

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

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In re:)
 Request for Regulatory) 1998 OAL Determination No. 29
 Determination filed by)
 CALIFORNIA) [Docket No. 93-002]
 CORRECTIONAL PEACE)
 OFFICERS ASSOCIATION) October 29, 1998
 regarding the STATE)
 PERSONNEL BOARD'S policy) Determination Pursuant to
 that job applicants disclose) Government Code Section
 all dismissals from prior) 11340.5; Title 1, California
 employment, including) Code of Regulations,
 dismissals set aside by court) Chapter 1, Article 3
 action¹)
)

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SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether the policy of the State Personnel Board ("SPB") that applicants for state employment disclose *all* dismissals from prior employment, including dismissals set aside by court action, is a "regulation," which is without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA"). OAL concludes that the policy is a "regulation," issued in violation of the APA. If the Board wishes to exercise its discretion to issue rules governing this topic, it may adopt regulations pursuant to statutory requirements.

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The issue presented to the Office of Administrative Law ("OAL") is whether the State Personnel Board's ("SPB's") requirement that applicants for state employment disclose all dismissals from employment on Form 678 (Examination Application, Rev. 11/89) and SPB's interpretation of that *uncodified* requirement are "regulations" which are without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA"). This matter involves not only an SPB requirement that was issued without first complying with APA requirements, but also an SPB interpretation of that *uncodified* requirement.

OAL has concluded that:

- (1) SPB's requirement that all applicants for employment or promotional examinations answer the question:

"Were you ever discharged, rejected during probation, or have you ever been requested to resign or resigned under unfavorable circumstances from any employment?"

is a "regulation" that is invalid because it should have been, but was not, adopted pursuant to the APA.

- (2) SPB's explanation of the requirement to disclose *all* dismissals from employment, including dismissals set aside by court action, contained in its 1990 letter, is also a "regulation" which is without legal effect unless adopted pursuant to the APA. Having concluded that the primary requirement is an "underground regulation," it is difficult to avoid the conclusion that a subsequent interpretation of the underground regulation is also an underground regulation.

ISSUE

The California Correctional Peace Officers Association ("CCPOA") has requested OAL's determination of whether SPB's policy that applicants for state employment disclose *all* dismissals from employment, including dismissals set aside by court action, on the Application Form 678, is a "regulation" required to be adopted pursuant to the APA.^{2, 3}

ANALYSIS

I. WAS THE APA GENERALLY APPLICABLE TO THE STATE PERSONNEL BOARD'S QUASI-LEGISLATIVE ENACTMENTS AT THE TIME THE REQUEST FOR DETERMINATION WAS SUBMITTED TO OAL?⁴

The SPB has been delegated rulemaking power by the Legislature. 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.)

Government Code section 18577 provides:

"Whenever this part refers to 'board rule,' 'rules of the board,' or makes similar reference, such reference authorizes the board to make rules concerning the subject matter concerning which such reference is made."

At the time this determination was requested in February, 1992, the SPB's exercise of rulemaking powers *in accordance with law* was subject to the APA, which establishes minimum procedural and substantive requirements for the promulgation of regulations by state agencies. Government Code section 11342, subdivision (b), clearly indicates that, for purposes of the APA, the term "state agency" applies to *all* state agencies, except those "in the judicial or legislative departments."⁵ The Board is a "state agency" as that term is defined in Government Code section 11000⁶ and it is not in the judicial or legislative branch of state government. Therefore, OAL concludes that APA rulemaking requirements generally applied to the Board.⁷ At the time this determination was requested, there was no specific⁸ statutory exemption which would have permitted the Board to conduct rulemaking without complying with the APA. Clearly, the APA generally applied to the SPB's quasi-legislative enactments.

II. DO THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

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 agency rules are "regulations," and thus subject to APA adoption requirements, 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, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. (Emphasis added.)"

In *Grier v. Kizer*,⁹ the California Court of Appeal upheld OAL's two-part test¹⁰ 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:

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

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

- implement, interpret, or make specific the law enforced or administered by the agency, *or*

- govern the agency's procedure?

If an uncodified rule satisfies both of the above two parts of the test, OAL must conclude that it is a "regulation" subject to the APA. In applying the two-part test OAL is 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.)"¹¹

A. ARE THE CHALLENGED RULES "STANDARDS OF GENERAL APPLICATION?"

The first challenged rule appeared as a question on an official state form familiar to state employees and to applicants for state employment:

"Were you ever discharged, rejected during probation, or have you ever been requested to resign or resigned under unfavorable circumstances from any employment? (You may omit any incident occurring over 7 years ago except a disciplinary or punitive dismissal or a probationary period rejection from California State Civil Service.) If 'yes,' give details in # 10."

"(Individuals dismissed from California state employment by adverse action or disciplinary proceedings must obtain the consent of the executive officer of the State Personnel Board before taking a civil service examination.)"

Applicants are required to certify that answers to all questions are true and complete.

Form 678 is the standard application form for employment in the state civil service. The form is utilized by the SPB to obtain information from job applicants about their education and experience. Thus, any standards or requirements set forth in the Form 678 apply to all those who seek employment or promotion in the state civil service. 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.¹² OAL concludes that any standards or requirements set forth in the Form 678, including Question 2 E, are standards of general application because they apply to all those who seek employment or promotion in the state civil service.

