All existing . . . HELP eligible lists will be retained and departments may continue to make appointments from them until they expire. [Government Code section 18901.5 allows eligible lists to be extended up to six years.] . . . After the . . . HELP Demonstration Project[] terminate[s] in . . . December 1992, . . . new examinations for any of the parenthetical specialty classes, which have been established in conjunction with [this project], can only be scheduled if the SPB has adopted a remedial order specifically authorizing such examinations."

The question, thus, is whether or not the rules that formerly constituted the HELP project continue to violate the APA in their new garb. The answer is "yes." It is not entirely clear from the January 1992 bulletin how the Board views the status of the various HELP rules. We need not get into the details, however. Whichever of the HELP rules are still in effect--all, most, or some--they still violate the APA. If anything, their APA compliance status has worsened since the demonstration project expired. Following this expiration, the

December 14, 1993

express exemption argument involving the demonstration project statute no longer can be used. Thus, we are left with the constitutional exemption theory. As indicated above, we conclude that this constitutional theory is legally invalid.

Are any new theories developed in the January 1992 bulletin? Yes, we note that the Board is arguing that it has power to issue "remedial orders" which will in effect justify continued use of Hispanic-only classifications (and establishment of *new* "gender or race/specific" classifications, such as Electrical Engineer (Pacific Islander)). However, so far as the record reveals, the Board has not yet invoked quasi-judicial power for either purpose.²⁶⁹ Also, the request for determination was limited to the HELP rules.

3. DEPARTMENT OF JUSTICE ONLY

(a) Forms Exception Theory

Under this heading, our inquiry is focused solely on Department of Justice rules which have been found to be "regulations." Specifically, we discuss the applicability of the so-called forms exception to DOJ rule no. 1 (affirmative action form)--the written justification requirement.

In its Agency Response, the Department states:

"Government Code section 11342 exempts from the definition of 'regulation' *any* form prescribed by a state agency or any instructions relating to the use of the form.' As JUS 105 clearly states, its purpose is to collect data for statistical reports to show compliance with EEOC guidelines. It is not a regulation."²⁷⁰ (Emphasis added.)

The Response does not quote the concluding clause in section 11342.

Including its concluding clause, Government Code section 11342 reads in part:

"(b) . . . 'Regulation' does not mean . . . any form prescribed by a state agency or any instructions relating to the use of the form, *but this*

December 14, 1993

provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued." (Emphasis added.)

According to the leading case, *Stoneham v. Rushen*, the language quoted directly above creates a "statutory exemption relating to *operational forms*." (Emphasis added.)²⁷¹ An example of an operational form would be as follows: a form which simply provides an operationally convenient space in which, for example, applicants for licenses can write down information that existing provisions of law already require them to furnish to the agency, such as the name of the applicant.

By contrast, if an agency form goes beyond existing legal requirements, then, under Government Code section 11342, subdivision (b), a formal regulation is "needed to implement the law under which the form is issued." For example, a hypothetical licensing agency form might require applicants to fill in marital status, race, and religion--when none of these items of information was required by existing law. The hypothetical licensing agency would be making new law: i.e., "no application for a license will be approved unless the applicant completes our application form, i.e., furnishes his or her name, marital status, race, and religion."

In other words, according to the *Stoneham* Court, if a form contains "uniform substantive" rules which are used to implement a statute, those rules must be promulgated in compliance with the APA. On the other hand, a "regulation is *not* needed to implement the law under which the form is issued" (emphasis added) insofar as the form in question is a simple operational form limited in scope to *existing* legal requirements.

In sharp contrast, the Agency Response reads section 11342 as exempting from the APA "any" form prescribed by a state agency. This reading of section 11342 is too broad.

An interpretation of the forms language in section 11342 which permits agencies to avoid APA rulemaking requirements by the simple expedient of typing regulatory material into a form would lead to absurd consequences. There

December 14, 1993

would be no limit to the degree to which agencies would be able to avoid public notice and comment, OAL review, and publication in the California Code of Regulations. Read in context, and in light of the authoritative interpretation rendered by the *Stoneham* Court, section 11342 cannot be reasonably interpreted in the broad fashion proposed by the Agency Response.²⁷²

Form JUS 106 is not merely an "operational" form. Since hiring personnel must complete this form to justify a non affirmative action hire, the form goes beyond existing legal requirements and the forms exception does not apply.

Since Part 6 of Form JUS 106 does not fall within the so-called forms exception, we conclude that it is a "regulation," and that it thus violates the APA.

IV. CONCLUSION

For the reasons set forth above, OAL finds that:

1. Both the Board's and the Department's quasi-legislative enactments are generally required to be adopted pursuant to the rulemaking requirements of the APA;
2. The following challenged rules are "regulations" as defined in Government Code section 11342, subdivision (b):
 - In the Board's HELP plan (the Board-approved HELP Proposal and a Bulletin setting out procedures for implementing HELP);
 - creation of Hispanic-only classifications;
 - definition of Hispanic;
 - use of "1980 labor force parity figure of 17.2%" as threshold criterion in determining whether or not to create Hispanic-only classifications;
 - use of the "available, qualified labor pool" criterion for determining Hispanic underrepresentation (or "underutilization") in *professional* classes;
 - use of the "80% rule" criterion for determining whether Hispanics are "significantly underrepresented" (or "underutilized") in *nonprofessional* classifications;
 - use of "historical recruitment difficulties" as a criterion for determining if a HELP class would be created;
 - limiting HELP classifications to those that are the

December 14, 1993

- "entry-level in a class series";
 - eleven Hispanic-only classifications;
 - the Legal-Analyst-DOJ-Hispanic classification;
 - the Quick Placement Program policies.
 - certain specific Department of Justice affirmative action policies
 - *Part 6* of the affirmative action form (Form JUS 105) (requiring written justification of non-affirmative action hire);
 - Definition of "underrepresented."
3. The following challenged rules are not "regulations" as defined in Government Code section 11342, subdivision (b):
- In the Board's HELP plan;
 - the designation of Legal *Analyst* rather than Legal *Assistant* as the entry level classification in the newly created HELP class "Legal Analyst-DOJ (Hispanic)";
 - oral examination scoring of minorities.
 - certain specific Department of Justice affirmative action policies
 - the remainder of the affirmative action form (Form JUS 105) (other than part 6)
 - "Hire Hispanic";

December 14, 1993

- perception of ethnicity/race.

4. No exceptions to the APA requirements apply to either the Board or the Department concerning the items found to be "regulations"; and
5. The rules listed above in finding 2 violate Government Code section 11347.5, subdivision (a).

DATE: December 14, 1993



HERBERT F. BOLZ²⁷³

Supervising Attorney
Regulatory Determinations Program

Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814-4602
Phone (916) 323-6225
CALNET 8-473-6225
FAX No. (916) 323-6826

i:\wp\93.5k hfb

December 14, 1993

1. This Request for Determination was filed by Marsha Elam and Karen J. Kilpatrick, P.O. Box 163237, Sacramento, CA, 95816-9237. The State Personnel Board and the Department of Justice were both represented by Deputy Attorney General Richard Thomson, 1515 K Street, Suite 511, P.O. Box 944255, Sacramento, CA, 94244-2550, (916) 324-5470.

Since January 1, 1989, OAL has assigned consecutive page numbers to the typewritten versions of all determination filed within each calendar year. For instance, the first page of *this* determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "149" rather than "1." This determination is the fifth determination filed in 1993. Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

The determination was prepared using WordPerfect 5.1 for Windows, in the Times New Roman font.

This determination may be cited as "**1993 OAL Determination No. 5** (State Personnel Board and Department of Justice)."

The background and issues in this determination are set out at some length for two reasons: (1) because of the sensitive and complex nature of the policy and legal issues involved; (2) in an attempt to make the determination more understandable to those readers who may not be specialists in California state civil service procedures, California rulemaking law, or employment discrimination law.

2. OAL's conclusion is supported indirectly by a recent California Court of Appeal decision. In *Domar Electric, Inc., v. City of Los Angeles* (October 26, 1993) 93 Daily Journal D.A.R. 13545, the Second Appellate District, Division One, declared invalid Mayor's Executive Directives Nos. 1-B and 1-C on the ground they were inconsistent with the city charter. The directives established a "minority and women business enterprise outreach program" which addressed "all aspects of contracting related to procurement, construction, and personal services." Though issued by the Mayor, the directives had not been approved by voters for incorporation into the city charter.

Domar Electric supports the basic APA concept that quasi-legislative rules issued by executive branch agencies are valid and enforceable only if required notice and hearing procedures are followed. Cf. *Wallace v. State Personnel Board* (1959) 168 Cal.App.2d 543, 547 (struck down uncodified State Personnel Board rule, relying in part upon earlier case striking down uncodified *municipal* personnel rule as procedurally defective).

3. 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 request before the enactment of Government Code section 11347.5, and the other opinion request 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*

December 14, 1993

Committee v. Proconier 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 requested 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, 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 206, 3 Cal.Rptr.2d 289, 301, the Court found the challenged rules inconsistent with the statute, avoiding the APA compliance issue. **1993 OAL Determination No. 1** had found most of the challenged CEC interpretations to be underground regulations.

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.

4. Title 1, California Code of Regulations (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").

5. 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 (\$5.40 if sent U.S. Mail).

6. 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

December 14, 1993

"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 was therefore] . . . 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.

7. 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, California Code of Regulations, 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.

December 14, 1993

8. Pursuant to Title 1, California Code of Regulations, 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. The listed rules are invalid as violative of the APA whether *labelled* as (1) "demonstration project provisions" or (2) "affirmative action guidelines." Our legal conclusions concerning the invalidity of the rules are predicated on the *content* of the individual rules.
10. Requesters attached ten exhibits (A through J) to the request. Exhibits A and B comprise the HELP plan.

Exhibit A to the Request is a proposal from Jose Perez, Manager, Hispanic Employment Program and Dina Hidalgo, Personnel Analyst, to the State Personnel Board; reviewed by Laura M. Aguilera, Chief, Affirmative Action and Merit Oversight Division, and Jay F. Atwood, Program Manager, on the subject of "Proposed Demonstration Project-Hispanic Employment Link Program (HELP)". It recommends that the Board implement HELP, and describes in detail the procedures needed to do so. The last page of that document contains a Resolution by the State Personnel Board at its June 2-3, 1987 meeting, to proceed with HELP.

Exhibit B is a Board Bulletin (pink memorandum or "pinkie") dated December 21, 1987, to all state agencies and employee organizations, on the subject of "Initiation of the Hispanic Employment Link Program (HELP)". It repeats much of the language of Exhibit A and also provides specific procedures to implement HELP.

11. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249, review denied.
12. Government Code section 11342, subdivision (b).
13. *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 183.
14. *Id.*, 29 Cal.3d at 183-184.
15. Government Code sections 3512-3524.
16. *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 172 Cal. Rptr. 487; *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 172 Cal.Rptr. 478.
17. *Pacific Legal Foundation v. Brown* (1981) 29 Cal. 3d 168.

18. In a 1991 case involving a state agency, the California Court of Appeal began its opinion with these words:

"In this case we face a variation on the *recurrent theme of executive agencies seeking to implement 'house rules' unfettered by any outside constraints--rules sometimes called 'underground regulations.'*" *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 49, 3 Cal.Rptr.2d 264, 265, rehearing denied, review denied (Emphasis added; citations omitted).

19. p. 5.

20. Report, pp. 8-9.

21. Report, p. 38.

22. *Wallace v. State Personnel Board* (1959) 168 Cal.App.2d 543 (Board cannot use uncodified provision in Personnel Transactions Manual to restrict clear and unambiguous provisions of statute and duly adopted regulation). The *Wallace* case may be summarized as follows.

