

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

In re:)
Request for Regulatory) 1998 OAL Determination No. 36
Determination filed by the)
CALIFORNIA STATE) [Docket No. 96-001]
EMPLOYEES ASSOCIATION)
regarding DEPARTMENT) November 19, 1998
OF MOTOR VEHICLES')
"Attendance Restriction) Determination Pursuant to
Guidelines" governing use) Government Code Section
of sick leave) 11340.5; Title 1, California
Code of Regulations,
Chapter 1, Article 3

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
RAYMOND G. SAATJIAN, Staff Attorney
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether "Attendance Restriction Guidelines" issued by the Department of Motor Vehicles ("DMV") contain "regulations," which are invalid unless adopted pursuant to the Administrative Procedure Act ("APA"). Applied to DMV employees who have attendance problems, the Guidelines place conditions on use of sick leave. OAL has concluded that portions of the Guidelines which supplement validly issued requirements by prescribing what constitutes verification of illness, as well as the adverse consequences that could result from the failure to produce proper substantiation, are "regulations" within the meaning of the APA.

In more detail, OAL concludes as follows. The challenged DMV Guidelines clearly contain “regulations,” within the meaning of the APA. The key issue is whether they fall within the internal management exception. Governing law provides that agency rules (here, the Guidelines) do not fall within the internal management exception if the rules involve matters of serious consequence involving an important public interest. OAL concludes that the challenged rules implicate two such matters: (1) the public interest in protecting the privacy of individuals’ medical history and records and (2) the public interest in having fair and appropriate standards governing the suspension, demotion, and dismissal of public employees.

Sick leave verification rules may, it appears, be validly adopted in any one of three ways:¹ (1) by the Department of Personnel Administration (“DPA”) through a duly adopted regulation, (2) in a memorandum of understanding (“MOU”) resulting from the collective bargaining process and approved by the Legislature, and (3) by DMV,² through a regulation adopted pursuant to the APA, if such a DMV regulation is consistent with governing law, including any DPA sick leave regulations and any applicable MOU provisions.

The Legislature has directed the Department of Personnel Administration to adopt regulations concerning “satisfactory proof of the necessity for sick leave.”³ Though uncodified Guidelines have been issued by DPA, detailed regulations specifying how illnesses may be verified (in the case of employees identified as having attendance problems) have not been adopted. Procedures for protecting the confidentiality of sensitive medical information obtained through the verification process have not been incorporated into duly adopted regulations.

Such detailed rules could also be incorporated into memoranda of understanding between the State of California and the various employee bargaining units.⁴

ISSUE

The California State Employees Association (“CSEA” or “requester”),⁵ has asked OAL to determine whether DMV “Attendance Restriction Guidelines” (“Guidelines”) were issued in violation of the APA.⁶

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE DEPARTMENT MOTOR VEHICLES?

For purposes of the Administrative Procedure Act ("APA"), Government Code section 11000 defines the term "state agency" as follows:

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

The APA further clarifies or narrows the definition of "state agency" from that in Section 11000 by specifically excluding "an agency in the judicial or legislative department of the state government."⁷ The Department is in neither the judicial nor legislative branch of state government.⁸ Clearly, the Department is a "state agency" within the meaning of the APA, and unless the Department is expressly exempted from the APA,⁹ the APA is generally applicable to the Department.

In addition, Vehicle Code section 1651 provides:

"The director [of Motor Vehicles] may adopt and enforce rules and regulations as may be necessary to carry out the provisions of this code relating to the department. Rules and regulations shall be adopted, amended, or repealed in accordance with the [APA]."

II. DO THE DEPARTMENT'S "ATTENDANCE RESTRICTION GUIDELINES" CONTAIN "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*,¹⁰ the California Court of Appeal upheld OAL's two-part test¹¹ 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 fails to satisfy either of the above two parts of the test, OAL must conclude that it is *not* a "regulation" and *not* subject to the APA. In applying the two-part test, however, 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.]¹²

A. IS THE CHALLENGED RULE A "STANDARD OF GENERAL APPLICATION?"

Background of the "Attendance Restriction Guidelines":

Some of the Guidelines are found in an undated two-page document entitled "Guidelines for Attendance Memos." Some of the Guidelines are found in a three-page document dated February 1, 1993, entitled "Attendance Restrictions," and containing what appear to be standard restrictions, which document is addressed to a specific DMV employee.¹³ Though numerous guidelines are found in these two documents, OAL has determined, after careful review of the request, that the requester is seeking a determination only on those guidelines that require verification of illness by health care providers and which lay out adverse consequences that could result from the failure to produce proper substantiation.