The second challenged rule is SPB's interpretation or explanation of what is required in order to truthfully answer question 2 E on the application form, the first challenged rule above. This interpretation or explanation was communicated by the SPB to the CCPOA in a November 7, 1990, letter sent by Walter Vaughn, then the Board's Assistant Executive Officer, in response to CCPOA's inquiry seeking clarification of the first challenged rule. The requester contends that the letter is evidence of a generally applicable rule that interprets Question 2 E in the application form 678.

The Board, in its response to this request for determination, makes several arguments in support of its contention that the 1990 letter does not contain a standard of general application and is not a "regulation," as defined in the APA.

First, the Board states that the letter "merely responds to a letter from an employee representative who was seeking an *advisory opinion* on behalf of a specific client" ¹³ The Board's argument recognizes an important interest, that of communication between an agency and members of the public with respect to the agency's application of the law to an individual's specific circumstances; however, SPB's argument that the policy contained in its 1990 letter was never intended to apply to other persons and, consequently is not a standard of general application, is unpersuasive.

The Board's argument, in substance, claims that the 1990 letter is exempt from the requirements of the APA pursuant to Government Code section 11343, subdivision (a) (3), an issue that is more fully discussed in section IV.B of this determination. Subdivision (a) of Government Code section 11343 states in part:

"Every state agency shall:

- (a) Transmit to the office [of Administrative Law] 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 added.)

OAL determinations have consistently opined that, there is no “automatic” APA exemption for advisory opinions.¹⁴ In order to qualify for an APA exemption pursuant to Government Code section 11343, subdivision (a) (3), the advisory opinion must meet both parts of the two prong test articulated in subdivision (a) (3), that is, the regulation must be directed to a specific person or group of persons *and not* apply generally throughout the state.

When applying the two prong test to the 1990 letter, it is clear that, although the letter is addressed to a particular person or group of persons, it fails the second part of the test. Rather than not applying generally throughout the state, the rule articulated in the letter *applies statewide* to all persons seeking employment with the state who have ever been dismissed from employment. Because the rule applies *statewide*, it is a standard of general application and the APA exemption set forth in Government Code section 11343, subdivision (a) (3), does not apply.

The Court of Appeal, in *Winzler & Kelly v. Department of Industrial Relations*, found that the department director, in issuing a determination that field surveyors were covered by the prevailing wage laws that was contained in a letter to *one specific business firm*, had issued a standard of general application “because it had a statewide impact and *applied not only to the individual firm to which it was addressed but also to all public entities letting contracts for public works and to all employees who engaged the services of field surveying workers on public work projects.*” (Emphasis added.)¹⁵

The request for determination, similarly, involves a letter directed to one specific person, which nonetheless contains a policy which constitutes a standard of general application, has a statewide impact, and applies not only to the specific addressee of the letter, but also to all persons who are prospective applicants for state jobs, who have experienced dismissals from prior employment which they are not sure they are required to disclose, because, for instance, (1) the dismissal was set aside by court action or (2) pursuant to a stipulated agreement, the employee had been exempted from having to indicate on future applications that he or she had been dismissed or had resigned under unfavorable circumstances.¹⁶

Furthermore, the Board's characterization of its letter as an advisory opinion is not dispositive of whether the rule contained in the letter is a "regulation" subject to the APA. *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Coalition)* ("*SWRCB v. OAL*"), 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.)¹⁷

Second, the Board argues that the requester "has failed to establish any source for the supposed standard of general application."¹⁸ Although the Board's response is not clear regarding its reasons for making this statement, OAL will assume that the statement is based on two of the Board's other assertions:

- 1) The 1990 letter was addressed to only one person and meant to apply to only one person (analyzed above); and
- 2) "The Board recognizes that Board policy setting forth standards of *general* application can only be adopted by the State Personnel Board itself through the adoption of regulations The Board has not adopted regulations . . . setting forth its interpretation of the [relevant] provisions of [statute] or Question 2(E) as it pertains to dismissals."¹⁹ Furthermore, the matter had not been properly presented to the Board. Therefore, it "logically" follows that the Board has not adopted a standard of general application that meets the definition of "regulation."

Inherent in the second assertion is the notion that an agency rule cannot be a standard of general application if it has not been adopted by the Board. The fact that the Board did not adopt the challenged rule is not determinative of whether the rule is a standard of general application. In *Armistead v. State Personnel Board*,²⁰ the California Supreme Court found a provision of an SPB Personnel Transactions Manual prepared by Board *staff* to be invalid "because it was not

duly promulgated and has not been duly published.”²¹

In *Goleta Valley Community Hospital v. State Department of Health Services*,²² the Court of Appeal found that a letter written by a *staff* attorney to the department’s chief hearing officer construing an agency regulation governing an appeal procedure was undertaken without any attempt at complying with APA, and hence, the letter interpreting the regulation was procedurally invalid.

OAL disagrees with the Board’s argument that no source for the interpretation of Question 2E has been established. SPB’s letter to CCPOA, dated November 7, 1990, an official communication, notwithstanding the fact that it was not signed by all Board members, is clearly the source.