Summary: California Government Code section 18100 provides for sick leave credits for all state civil service personnel upon submission of satisfactory proof of the necessity thereof. Implementing this statute, the State Personnel Board duly adopted Title 2, California Administrative Code, section 401, defining sick leave as ". . . the absence from duty of an employee because of *his illness or injury*, his exposure to a contagious disease, his attendance upon a member of his immediate family who is seriously ill and requires the care or attendance of the employee," [Emphasis added.] *Wallace*, a state employee, was fired based upon section 502 of the Personnel Transactions Manual (the same uncodified Manual at issue 19 years later in the case of *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1). Section 502 (the Manual provision invoked against *Wallace*) provided that an employee seeking sick leave must be *physically incapacitated* if his request for absence is based upon an emotional disturbance. Following *Conroy v. Wolff* (1950) 34 Cal.2d 745, the Court rejected the Board's argument that the Manual provision was entitled to great weight as an administrative interpretation, noting that such an interpretation would not be followed if it (1) altered or enlarged the terms of a statute or (2) was erroneous. The *Wallace* Court stated:

"It is well established that an administrative directive such as is embodied in section 502 does not have the force of law and hence may not be asserted as a

standard for the conduct of the agency if the assertion would in any way effect a change in the meaning of section 401 of the Administrative Code. (*Conroy v. Wolff*) If, as was held in *Nelson v. Dean*, [section 18100 of the Government Code] does not limit sick leave to physical illness [*Nelson* upheld as consistent with the statute the awarding of sick leave to an employee caring for an ill relative], then it follows that the administrative directive embodied in section 502 of the Transactions Manual cannot be used to so restrict the purpose and intent expressed in section 401 of the Administrative Code or 18100 of the Government Code. If the provisions of the Transactions Manual may not be so used, then it also follows that the provisions of section 401 of the Administrative Code, which are clear and unambiguous, must be given their obvious meaning that illness may be mental as well as physical."

23. In July 1981, three years after the *Armistead* decision, the Board issued a document entitled "State of California Affirmative Action *Manual*." Contained in a 3 and 1/2 inch binder, the Affirmative Action Manual was distributed to all state agencies. This Manual contains numerous numbered provisions (e.g., section 3300.3, "The Sanctions Process"), a glossary (e.g., "Labor Force Parity"), and a model affirmative action plan. This manual has not itself been challenged in this determination proceeding; so far as we know, neither has it been challenged in court as an underground regulation. It has apparently not been formally supplemented since 1981. There is no indication it has been rescinded by the Board; a copy is available in the Governments Documents Unit of the State Library in Sacramento.
24. *Ligon v. California State Personnel Board* (1981) 123 Cal.App.3d 583.
25. **1987 OAL Determination No. 5** (State Personnel Board, April 30, 1987, Docket No. 86-011) California Regulatory Notice Register 87, 20-Z, p. B-40, n. 12.
26. AB (Assembly Bill) 3001 referred to the bill which contained the language which directed the Board to create the program (Government Code section 19798).
27. Government Code section 15000; see also Government Code section 12510.
28. Government Code section 15001.
29. An example of litigation assistance may be found in *Black Employees Association v. State of California* (case no. 520179), a case tried this past summer in Sacramento Superior Court. In this case, six African-American employees of the Department of Health Services sought \$6,000,000 per person in damages from the Department for its allegedly discriminatory failure to promote them to mid- and upper-management jobs. The Department, plaintiffs alleged, had a "scheme of ethnic priorities that favored one

December 14, 1993

group over another." The deputy attorney general representing the Departments stated that there "was a program targeting Latinos, but [argued] that it was for *entry-level jobs*." (Emphasis added.) (Sacramento *Bee*, August 12, 1993, p. B1 and August 14, 1993, p. B1.) The five week trial ended with a jury verdict in favor of the Department. Plaintiffs have filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. The HELP program is mentioned in this motion, and in other pleadings.

30. Government Code section 12519. An example of the Attorney General's opinion-writing function may be found in two matters currently pending in the Opinion Unit:
- * Request no. 93-205, from Senator Quentin Kopp, which asks "Is the Cal. State University [Sacramento] affirmative action program constitutional?"
 - * Request no. 93-813, from Thomas J. Nussbaum, Vice Chancellor and General Counsel, California Community Colleges, which asks "Are the state laws pertaining to contracting with minority and women business enterprises consistent with the United States Constitution?"

A number of published opinions of the Attorney General address the question of whether or not an agency rule must be adopted pursuant to the APA. One such opinion was relied upon in **1987 OAL Determination No. 12**, California Administrative Notice Register, 87, No. 42-Z, October 16, 1987, p. 411, from which the following quotation is taken:

"No matter how logical or necessary, changes to existing [California Code of Regulations] provisions may be accomplished only by revising existing regulations.

"This basic APA principle was insightfully applied to a specific factual situation in a 1977 opinion of the Attorney General of California. The Attorney General was asked whether or not Board regulations which limited community college academic senate membership to 'persons who teach *full-time*' (emphasis added) could be interpreted to permit *part-time* faculty members to serve in a community college academic senate. Noting that there were excellent policy reasons for including part-time faculty, the Attorney General stated:

'Nevertheless voting membership in community college academic senates is limited by regulation to full-time faculty. The inclusion of

December 14, 1993

part-time faculty, if deemed appropriate in light of prevailing employment patterns, *may be accomplished only by means of amending the existing regulations.*' [Emphasis added.]

"Similarly, in the case at hand, it may well be that the time is ripe for strengthening academic standards in community colleges. However, this significant reform may be accomplished 'only by means of amending the existing regulations.' The 1977 opinion notes that interested parties had advised the Attorney General that several community college academic senates actually allowed part-time faculty membership with limits on the extent of their participation. The opinion nonetheless concluded that 'inclusion of part-time faculty . . . may be accomplished [legally] only by means of amending the existing regulations.' "

The reasoning of this published Attorney General's opinion is easily applied to the Personnel Board's HELP rules: although there may be excellent reasons for modifying current California Code of Regulations provisions (or statutes) governing civil services examinations and affirmative action policies, such changes "may be [legally] accomplished *only* by means of amending the existing regulations [or statutes]." (Emphasis added.) And, of course, even duly adopted regulations and statutes must be consistent with state and federal constitutional mandates.

31. California Constitution, Article V, sections 11 & 13; Government Code sections 12510 & 15000.
32. California Constitution, article V, section 13.
33. (1989) 109 S.Ct. 706.
34. Request, p. 4. The memo to SPB is attached to the Request as Exhibit "E". Exhibit "F" to the Request is SPB's response to the memo. This response basically states that HELP and the Legal Analyst-DOJ-Hispanic classification were validly established; that the time frames within which to raise issues and concerns had passed; that "issues and concerns raised within *appropriate* time frames [had been] responded to." (Emphasis added.)
35. The proposal was addressed to the Board from Jose Perez, Manager, Hispanic Employment Program and Dina Hidalgo, Personnel Analyst; reviewed by Laura M. Aguilera, Chief, Affirmative Action and Merit Oversight Division, and Jay F. Atwood, Program Manager.

December 14, 1993

36. It was signed by Laura M. Aguilera, Chief, Affirmative Action and Merit Oversight Division.
37. This pink memorandum was signed by "Edward S. Barragan for" Laura M. Aguilera, Chief, Affirmative Action and Merit Oversight Division.
38. P. 1.
39. This pink memorandum was signed by Gloria Harmon, Executive Officer.
40. This pink memorandum was signed by Laura M. Aguilera, Chief, Affirmative Action and Examination Services Division.
41. For instance, "labor force parity."
42. Government Code section 18901.5 allows eligible lists to be extended up to *six* years.
43. For instance, a Parole Agent II list prepared by the Department of Youth Authority in 1971 was still in active use in 1974. *Dawn v. State Personnel Board* (1979) 91 Cal.App.3d 588, 590, hearing denied.
44. Government Code section 19057.1.
45. According to Greg King, "Deliver Us From Evil: A Public History of California's Civil Service System," Governor's Office of Planning and Research (1979), pp. 60-61:

"[The Personnel Board's] massive effort to open state government to minorities has resulted in modest figures which the State Personnel Board itself, although pleased with the campaign it has launched, feels are less than adequate. The proportion of minority employment rose from 11.6 % of the total state government work force in 1963 to 18.2 % in 1975. Between 1975 and 1977, figures show the following increase:

Asians	0.3 %
Blacks	0.6 %
Filipino	0.2 %
Spanish speaking/surname	1.2 %
Women	1.9%

"In July 1976, the minority population in California (excluding women as a group) amounted to 28.48 % of the whole. Thus, even with the recent gains, minorities--and women--remain substantially underrepresented if compared to

December 14, 1993

their numbers in the population. But, even these statistics don't tell the entire story. Where minorities and women to appear in the state government work force, they cluster in the low-paying classes and seldom appear in the middle-level jobs, which still remain a white male bastion."

In 1975, 5.7% of state employees were Hispanic. (SPB, *Annual Census of State Employees and Affirmative Action Report* (November 1988), p. 8.)

In 1983, 10.2% of state employees were Hispanic. (Board Memorandum of July 27, 1990, p. 8.)

"In 1983," the Board has stated, "two public hearings were held before the Personnel Board at the request of CAFE de California, a Hispanic advocate [sic] organization, regarding the problem of underemployment of Hispanics in the State civil service." (This quotation, and the list of actions which follows, are taken from the Board Memorandum of July 27, 1990, pp. 8-9.) In response to this concern, the Board took numerous actions during the four year period following the hearings (that is, 1983-87), including:

- a. A policy directive to all departments making Hispanic hiring a top priority for affirmative action hiring.
- b. A 25% statewide hiring goal for Hispanics.
- c. Focused recruiting in all open examinations.
- d. Balanced interview panels in all open examinations
- e. Establishment of departmental Hispanic Employment Coordinator positions.
- f. Increased resources at the Board for coordinating and monitoring the statewide effort to improve Hispanic hiring.
- g. Holding meetings with individual department directors to enlist their support for achieving Hispanic hiring goals.

By March 31, 1987, the percentage of state employees that were Hispanic had increased to 13.1%--up from the 1983 level of 10.2% (HELP Proposal, p. 16), for a total increase of 2.9%.

December 14, 1993

Averaging this increase over the four year period, the Hispanic *percentage* of state employees went up at an average annual rate of 0.725% per year. The Hispanic percentage of the state civil service workforce had increased 30.6% between 1983 and 1987, an average annual *rate of increase* of 7.65%. In response, the Board determined the following:

"Because improvement was progressing very slowly, in spite of the vigorous affirmative action efforts made, and because Hispanics in the California labor force were estimated to have increased [from 17.2% in 1980] to 19.7% [in 1987], the Board felt that new initiatives were needed. As a result, the Personnel Board established a five-year demonstration project title [sic] the Hispanic Employment Link Program (HELP), [sic] the effective dates were to be December 21, 1987 to December 20, 1992." (July 27, 1990 Memo, p. 9.)

In its July 1987 *California State Personnel Board Report to the Governor and the Legislature: the Annual Census of State Employees*, the Board stated:

"Census reports have shown that Hispanics are the largest and fastest growing minority population in California. Yet *despite intensive efforts, Hispanics continue to be severely underrepresented* in the State civil service labor force. The Personnel Board is *firmly committed to taking the necessary steps to increase overall representation and achieve labor force parity as quickly as possible*, and to this end, has initiated a demonstration project, HELP (the Hispanic Employment Link Program) which will utilize separate, parallel Hispanic only civil service classes and eligible/employment lists *for occupations/jobs where particularly severe underrepresentation continues.*" (Page 1; emphasis added.)

According to the Board, "[i]t is the State's overall goal to achieve GLF [General California Labor Force] representation of Hispanics (17.2%) *in each class.*" (July 1987 Report, p. 10; emphasis added.) In the 1987 HELP Proposal (p. 16), Board staff recommended that the appropriate goal was an increase of Hispanic representation in state civil service of 1% per year. For instance, if the 1987 figure was 13.1%, the goal for 1988 would be 14.1%, the goal for 1989, 15.1%, etc. The Proposal also recommended a method for achieving the 1% annual representation increase goal: a 20-25% annual Hispanic hiring rate. In other words, if every fourth or fifth new state employee hired were Hispanic, staff predicted that it would be possible to attain an annual increase level of 1%.

The Proposal continued:

December 14, 1993

"The representation of Hispanics in the State civil service work force has increased an average of 0.425% per year in the last four years. It is estimated that Hispanic representation in the labor market increases between .3% and .4%. Assuming existing hiring practices remain unchanged and the rate of change in composition from 1983 to 1987 continues, 1980 U.S. Census Labor Force Parity for Hispanics will not be achieved until 1997 at which time new 1990 Labor Force parity figures will have been requested and the existing gap will continue to be present." (Proposal, p. 17; the words "Attachment 4" follow this paragraph in the Proposal; this attachment was not provided to OAL.)

(The 0.425% figure contained in the quotation directly above contrasts with our 0.725% figure (stated in this note four paragraphs above).)

Board staff pointed out the special need to bring the Hispanic representation in *professional* classifications up to the Labor Force Parity level. Board staff recommended the HELP plan as a means of achieving the above noted goals: 20-25% annual Hispanic hiring rate; 1% annual Hispanic representation increase.