A key verification guideline is found in the second document ("Attendance Restrictions"):

"2. All absences for health reasons. (self or family) must be substantiated with a statement verifying the dates of disability and the date of release to return to work. The statement must be signed by an authorized medical person and verify that you or your family member was seen and physically unable to work for the period of absence. We will not accept a statement that says 'patient states he/she was ill and unable to work,' or any statement where the reason has been blackened out, unless the reason for illness has been previously discussed with your immediate supervisor. Failure to bring

this statement with you when you return to work will result in an unapproved absence and will be reported as AWOL (absence without leave). If you were advised by the medical facility not to be seen in person, the statement must reflect that advice.”¹⁴

CSEA argues that:

“[t]he Department is in violation of Government Code Section 11347.5 [now 11340.5] and has created a regulation as defined in Government Code Section 11342. . . . Acts which occur are AWOL, DOCK, the non-timely payment of wages, Adverse Actions based on attendance, denial of Merit Salary Adjustments based on attendance and many other abuses which constitute an abuse of Administrative Authority.

. . . .

“Single parents are being economically disadvantaged because they have to care for chronically ill children. They are being forced to come to work ill themselves thus endangering themselves and other employees at DMV. Individuals on IDL [Industrial Disability Leave] and NDI [Non-industrial Disability Leave] are being adversely and punitively affected by the enforcement of this underground regulation. Single parents are being held to an unrealistic standard of attendance because of family illness.

“Individuals are being required to go to the medical doctor or licensed practitioner to get an excuse for any absence, often in cases where the Department is aware of a chronic illness. This requirement works an economic hardship on individuals who have co-payment in their medical plan. . . .”¹⁵

“Many Department of Motor Vehicles Managers and Supervisors, as a part of enforcing this underground regulation are calling Hospitals, Doctors and Licensed Practitioners for personal and confidential information which at times said information acquired is pandered among other individuals at DMV. Also the acquisition of specific medical information to be placed on the 634's seems to be a circumvention of the request for determination filed by Peggy Horton-Paine.”¹⁶

The "634" is a standard state government form, the full designation of which is "Absence and Additional Time Worked Report," State of California Standard Form 634. 1990 OAL Determination No. 16, responding to a request alleging that the Department of Personnel Administration had a policy requiring state employees using sick leave to list the specific nature of their illness in blank 8 of the Form 634, concluded that the challenged rule violated the APA.

In the matter of the attendance guidelines, DMV has responded to the allegations of the requester by claiming that its Guidelines, and more specifically provisions that relate to conditions governing the treatment of sick leave, are nothing more than a reflection of the comprehensive labor relations Memorandum of Understanding ("MOU")¹⁷ negotiated between the California State Employees Association and the State of California:

"The Memoranda of Understanding (MOUs) for Bargaining Units One and Four between the State of California and CSEA *address the definition, earning, accumulation and abuse of sick leave.* Article 8.2(e)(1), (2) and (3) specifically state that if the employee has a demonstrable pattern of sick leave abuse, the absence was for an unauthorized reason or the employee has an above average use of sick leave, verification may be required."¹⁸
[Emphasis added.]

In an effort to determine whether the Guidelines are "regulations" that must be adopted pursuant to the APA, or are, in actuality, nothing more than a restatement of the terms of a negotiated labor contract, OAL has examined Article 8.2 of the MOU and determined that the Department has the authority, under contract, to define the conditions for verification of an employee's need for sick leave:

"8. (d). The department head or designee shall approve sick leave only after having ascertained that the absence is for an authorized reason and *may require the employee to submit substantiating evidence including, but not limited to, a physician's or licensed practitioner's verification.* Such substantiation shall include, but not be limited to, the general nature of the

employee's illness or injury and prognosis. If the department head or designee does not consider the evidence adequate, the request for sick leave shall be disapproved."¹⁹ [Emphasis added.]

The Department has further responded to the requester by claiming that the Guidelines are permitted by statutes that govern the Department of Personnel Administration:

“Additionally, the Department of Personnel Administration (DPA) has published guidelines which state that when employees have a pattern of sick leave use, employees may be given written instructions to provide verification of sick leave on future absences. This is known in many departments as placing an employee on ‘attendance restriction.’ This provides the employee with reasonable notice of the verification requirement.”²⁰

The Government Code mandates the Department of Personnel Administration to adopt regulations that govern how state agencies must treat the subject of employee sick leave and the verification of illness that may be required by individual state agencies. Government Code section 19859 (last amended in 1983) provides in part that:

“Each state officer or employee is entitled to [sick] leave with pay, *on the submission of satisfactory proof* of the necessity for sick leave as provided by rule of the department.”²¹ [Emphasis added.]

