

STATE OF CALIFORNIA

ENDORSED FILED  
IN THE OFFICE OF

OFFICE OF ADMINISTRATIVE LAW

95 APR 18 PM 3: 25

*Bill Jones*  
REG. CLERK OF STATE

|                                     |   |                                   |
|-------------------------------------|---|-----------------------------------|
| In re:                              | ) |                                   |
| Request for Regulatory              | ) |                                   |
| Determination filed by the          | ) | 1995 OAL Determination No. 2      |
| CALIFORNIA STATE                    | ) |                                   |
| EMPLOYEES ASSOCIATION               | ) | [Docket No. 90-024]               |
| concerning the EMPLOYMENT           | ) |                                   |
| DEVELOPMENT                         | ) | April 18, 1995                    |
| DEPARTMENT's time base              | ) |                                   |
| change policy for permanent-        | ) | Determination Pursuant to         |
| intermittent employees in           | ) | Government Code Section 11347.5;  |
| Employment Program                  | ) | Title 1, California Code of       |
| Representative and Disability       | ) | Regulations, Chapter 1, Article 3 |
| Insurance Program                   | ) |                                   |
| Representative classes <sup>1</sup> | ) |                                   |

Determination by: JOHN D. SMITH, Director

HERBERT F. BOLZ, Supervising Attorney  
DEBRA M. CORNEZ, Staff Counsel  
Regulatory Determinations Program

**SYNOPSIS**

The issue presented to the Office of Administrative Law is whether or not the Employment Development Department's policy listing specific employees' eligibility requirements for a time base change is a "regulation" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law concludes that the policy, though a "regulation," is nonetheless exempt from the Administrative Procedure Act because it falls within the "internal management" exception.



## THE ISSUES PRESENTED<sup>2</sup>

The Office of Administrative Law ("OAL") has been requested to determine<sup>3</sup> whether the Employment Development Department's policy listing requirements that employees in the Employment Program Representative ("EPR") and Disability Insurance Program Representative ("DIPR") classes must meet in order to be eligible for a time base change from permanent intermittent to full-time work, is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").<sup>4</sup>

## THE DECISION<sup>5, 6, 7, 8</sup>

The Office of Administrative Law finds that:

- (1) the Department's quasi-legislative enactments are generally subject to the APA;
- (2) the challenged "time base change" policy is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g);
- (3) the "time base change policy," however, falls within the "internal management" exception to APA requirements, and therefore;
- (4) the "time base change" policy does not violate Government Code section 11340.5, subdivision (a).<sup>9</sup>

## 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.) Its provisions are applicable to the exercise of any quasi-legislative power conferred by statute (section 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 11346.2), 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.)<sup>10</sup>

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature

enacted Government Code section 11340.5. That section, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. The section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (g) of Government Code section 11342. Subdivision (b) of section 11340.5 states as follows:

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

These provisions authorize OAL to determine whether a challenged rule violates the APA. Section 11340.5, however, does not empower OAL to prevent the use of a rule or policy found to be invalid under the APA or to impose penalties upon such use. Such authority rests with the courts.

## **II. THE RULEMAKING AGENCY INVOLVED HERE; ITS RULEMAKING AUTHORITY; BACKGROUND OF THIS REQUEST FOR DETERMINATION**

### **The Rulemaking Agency Named in this Proceeding**

The California Employment Development Department ("Department") provides many services. It acts as a broker between employers and job seekers; pays benefits to eligible unemployed or disabled persons; collects payroll taxes; helps disadvantaged persons to become self-sufficient; gathers and shares information on California's labor markets; administers the Job Training Partnership Act program; and ensures that these activities are coordinated with other organizations that also provide employment, training, tax collection and benefit payment services.<sup>11</sup>

## **Rulemaking Authority**<sup>12</sup>

The Department has been granted general rulemaking authority pursuant to Unemployment Insurance Code section 305, which states:

"Regulations for the administration of the functions of the Employment Development Department under this code shall be adopted, amended, or repealed by the Director of Employment Development as provided in Chapter 4.5 (commencing with Section 11371) of Part 1 of Division 3 of Title 2 of the Government Code [i.e., the APA]."<sup>13</sup>

## **Background: This Request for Determination**

This Request for Determination was filed on or about May 24, 1990, by the California State Employees Association ("CSEA" or "Requester"), SEIU Local 1000. Pursuant to the Ralph C. Dills Act,<sup>14</sup> which established collective bargaining for state employees, the state work force is divided into 21 bargaining units. CSEA is the authorized union representative for several of these bargaining units.

In its Request for Determination, CSEA challenged the Department's "policy concerning application of State Personnel Board ['SPB'] Rule 277, Time Base Change, to the Employment Program Representative (EPR) and Disability Insurance Program Representative (DIPR) classes." CSEA enclosed with its Request, a letter from the Department to CSEA, dated November 21, 1989, signed by James A. Wheatley, Chief, Employee Relations Section. This letter from the Department included an attachment in which the Department set forth the specifics of its time base change policy, in addition to the requirements set forth in Rule 277, as it applies to EPR or DIPR permanent intermittent employees. The policy attachment states in part:

". . . .

"To fill a vacant position the Department has the right to use any one of several means: eligible lists, transfer, reinstatement,

reassignment, training and development assignment *and time base change*.

"In those situations where consideration is given to changing the time base of an EPR/DIPR from permanent intermittent ["PI"] to full time *the following requirements must be met by the candidate*.

1. Successful completion of all components of Block training for the class (EPR or DIPR) to which the employee would receive a full time appointment.
2. Documented satisfactory performance in all functions assigned to as an EPR or DIPR PI.
3. Assignment to Range C of the class (EPR or DIPR) in which the full time appointment would be made.
4. Fulfill the requirements of SPB Rule 277. - The employee must have held any combination of permanent or probationary appointments to the class in which the appointment would be made for at least two years and has worked at least 1920 hours in such appointments.

". . . . [Emphasis added.]"

SPB Rule 277 is a codified regulation set forth in title 2 of the California Code of Regulations ("CCR") at section 277. Section 277 states:

"The following provisions specify when employees are eligible for various time base changes without an appointment from an employment list. They are not to be construed, by themselves, as entitling employees to such changes or as enabling appointing powers to make such changes without the employee's consent. These provisions do not extend or modify an employee's eligibility to reinstate to a position in a different class:

"(a) Increases in time base of part-time or intermittent employees to full time or movement of intermittent employees to part time are permitted when:

(1) The employee has previously held a permanent or probationary status appointment at or above the desired time base in the classification to which the appointment is to be made or in the classification that is substantially at or above the salary level of that classification; or,

(2) The appointing power can clearly demonstrate that the employee has previously been eligible for an appointment from an employment list to the position and time base in question; or,

(3) For at least two years the employee has held any combination of permanent or probationary appointments to the types of classes specified in subsection (1) and has worked at least 1920 hours in such appointments.

"(b) Time base changes other than those specified in Part (a) of this rule are permitted at the discretion of the appointing power."<sup>15</sup>

On May 17, 1991, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,<sup>16</sup> along with a notice inviting public comment. CSEA submitted further comments arguing that the challenged policy was a rule or standard of general application because "it applies to all members of a class, kind or order . . . . [i.e.,] to all EDD PIs in the [EPR] and [DIPR] classification", and "that none of the exceptions to the APA apply in this case."<sup>17</sup> The Department submitted its Response to the Request for Determination ("Response") on July 10, 1991. In its Response, the Department argued that

"The Department's time-base change policy is an internal management policy which affects approximately 1300 permanent-intermittent employees who work in only two civil service classes in the Department. The policy is actually an internal directive to EDD

managers like any other internal directive relating to office management and applies to only one of a number of permissive options for appointments. It is clearly not a regulation within the meaning of Government Code section 11342. It is designed to ensure that EDD field office managers will select for time-base changes from those employees who meet the minimum requirements of State Personnel Board Rule 277 only those who are fully trained, experienced, and satisfactory performers in accordance with the needs and prerogatives of the Department."