46. Proposal, p. 15.
47. Id.
48. Id.
49. Id.
50. The demonstration project statute authorizes the Board to conduct and evaluate "demonstration projects" in various personnel management areas, including recruitment, classifying positions, promotion, disciplinary process, incentive pay and conditions of employment. Government Code section 19600.1 defines "demonstration project" as:

". . . a project conducted by the State Personnel Board . . . to determine whether a specified change in personnel management policies or procedures would result in improved state personnel management."

With one noteworthy exception, the demonstration project statute authorizes the Board to waive *any* Civil Service Act provision (or implementing regulation) which would be "inconsistent" with the actions planned under the demonstration project. The exception is spelled out in Government Code section 19601: the provisions of *Chapter 10* of the Civil Service Act may not be waived. Chapter 10 (sections 19680

through 19765):

- * prohibits (1) dishonest conduct in taking examinations, (2) *discrimination on various bases* (Sec. 19702(a)), and (3) state officers and employees from paying salaries to persons not lawfully holding government positions.
- * provides that persons violating any provision of the chapter are guilty of a misdemeanor and (if employed by the State) subject to disciplinary action (sec. 19682).

51. Regulations have been adopted to carry out LEAP.

In 1988, the Legislature created LEAP (Government Code, secs. 19240-19244) to "... provide an alternative to the traditional civil service examination and appointment process to facilitate the hiring of persons with disabilities in the state civil service where accommodation can be provided and where prohibitive physical requirements are not mandated by [the Board]."

In 1989, the Board adopted Article 28 of Title 2 (sections 547.50-547.57) of the California Code of Regulations to implement LEAP. The fact that the Board adopted these regulations indicates that the Board knew that it needed to do so to make LEAP legally enforceable. The ramifications of this "acquiescence" argument with respect to HELP are discussed elsewhere in this Determination.

52. Report, pp. 15-18.

Adoptions Case Worker (Hispanic)
Architectural Designer (Hispanic)
Auditor I (Hispanic)
Clinical Dietician (Hispanic)
Corporations Counsel (Hispanic)
Correctional Counselor (Hispanic)
Criminal Identification Specialist (Hispanic)
Electrical Engineer (Hispanic)
Hazardous Materials Specialist (Hispanic)
Health Facilities Evaluator Nurse (Hispanic)
Junior Civil Engineer (Hispanic)
Legal Analyst (Hispanic)
Legal Counsel (Hispanic)
Licensed Vocational Nurse (Hispanic)
Medical Consultant I, DHS (Hispanic)

December 14, 1993

Medical Technical Assistant CF (Hispanic)
Physician and Surgeon (Hispanic)
Programmer I (Hispanic)
Psychiatric Social Worker (Hlth Fclts) (Hispanic)
Public Health Nurse I (Hispanic)
Registered Nurse (Hispanic)
Staff Counsel (Hispanic)
Staff Psychiatrist (Hispanic)
Staff Services Management Auditor I (Hispanic)
Staff Toxicologist (Hispanic)
Transportation Planner (Hispanic)
Waste Management Engineer (Hispanic)

53. Proposal, p. 18.
54. HELP bulletin, p. 5.
55. In July 1990, Board staff recommended immediately abolishing *all but two* HELP classifications on the grounds that the program, as a "race-based remedial action" [Pink Memorandum cover sheet (unnumbered)], was "vulnerable to legal challenge" (unnumbered page headed "Summary of Conclusions and Recommendations") on the grounds that it lacked the "firm basis" (pp. 5-7, in section headed "Discussion of Legal Considerations in Race-based Remedial Action") required of such plans by recent decisions of the United States Supreme Court. The Board did not follow this staff recommendation, apparently electing to continue on with all 27 Hispanic-only classifications.
56. This January 15, 1992 bulletin stated:

"All parenthetical specialty classes, which have been an essential element of . . . HELP will be retained following the expiration of the demonstration projects [pursuant to statute on December 21, 1992]. No new statutes or SPB regulations are required either to retain or expand the use of the parenthetical specialty classes." (Page 1; emphasis added.)

This January 1992 bulletin went on to state that *legislation* authorized the Board to "establish corrective action to eliminate underutilization of minorities and women." (Government Code section 19792, subdivision (e).) The memorandum stated that regulations had been adopted based upon this statutory authorization. (Title 2, California Code of Regulations, sections. 547.30--547.33.) These regulations authorize the Board to issue "remedial orders" to "eliminate and rectify present effects

December 14, 1993

of past discriminatory employment practices." (p.1)

According to the January 1992 bulletin, departments may utilize this "remedial order" procedure to apply for additional classifications limited to *any* "race/ethnic group" or gender. The bulletin thus puts forward a "let's add more" thesis in rebuttal to the staff recommendation that classifications limited to one ethnic group be drastically decreased in number.

"Keep in mind"--the January 1992 bulletin advised--"that parenthetical specialty classes can be established in *any* occupation, *at any level* in the classification plan *and for any race/ethnic group*." (Emphasis added.) (p.2) In practice, it would appear that this could become a fairly complex undertaking. For instance, in addition to Staff Counsel (Hispanic), one might add Staff Counsel (*Pacific Islander*) and Staff Counsel (*African-American*). If different underrepresentation problems were judged to exist at a higher non-supervisory legal classification level, one might add Staff Counsel III (Specialist) (*Female*) and Staff Counsel III (Specialist) (*Filipino*). In the supervisory legal classifications, on the other hand, it might be determined appropriate to add Staff Counsel III (Supervisor) (*American Indian*) and Staff Counsel III (Supervisor) (*Asian*).

According to this bulletin, applications from agencies for establishment of new classifications along these lines would be evaluated under six criteria listed in a Board regulation.

57. In this February 1, 1993 bulletin, the Board announced a public hearing on (1) "Proposed Changes to Affirmative Action Policies Affecting the Goals and Timetables Process" and (2) the Limited Examination and Appointment Program." Part of this bulletin was a hard-hitting staff study which strongly recommended substantial changes to the Board's affirmative action programs. The Board staff study focused on the question of whether the current programs would pass muster under the federal Equal Protection Clause. Key points from the 1993 staff study follow:

- * . . . "the third phase of the affirmative action process involves those special actions which provide *preference* to women and/or minorities in hiring, promotion, training, and any other employment practice. Hiring goals which mandate the *preferential* hiring of women and minorities are included in this phase. *Other actions in this phase include* seniority based layoffs [pursuant to AB 3001]; and administering special selection programs, such as [*HELP*] This type of *race/gender conscious affirmative action is only legal under very limited circumstances and is subject to [strict] scrutiny by the courts.*" (Emphasis added.) (p. 3)

- * "For jobs having specific education and/or experience requirements, departmental representation for full-time and other than full-time employees should be compared with either Occupational Labor Force representation in the geographic area in which the department expects to recruit, or other relevant applicant pool information (e.g., accepted applications in examinations or college graduates in a specific field, etc.). Goal-setting based on General Labor Force, for jobs with specific qualifications, is not consistent with Supreme Court standards. *The State must modify its goal-setting process to use relevant area labor force data as its basis for determining underutilization of women and minorities in all job classifications*".

"In addition, comparisons need to be made with those qualified for the specific job (e.g., engineers to engineers, accountants to accountants, attorneys to attorneys, etc.). Comparisons with broader job categories, composed of many job classifications with different minimum qualifications, would distort and invalidate relative labor force comparisons. It is only appropriate to group jobs with the same minimum qualifications." (Emphasis in original.) (p. 12)

- * "The State must recognize (p. 15) the potential impact of the recent Supreme Court decisions on race/gender conscious affirmative action and the importance of revising its practices to be consistent with those decisions. A public employer's affirmative action program may be consistent with Title VII provisions and still be in violation of the *14th Amendment to the Constitution*, potentially subjecting the employer to costly compensatory damages. . . . [I]n a Constitutional suite [sic], compensatory damages are not limited to \$300,000, as they are under a Title VII suite [sic]. Although the likelihood of being sued does not appear to be very great, it can happen at any time. State agencies should be prepared to defend against such actions by bringing affirmative action programs into conformance with Supreme Court standards." (Emphasis in original.)

- * "It is (p.16) anticipated that the use of *relevant* labor force [statistics] will reduce the number of job classifications having an underutilization of women and minorities. This should not be surprising, since State departments have put forward considerable affirmative action effort over the last 15 years to improve representation in State service." (Emphasis added.)

58. 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

December 14, 1993

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) 12 Cal.App.4th 697, 16 Cal.Rptr. 2d 25, rehearing denied, Feb. 19, 1993.

59. *Ex proprio vigore* means "of its own force."
60. 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.
61. Quoting a 1955 Senate Committee Report, the California Supreme Court has stated: ". . . the [State Personnel Board] is subject to . . . the procedure for adoption of regulations as specified in the *Administrative Procedure Act*." *Armistead v. State Personnel Board*, 22 Cal.3d at 202 (emphasis added).
62. A number of other Civil Service Act provisions also evidence a legislative intent that the Board be required to adopt regulations (or "rules") when acting to implement the Act. See, e.g., Government Code sections 18576, 18577, 18670, 18675, and 19798. The June 1946 report of the California Legislative Committee on Administrative Regulation, "Summary of California Statutory Provisions Conferring Quasi-Legislative Functions Upon State Administrative Agencies," p. 79, clearly envisions the Board as proceeding by formal rule when administering and enforcing the Civil Service Act.
63. See also Penal Code section 12403.7, subdivision (a)(7)(C)(exempting tear gas weapon fees from the APA), added by Statutes of 1993, Chapter 954, section 1.
64. The Department has adopted numerous regulations under the APA, thus acquiescing in the application of the APA to its rules. (See Title 11, California Code of Regulations, sections 1-999.4.)
65. State agencies have sometimes argued before OAL that they are not required to adopt as regulations their "interpretations" of duly adopted regulations or statutes. These agencies have sometimes cited *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, review denied, in support of this proposition.

This proposition clearly cannot be reconciled with the express terms of Government

December 14, 1993

Code section 11342, subdivision (b) ("regulation" includes "every rule . . . adopted by any state agency to . . . *interpret* . . . the law enforced . . . by it") (emphasis added).

Indeed, OAL has explicitly rejected this *Skyline*-based "interpretive rule" notion in a number of determinations: **1986 OAL Determination No. 2** (Coastal Commission), California Administrative Notice Register ("CANR") (86, No. 20-Z, May 16, 1986), p. B-31, at pp. B-34-36; typewritten version, pp. 7-10; **1987 OAL Determination No. 4** (State Labor Commissioner) CANR, 87, No. 15-Z, April 10, 1987, p. B-27, n. 33; typewritten version, p. 17, n. 33. **1987 OAL Determination No. 7** (State Labor Commissioner), CANR 87, No. 24-Z, June 12, 1987, p. B-45, at pp. B-51-52; typewritten version, pp. 9-10, and **1990 OAL Determination No. 11** (Division of Labor Standards Enforcement), California Regulatory Notice Register 90, No. 32-Z, p. 1204, at p. 1207; typewritten version, pp. 313-314. OAL also rebutted a variant of this *Skyline* thesis at pp. 34-41 in the Respondent's Brief filed May 5, 1992 in the appellate phase of the lawsuit which culminated in *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993) 12 Cal.App.4th 697, 16 Cal.Rptr. 2d 25, rehearing denied, (affirming **1989 OAL Determination No. 4**).

In the determination proceeding leading up to **1986 OAL Determination No. 2**, the Coastal Commission made two arguments: (1) that the challenged guidelines were expressly exempted from the APA by statute, and (2) that in any event the guidelines did not meet the statutory definition of "regulation." In the determination, OAL addressed both arguments, concluding (1) that the challenged rules did not fall within the scope of the express statutory exemption and (2) that the rules were "regulations." **1986 OAL Determination No. 2's** finding on the *first* issue was subsequently rejected in *California Coastal Commission v. Office of Administrative Law* (1989) 210 Cal.App.3d 758: the California Court of Appeal held that the challenged guidelines fell within the scope of the express statutory exemption. The Court did not reach the question of whether or not the guidelines were regulatory in nature.

On September 5, 1989, the California Supreme Court denied OAL's petition for review. On September 27, 1989, in compliance with the trial court order finding the guidelines exempt from the APA under Public Resources Code section 30333, OAL issued a notice setting aside 1986 OAL Determination No. 2. However, OAL's analysis of the second issue (which dealt with the *Skyline* thesis) was not affected by the court action. The *Skyline* analysis presented in **1986 Determination No. 2** accurately represents OAL's current perspective on that case.