Third, the Board states that, in the absence of a rule interpreting Government Code section 18935, the CCPOA member

“could have chosen not to seek an advisory opinion of the SPB and could have answered ‘no’ to Question 2(e) or he could have chosen to answer ‘no,’ even in light of the advisory opinion given that the opinion was of no legal force or effect. Had [he] then been withheld or denied the opportunity to take an examination pursuant to Government Code section 18935, or had [he] even been hired and then dismissed for fraud in securing appointment, [footnote deleted], he could have appealed the action taken and argued his own interpretation of the question on the form.”²³

The statement seems to put forth the proposition that because the Board’s letter did not clearly set forth a *mandate* that any and all persons who were ever dismissed from state service must state that fact, the letter did not state a standard of general application.

According to Government Code section 19572, fraud in securing an appointment is cause for discipline of an employee or a person whose name appears on any employment list. An affirmative response to question 2 E by any person who had ever been dismissed from state service would provide a “safe harbor” against a charge of fraud for not revealing that fact. Conversely, any such person who responded in the negative would be at risk. Thus, the possibility of serious practical and legal consequences to an applicant who had been dismissed and failed to reveal that fact in response to question 2E supports OAL’s position the

1990 letter contains a rule of general application that applicants disregard at their peril. In any event, the statutory test of whether an agency rule constitutes a standard of general application does not require that the agency rule be phrased in mandatory terms.

OAL concludes that SPB's 1990 letter states a rule of general application: all persons who were ever dismissed from state service are expected to state that fact in response to question 2 E on Form 678, even if, for instance, the dismissal was set aside by court action.

B. DO THE CHALLENGED RULES INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

Having established that the first challenged rule concerning dismissal from employment is a rule of general application, OAL must determine if it interprets, implements or makes specific a law enforced or administered by SPB, or governs its procedure. The first challenged rule asks applicants to answer the following question:

“Were you ever discharged, rejected during probation, or have you ever been requested to resign or resigned under unfavorable circumstances from any employment?” (You may omit any incident occurring over 7 years ago except a disciplinary or punitive dismissal, or a probationary period rejection from California State Civil Service) If “yes”, give details in #10”

“(Individuals dismissed from California state employment by adverse action or disciplinary proceedings must obtain the consent of the executive officer of the State Personnel Board before taking a civil service examination.)”

SPB contends that question 2 E:

“merely seeks information that enables potential employers to evaluate a candidate for an examination or for appointment. The question is *authorized* by Government Code section 18935.” (Emphasis added)²⁴

Government Code section 18935 provides, in pertinent part:

“The board may refuse to examine or, after examination, may refuse to declare as an eligible or may withhold or withdraw from certification, prior to appointment, anyone who comes under any of the following categories:

“(h) Has been dismissed from any position for any cause which would be a cause for dismissal from the state service.” (Emphasis added.)

In *Grier v. Kizer*, the Department of Health Services argued that the Medi-Cal Act provided sufficient authorization for use of a challenged audit method. The Court of Appeal pointed out that the Medi-Cal Act did not provide sufficient authorization for the use of the audit method without the formality of APA regulation promulgation and OAL review. “It is a fundamental rule of statutory construction that every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.”²⁵ Question 2 E may be “authorized” by Government Code section 18935; however, that section does not provide sufficient authorization for the use of the challenged rule without the formality of APA compliance. As the court instructed in *Grier*, Section 18935 “should be construed with reference to the whole system of law of which it is a part,” including the APA, “so that all may be harmonized and have effect.”

If SPB argues by implication that Question 2 E merely restates Government Code section 18935, the argument misses the mark. Question 2 E asks:

“Were you ever discharged, rejected during probation, or have you ever been requested to resign or resigned under unfavorable circumstances from any employment?”

The question calls for a broader disclosure of information than that described under section 18935, subdivision (h). Section 18935 authorizes the Board to refuse to examine or, after examination, to refuse to declare eligible, or withhold certification to anyone who has been dismissed from any position for any *cause that would be a cause for dismissal from state service*. Question 2 E requires the

applicant to disclose *any* dismissal, even one that would *not* be a cause for dismissal from state service.

California Court of Appeal cases provide guidance on the proper approach to take when assessing claims that agency rules are *not* subject to the APA because they merely restate the law. 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 established. . . .”²⁶

“But to the extent any of the [agency rules] depart from, or *embellish* upon express statutory authorization and language, the [agency] will need to promulgate regulations”²⁷ [Emphasis added.]

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations provisions) can be restated, but not “embellished upon” in administrative bulletins²⁸ or other communications.

The SPB has duly adopted a regulation to implement, interpret, or make specific Government section 18935, Title 2, California Code of Regulations, section 211, which provides the following.

“If an employee is dismissed from State employment by adverse action or as a result of disciplinary proceedings, that employee shall not thereafter be permitted to take any state civil service examination or be certified to any position in the state service without the consent of the executive officer. If such an employee subsequently attains permanent status in the state civil service, the executive officer may grant a continuing waiver of this requirement which may apply to all subsequent examinations for which that employee applies or to those for specified occupations. In all other cases, the executive officer shall determine whether to refuse to examine, or after examination, to declare or certify as eligible anyone for any of the reasons set forth in section 18935 of the act.

“Persons denied permission to compete or be certified under this section may appeal in writing to the Board within 30 days of notification.”