The Department of Personnel Administration has adopted regulations which permit the state agencies, including DMV, to implement a policy of verification of the need for sick leave. Title 2, CCR, section 599.749 (last amended substantively in 1954)²² provides in part:

“The appointing power shall approve sick leave only after having ascertained that the absence was for an authorized reason and may require the employee to submit *substantiating evidence* including, but not limited

to, a physician's certificate. If the appointing power does not consider the evidence adequate, the request for sick leave shall be disapproved."²³
[Emphasis added.]

No statewide regulations specifically addressing the issue of sick leave abuse (including the matter of requiring employees with attendance problems to verify or substantiate the need for sick leave) have been adopted, either by DPA or by SPB, the agency responsible for administering the sick leave statute prior to 1982.

Do the DMV Guidelines Contain Standards of General Application?

For an agency rule 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.²⁴

The challenged DMV "Attendance Restriction Guidelines" apply to all DMV employees who are identified as having attendance problems, in part because of possible misuse of sick leave. OAL concludes that the Guidelines are standards of general application because they apply to all DMV employees identified as having attendance problems.

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

The Guidelines implement, interpret, and make specific the sick leave statute and CCR provision quoted above in section II.A. (Government Code section 19859, subdivision (a); Title 2 CCR section 599.749.) The Guidelines also implement Government Code section 11152, which provides in part: "[s]o far as consistent with law the head of each department may adopt such rules and regulations as are necessary to govern the activities of the department"

The Guidelines also implement provisions of the MOU for bargaining unit 4. The MOU negotiated by representatives of the California State Employees Association and the State describes in section 8. (d) the conditions required for the verification and substantiation of illness that constitute sick leave:

“8. (d). The department head or designee shall approve sick leave only after having ascertained that the absence is for an authorized reason and *may require the employee to submit substantiating evidence including, but not limited to, a physician’s or licensed practitioner’s verification.* Such substantiation shall include, but not be limited to, the general nature of the employee’s illness or injury or prognosis. If the department head or designee does not consider the evidence adequate, the request for sick leave shall be disapproved.”²⁵ [Emphasis added.]

Clearly, the following six Guideline provisions implement, interpret, and make specific the negotiated provisions in the MOU, that relate to sick leave. Numbers have been added to illustrate the fact that there is a series of related rules.

1. “All absences for health reasons. (self or family) must be substantiated with a statement verifying the dates of disability and the date of release to return to work.”
2. “The statement must be signed by an authorized medical person and verify that you or your family member was seen and physically unable to work for the period of absence.”
3. “We [the Department] will not accept a statement that says “patient states he/she was ill and unable to work”
4. “[We will not accept] any statement where the reason has been blackened out, unless the reason for illness has been previously discussed with your immediate supervisor.”
5. “Failure to bring this statement with you when you return to work will result in an unapproved absence and will be reported as AWOL (absence without leave).”

6 "If you were advised by the medical facility not to be seen in person, the statement must reflect that advice."²⁶

Accordingly, OAL concludes that because the challenged Guidelines go beyond a simple restatement of (1) the sick leave statute, (2) the sick leave CCR provision, and (3) applicable provisions of the MOU and, instead, interpret the means and manner of "substantiating" sick leave, the Guidelines contain "regulations" within the meaning of the key provision of Government Code section 11342, subdivision (g).

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

Rules concerning certain activities of state agencies are not subject to the procedural requirements of the APA.²⁷ The definition of "regulation" found in Government Code section 11342, subdivision (g), contains the following specific exception to APA requirements:

"'Regulation' means 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, *except one that 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 (b), the *Grier* court states as follows:

"*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 Department rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the Department'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]."²⁸

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the 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"²⁹

The internal management exception has been judicially determined to be narrow in scope.³⁰ A brief review of relevant case law demonstrates that the "internal management" exception applies if the "regulation" at issue (1) affects only the employees of the issuing agency,³¹ and (2) does not address a matter of serious consequence involving an important public interest.³²

(1) FIRST, DOES THE CHALLENGED POLICY AFFECT ONLY THE EMPLOYEES OF THE ISSUING AGENCY?

The answer to the first part of the inquiry is "yes". The challenged Department Guidelines affects *only* Department of Motor Vehicles employees.

(2) SECOND, DOES THE CHALLENGED POLICY ADDRESS A MATTER OF SERIOUS CONSEQUENCE INVOLVING AN IMPORTANT PUBLIC INTEREST?