OAL is aware that most lawyers and interested parties do not have ready access to copies of earlier OAL determinations. Older issues of the California Regulatory

December 14, 1993

Notice Register (in which determinations are published) are not maintained by most law libraries; to our knowledge, no electronic database yet includes OAL regulatory determinations. In light of this accessibility problem, the analysis of a *Skyline*-based argument appearing in **1986 OAL Determination No. 2** is reprinted below.

Endnote material found in the original Coastal Commission determination request April 30, 1986, has been (1) reprinted in "small capitals" and (2) included below in brackets immediately following the number of the endnote, e.g., /note 3 [COASTAL COMMISSION].

N.B.: the quotation from **1986 OAL Determination No. 2** begins immediately below, and is reprinted without beginning or concluding quotation marks.

[Coastal Commission] Arguments Based on Federal Law Rejected

First, the Federal Administrative Procedure Act exempts "interpretive rules" and "policy statements" from that Act's procedural requirements. / Note 15 [5 U.S.C SECTION 552(A)(1)(D) AND (A)(2)(B); ALSO SECTION 553(B)(A) AND (D)(2); ASIMOW, NONLEGISLATIVE RULEMAKING AND REGULATORY REFORM, DUKE L.J. 381 (1985)."INTERPRETIVE RULES" AND "POLICY STATEMENTS" ARE DESCRIBED AS NON-LEGISLATIVE, WHILE RULES WHICH MUST MEET FEDERAL RULEMAKING PROCEDURAL REQUIREMENTS ARE DESCRIBED AS "LEGISLATIVE." THE LEGISLATIVE/NONLEGISLATIVE DISTINCTION IS DESCRIBED BY FEDERAL APPELLATE COURTS AS "FUZZY" (*AVOUELLES SPORTSMEN'S LEAGUE INC. V. MARSH*, 715 F.2D 897, 909 (5TH CIR. 1983); *PACIFIC GAS AND ELECTRIC CO. V. FEDERAL POWER COMMISSION*, 506 F.2D. 33,37 (D.C. CIR 1974)), AND BY A LEADING COMMENTATOR AS "DIFFICULT TO APPLY IN PRACTICE . . . THE SUBJECT OF CONSTANT LITIGATION." (ASIMOW, AT P. 382.)]

Under the Federal Act, interpretive rules are *not* deemed to be quasi-legislative in nature and thus *not* legally binding. The California Act is intended by contrast to cover not only "legislative" but also "interpretive" rules./Note 16 [*SEE ARMISTEAD*, 149 CAL.RPTR. AT P. 2, SUPRA, NOTE 13 (CITING GOVERNMENT CODE SECTIONS 11346 AND 11342); ASIMOW, SUPRA, NOTE 15.]

The Commission argues at some length that the "guidelines and policy statements are exempt from APA regulation promulgation requirements under established principles of administrative law and clear case authority." The above argument may well be true under federal law and under the law of many states whose statutes exempt "interpretive guidelines" or "policy statements" from procedural rulemaking requirements. The governing law here, however, is the *California* Administrative Procedure Act, which has a notably more expansive definition of "regulation."

December 14, 1993

Second, the Commission argues that the Federal legislative/ interpretive distinction is now part of California law.

The Commission was able to cite only one California case which purportedly held that interpretive rules need not comply with the California APA. The Commission argued:

"California courts have also recognized a similar distinction between legislative rules or regulations, and agency interpretive statements that need not be adopted in compliance with regulation-promulgation requirements. In *Skyline Homes Inc. v. Department of Industrial Relations*, 165 Cal.App.3d 239 (1985), it was claimed that certain enforcement policies and interpretations in the Division of Labor Standards Enforcement (DLSE) were 'regulations' that had to be adopted under the APA. The DLSE enforcement policies construed and were used in applying a certain wage order. While the Court found that the wage order was a regulation, it rejected the claim that the enforcement policy interpreting the wage order was a regulation. The Court stated that 'DLSE is charged with enforcing the wage orders, to do so, it must first interpret them. The enforcement policy *is precisely that--an interpretation--and need not comply with the APA.*' 165 Cal.App.3d at 254 (emphasis added). The *Skyline Homes* holding is based on the distinction between legislative and interpretive rules. Thus, PLF's notion that anything that 'interprets' or 'explains' the Coastal Act necessarily becomes a 'regulation' is simplistic and erroneous. Agencies can have interpretive statements (like the enforcement policy in *Skyline Homes*) that are not 'regulations' and that need not be adopted in compliance with the APA. The relationship between guidelines/policy statements and the Coastal Act is analogous to the relationship between DLSE's enforcement policy statement and the underlying wage rule in *Skyline Homes*. The wage rule (and the Coastal Act) are the source of the mandatory rules having the force and effect of law, not the DLSE enforcement policy (or Coastal Commission guidelines/policy statements). Therefore, the latter type of administrative enactment--which merely interprets or explains the former rule--is not subject to APA requirements."/Note 17 [MEMORANDUM, PP. 29-30]

We reject this interpretation of the *Skyline* case. As pointed out in the Board of Chiropractic Examiners Determination,/Note 18 [DOCKET NO. 85-001; APRIL 9, 1986, SUPRA, NOTE 2.] the *Skyline* court upheld the agency order that the company pay overtime pursuant to the agency's Operations and Procedures Manual's interpretation of a wage regulation. The *Skyline* court held that the interpretation was permissible despite lack of compliance with the APA in light of the agency's duty to enforce the regulation and considering that the only alternative interpretation of the regulation was

legally untenable.

Noteworthy by its absence in *Skyline* was any reference to the statutory definition of "regulation" contained in Government Code section 11342(b), which provides in part:

'Regulation' means every rule . . . or the amendment, supplement, or revision of any such rule, . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it.' [Emphasis added.]

We therefore reject the *Skyline* dictum that "interpretations" of regulations need not comply with the California APA. The *Skyline* decision is based on an earlier California Supreme Court decision which characterized the agency treatment of the regulation in question as "application" rather than "interpretation." /Note 19 [*BENDIX FOREST PRODUCTS CORP. V. DIVISION OF OCCUPATIONAL SAFETY AND HEALTH* (1979) 25 CAL.3D. 465, 158 CAL.RPTR. 882.] In rulemaking, an agency is often free to interpret a statute or another regulation in such a way as to impose an additional requirement on the regulated public. By contrast, in *applying* a statute or regulation, an agency has much less latitude. In the interest of clarity, it would have been preferable had the *Skyline* Court avoided the term "interpretation" when the term "application" would have more closely reflected the intended meaning.

The Commission's interpretation of *Skyline* is clearly inconsistent with governing California statutory and decisional law.

In Government Code section 11342(b), the Legislature expressly states that the term "regulation" includes "every rule . . . adopted by any state agency to . . . interpret . . . the law . . . administered by it." In *Armistead v. State Personnel Board*, the California Supreme Court, citing section 11342(b), in substance rejected the argument (based on the Federal Administrative Procedure Act) that "interpretive rules" and "policy statements" were not exercises of quasi-legislative power./ Note 20 [SUPRA, NOTE 13, 22 CAL.3D AT PP. 202-204, 149 CAL.RPTR. AT PP. 2-3.]

In *Hillery v. Rushen*, (1983) the state agency argued that where an administrative problem must be handled "flexibly or in minute detail," it was appropriate for the agency to utilize informal guidelines./Note 21 [(9TH CIR. 1983) 720 F.2D 1132, 1135-1136. THE REASONING OF *HILLERY* WAS ADOPTED BY *FAUNCE V. DENTON* (1985) 167 CAL.APP.3D 191, 197, 213 CAL.RPTR. 122, 125.] The *Hillery* court rejected this argument, noting that no such exemption was provided by the California Act, and concluding that:

". . . 'guidelines' after all, clearly constitute 'standard[s] of general application' within the meaning of California's definition of 'regulation.'" [Citation

December 14, 1993

omitted.]/ Note 22 [SUPRA, NOTE 21, 720 F.2D AT PP. 1135-1136.]

In 1983, the Legislature codified the *Armistead* holding in Government Code section 11347.5, declaring that:

"No state agency shall issue [or] utilize *any* guideline, criterion, bulletin, manual, instruction, or other rule, which is a regulation as defined in subdivision (b) of section 11342 unless [adopted pursuant to the APA]." [Emphasis added.]

The California Court of Appeal, in the 1984 case of *Stoneham v. Rushen (Stoneham II)* characterized the list contained in section 11347.5 as "all-inclusive."/Note 23 [156 CAL.APP.3D. 308, 310, 203 CAL.RPTR. 20, 25.]

Thus, not only has the highest court construed the APA to *not* exempt interpretive guidelines and policy statements, but also the Legislature *subsequently* affirmed that judicial understanding of the APA by enacting Government Code section 11347.5.

NB: this concludes the quotation from **1986 OAL Determination No. 2.**

66. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
67. The history note to Chapter 5 ("Administrative *Adjudication*," sections 11500-11529.; 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, subdivision (b) would at a minimum appear to encompass the types of rules governing administrative *adjudication* (e.g., administrative hearings on such matters as license revocation) that are found in Chapter 5.
68. 3 Cal.Rptr. 2d 47, 63
69. Id.
70. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.
71. Id.
72. (1993) 16 Cal. Rptr. 2d 25 at 28.

73. Like other executive branch "line" agencies, the Department of Justice is obliged to comply with directives of "control" agencies such as the Board. Responsibility for the HELP program must thus rest ultimately with the Board, not with line agencies that merely carried out instructions.

Similarly, if the Board had *properly* adopted regulations defining "underrepresented," it is unlikely that the Department would now be in the position of having to defend its own informally adopted definition of this key term. The failure of the Board to develop appropriate definitions of such key affirmative action terms *through the APA process* has had a ripple effect throughout state government.

74. We have distilled the HELP plan documents down into these key elements. These numbers do not appear in the HELP documents. Endnotes in our discussion indicate exactly where the cited material may be found in the HELP documents.
75. HELP Proposal, p. 15 (p. 15 is the first page of the proposal; perhaps the proposal was numbered as part of a packet prepared for Board review).
76. *Id.*, p. 20.
77. *Id.*, p. 16.
78. *Id.*, p. 18.
79. *Id.*, p. 16.
80. *Id.*, p. 18.
81. *Id.*, p. 15.
82. Pink Memorandum of Dec. 21, 1987, pp. 2-3.
83. *Id.*, p. 3.
84. *Id.*, p. 3.
85. We note that rule no. 4, which first appeared in the HELP bulletin, was a substantial change to the parallel class creation criteria spelled out in the earlier HELP proposal. Indeed, rule no. 4 seems to dramatically limit the number of classifications that could qualify for a parallel class.
86. *Id.*, p. 3.

87. Bulletin, p. 3 (emphasis added).
88. Id., p. 3 (emphasis added).
89. Id., p. 3.
90. Bulletin, p. 3.
91. Bulletin, p. 2. The Bulletin states that only entry level classes will be authorized "at least initially."
92. Item III, Request for Determination, page 8.
93. Bulletin, p. 2. A twelfth classification, Assistant Transportation Engineer, had been proposed by staff, but was apparently not authorized by the Board.
94. *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 (standard of general application applies to all members of any open class).
95. Cf. *Armistead v. State Personnel Board* (the challenged rule "is designed for use by personnel officers and their colleagues throughout the state.") 22 Cal.3d at 203, 149 Cal.Rptr. at 3.
96. Such an outcome would to a degree undercut the State's "upward mobility" program. The upward mobility program has been a key component of the "State Women's Program." See, for instance, *Upward Mobility Handbook*, November 1980. See also Government Code section 19792.5 (mandating SPB to compile data on "glass ceiling" patterns).
97. Pink Memorandum dated July 27, 1990, concerning "Hearing on proposed revisions to the Hispanic Employment Link Program (HELP) Demonstration Project," unnumbered page headed "Summary of Conclusions and Recommendations." This staff document recommended that "when departments administer examinations for the HELP classes, they administer examinations for the *regular* classes either simultaneously or within six months." (Emphasis added.) If adopted, such a policy would mean that both Hispanic and non-Hispanic persons would be able to compete for particular jobs at a particular agency.

The record of this proceeding suggests that this recommendation was not followed by the Board.