Question 2 E implements, interprets, and makes specific Government Code

section 18935 and embellishes upon 2 California Code of Regulations 211.

Furthermore, SPB's policy of requiring all applicants to respond to Question 2 E on Form 678 governs the Board's procedure. The Board may have had several options in utilizing its authority to refuse to examine or, after examination, to refuse to declare eligible, or withhold certification to anyone who comes under categories specified in section 18935, including those who have been dismissed. For example, since the section authorizes the board to refuse eligibility or certification after an examination, the Board could have chosen to require otherwise eligible candidates to disclose a dismissal at that time. Instead, the Board's procedure, as implemented in Question 2 E, was to require every applicant to disclose any dismissal at the point of application for examination.

Therefore, OAL finds that question 2 E, having satisfied both prongs of the *Grier* test set forth above, is an invalid regulation that should have been, but was not, adopted pursuant to the APA.

The second challenged rule contained in SPB's 1990 letter interprets Question 2 E on Form 678 by resolving at least one ambiguity in the question, for example, was the applicant to disclose *any* dismissal, irrespective of the cause or subsequent relevant actions, or to disclose only a dismissal that was not set aside by a court? In its response to CCPOA, SPB resolved the ambiguity by relying upon a literal reading of the application question, indicating essentially that the question means what it says, without exception, or stated differently, *any and all* dismissals from state service are to be indicated on Form 678.

Had the 1990 letter done no more than quote question 2 E verbatim, the letter would have constituted a reissuance of an underground regulation. However, the rule contained in the letter goes further; it implements, interprets, and makes specific Government Code section 18935, 2 California Code of Regulations 211, and the first challenged rule. Consequently OAL concludes that the second challenged rule is also a "regulation."

III. DOES THE CHALLENGED RULE FALL WITHIN ANY *SPECIAL*²⁹ EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

OAL is obliged to consider both the state of the law at the time the request was

filed, and the state of the law as of the date this determination is issued.^{30,31}

After this request was filed, SPB's enabling act was amended to expressly exempt most SPB regulations from the APA. Under the new statutory scheme, effective January 1, 1997, SPB is authorized to adopt regulations concerning employee "selection and examinations" without notice and comment, but is required to make the regulations reasonably available to all interested parties.³² Most other regulations are subject to a streamlined procedure that incorporates notice, opportunity to comment, filing with the Secretary of State and publication in the California Code of Regulations.³³ Regulations dealing with a few specified subjects, including "grounds for employee discipline," are *subject to full APA procedural requirements*, with a few minor exceptions, such as disclosure of impact on housing costs.³⁴

The issue, thus, is whether the policy concerning full disclosure of dismissals, which OAL found in section II.B of this determination to constitute a "regulation" within the meaning of the APA, falls within one or more of the new statutory APA provisions.

Government Code section 18215, subdivision (a), provides:

"Except as provided in subdivision (b) [list of relatively minor APA procedural requirements], regulations concerning the following shall be subject to the [APA]:

- (1) Representation of minorities, women, and persons with disabilities in the state work force.
- (2) Equal employment opportunities.
- (3) Board hearing procedures relating to public testimony and participation, except a procedure that is expressly required by statute.
- (4) Disciplinary hearing procedures not mandated by statutes, court decisions, or board precedential decisions. However, rulings within the discretion of an administrative law judge are not subject to this article.

- (5) Drug testing
- (6) *Grounds for employee discipline.*
- (7) Reasonable accommodation.” (Emphasis added.)

Reviewing the structure and content of the seven Government Code sections added in the 1996 amendment to the Board’s enabling act, OAL concludes that the intent of the Legislature was that the Board adopt regulations on topics specifically mentioned in sections 18215 and 18216 pursuant to the procedures set out *in those sections*. These specific sections, OAL concludes, were intended to govern over the more general language in section 18213. As stated in section 18214, the default provision: “[t]he procedures set forth in [this section] shall apply to the adoption of a regulation concerning all matters not specified in Sections 18213, 18215, or 18216.”

Similarly, reading sections 18213, 18215, and 18216 together, the intended meaning is that rules concerning “selection and examinations” are not subject to any APA procedural requirements, except insofar as these rules concern specified topics, such as grounds for employee discipline.

Most aspects of selection and examination are not subject to any APA requirements. However, if the employee selection and examination rule involves representation of minorities or drug testing, those particular facets of the selection and examination process would be subject to the procedures specified in section 18215. Similarly, insofar as the job application form touches upon “grounds for employee discipline,” the procedures specified in section 18215, that is, full APA procedures with minor exceptions, apply.

Therefore, OAL concludes that the dismissal-disclosure policy is subject to the APA requirements contained in Government Code section 18215 because it concerns “grounds for employee discipline.” OAL concludes that the policy does not qualify for the APA exemption contained in Government Code section 18213 (no public notice or comment) because it impacts “grounds for employee discipline.” OAL notes that the Board does not contend that the challenged rule qualifies for section 18213.