### III. DISCUSSION

In this determination, the key issues are:

- A. **Whether the APA is generally applicable to the Department's quasi-legislative enactments.**
- B. **Whether the challenged policy constitutes a "regulation" within the meaning of the key provision of Government Code section 11342.**
- C. **Whether the challenged policy falls within an exception to APA requirements.**

#### A.

**The APA is generally applicable to the Department's quasi-legislative enactments.**

Government Code Section 11000 states in part:

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

This statutory definition applies to the APA, that is, it helps determine whether or not a particular "state agency" must adhere to the 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 part of Title 2 of the Government Code: to be precise, Chapter 3.5 of Part 1 of Division 3.

The Employment Development Department, a state "department," is clearly a "state agency" as that term is defined in Government Code section 11000.

The APA somewhat narrows the broad definition of "state agency" given in Government Code Section 11000. In Government Code Section 11342, subdivision (a), the APA provides that the term "state agency" applies to *all* state agencies, *except* those in the "judicial or legislative departments."<sup>18</sup> The Department is not in either the judicial or the legislative "department" (or branch) of state government; it is in the executive branch. Accordingly, we conclude that APA rulemaking requirements generally apply to quasi-legislative enactments of the Department.<sup>19</sup>

We also note that Unemployment Insurance Code section 305, quoted above, requires specifically that regulations of the Department "shall be adopted, amended, or repealed . . . as provided in [the APA]."

## B.

**The challenged policy constitutes a "regulation" within the meaning of the key provision of Government Code section 11342.**

In part, Government Code Section 11342, subdivision (g), defines "regulation" as:

". . . *every* rule, regulation, order, or standard of general application or the amendment, supplement or revision of *any* rule, regulation, order or standard adopted by *any* state

agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . . ." (Emphasis added.)

Government Code Section 11340.5, 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 (g) 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*,<sup>20</sup> the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code Section 11342, subdivision (g):

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 agency adopted the challenged rule to either

- o implement, interpret, or make specific the law enforced or administered by the agency *or*
- o govern the agency's procedure?

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

" . . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.*" (Emphasis added.)<sup>21</sup>

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. . . .'"<sup>22</sup> 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. . . ."<sup>23</sup>

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations provisions) cannot legally be "embellished upon" in administrative bulletins. For example, in turn, *Union of American Physicians and Dentists v. Kizer* (1990)<sup>24</sup> 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.<sup>25</sup> 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 Coalition)* ("*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.)<sup>26</sup>

**(1) Is the challenged policy a standard of general application or a modification or supplement to such a standard?**

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.<sup>27</sup>

In its Response, the Department quotes Government Code section 11343, subdivision (a):

"Every state agency shall:

(a) Transmit to [OAL] for filing with the Secretary of State a certified copy of every regulation adopted or amended by it *except one which:*

. . . .

*(3) is directed to a specifically named person or to a group of persons and does not apply generally throughout the state*  
. . . . [Emphasis by Department.]"

The Department then argues that the "time-base change policy is an internal management policy which affects approximately 1300 permanent-intermittent employees who work in only two civil service classes in the Department." We assume that the Department is arguing that the challenged policy applies only to a specifically named person or to a group of specifically named persons, and therefore, is not a standard of general application.

We do not agree with this argument for two reasons. First, the policy does not refer to any specifically named person or persons. In other

words, it is not directed to John Doe or Jane Doe. Thus, it does not satisfy the first element of section 11343, subdivision (a) (3). Second, the policy does in a sense apply generally throughout the state. As stated above, the agency rule 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. The Department itself describes the rule as "affect[in] . . . only two civil service *classes* in the Department." (Emphasis added.) The names and number of the members in these "classes" are ever changing, i.e., the classes are open, not closed. The challenged policy, therefore, is a standard of general application.