98. (1976) 18 Cal.3d 34, 132 Cal.Rptr. 680.
99. July 1990 bulletin, supra.
100. Cf. *Northeastern Florida Chapter v. City of Jacksonville* (1993) ____ U.S. ____, 113 S.Ct. 2297, 2300 (city ordinance reserved certain contracts "'for the exclusive competition' of certified black- and female-owned businesses").
101. Proposal, p. 17.
102. Proposal, pp. 15 & 19.
103. Proposal, p. 17.
104. *Armistead and Ligon*.
105. The word "class" here does not, of course, refer to civil service classifications, but rather to the more general category of persons, as illustrated in the examples preceding this note in the text.
106. HELP Proposal, p. 15 (p. 15 is the first page of the proposal; perhaps the proposal was numbered as part of a packet prepared for Board review).
107. *Shaw v. Reno* (1993) 113 S.Ct. 2816, 2824.
108. Id.
109. *Hiatt v. City of Berkeley* (1982) 130 Cal.App.3d 298, 308-310 (most recent published state court appellate opinion construing the California Equal Protection Clause in the context of a racial classification in the employment setting).

The *Hiatt* court struck down key elements of the City of Berkeley's Affirmative Action Program as violative of both federal and state equal protection guarantees. The California Court of Appeal, First Appellate District, Division 2, had earlier (in 1979) struck down the same Berkeley program, but the California Supreme Court granted a hearing in that case and then (in June 1980) remanded the matter to the Court of Appeal for reconsideration in light of *Price v. Civil Service Commission* (1980) 26 Cal.3d 257, 161 Cal.Rptr. 475 (upholding City of Sacramento affirmative action hiring program involving quotas) and *Steeworkers v. Weber* (1979) 443 U.S. 193. (Three justices dissented from the June 1980 California Supreme Court remand order, indicating that they would have directed the Court of Appeal to refile its original opinion.) Again, in 1982, the *Hiatt* Court struck down the Berkeley affirmative action

program.

110. Such practices are not unlawful if "based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the State of California." (Gov. Code sec. 12940, first paragraph.)
111. According to Government Code section 18570, part 2 of division 5 of title 2 of the Government Code shall be known as "the State Civil Service Act."
112. See also Government Code section 19570.
113. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 438-39 (*two* legally tenable ways for Department of Health Services to interpret audit statute). Compare **1988 OAL Determination No. 10** (Department of Corrections), California Regulatory Notice Register 88, No. 28-Z, July 8, 1988, p. 2313 (only *one* reasonable way to read prison credit statute) *with* **1989 OAL Determination No. 15** (Department of Fair Employment and Housing), California Regulatory Notice Register 89, No. 44-Z, Nov. 3, 1989, p. 3122 (*two* reasonable ways to read statutes applying to pregnancy discrimination claims). See also *State Board of Education v. Honig* (1993) ----Cal.App.4th----, 16 Cal.Rptr. 727, 751 (when constitutional provision "may well have either of two meanings," Legislature's decision to adopt one of the competing interpretations in statute is "well-nigh, if not completely, controlling").
114. Government Code sections 11346.5, subdivision (a)(6); 11346.51; 11346.52; 11349.1, subdivision (d).

115.

EXECUTIVE DEPARTMENT

STATE OF CALIFORNIA

EXECUTIVE ORDER D-20-83

WHEREAS, the State of California has a legal and moral responsibility to ensure all citizens equal opportunity for state employment; and

WHEREAS, this Administration is committed to the goal of achieving a state employee work force which draws upon the strength of California's diverse working population; and

December 14, 1993

WHEREAS, in spite of substantial efforts and improvements in the employment of minorities, women and the disabled by the State, further progress can be made in many departments and occupations for all of these groups:

NOW, THEREFORE, I, GEORGE DEUKMEJIAN, Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby issue this order to become effective immediately.

1. It is my policy and the policy of the State of California to eliminate discrimination in employment because of race, sex, color, religion, national origin, age, marital status and physical or mental disability. This policy is required not only by law, but also by basic concepts of justice and fairness.
2. The goal of the State is to provide equal opportunity for employment and advancement to every member or prospective member of the State's work force and achieve a state work force representative of California's diverse working population.
3. All cabinet secretaries, directors and executive officers of state agencies, departments, boards and commissions are directed to take necessary actions to ensure the adherence to this policy. Every officer and employee is responsible for assisting in the implementation and enforcement of this policy and shall take all actions necessary to ensure that equal employment opportunities become a reality.
4. Administrative and program improvements are expected in the following areas.
 - (a) Incorporating affirmative action into the existing management planning process;
 - (b) Expanding focused recruitment activity;
 - (c) Developing more comprehensive mobility programs;
 - (d) Promoting more effective deployment and utilization of affirmative action resources; and
 - (e) Assuring effective monitoring and accountability systems.
5. Cabinet secretaries, directors, and executive officers are accountable to me for

December 14, 1993

achieving the Administration's goals pursuant to this policy and for full support and compliance with its spirit and intent.

6. All state entities exempt from the mandatory authority of Executive Orders are hereby requested to implement all actions necessary to comply with the spirit and intent of this policy.
116. The Board resolution reads, in part:
- "WHEREAS Hispanics are *severely* underrepresented in the State civil service work force; and
- "WHEREAS focused recruitment and other affirmative action efforts have not fully alleviated this problem; and
- "WHEREAS the State Personnel Board has been *charged by statute* with the responsibility of ensuring that all groups are *fully* utilized in classes of positions in the State civil service and are not excluded on a non-job related basis from employment; and
- "WHEREAS the State Personnel Board is committed to a program of assuring that Hispanics are fully represented in the State civil service workforce; and
- "WHEREAS Executive Order D-20-83 *requires* a state civil service work force *representative* of California's *diverse* working population" (Emphasis added.)
117. Cf. Executive Order D-20-83 (legally and morally necessary to "ensure all citizens *equal* opportunity for state employment" (emphasis added) by eliminating "discrimination in employment because of *race*, sex, color, religion, *national origin*, age, marital status and physical or mental disability (emphasis added)).
118. In *Northeastern Florida Contractors v. Jacksonville* (1993) ___ U.S. ___, 113 S.Ct. 2297, 2299, the U.S. Supreme Court dealt with a "Jacksonville, Florida, ordinance [which] accords preferential treatment to certain minority-owned businesses in the award of city contracts." An association of contractors had alleged that the ordinance violated the Equal Protection Clause, both on its face and as applied.

A lower court threw out the case on the grounds the association lacked standing to sue. Reversing the lower court, the U.S. Supreme Court ruled that the association of contractors seeking to challenge the ordinance need *not* show that one of its members would have received a contract absent the ordinance. It was enough, the high court

held, for the association to demonstrate that it was able and ready to bid on contracts, but that a "discriminatory policy prevent[ed] it from doing so on an equal basis." The Court stated:

" . . . in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract. See *Croson*, 488 U.S. at 493 (opinion of O'CONNOR, J.) ('The [set-aside program] denies certain citizens the *opportunity to compete* for a fixed percentage of public contracts based solely upon their race') (emphasis added). To establish standing, therefore a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." (113 S.Ct. at 2303.)

119. Memorandum of Feb. 1, 1993, p. 3 of document headed "Hearing on Proposed Changes to the Process for Setting Affirmative Action Goals and Timetables in State Service."
120. Other protected groups include African-Americans, women, the disabled, and people over 40.
121. Various aspects of the State's affirmative action programs have been attacked on legal grounds for many years. See, for instance, King, "Deliver Us From Evil," Governor's Office of Planning and Research (1979), p. 59:

"Critics of the various affirmative action programs argue that entry into civil service and promotion in the ranks has become a numbers game and that affirmative action and upward mobility (both of which were further institutionalized in state law in 1977) directly counter Constitution Article VII, which states that appointments and promotions in the civil service must be 'based on merit. . .'" (Endnote omitted.)

122. HELP proposal, p. 5. The 1987 Proposal goes on to state that disqualified applicants "will be given an alternate rating if otherwise competitive." The meaning of this statement is not crystal clear. It seems clear, though, that non-Hispanic competitors are definitively excluded from competition for the Hispanic-only classification for which the oral examination was held. If one or more positions are filled solely from the Hispanic-only list, then these non-Hispanic applicants would appear to have lost the opportunity to compete for those positions. Possibly, the "alternate rating" language means that if a parallel oral examination is being held by the same agency for the same positions, that the disqualified competitor can have his or her score

December 14, 1993

transferred to the "open to all" eligibility list. However, according to the Board bulletin dated July 27, 1990, "[w]hen examinations for HELP classes are given, other [i.e., Non-Hispanic] groups have not always had an equal opportunity to compete for jobs." In other words, agencies electing to fill positions through the HELP process have apparently on occasion scheduled *only* an examination for the parenthetical HELP class. For instance, in order to fill two electrical engineer positions, an agency might schedule an examination for "Electrical Engineer (Hispanic)," but not the regular "Electrical Engineer" classification, and then proceed to fill both open positions from the HELP list.

123. Clearly, the demonstration project statute authorizes the Board to waive certain Civil Service Act provisions during the life of a particular demonstration project. In the case of HELP, the demonstration project expires in December 1992. Thus, the waiver of the two sections expressly mentioned in the Proposal presumably ceased to be effective December 1992.
124. Nor was mention made of Government Code section 19702, subdivision (b), discussed above in the text (p. 183), which also bans discrimination in the administration of the Civil Service Act.
125. Equal Employment Opportunity Commission guidelines were discussed in **1987 OAL Determination No. 5**, at p. 14. In that earlier matter, the Board had argued that EEOC guidelines *mandated* that the Board conduct the AB 3001 voluntary affirmative action program in a certain way. In response, OAL noted that the federal guidelines were not mandatory, and that even if they were, they did not mandate use of *general* labor force statistics.

"In its Response, the Board places special emphasis on the federal Uniform Guidelines for Employee Selection Procedures. Examining these guidelines, we find the following *recommendations* applying to employers' voluntary affirmative action plans (such as the AB 3001 program):

'Voluntary affirmative action to ensure equal employment opportunity is appropriate at any stage of the employment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether percentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the percentages of those groups *available in the relevant job market who possess the basic job-related qualifications.*' [Emphasis added.] [Endnote 42 appeared here in the original and read "29 Code of

December 14, 1993

Federal Regulations, section 1607.17.")

"If analysis shows that remedial steps are needed, the Uniform Guidelines recommend that these steps include:

'(a) The establishment of a long-term goal, and short-range, interim goals and timetables for the specific job classifications, all of which should take into account the *availability of basically qualified persons in the relevant job market . . .*' [Emphasis added.]

"The precise nature of all SPB policies pertinent to AB 3001 has not been outlined in detail in the record before us. The record, however, appears to support the inference that SPB gauges adverse impact by individually comparing the composition of each state civil service classification against the composition of the California work force. It appears to be SPB policy that the Board considers no statistical data drawn from general work force sources except for the undifferentiated, statewide, general data reflected in the 12-17-85 memo's Labor Force Parity table (displayed above). That is, it appears that SPB does *not* make its AB 3001 determinations, where possible, based upon all "*available* [state and non-state] data" (emphasis added), as Title 2, CAC, section 473 would appear to provide, but rather as a matter of policy limits itself to mechanically comparing *classification composition against California work force composition*. [Endnote 43 appeared here in the original and read "On the other hand, the Board could have decided, as a matter of policy in implementing section 473, to look first for qualified work force data where appropriate and available, relying on 'general workforce data' only where appropriate or where more reliable data was unavailable."] (Bold emphasis in original.)

"We assume for the purposes of this Determination that SPB policy is as stated in the preceding paragraph. This policy is not clearly articulated in section 473. Such a policy, we conclude, would constitute a standard of general application used to *interpret* section 473 and Government Code section 19798; this policy must be formally adopted as a regulation in order to be enforceable.

"Given the way section 473 is drafted, we recognize that the above conclusion is not wholly free from doubt. But in any event, in light of the apparent need to re-draft the AB 3001 regulations to fully reflect other actual Board policies, we would suggest that SPB carefully consider how to articulate its data consideration policies and procedures in regulation."

December 14, 1993

126. Such practices are not unlawful if "based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the State of California." (Gov. Code sec. 12940, first paragraph.)

127. Government Code section 19705 provides:

"Notwithstanding Section 19704, the State Personnel Board may, after public hearing, adopt a system in which applicants for employment in the state civil service shall be asked to provide, voluntarily, ethnic data about themselves where such data is determined by the board to be necessary to an assessment of the ethnic and sex fairness of the selection process and to the planning and monitoring of affirmative action efforts. *The Board shall provide by rule for safeguards to ensure that such data shall not be used in a discriminatory manner in the selection process. Ethnic data may be compiled for women and minorities. Ethnic data information gathered pursuant to this section on an individual applicant shall not be available to any interviewer or any officer or employer empowered to make or influence the civil service appointment of such individual.* The board shall report annually to the Governor and the Legislature on the results of the selection process as determined by data gathered under this section." (Emphasis added.)