IV. DO THE CHALLENGED RULES FOUND TO BE “REGULATIONS” FALL WITHIN ANY *GENERAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

Generally, all “regulations” issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.³⁵ Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.³⁶

A. FORMS

SPB contends³⁷ the challenged rule falls within the general exception concerning forms.³⁸ Government Code section 11342, subdivision (g), provides in part:

“‘Regulation’ does not mean . . . *any form* prescribed by a state agency or any instructions relating to the use of the form, *but this 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.)³⁹

This statutory provision contains a significant restriction on the use of the “form” exception. In other words, according to the leading case, *Stoneham v. Rushen*,⁴⁰ the language quoted above creates a “statutory exemption relating to *operational forms.*” (Emphasis added.) 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.*”

According to the *Stoneham* court, if a form contains “uniform substantive” rules that are used to implement a statute, those rules must be promulgated in compliance with the APA. On the other hand, if the form in question is a simple operational form limited in scope to *existing* legal requirements a regulation is *not* needed to implement the law under which the form is issued. The analysis is essentially the same as that employed above to determine whether the challenged rule implemented, interpreted or made specific, laws administered by the SPB.

The first challenged rule was generally distributed in a form. The form contains “uniform substantive” rules. As OAL has analyzed above in part II B of this

determination. Question 2 E interprets and implements Government Code section 18935 and governs the Board's procedure. Therefore, it is not simply an operational form. It is an employment application with the potential to have a significant effect upon job applicants because the board may refuse to examine any applicant for employment who has been dismissed for *any* cause. Therefore, OAL concludes that Form 678, and Question 2 E, in particular, is not exempt under the forms exception to the APA.

B. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Government Code 11343, subdivision (a) (3).)

The Board's response states that the 1990 SPB letter "merely responds to a letter from an employee representative who was seeking an *advisory opinion* on behalf of a specific client" (Emphasis added.)¹¹ When read in light of dicta concerning "advice letters" in a 1996 California Supreme Court case, this statement may be read to raise the issue of whether the regulatory material in the 1990 letter is exempt from the requirements of the APA pursuant to Government Code 11343 (a) (3), which states in part:

"Every state agency shall:

- (a) Transmit to the office [of Administrative Law] 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 added.)

In 1996, the California Supreme Court, in *Tidewater Marine Western v Bradshaw*¹² in *dicta*, spoke to the practice of some agencies with respect to advisory opinions. Speaking to the practice, the court stated:

"Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases. [citations] Similarly, agencies may

provide private parties with *advice letters*, which are not subject to the rulemaking provisions of the APA. (Gov. Code §§ 11343, subd. (a) (3), 11346.1, subd. (a).)⁴³ (Emphasis added.)

The issues before the court did not include the validity of an “advice letter.” The applicability of section 11343 to “advice letters” was not briefed. The court opinion does not fully develop the assertion that advice letters are not subject to the rulemaking part of the APA. It refers to Government Code section 11343, but does not quote the statutory language containing the two-part test that a regulation must meet in order to qualify for the exemption set forth therein. The opinion does not discuss the significance of Government Code section 11342, subdivision (g), which expressly exempts from the APA “legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization,” which are advice letters on tax issues. If the Legislature had intended that advice letters in general be exempt from the APA pursuant to Government Code section 11343, there would seem little need for the exemption language in section 11342, subdivision (g).

Nor does the *Tidewater* opinion discuss *Winzler* (cited above in the analysis of the 1990 letter as a standard of general application). *Winzler* refers to Government Code section 11380, from which Government Code 11343 is derived, as making clear that the test for exemption from APA requirements includes the two prong test now set forth in Government Code 11343, that is, the regulation must (1) be directed to a specifically named person or to a group of persons *and* (2) not apply generally throughout the state.

Since 1986, OAL has consistently taken the position that there is no “automatic” APA exemption for “regulations” directed to specifically named persons or group of persons.⁴⁴ Some have argued that any “regulation” directed toward a specifically named person in response to a request for advice should be deemed exempt from the APA pursuant to section 11343(a)(3).

In order to qualify for an APA exemption pursuant to Government Code section 11343, subdivision (a) (3), however, state agency communications (including “advisory opinions”) must meet both parts of the two prong test, that is, the regulation must be directed to a specific person or group of persons *and* not apply generally throughout the state.

Review of the legislative history of the APA indicates that the Legislature has strictly limited APA exemptions, with an eye toward making a much greater proportion of *state* agency rules subject to public notice and comment requirements than Congress sought to achieve in the federal APA regarding *federal* agency rules.⁴⁵

Though “interpretive guidelines” are expressly exempt from notice and comment requirements under the federal APA, the California Legislature has not enacted a parallel provision in the California APA.

It appears the Legislature intended that there be no exemption for “interpretive rules.” Exempting interpretive guidelines was--and is--a clear policy alternative. The federal APA, first enacted in 1946, exempts “interpretive rules” “policy statements” from notice and comment requirements.⁴⁶ In enacting the California APA in 1947, the Legislature rejected a proposal to exempt “*any interpretative rule* or any rule relating to public property, public loans, public grants or public contracts” (emphasis added) from APA notice and hearing requirements.⁴⁷ It, therefore, seems that the 1947 Legislature considered and rejected the idea of following the federal example of exempting “interpretive rules” (including “advisory letters” or “advice letters”) from notice and comment requirements.

In recent years, however, the Legislature has enacted several significant APA provisions that address the issue of agency communications regarding application of law within the agency’s jurisdiction. These amendments were enacted on the recommendation of the California Law Revision Commission, which will shortly be forwarding to the Legislature an additional Commission recommendation on a similar topic.