**(2) Does the challenged policy interpret, implement, or make specific the law enforced or administered by the agency or the law which governs the agency's procedure?**

The law being administered by the Department is title 2, CCR, section 277, titled "Change in Time Base," referred to as SPB Rule 277 in this determination. The Department's letter, to which the challenged policy was attached, states that "the Department has developed a *policy concerning application of State Personnel Board Rule 277, Time Base Change, to the [EPR] and [DIPR] classes.*" (Emphasis added.) The challenged policy sets forth requirements which must be met by all candidates, "[i]n those situations where consideration is given to *changing the time base of an EPR/DIPR from permanent intermittent to full time . . . .*" (Emphasis added.) The question is, therefore, does the challenged time base policy amend, supplement or revise section 277. The answer is clearly "yes."

The Department lists four requirements in the challenged time base policy. (See Part II. Background: This Request for Determination, *supra*.) The fourth requirement is merely a restatement of title 2, CCR, section 277 (a)(3). However, a comparison of the challenged policy requirements 1, 2, and 3, and the regulatory requirements of section 277 brings one quickly to the conclusion that the challenged time base policy requires an EPR or DIPR to meet more than just section 277 requirements in order to be eligible for a time base change.

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

C.

**The challenged policy found to constitute a "regulation" is nonetheless statutorily exempt from compliance with APA requirements.**

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.<sup>28</sup> However, rules concerning certain activities of state agencies are not subject to the procedural requirements of the APA.<sup>29</sup>

**Internal Management Exception**

Government Code Section 11342, subdivision (g), 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.)

*Grier v. Kizer* provides a good summary of case law on internal management. After quoting Government Code Section 11342, subdivision (g), 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.]

"*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.][<sup>30</sup>]

"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. . . ."<sup>31</sup>

*Poschman* 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.) The time base policy at issue in this matter

affects *only* employees within the EPR and DIPR classifications within the Department; therefore, the remaining question to be answered is whether the time base policy concerns "a matter of serious consequence involving an important public interest."

Though the time base policy concerns the possibility of a career advancement and an increase in hours and salary--no doubt a matter of importance to the individual employee--the time base policy does not concern a matter of *serious consequence* involving an *important public interest*.<sup>32</sup> What are examples of agency rules which involve a matter of serious consequence involving an important public interest? One case involved a state college rule concerning how professors obtained tenure. In this first case, *Poschman*, the rule involved not only denial of tenure (and eventual termination of employment of the individual involved), but also the broader public interest in the tenure rules of any public school system. The second case involved mandatory drug testing of correctional officers and other state prison employees.<sup>33</sup> This second case involved two important public interests: the public interest in a drug-free work force and the public interest in constitutional privacy guaranties.

The rules at issue in this request for determination simply do not rise to the level of significance found in either the public school tenure or the drug testing cases. They do not concern matters of *serious* consequence involving an *important* public interest. We therefore agree with the Department<sup>34</sup> that the time base change policy falls within the "internal management" exemption and is not subject to the procedural requirements of the APA.

#### IV. CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) the Department's quasi-legislative enactments are generally subject to the APA;
- (2) the challenged "time base change" policy is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g);

- (3) the "time base change" policy, however, falls within the "internal management" exception to the APA requirements apply; and therefore;
- (4) the "time base change" policy does not violate Government Code section 11340.5, subdivision (a).