128. HELP Bulletin, p. 5.

129. HELP Bulletin, p. 5.

130. The remainder of section 174.7 provides:

"(b) Such information shall only be used for one or more of the following purposes:

"(1) research and statistical analysis to assess the fairness of the selection process in regard to ethnicity, sex, and the disabled; or

"(2) to provide a basis for corrective action when adverse effect is present, and

"(3) to evaluate the State's affirmative action program."

131. Bulletin, p. 5.

132. Proposal, p. 20.

133. *The American Heritage Dictionary* (Second College Edition, 1982), pp. 613-614.

December 14, 1993

134. In the APA and in Government Code section 18701.
135. First line of section 470.1 ("For purposes of *this* Article") (emphasis added).
136. Page 5.
137. Typical of such *informally* adopted "law," however, there is no clue in the text of the California Code of Regulations that the Board views this definition as applying to the HELP program.
138. **1987 OAL Determination No. 5** was issued in April 1987. It created considerable concern because the Department of Industrial Relations was then in the midst of a major layoff, which could not proceed if the Board was unable implement Government Code section 19798.

The emergency regulations adopted by the Board in July 1987 (which included the definition of Hispanic) narrowly focused on one particular affirmative action/APA compliance problem. The broader problem of putting other existing affirmative action rules through the APA process was not addressed. Indeed, in June 1987, the Board approved the HELP program--which added a substantial number of *new* non-APA rules.

We will discuss the striking similarities between the 1987 determination and the matter currently under review (the HELP program).

In **1987 OAL Determination No. 5** (State Personnel Board, Docket No. 86-011), California Administrative Notice Register 87, No. 20-Z, 1987, p. B-40, OAL concluded that specifying *which* ethnic groups were entitled to special protection in the event of a state agency seniority-based layoff was a "regulation" within the meaning of the APA and violated Government Code section 11347.5 (the statutory ban on agency use of underground regulations). In this 1987 determination proceeding, several state employees alleged that key portions of a Board memorandum dated 12-17-85 were underground regulations. Among the items appearing in this 1985 Board memorandum which were found by OAL to violate Government Code section 11347.5 was the following ethnic group table:

"Labor Force Parity (LFP) percentages used *throughout* this report are as follows (emphasis added):

December 14, 1993

	<u>1980 LFP</u>			<u>1970 LFP</u>		
	Male	Female	Total	Male	Female	Total
White	40.0	29.8	69.8	47.3	29.0	76.3
Black	3.4	3.2	6.6	3.5	2.8	6.3
Hispanic	10.4	6.8	17.2	8.9	4.8	13.7
Asian	1.9	1.7	3.6	1.3	1.0	2.3
Fili.	0.8	0.8	1.6	0.4	0.3	0.7
Amer. Indian	0.4	0.3	0.7	0.2	0.2	0.4
Pacific Islander	0.2	0.1	0.3	n/a	n/a	n/a
Other	0.1	0.1	0.2	0.2	0.1	0.3
Total	57.2	42.8	100.00	61.9	38.1	100.00
Disabled		----	6.3			

(1987 OAL Determination No. 5, typewritten version, p. 7; boldface type emphasis added.)

The rationale of the 1987 determination--concluding that the ethnic listings violated the APA--follows. We will quote the entire discussion; this will permit more convenient treatment of issues raised by various HELP rules.

"The second component of the Labor Force Parity concept considered in the 'underutilization' context is the specification of the particular protected groups listed in the table reproduced above. By specification, we mean the determination that, for instance, 'Pacific Islanders' should be deemed a protected minority or ethnic group.

"We have not located the above displayed listing in any SPB statute or regulation. SPB has not called any such provision to our attention. Creating

December 14, 1993

such a listing clearly supplements the regulatory term 'underutilization' by specifying precisely which groups will be protected. We note that SPB has implicitly recognized the need to specify particular protected groups in formally adopted regulations by promulgating Title 1, CAC [now, 'CCR' or 'California Code of Regulations'], section 547.34, which defines 'American Indian':

'Any person shall be counted as American Indian for affirmative action and statistical purposes who . . . [i]s a member of an American Indian tribe or band which is under the jurisdiction of the Federal Government as shown on the list of recognized tribes and bands maintained by the Federal Bureau of Indian Affairs; or has at least one-quarter American Indian blood quantum of tribes or bands indigenous to the United States or Canada.' [Emphasis added.]

"By contrast, what does the protected group designation 'other' signify?

"SPB regulations make an invalid effort to delegate to the Board the power to create a listing of protected groups without complying with APA procedures.

"Title 1, CAC, section 472 provides in part:

(b) If the executive officer determines that the layoff. . . will significantly cause underutilization . . . *of any group identified, pursuant to Rule 471 as making up the composition of the affected workforce*, the executive officer shall . . . schedule a . . . hearing' [Emphasis added.]

"Title 1, CAC, section 471 provides that:

' . . . the composition of the affected workforce shall be determined in accordance with relative representation within the area of layoff of the various ethnic, sex, and disability groups identified in the most recent report published by the Board pursuant to Government Code sections 19237 and 19793.' [Emphasis added.]

"The Government Code sections cited in section 471 simply require reports to the Legislature; these statutes neither list the particular protected groups designated by SPB nor expressly exempt SPB from compliance with the APA in creating such a list.

"As indicated in an earlier Determination, an agency may not avoid the

requirements of the APA by simply incorporating regulatory material in reports to the Legislature.

"Arguably, SPB need not comply with APA requirements concerning designation of particular minority groups because section 471 permits reliance on legislative reports. We reject this argument on the authority of *Hillery v. Rushen*, which held that a state agency may not delegate to itself by regulation the power to avoid APA procedures. (It should be noted that section 471 was adopted before Government Code section 11347.5 became law and before current OAL requirements for incorporation by reference took effect.)

"Government Code section 11347.5 clearly states that

'no state agency shall issue . . . any . . . guideline . . . which is a regulation . . . unless the guideline . . . has been adopted as a regulation'

[Emphasis added.]

"HERE, THE 'GUIDELINE' IS THE LIST OF SPECIFIC ETHNIC OR MINORITY GROUPS APPEARING SOLELY IN THE MEMO OF 12-17-85. THIS 'GUIDELINE' HAS NOT BEEN FORMALLY ADOPTED AS A REGULATION AND THUS CANNOT WITHSTAND SCRUTINY UNDER SECTION 11347.5.

"OAL regulations governing requests filed under Government Code section 11347.5 (i.e., Title 1, CAC, section 121(a)) make clear that when confronted with an informally adopted regulatory enactment, OAL has only two alternatives: (1) to find the enactment 'invalid and unenforceable' unless formally adopted as a regulation or (2) to find the enactment 'has been exempted *by statute* from the requirements of the [APA].'" (1987 OAL Determination No. 5, typewritten version, pp. 11-12; italicized emphasis appears in quoted determination; endnotes omitted.).

139. Id., p. 16.

140. Id., p. 18.

141. Id., p. 16.

142. Id., p. 18.

- 143. Id., p. 15.
- 144. Request, p. 5.
- 145. Proposal, p. 16.
- 146. Request. pp. 3-4.
- 147. Constitutional Provisions

California Constitution, Section 7, Article I (a person may not be denied equal protection of the laws).

California Constitution, Section 8, Article I (a person may not be disqualified from entering or pursuing a profession or vocation because of sex, race, creed, color or national or ethnic origin)

California Constitution, Section 3, Article VII (Board shall prescribe classifications)

Federal Constitution's Equal Protection Clause (no state shall deny to any person within its jurisdiction the equal protection of the laws). See *Shaw v. Reno* (1993) 113 S.Ct. 2816

Statutory Provisions

Government Code section 12920 (anti-discrimination statute, right for all persons to seek, maintain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, etc.)

Government Code section 12921 (guarantees as a civil right the opportunity to seek, obtain, hold employment without discrimination because of race, religious creed, color, national origin, ancestry, etc.)

Government Code section 12940(d) (declares unlawful employment practice for any employer to print or circulate any job-related inquiry which expresses limitation, specification or discrimination as to race, color, national origin, or ancestry)

Government Code section 18500(c)(5) (no discrimination in civil service appointments)

Government Code section 18702 (Board shall create and adjust classes of positions in state civil service)

December 14, 1993

Government Code section 18900 (exams must be free, competitive and open to all persons)

Government Code sections 19600-19607 (Demonstration project statute)

Government Code section 19702(a) (no one shall be discriminated against because of race, religious creed, color, national origin or ancestry, etc.)

Government Code section 19704 (unlawful to indicate in any way a person's race in examination, appointment or employment, etc., except when gathering statistical data)

Government Code section 19792 (directs Board to improve or correct the problem of underutilization of minorities and develop and maintain affirmative action guidelines)

Government Code section 19801(b) (specifying order of certifying eligibles when new lists are created for same classifications)

Regulatory (i.e., California Code of Regulations) Provisions

Title 2, California Code of Regulations, section 174.6 (Executive Officer of the Board may gather information on ethnicity, but such information is voluntarily provided by applicant)

Title 2, California Code of Regulations, section 174.7(a) (ethnic information shall not be used in a discriminatory manner in the selection process).

148. Response, pp. 4-5.
149. For instance, "Physician and Surgeon."
150. For instance, "Physician and Surgeon (Hispanic)."
151. Table 1, p. 1.
152. 1990 Board bulletin, p. 5.
153. It appears that the Board approved creation of the specific Hispanic-only classifications proposed in the original HELP proposal, which classifications were established based upon the labor force parity benchmark, but then went on to decide that no *additional* Hispanic-only classifications would be created unless Hispanic underrepresentation was established under the more demanding "qualified" labor force benchmark. Two *different* underrepresentation tests were thus approved. The first test (articulated in

HELP rule no. 3) was applied in creating the initial batch of about a dozen Hispanic-only classifications. The second test (articulated in HELP rule no. 4) was to be applied in reviewing requests that *additional* Hispanic-only classifications be created.

OAL recognizes the tension between the two tests. However, for present purposes (deciding whether or not the Board violated Government Code section 11347.5), it makes no difference (1) which was the "correct" test, or (2) whether or not it was proper to create some Hispanic-only classifications using the first test and other classifications using the second test. It is clear that the Board violated the APA when it issued and used the first test. It is clear that using the second test violated the APA. Further analysis is beyond the scope of this proceeding under Government Code section 11347.5.

154. OAL expresses no opinion concerning whether or not the Manual or the criterion are "regulations" within the meaning of the APA. Every state agency has a copy of the Manual. Agency staff do not lightly disregard written instructions from control agencies such as the Personnel Board. Further, the Manual is likely widely perceived as valid. "Most members of the public assume that *all* agency rules are valid, correct, and unalterable. Consequently, most people attempt to conform to them rather than to mount costly, time-consuming and usually futile challenges." Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, Duke L.J. (1985), p. 383 (discussing the federal distinction between legislative and nonlegislative rules; emphasis added.)
155. Section 2200.
156. "Deliver Us From Evil: A Public History of California's Civil Service System," Greg King, Governor's Office of Planning and Research, 1979, p. 60.
157. An undated Career Executive Assignment examination announcement lists seven "knowledge" elements, one of which reads "Knowledge of . . . [t]he Department's Affirmative Action Program objectives and a manager's role in the Affirmative Action Program, and the processes available to meet affirmative action objectives." The same announcement also lists eight "ability" elements, one of which reads "Ability to . . . [e]ffectively contribute to the Department's affirmative action objectives." The announcement in question is for the position of Chief Counsel, Department of General Services, and shows a final filing date of June 17, 1993.
158. Pink Memorandum of Dec. 21, 1987, pp. 2-3.
159. Id., p. 3.
160. Id., p. 3.