In 1995, the Legislature enacted a major revision of the adjudication portion of the Administrative Procedure Act, developed over a period of years by the Law Revision Commission.⁴⁸ Among other things, the legislation authorizes a state agency to issue a “declaratory decision” in response to an application to the agency for a decision as to the applicability to *specified* circumstances of a statute, regulation or decision within the jurisdiction of the agency, in other words, to issue an “advisory opinion.” Article 14 of Chapter 4.5 Division 3 of Title 2 of the Government Code (commencing with section 11465.10). The Commission’s commentary to section 11465.10, the introductory section Article 14, states the following.

“Article 14 . . . creates, and establishes all of the requirements for, a special proceeding to be known as a ‘declaratory decision’ proceeding. The purpose of the proceeding is to provide an inexpensive and generally available means by which a person may obtain fully reliable information as to the applicability of agency administered law to the person’s particular circumstances.

‘The declaratory decision procedure is thus quasi-adjudicative in nature, enabling an agency to issue in effect and *advisory opinion* concerning assumed facts submitted by a person. The procedure does not authorize an agency ‘declaration’ of a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that is an ‘underground regulation

‘The declaratory decision procedure provided in this article applies only to decisions subject to this chapter’ (Emphasis added.)

The Law Revision Commission and the Legislature both recognized that there would be cases in which an agency, having issued an advisory opinion to one person based on specific facts, would want to utilize the opinion in situations where similar facts exist, in other words, utilize the opinion as a standard of general application. Consequently, the 1995 legislation provides that a “declaratory decision” can be given “precedential effect,” according to procedures specified in the legislation. Under these procedures, an agency “may designate as a *precedent decision* a decision . . . that contains a significant legal or policy determination of general application that is likely to recur.” (Emphasis added.)⁴⁹ The official Law Revision Commission comment states that the legislation “recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking. It codifies the practice of a number of agencies to designate important decisions as precedential . . .” and applies notwithstanding APA provisions prohibiting “underground regulations.” In other words, the Legislature expressly exempted “precedent decisions” from the requirements of the APA, proving once again that the Legislature knows how to grant an express exemption when it makes a policy decision to do so.

The exemption for “precedent decisions” draws attention to the fact that *no* express exemption was enacted with respect to “declaratory decisions.” Thus, the Legislature specifically authorized agencies to issue advisory opinions that apply

the law to specific, not general, circumstances. The opinions may not apply *statewide*. They are not to be used as standards of general application in lieu of duly adopted regulations or without the formality of designation as “precedent” decisions.

As part of its ongoing study of the APA, the Law Revision Commission is currently drafting a final recommendation setting forth an APA procedure for issuance of “advisory interpretations” by state agencies. The recommendation would create a simplified notice and comment procedure an agency may use to issue generally applicable, nonbinding, interpretive advice, another form of an advisory opinion. The purpose is to “expedite beneficial communication between agencies and the public while preserving the benefits of public participation in agency deliberations.”⁵⁰ Under the Law Revision Commission’s proposal, an advisory interpretation: 1) is an expression of an agency’s opinion regarding the meaning of a provision of law that the agency administers; 2) cannot purport to bind or compel; 3) is not to be given any judicial deference or binding effect; and 4) provides a “safe harbor” for those who conform their conduct to the interpretation.

In summary, OAL concludes that though the SPB policy that persons answering question 2E are expected to disclose all dismissals, including those set aside by court action, was directed to a specifically named person, it is nonetheless a standard of general application: it applies generally throughout the state to all persons who have experienced a dismissal set aside by court action. (See part II.A of this determination.) Because this policy applies generally throughout the state, it thus fails to satisfy the second part of the two-part test contained in Government Code section 11343, subdivision (a)(3).⁵¹

The second challenged rule does not fall within any general express statutory exemption from the APA. Accordingly, OAL concludes that the rule is without legal effect because it has not been adopted in compliance with the APA.

CONCLUSION

For the reasons set forth, OAL concludes that :

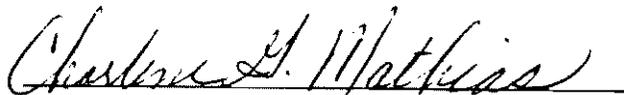
- (1) SPB’s requirement that all applicants for employment or promotional examinations answer the question:

“Were you ever discharged, rejected during probation, or have you ever been requested to resign or resigned under unfavorable circumstances from any employment?”

is a “regulation” that is invalid because it should have been, but was not, adopted pursuant to the APA.

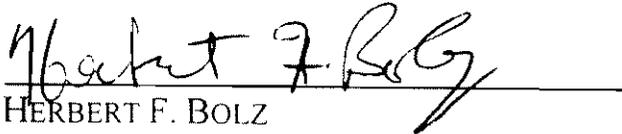
- (2) SPB’s explanation of the requirement to disclose *all* dismissals from employment, including dismissals set aside by court action, contained in its 1990 letter, is also a “regulation” which is without legal effect unless adopted pursuant to the APA. Having concluded that the primary requirement is an “underground regulation,” it is difficult to avoid the conclusion that a subsequent interpretation of the underground regulation is also an underground regulation.