DATE: April 18, 1995

  
HERBERT F. BOLZ  
Supervising Attorney

  
DEBRA M. CORNEZ  
Staff Counsel

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

1. This Request for Determination was filed by Chris Bender, Senior Labor Relations Representative, California State Employees Association, SEIU Local 1000, 1108 O Street, Sacramento, CA 95814, (916) 444-8134. The Employment Development Department was represented by Mary Jean Mee, Senior Staff Counsel, 800 Capitol Mall (95814), P. O. Box 826880, Sacramento, CA 94280-0001, (916) 653-0707.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "22." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

This determination may be cited as "**1995 OAL Determination No. 2.**"

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

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

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

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.

In December 1993, a *fifth* survey of governing law was published in **1993 OAL Determination No. 4** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register 94, No. 2-Z, page 61, note 3.

In December 1994, a *sixth* survey of governing law was published in **1994 OAL Determination No. 1** (Department of Education, December 22, 1994, Docket No. 90-021), California Regulatory Notice Register 95, No. 3-Z, page 94, note 3.

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

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

"*Determination*" means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), 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 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*").

4. According to Government Code section 11370:

"*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with

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

*We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.*

The rulemaking portion of the APA and all OAL regulations are both reprinted and indexed in the annual APA/OAL regulations booklet "**California Rulemaking Law**," which is available from OAL (916-323-6225). The January 1995 revision is \$3.50 (\$6.40 if sent U.S. Mail).

5. *OAL Determinations Entitled to Great Weight In Court*

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been asked to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987). The *Grier* court concurred with OAL's conclusion, stating that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) (now subd. (g)). [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 (now 11340.5), subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) (now subd. (g)), *we accord its determination due consideration.*" [Id.; emphasis added.]

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

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

6. *Note Concerning Comments and Responses*

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

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

7. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) Of course, an agency rule found to violate the APA could also simply be rescinded.
8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
9. Government Code section 11340.5 provides:

"(a) *No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction,*

*order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.*

- "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (g) of Section 11342.
- "(c) The office shall do all of the following:
  - "1. File its determination upon issuance with the Secretary of State.
  - "2. Make its determination known to the agency, the Governor, and the Legislature.
  - "3. Publish its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
  - "4. Make its determination available to the public and the courts.
- "(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.
- "(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:
  - "1. The court or administrative agency proceeding involves the party that sought the determination from the office.
  - "2. The proceeding began prior to the party's request for the office's determination.

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

(Emphasis added.)

10. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249, review denied.
11. The duties and services performed by the Department are set out in the Unemployment Insurance Code, sections 1 through 16010.
12. *OAL does not review alleged underground regulations for compliance with APA's six substantive standards*

We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. (Of course, as discussed in the text of the determination, the APA itself applies to all Executive Branch agencies, absent an express statutory *exemption*.) If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

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

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

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of

proposed regulatory actions *from a specific rulemaking agency* will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

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

13. Section 2 of Statutes 1979, chapter 567, amended by Statutes 1980, chapter 204, section 7, provided:

"Chapter 4.5 (commencing with Section 11371) of Part 1, Division 3, Title 2 of the Government Code is repealed.

"Any reference in any statute of this state to Chapter 4.5 (commencing with section 11371) of Part 1, Division 3, Title 2 of the Government Code shall be deemed to be a reference to Chapter 3.5 (commencing with section 11340) of Part 1 of Division 3 of Title 2 of the Government Code."

14. Government Code sections 3512-3524.

15. For further clarification of the issues in this Determination, the following definitions from the Government Code are provided:

Section 18550 states "A 'full-time' position or appointment is a position or appointment in which the employee is to work the amount of time required for the employee to be compensated at a full-time rate."

Section 18551 states "A 'part-time' position or appointment is a position or appointment in which the employee is to work a specific fraction of the full-time work schedule."

Section 18552 states "An 'intermittent' position or appointment is a position or appointment in which the employee is to work periodically or for a fluctuating portion of the full-time schedule."