December 14, 1993

161. We note that rule no. 4, which first appeared in the HELP bulletin, was a substantial change to the parallel class creation criteria spelled out in the earlier HELP proposal. Indeed, rule no. 4 seems to dramatically limit the number of classifications that could qualify for a parallel class.
162. Id., p. 3.
163. Bulletin, p. 3 (emphasis added).
164. Id., p. 3 (emphasis added).
165. Id., p. 3.
166. Bulletin, p. 3.
167. Memo, pp. 2-3.
168. Request, p. 6.
169. P. 4.
170. Bulletin, p. 2. The Bulletin states that only entry level classes will be authorized "at least initially."
171. Item III, Request for Determination, page 8.
172. Additional Hispanic-only classifications have been approved by the Board since 1987. However, with one exception, these additional classifications were either (1) not challenged in the request for determination or (2) were authorized by the Board after the request was filed.
173. Bulletin, p. 2. A twelfth classification, "Assistant Transportation Engineer," had been proposed by staff, but was apparently not authorized by the Board.
174. See Government Code section 11346.
175. Government Code sections 20017.93-20017.87 list numerous specific classifications, e.g., "seasonal firefighter, California Department of Forestry," as falling in the state peace officer\firefighter category and thus qualifying for more generous retirement benefits than regular state employees.

December 14, 1993

176. Indeed, all HELP rules implement, interpret, or make specific Government Code section 18701.
177. *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 (standard of general application applies to all members of any open class).
178. Request, p. 8.
179. Item IV.D., Request for Determination, pp. 9-10.
180. Department Response, page 4.
181. Item IV.B., Request for Determination, pages 8-9.
182. P. 21.
183. It would seem pointless to enter the data until after the request for personnel action and the affirmative action form had been approved. If the hire was not approved, but the data had already been entered, one would have to go back into the database and delete the data.
184. Id.
185. Id.
186. The instructions on the reverse side of the form consist of a reference to a Chief Deputy's memo that has not been furnished to OAL by any of the parties.
187. Affirmative Action Plan, pp. 16-19.
188. p. 32.
189. The Plan (p. 4) designates " underrepresented" groups as : "Black, Hispanic, Asian, Native American, Pacific Islanders, Filipino, disabled person, other minorities [sic] and women."
190. (1990) 223 Cal.App.3d 490, 502.
191. Id.

192. For instance, requesters argue that SPB regulations "specifically prohibit" data gathering of the type used in preparing and processing the form. (Request, p. 8.) Title 2, California Code of Regulation, section 174.8 ("Confidentiality of Ethnic, Sex and Disability Information") provides in part:

". . . ethnic and sex information shall be *accessible* only to authorized persons. Ethnic and disability information on an individual applicant *shall not be available to any member of an oral interviewing panel, performance testing panel, or the appointing power or the appointing power's representative prior to the offer of employment.*" (Emphasis added by requesters.)

The Department, in its Agency Response, responds that the legal provisions cited by requesters (1) address only collection of data "at or before the testing process" and (2) "do not apply to JUS 105 since that form, as clearly stated on its face, is to be completed *only on applicants who have already been selected* for employment." (p. 3; emphasis added.) The Agency Response does not address the regulatory language "not be available to . . . the appointing power or the appointing power's representative prior to the offer of employment." Section. 174.8, on its face, appears to address--among other things--availability of ethnic data at the hiring agency after completion of the testing process. In addition, requesters allege that the "form is to be filled out [at DOJ] before a candidate is offered employment." (p. 8.)

Nonetheless, we agree with the Department that the question of whether or not the Department has *violated* section 174.8 is beyond the scope of the present proceeding. However, we conclude that the form *does* implement, interpret, and makes specific section 174.8. The Department, in effect, argues that the challenged form correctly implements section 174.8. Requesters, by contrast, argue that the Department's use of the form violates section 174.8. In either case, it is necessary to interpret section 174.8. If the Department's view were to prevail in an appropriate proceeding, it could then be argued that no formal regulation is necessary because the Department has merely "applied" section 174.8. In the event that the requesters' view were to prevail, it could be argued that the Department had in substance created an exception to section 174.8, an exception which could validly be adopted only pursuant to the APA (assuming there were no consistency problems).

193. Request, p. 9.

194. p. 16.

195. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128.

196. We use the terms "exemption" and "exception" interchangeably.
197. Government Code section 11346.
198. In 1991-92, the Board unsuccessfully attempted to obtain legislation designed to expand the internal management exception. The Board's "Calendar" dated October 8-9, 1991, at page 5 (subject: Legislation), item 5, reads as follows:

"Problem: APA notice and review requirements have proven to be *burdensome* and in some cases have prevented timely administration of the civil service system. Because the Office of Administrative Law (OAL) interprets the APA expansively, many of the Board's operational directives and manual sections potentially could be judged to be 'underground regulations' that should be subject to the formal regulation adoption process. . . .

"Solution: Sponsor legislation to expand the internal management exception in the APA to include directives from control agencies such as the State Personnel Board to departments with delegated authority where the rights of the public are not significantly impacted."

On January 29, 1992, the Board sponsored AB 2426/Seastrand. The bill, which died in committee, would have exempted from the APA Board instructions to any state agency that were required only for the administration of the state's civil service selection and appointment processes. According to the Legislative Counsel's Digest of the bill, as amended March 26, 1992, "[t]he bill would also require this exemption to be construed narrowly and not include instructions that significantly affect the legal rights or obligations of employees, applicants, or the public." AB 2426 also reveals an apparent belief on the part of the Board that the APA *covers* Board rules concerning civil service selection and appointment processes.

This apparent belief is inconsistent with the position taken in the Board's May 1991 Response in this determination proceeding, a position to the effect that the Board has "'primary and exclusive' [jurisdiction] under the California Constitution in *any* matter involved in the examination and selection of civil service personnel." (Response, p. 2; emphasis added.) The Response asserts that the Legislature lacks the power to give the Board any statutory instructions in the area of "examination and selection of civil service personnel," including but not limited to classifications.

Also, we note that even under the *expanded* internal management exception (which failed to pass), the HELP rules would violate the APA. Clearly, the HELP rules

December 14, 1993

significantly affect the legal rights of applicants for state jobs.

199. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, fn. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
200. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.
201. 1990 Bulletin, unnumbered p. 1 of Summary of Conclusions and Recommendations, conclusion 4.
202. The United States acquired California from Mexico in 1848 by the Treaty of Guadalupe-Hidalgo. Though the Americans promised in the treaty that private property rights of the Mexicans would be "inviolably respected," this promise was not always kept in practice due in part to "the general distaste that nineteenth century Americans had for both Mexican culture and the Mexican 'race.'" Grossman, "John C. Fremont, Mariposa, and the Collision of American and Mexican Law," 6 *Western Legal History* 16, 23 (Winter/Spring 1993).
203. Former Government Code section 19573 (added by Statutes of 1945, chapter 123, p. 567, section 1) declared (among other things) that state employees possessing dual citizenship were subject to discipline. According to uncodified language enacted by the Legislature in 1985 in the process of repealing section 19573, this section had been invoked only once, ". . . to terminate the employment of *all* state employees of Japanese ancestry, regardless of citizenship, during World War II." (Stats. 1985, ch. 928, sec. 1; emphasis added.) The uncodified language concluded: "The Legislature hereby finds that the repeal of this section is necessary due to the discriminatory climate in which it was enacted and the civil rights violations which resulted from the method in which it was imposed."
204. Government Code section 12920.
205. Bulletin of January 15, 1992, p. 1.
206. *Id.*
207. Even assuming for the sake of argument that classifications generally are exempt from the APA, classification policies which implicate fundamental constitutional and equitable principles (such as HELP) should nonetheless be deemed subject to the APA on the grounds they concern matters of serious consequence involving an important public interest. See *Poschman*.

208. See also:

- * Government Code section 18701, which provides in part that "[t]he board shall *prescribe*, amend, and repeal rules . . . for the administration and enforcement [of the Civil Service Act and other Government Code sections]. . . ." (Emphasis added.)
- * Penal Code section 5058, subdivision (a) provides in part that the Director of Corrections "may *prescribe* and amend rules and regulations for the administration of prisons." (Emphasis added.)

209. This choice of words may reveal a degree of frustration with the Personnel Board's predilection for informally adopting rules interpreting the Civil Service Act.

210. Section 19700 has two interesting facets. First, the use of the phrase "or unwritten" reveals legislative awareness of the Board's predilection to issue rules which are not codified in the California Code of Regulations. Second, the section appears to "invade" the Board's exclusive province, because an age limit could be part of a classification.

211. *Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 1690170 (quasi-legislative enactments are general policies intended to govern future decisions). Clearly, the HELP rules are policies intended to govern future decisions.

212. 2 Cal App.4th 47, 53 & 55, 3 Cal.Rptr. 2d 264, 269-270.

213. Checking *Sheperd's California Citations*, we note that the 1973 published Attorney General's opinion upon which the "primary and exclusive jurisdiction" thesis is predicated has never been cited in a subsequent published Attorney General's opinion.

214. (1985) 39 Cal.3d 422.

215. See also *Oquendo v. California Institution for Women* (1989) 212 Cal.App.3d 520 (FEHA covers state as well as private employees).

216. 39 Cal. 3d at 427.

217. *Id.*, 39 Cal.3d at 435.

218. *State Board of Education v. Honig* (1993) ----Cal.App.4th----, 16 Cal.Rptr.2d 727, 750-751, rehearing denied, review denied.

219. Government Code section 19792, subdivision (g), *instructs* the Personnel Board to "review, examine the validity of, and update qualification standards, selection devices, including oral appraisal panels and career advancement programs."

Government Code section 19700 *forbids* the Personnel Board or its executive officer from adopting "any rule, either written or unwritten, prohibiting the employment of any person in any state position who is otherwise qualified therefor, solely because his or her age"

How can the existence of (and the Board's enforcement of) the above statutes be reconciled with the thesis that the Legislature lacks power to pass laws concerning examination and selection of civil service personnel?

220. Government Code section 11349.1.
221. Government Code sections 11120-11132.
222. Government Code sections 6250-6267.
223. p. 3.
224. *Hatch v. Ward* (1946) 27 Cal.2d 883, 887 (upholding validity of Board rule 14a, concerning use of sick leave for care of sick family members).
225. 2 Cal.App.4th at 57.
226. 2 Cal.App.4th at 60.
227. In 1947, that provision was numbered Government Code section 11420.
228. *Le Ballister v. Redwood Theatres, Inc.* 1 Cal.App.2d 447, 448 (1934); *R.J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 135.
229. *Ganyo v. Municipal Court* (1978) 80 Cal.App.3d 522, 529; and see, Black's Law Dictionary (5th ed., 1979, p. 521).
230. *Addison v. Holly Hill Fruit Products* (1944) 322 U.S. 607, 618.
231. *SWRCB v. OAL*, *supra*, 12 Cal.App.4th 697, 703.
232. Other examples of express exemption provisions include:

December 14, 1993

- "[t]he determination of the facility fee pursuant to this section . . . is exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 2 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 2 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 cases 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.

Another variation is when certain types of rules enacted by an agency are exempted from the APA, but other types are not. One example is found in 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.]

- 233. 2 Cal. App. 4th 47, 59, 3 Cal. Rptr. 2d 264, 272.
- 234. (1968) 263 Cal.App.3d 41, 69 Cal.Rptr. 480.
- 235. 263 Cal.App.2d at 56.
- 236. *Fig Garden Park v. Local Agency Formation* (1984) 162 Cal.App.3d 336, 343, 208 Cal.Rptr. 474, 478.
- 237. *California Optometric Association v. Lackner* (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751, rehearing denied.

238. *Id.*, quoting *California Association of Nursing Homes v. Williams* (1970) 4 Cal.App.3d 800, 813, 84 Cal.Rptr. 590, 598, rehearing denied, hearing denied.
239. *Supra*, 219 Cal.App.3d at 431.
240. *Hiatt*, *supra*, 130 Cal.App.3d at 311.
241. The APA also requires that notice be mailed to every person who has requested such rulemaking notices from the particular rulemaking agency.
242. Government Code section 11346.4(a)(5).
243. Government Code section 11346.5.
244. Government Code section 11346.7, subdivision (b)(4).
245. Government Code section 11346.7(b)(3).
246. Government Code section 11346.7(b)(3).
247. Government Code sections 11349.1(a); 113467.3(b).
248. Government Code section 11349.5.
249. Government Code section 11350.3.
250. Shortly before the adoption hearing, the HELP Proposal stated that "no opposition to the proposed project had been expressed." Given the controversial nature of the subject of affirmative action (see, e.g., the opposing opinions of Justices Richardson and Mosk in *DeRonde v. Regents of the University of California* (1981) 28 Cal.3d 875, 172 Cal.Rptr. 677), this total lack of opposition is a surprising fact. A reasonable inference to draw from this fact is that the HELP Proposal was not widely publicized prior to its inclusion on the Board agenda.
251. True, Government Code section 19602, subdivision (b), requires the Board to provide 180 days notice to (1) the Legislature and (2) state employees that are likely to be affected by the demonstration project. According to the HELP Proposal (p. 21), however, the Legislature was notified 180 days *prior* to the sole public hearing.