DATE: October 29, 1998



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ENDNOTES

1. This Request for Determination was filed by Jacqueline A. Campbell, Esq., California Correctional Peace Officers Association, 755 River Pointe Drive, Suite 200, West Sacramento, CA 95605, (916) 923-6060. The State Personnel Board was represented by Elise S. Rose, Chief Counsel, California State Personnel Board, 801 Capitol Mall, Sacramento, CA 95814.
2. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act." [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.
3. In 1991 OAL Determination No. 1, which involved the same requester as the present determination, and SPB, OAL considered whether an advisory addressed to "All State Agencies and Employee Organizations" was a regulation. In the advisory SPB explained that it had disapproved a recent stipulated agreement which contained a provision that would have exempted a resigning employee from having to indicate on future applications that he or she had resigned under unfavorable circumstances. The advisory also indicated that a number of similar agreements had not been acted upon by the SPB, and that they would be returned "to the parties so they may have an opportunity to reconsider the language in these agreements." The language of the advisory implied that the "recent stipulated agreement" was not approved because the Board found the language concerning disclosure of the resignation unacceptable, and may very well have been intended to signal the Board's unwillingness to approve such a provision in any case. OAL concluded that the ambiguity of the advisory made the existence of the challenged rule uncertain, but that if the SPB had actually employed a rule prohibiting stipulations, such a rule would be a "regulation."
4. After the filing of the Request for this determination, the Legislature promulgated Government Code sections 18210 through 18216 which implement specific exemptions from the APA for SPB regulations. Section 18214 created a simplified procedure for the promulgation of regulations. Section 18215 identified certain types of regulations which would instead be subject to a portion of the APA, rather than the simpler procedure described in section 18214. These provisions took effect January 1, 1997.
5. Government Code section 11342, subdivision (a).

6. 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."

Section 11000 is contained in Title 2, Division 3 (Executive Department), Part 1 (State Department and Agencies), Chapter 1 (State Agencies) of the Government Code.

7. 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.

8. By "specific," we mean an exemption which pertains solely to one specific program or to one specific agency, such as the statute stating that the rule setting the California minimum wage is exempt from APA requirements (Labor Code section 1185). A specific exemption contrasts with a "general" exemption or exception, which applies across-the-board to all agency enactments of a certain type, such as the "internal management" exemption.

9. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n.3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a

case which quotes the test from *Grier v. Kizer*.

10. The *Grier* Court stated:

“The OAL’s analysis set forth a two-part test: ‘First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency’s procedure?’ (1987 OAL Determination No. 10, *supra*, slip op’n., at p. 8.)

OAL’s wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

11. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
12. *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).
13. Agency Response, dated September 18, 1998, p. 2.
14. See determinations listed in endnote 44.
15. (1981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 747.
16. 1991 OAL Determination No. 1 indicates that SPB discourages state agencies from entering into settlement agreements with non-disclosure provisions, presumably because SPB has concluded that it is important that *subsequent* state agencies, reviewing job applications, be fully informed concerning prior dismissals, even though it might be in the short-term interests of the dismissing state agency to agree to non-disclosure in the interests of quickly ending its involvement with an unsatisfactory employee. Protecting the interests of other hiring agencies appears to be a matter of statewide importance, and would appear to be a rationale appropriate for inclusion in the statement of reasons for a regulation proposed for adoption pursuant to the APA.
17. (1993) 16 Cal.Rptr.2d 25 at 28.
18. Agency Response, dated September 18, 1998, p. 5.
19. Agency Response, dated September 18, 1998, p. 5.
20. 22 Cal. 3d 198, 149 Cal. Rptr. 1 (1978)

21. 22 Cal. 3d 198, 149 Cal. Rptr. 1, 2
22. (1983) 149 Cal.App.3d 1124, 197 Cal.Rptr. 294 at 297. (Hearing denied January 25, 1984.)
23. Agency Response. dated September 18, 1998. p. 4.
24. Agency response. dated September 18, 1998, p. 4.
25. (1990) 219 Cal.App.3d 422, 268 Cal.Rptr.244, 250.
26. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274
27. *Id.*, 275.
28. *Union of American Physicians v. Kizer* (1990) 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891, 892.
29. All state agency "regulations" are subject to the APA unless expressly exempted by statute. Government Code section 11346. Express statutory APA exemptions may be divided into two categories: special and general. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120,126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself). *Special* express statutory exemptions, such as Penal Code section 5058, subdivision (d)(1), which exempts Corrections' pilot programs under specified conditions, typically: (1) apply only to a portion of one agency's "regulations" and (2) are found in that agency's enabling act. *General* express statutory exemptions, such as Government Code section 11342, subdivision (g), part of which exempts internal management regulations from the APA, typically apply across the board to all state agencies and are found in the APA.
30. **1998 OAL Determination No. 7** (Department of Social Services, Docket No. 91-001, June 18, 1998), typewritten version, p. 9, California Regulatory Notice Register 98, No. 30-Z, July 24, 1998, p. 1400.
31. Although this determination addressed only Question 2 E as it appeared on Form 678 in use at the time of this request for determination, OAL notes that SPB continues to require applicants for state employment to disclose all dismissals. Form 678 (revised 8-97). Question 5, currently asks:

"Have you ever: (if 'yes', give details in Item 12 and refer to the instructions for further details.)

a. Been dismissed or fired from a position for any reason?"