16. California Regulatory Notice Register 91, No. 20-Z, May 17, 1991, p. 691.
17. Comments were submitted by Rosmaire Duffy, Senior Labor Relations Representative, of CSEA in a letter dated June 17, 1991.
18. Government Code Section 11342, subdivision (a). See Government Code Sections 11343, 11346 and 11347.5. See also *Auto and Trailer Parks*, 27 Ops. Cal. Atty. Gen. 56, 59 (1956). For a thorough discussion of the rationale for the "APA applies to all agencies" principle, see **1989 OAL Determination No. 4** (San Francisco Regional

Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

**1989 OAL Determination No. 4** was upheld by the California Court of Appeal in *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Coalition)* (1993) 12 Cal.App.4th 697, 16 Cal.Rptr.2d 25, rehearing denied.

19. 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.
20. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
21. *Supra*, 219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.
22. 2 Cal.App.4th 47 at 62; 3 Cal.Rptr.2d 264 at 274.
23. *Id.* at 62; 3 Cal.Rptr.2d at 275.
24. 223 Cal.App.3d 490, 500, 272 Cal.Rptr. 886, 891.
25. *Id.*
26. (1993) 16 Cal. Rptr.2d 25 at 28.
27. *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).
28. Government Code section 11346.
29. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
  - a. Rules relating *only* to the internal management of the state agency (Gov. Code, sec. 11342, subd. (g).)
  - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)

- c. Rules that "[establish] or [fix] *rates, prices, or tariffs.*" (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)
- f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); *Nadler v. California Veterans Board* (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see *Del Mar Canning Co. v. Payne* (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see *International Association of Fire Fighters v. City of San Leandro* (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, CRNR, 91, No. 43-Z, p. 1451, 1458, 1461; typewritten version, pp. 175-177. Like *Grier v. Kizer*, **1991 OAL Determination No. 6** rejected the idea that *City of San Joaquin* (cited above in this note) was still good law.

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (g), may also correctly be characterized as "exclusions" from the statutory definition

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

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

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Melvin Fong), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814-4602, (916) 323-6225, CALNET 8-473-6225. The price of the latest version of the Index is available upon request. Three indexes are currently available for the following calendar years: (1) 1986-88, (2) 1989-1990, and (3) 1991-1992. Also, regulatory determinations are published in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$162.

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

30. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, fn. 2, 149 Cal.Rptr. 1.)
31. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.
32. In 1988 OAL Determination No. 3 (State Board of Control, March 7, 1988, Docket No. 87-009), California Regulatory Notice Register 88, No. 12-Z, March 18, 1988, pp. 855, 864; typewritten version, p. 10, it was found that the State Board of Control's policy requiring psychotherapy expenses claimed at certain hourly rates to be reviewed by the Board prior to reimbursement of victims of crime under the Victims of Crime Act involved an important public interest, and therefore, did not fall within

the "internal management" exception. Also, in *1988 OAL Determination No. 6* (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, pp. 1682, 1685; typewritten version, p. 4., it was determined that the Department's Administrative Manual, which governs inmate/ parolee grievance procedures, involved a significant public interest, and therefore, did not fall within the "internal management" exception.

In contrast, in *1989 OAL Determination No. 5* (Department of Corrections, Docket No. 88-007, April 5, 1989), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, p. 1120, OAL found that an attendance policy, setting forth the time frame in which an employee must call in sick to a supervisor, did not significantly affect the general prison population or the general public.

33. See **1989 OAL Determination No. 6** (Department of Corrections, April 19, 1989, Docket No. 88-008), California Regulatory Notice Register 89, No. 18-Z, May 5, 1989, p. 1293, 1303-1305; typewritten pages 216-218.
34. In its Response, pp. 2-3, the Department asserts that the time-base change policy is an "internal management" policy and not subject to the APA:

"[The Department's time-base change policy] is designed to ensure that EDD field office managers will select for time-base changes from those employees who meet the minimum requirements of State Personnel Board Rule 277 only those who are fully trained, experienced, and satisfactory performers in accordance with the needs and prerogatives of the Department."