True, Government Code section 19602, subdivision (e), provides that the Legislature is to be notified of the "final version" of the demonstration project 90 days in advance of implementation.

However, the above noted reports to the Legislature fall short of providing the procedural protections of the APA 15-day change additional-notice requirement. First, the notice is sent solely to the Legislature, not to persons who have taken part in the proceeding. Second, there is no legal requirement that the rulemaking agency summarize and respond to public comments. Third, there is no OAL review requirement. OAL review ensures that the rulemaking agency has adequately considered (i.e., summarized and responded to on the record) all public comments.

252. *Id.*, 60 Cal.App.3d at 512, 131 Cal.Rptr at 752.

253. According to King, *Deliver Us From Evil*, *supra*, p. 61.

"State government cannot, as a matter of conscience, weaken its efforts to reach a work force that is both open to all and corrects past inequities. But, carrying out an affirmative action program that is fair to all may be well-nigh impossible. In the short run, the Personnel Board will have to choose *which* inequities it must now permit, in order to achieve ultimate fairness." (Emphasis added.)

254. In a footnote at this point, the treatise states:

At their outer limits, there are two very different viewpoints with respect to the purpose of Title VII [the federal employment discrimination statute], which can be termed "equal treatment" and "equal achievement." *Vuyanich v. Republic Nat'l Bank*, 505 F. Supp. 244, 262, 24 FEP 128, 157 (N.D. Tex. 1980) (defining "equal treatment" and "equal achievement"). The "equal treatment" doctrine seeks to achieve a "color blind" universe. All persons would be treated without regard to their racial or gender status. This doctrine focuses on individuals, acknowledges their varying skills, and seeks to assure that a person's protected group status plays no role in employment opportunities.

The second view of Title VII, "equal achievement," looks "to the results of the contest, not to whether the rules are the same for everyone. *Id.* at 262, 24 FEP at 157. Exponents of this view insist that members of protected groups be represented at all levels of the work force in proper proportion to their availability in the general work force, and contend that as a result of the effects of past discrimination, the concept of "equal treatment" is but another way of perpetuating former wrongs.

These two views are expressed very well in the comments of two men whose "bona fides" in the area of human rights and constitutional law can hardly be questioned. Alexander Bickel, in *THE MORALITY OF CONSENT* at 133 (1975), has stated:

"The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be un-learned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution."

Thurgood Marshall, writing for himself in the *Bakke* case, 438 U.S. 265, 387, 17 FEP 1000, 1052 (1978), sees the issue in a different light:

For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the mostly ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier."

The tension between the two views of Title VII is inherent in "reverse discrimination" decisions. In 1964, when Title VII was passed and the racial code of centuries past was officially pronounced to be a reprehensible in law as it was in fact, many believed that the balance between the groups would soon be in equilibrium. However, the focus of the law and of the peaceful revolution it works leaves incumbents in place. Recognition of incumbency means that the relative positions of groups will change slowly and, indeed, that progress may very well be determined less by the acceptance of change in public policy and morality than by the actuarial tables. The reality of this fact, the slowness of relative changes as to groups, is bitter for the earnest seeker of social justice or the willing seeker of work. Thus, even if minority and female entry-level candidates compete on the fairest of bases, change in overall numbers is likely to be a process of decades. This, of course, frustrates the desire of many who advocated the adoption of Title VII to correct racial, ethnic, and sexual imbalance in the work force which is produced not by any current employment practice, but merely by the fact of incumbency.

255. Schlei and Grossman, *Employment Discrimination Law* (2d. ed., 1983), pp. 775-776.

December 14, 1993

256. Though the specific legal authorities cited are federal, the thrust of the court's remarks on public participation are very much in harmony with California law, as evidenced by Justice Friedman's statement, quoted above.
257. We are discussing policies underlying the APA. No specific criticism of the Personnel Board or its policies is intended.
258. *Chamber of Commerce of United States v. OSHA* (D.C. Cir. 1980) 636 F.2d 464, 470-471.
259. *Supra*, note 107.
260. See *Associated General Contractors of California, Inc. v. City and County of San Francisco* (9th Cir. 1987) 813 F.2d 922, 931(court praised city's multiple public hearings and careful review of public input prior to adopting ordinance granting contracting preferences to minority, women, and locally owned businesses).
261. OAL often requires the rulemaking agency to supplement the rulemaking record.
262. Just prior to the June 1987 Board hearing on the HELP proposal, Board staff stated ". . . no opposition to the proposed project has been expressed." (Proposal, p. 15.)
263. Title 1, California Code of Regulations, sections 213--213.6 (effective 5-31-89).
264. *SWRCB v. OAL*, *supra*, 12 Cal.App.4th at 704-705.
265. *Grier, supra*, 219 Cal. App.3d at 436, 268 Cal. Rptr. at 254-255.
266. **1987 OAL Determination No. 5** (State Personnel Board, April 30, 1987, Docket No. 86-011, California Regulatory Notice Register 87, No. 20-Z, p. B-40).
267. See Title 2, California Code of Regulations, section 470.1, history note 1..
268. We have been told informally that the Board is not continuing the HELP project, that the complaint should be viewed as moot. This is not, however, what the 1992 bulletin states. As far as the record of this proceeding indicates, the individual HELP rules--Hispanic-only classifications, etc.--are still being used.
269. We rejected a quasi-judicial justification for APA avoidance in an earlier Personnel Board determination, **1987 OAL Determination No. 5**, *supra*, note 13. See also **1993 OAL Determination No. 1**(Energy Commission), p. 13.
270. Response, p. 3.

December 14, 1993

271. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.
272. We are not persuaded that the *Armistead* Court would have reached a different conclusion and *upheld* the employee resignation rule involved in that case if the Personnel Board had simply thought to incorporate the rule in a form or form instruction.
273. Former OAL Staff Counsels Mathew Chan and Linda Kouyoumdjian contributed to this determination by, respectively, preparing an analysis of the issues raised by the request for determination and contributing to Part C, "APA exemptions." Current OAL attorneys Charlene Mathias, Barbara Steinhardt-Carter and Gordon Young provided valuable editorial assistance.

AFFIRMATIVE ACTION APPOINTMENT AUDIT

* (Instructions on reverse side)

1 (a) DIVISION _____ (b) BRANCH _____

(c) BUREAU/SECTION/UNIT _____ (d) LOCATION (city) _____

2 TYPE OF ACTION (a) NEW HIRE (new to DOJ) (b) REINSTATEMENT (former DOJ) (c) PROMOTION (current DOJ) (d) INTERNAL TRANSFER (FROM WITHIN DOJ)

SEASONAL * MANDATORY IN PLACE (same position) DTLD
 TAU PERMISSIVE TO VACANT POSITION TOTAL POSITIONS TO BE FILLED:

PERMANENT

	WHITE		BLACK		HISP.		ASIAN		FILIPINO		AM. IND.		PAC. IS.		DISAB.		OTHER		TOTALS
	(M)	(F)	(M)	(F)	(M)	(F)	(M)	(F)	(M)	(F)	(M)	(F)	(M)	(F)	(M)	(F)	(M)	(F)	
4 (a) Applications Received																			
(b) Applicants interviewed																			
(c) Applicants not interviewed																			
5 (a) Candidate(s) Selected																			
(b) APPOINTEE'S NAME: (attach a list if more than one)																			
(c) SOCIAL SECURITY NUMBER																			

6 JUSTIFICATION FOR NON-AFFIRMATIVE ACTION HIRE IN A TARGETED CLASSIFICATION (See Instructions)

7 (a) SIGNATURE OF SUPERVISOR _____ (b) TITLE _____ (c) TELEPHONE _____ (d) DATE _____

(e) DIRECTOR'S SIGNATURE _____ (f) DATE _____

INSTRUCTIONS

In order to comply with Equal Employment Opportunity Commission guidelines on employment selection procedures, the Department must maintain records on sex and ethnic composition of its employees. The required information may be volunteered by the employee or coded by the supervisor. The data will not be part of the employee's permanent personnel folder and will be collected for statistical reporting purposes.

1. Complete appropriate sections. Location refers to city where employee is to be located.
2. **Type of Action** - Check all applicable boxes and indicate the Total positions to be filled in the space given.
3. Fill in all boxes (3a-3e). Deficiency and Target Class Information should be taken from Affirmative Action Deficiency Report available in all bureau or branch administrative offices.
4. Complete applicable boxes. Note: For 4c, indicate any "no shows" on an attached list.
5. Appointee's name and social security number must be provided.
6. **Justification** - For the hiring of a particular candidate, refer to the Chief Deputy's Hiring Procedures memo of September 27, 1985.
7. The form must be signed by the supervisor making the appointment and by the director or division chief approving the appointment.
8. For every personnel transaction, there must be one audit form completed and attached to the RPA. Include a list of all candidates.
9. For further assistance in completing this process, contact the Affirmative Action office (916) 324-5483, ATSS 8-454-5483.

AFFIRMATIVE ACTION INFORMATION AND MONITORING FORM

(Please read the reverse side before completing)

I. PERSONNEL ACTION REQUEST INFORMATION

Appointee Name	Prior Classification	Appointed Classification	Was Position Advertised	Date Appointed
----------------	----------------------	--------------------------	-------------------------	----------------

II. POSITION LOCATION

Division	Branch	Bureau	Section/Unit	Location (city)
----------	--------	--------	--------------	-----------------

III. TYPE OF APPOINTMENT

NEW employee to Department of Justice			CURRENT Department of Justice Employee		
a. Tenure	b. Civil Service Appointment	c. Time Base	a. Tenure	b. Civil Service Appointment	c. Time Base
<input type="checkbox"/> Permanent	<input type="checkbox"/> Promotion <input type="checkbox"/> Reinstatement	<input type="checkbox"/> Full time	<input type="checkbox"/> Permanent	<input type="checkbox"/> Promotion <input type="checkbox"/> Other	<input type="checkbox"/> Full time
<input type="checkbox"/> Limited Term	<input type="checkbox"/> Lateral <input type="checkbox"/> Other	<input type="checkbox"/> Part time	<input type="checkbox"/> Limited Term	<input type="checkbox"/> Lateral	<input type="checkbox"/> Part time
<input type="checkbox"/> TAU	<input type="checkbox"/> T & D		<input type="checkbox"/> TAU	<input type="checkbox"/> T & D	
	<input type="checkbox"/> Special Programs (i.e., LEAP, COD, HELP)			<input type="checkbox"/> Special Programs (i.e., LEAP, COD, HELP)	

IV. PROFILE OF APPLICANT(S)	White		Black		Hispanic		Asian		Filipino		Am. Ind.		Pac. Is.		Other		Disabled	
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Application(s) Received																		
Applicant(s) Interviewed																		
Applicant Selected																		

V. METHOD(S) OF RECRUITMENT

YES	NO	YES	NO	YES	NO
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Down Grade/Reclassify Position		Extended Filing Date		Contact Community Professional Organizations	
T & D Assignment		Advisory Committee		Other Efforts	

VI. JUSTIFICATION

VII. APPROVAL SIGNATURES

Hiring Supervisor/Manager	Title	Telephone	Date
Division Approving Authority			Date

INSTRUCTIONS

In order to comply with Equal Employment Opportunity Commission guidelines on employment selection procedures, the Department must maintain records on sex and ethnic composition of its employees. The required information may be volunteered by the employee or enter by the supervisor. The data will not be part of the employee's permanent personnel folder and will be collected for statistical reporting purposes.

Section I: PERSONNEL ACTION REQUEST INFORMATION

- * Indicate the full name of candidate.
- * Indicate his/her prior and appointed classification.
- * Indicate the date appointed.

Section II: POSITION LOCATION

- *Fill-in the division name etc., for position being filled.

Section III: TYPE OF APPOINTMENT

- *Check tenure.
- *Check type of civil service appointment.
- *Check the appropriate time base.

Section IV: PROFILE OF APPLICANT(S)

- *Indicate the number of applications received.
- *Indicate the number of applicants interviewed.
- *Indicate the applicant selected.

Section V : METHODS(S) OF RECRUITMENT

- *Check which recruitment methods used.

Section VI: JUSTIFICATION

- *An explanation is required if the selection does not enhance the department's Affirmative Action goals.

Section VII: APPROVAL SIGNATURES