- b. Resigned from or quit a position while under investigation or after being informed discipline would be taken against you, or during an appeal from a disciplinary action?
 - c. Been rejected or told you would not receive permanent or continued employment during any type of probationary or trial period on the job?"
32. Government Code section 18213.
 33. Government Code section 18214.
 34. Government Code section 18215.
 35. Government Code section 11346.
 36. 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). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the

idea that *City of San Joaquin* (cited above) was still good law.

37. SPB Response to Request for Determination dated September 18, 1998, page 3.
38. **1993 OAL Determination No. 5** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register 94, Volume 2-Z, January 14, 1994, p.61 at 105; typewritten version at p. 266.
39. Government Code section 11342, subdivision (g).
40. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.
41. SPB Response to Request for Determination dated September 18, 1998, page 2.
42. (1996) 14 Cal.4th 557, 59 Cal Rptr.2d 186.
43. (1996) 14 Cal.4th 557, 571, 59 Cal.Rptr.2d 186 at 194.
44. **1986 OAL Determination No. 1** (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), CANR 86, No. 16-Z, April 18, 1986, p. B-10, B-13; typewritten version, p. 5; **1987 OAL Determination No. 7** (State Labor Commissioner, May 27, 1987, Docket No. 86-013), CANR 87, No. 24-Z, June 12, 1987, p. B-45, B-53; typewritten version, p. 13; **1987 OAL Determination No. 9** (Department of Corporations, June 30, 1987, Docket No. 86-015), CANR 87, No. 29-Z, July 17, 1987, p. B-31, B-39; typewritten version, p. 12; **1987 OAL Determination No. 17** (Department of Motor Vehicles, December 18, 1987, Docket No. 87-006), CRNR 88, No. 1-Z, January 1, 1988, p. 88, 112; typewritten version, p. 25; **1988 OAL Determination No. 7** (Department of Rehabilitation, May 12, 1988, Docket No. 87-013), CRNR 88, No. 22-Z, May 27, 1988, p. 1855, 1877; typewritten version, p. 23; **1988 OAL Determination No. 11** (Respiratory Care Examining Committee, July 6, 1988, Docket No. 87-017), CRNR 88, No. 30-Z, July 22, 1988, p. 2435, 2444; typewritten version, p. 10.; **1989 OAL Determination No. 4** (State Water Resources Control Board and San Francisco Regional Water Quality Control Board, March 29, 1989, Docket No. 88-006), CRNR 89, No. 16-Z, April 21, 1989, p. 1026, 1075; typewritten version, p. 141; **1989 OAL Determination No. 12** (Board of Examiners in Veterinary Medicine, July 25, 1989, Docket No. 88-015), CRNR 89, No. 32-Z, August 11, 1989, p. 2530, 2546; typewritten version, p. 411; **1990 OAL Determination No. 4** (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket 89-010), CRNR 90, No. 10-Z, March 9, 1990, p. 384, 389; typewritten version, p. 109; **1992 OAL Determination No. 1** (Department of Corrections, January 13, 1992, Docket No. 90-010), CRNR 92, No. 4-Z, January 24, 1992, p. 83, 86; typewritten version, p. 10; **1992 OAL Determination No. 3** (State Board of Education, March 23, 1992, Docket No. 90-012), CRNR 92, No. 14-Z, April 3, 1992, p. 427, 434; typewritten version, p. 82; **1995 OAL Determination No. 2** (Employment Development Department, April 18, 1995, Docket No. 90-024), CRNR 95, No. 19-Z, May 12, 1995, p. 770, 773; typewritten version, p. 33; **1998 OAL Determination No. 4**

(Department of Fish and Game, Docket No. 90-049, May 22, 1998), CRNR 98, No. 26-Z, June 26, 1998, p. 1197, 1201; typewritten version, p. 11; **1998 OAL Determination No. 6** (Employment Development Department, Docket No. 90-051, June 16, 1998), CRNR 98, No. 26-Z, June 26, 1998, p. 1216, 1222; typewritten version, p. 15.

45. Government Code section 11346: *Armistead v. State Personnel Board* (1978) 22 Cal.3d. 198, 201, 149 Cal.Rptr. 1,2,
46. Title 5, U.S.C. section 553 (a)(2).
47. SB 824 (1947/DeLap) initially provided that interpretive rules were exempt from the APA. This provision was amended out, and then SB 824 died in committee. A competing bill, AB 35, which did *not* exempt interpretive rules from the APA, was approved by the Legislature and chaptered as 1947, ch. 1425.
48. SB 523 (Stats. 1995, ch. 938), effective January 1, 1996; however most provisions became operative July 1, 1997.
49. Government Code section 11425.60.
50. California Law Revision Commission, Tentative Recommendation, Advisory Interpretations, March 1998, p. 2.
51. **1987 OAL Determination No. 9** (Department of Corporations, June 30, 1987, Docket No. 86-015), CANR 87, No. 29-Z, July 17, 1987, p. B-31, B-39; typewritten version, p. 12 (letter addressed to one specifically named person which contained standard of general application *did not* fall within 11343(a)(3) exemption).