That portion of the Guidelines contained in Section 2 of "Attendance Restrictions," which specifically prescribes the manner and method of verifying "all absences for health reasons," contains "regulations" that interpret, implement and make specific the sick leave provisions of the Government Code, the duly adopted CCR provision on sick leave--as well as the MOU, which also implements the sick leave statute and regulation.

Having determined that the Guidelines are in part "regulations," OAL next examines whether Section 2 of the Guidelines falls with the "internal management" exception to the APA.

As has been noted, case law which refers to the "internal management" exception requires that this exemption be narrowly read so as to promote the underlying objectives of the APA, namely, that members of the public most affected by an adopted "regulation" have the opportunity to be notified of its intended application and an opportunity to be heard.

The internal management exception does not apply where an agency rule involves a matter of serious consequence involving an important public interest. For example, the following "challenged rules" have been found to *involve a matter of serious consequence involving an important public interest*.

The court in *Poschman v. Dumke*, found that "[T]enure within any school system is a matter of serious consequence involving an important public interest."³³

In 1988 OAL Determination No. 3,³⁴ OAL explored the issue of whether the State Board of Control's ("Board") 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, was a "regulation." In that determination, one factor that clearly substantiated the existence of an "important public interest" was the Legislature's express statement of intent:

"The Legislature has clearly stated [in Government Code section 13959] that there is a public interest in assisting Californians in 'obtaining restitution for the pecuniary losses they suffer as a direct result of criminal acts.'" [Emphasis added.]³⁵

Section 2 of the Guidelines describes the consequence for the failure by a Department employee to produce sufficient information to verify sick leave, namely a determination that the employee was inexcusably "absent without leave,"³⁶ and accordingly, subject to an "adverse action" including "dismissal, demotion, suspension, or other disciplinary action."³⁷

Clearly, the portions of the Department Guidelines which implement, interpret or make specific the terms of the MOU concerning the verification of Department employee usage of sick leave do *involve a matter of serious consequence involving an important public interest*, namely, consequences which could result in adjustments to the employment status of Department employees. Having fair and appropriate standards governing the suspension, demotion, and dismissal of public employees is an important public interest.

The challenged Guidelines also require employees to reveal the specific illness or "reason for illness." The Guidelines specifically prohibit employees from blackening out the "reason for illness" in statements prepared by health care providers which state that the employee was "unable to work" due to an identified medical condition, etc. Privacy of medical history and records is a matter of serious consequence involving an important public interest. The requester has alleged, and the Department has not denied, that personal and confidential medical information obtained by DMV managers and supervisors in the process of

verifying the need for sick leave has “at times” been passed on to “other individuals at DMV.”

Thus, OAL concludes that the challenged Guidelines implicate two important public interests: (1) having fair and appropriate standards governing the suspension, demotion, and dismissal of public employees and (2) protecting the privacy of individuals’ medical history and records.

Accordingly, the Guidelines do not fall within the “internal management” exception, and must be adopted as prescribed by law in order to be valid.

And finally, requester claims that the Guidelines “circumvent” a prior regulatory determination issued by OAL:

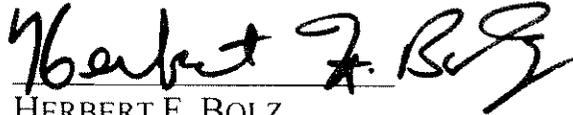
“requiring the ‘Reason for Absence’ in blank 8 of the Form 634 and requiring that employees list the specific nature of their illness in blank 8 of the Form 634 are ‘regulations’ as defined in the key provision of Government Code section 11342, subdivision (b).”

To the extent that the Department has required that employees submit information regarding the specific nature of illness as a condition of verifying sick leave, and the Department has yet to adopt such a “regulation” pursuant to the APA, such a requirement contained in the Guidelines is invalid unless and until it is adopted pursuant to the APA.

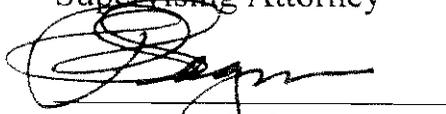
CONCLUSION

For the reasons set forth above, OAL has concluded that portions of the Guidelines which supplement validly issued requirements by prescribing what constitutes verification of illness, as well as the adverse consequences that could result from the failure to produce proper substantiation, are "regulations" within the meaning of the APA. In order to be valid these DMV "regulations" must be adopted as prescribed by law: pursuant to the APA as regulations printed in the CCR or incorporated into a memorandum of understanding approved by the Legislature.

DATE: November 19, 1998



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ENDNOTES

1. Of course, legislation would also be an option.
2. Vehicle Code section 1651; Government Code section 11152; *Gilmore v. Personnel Board* (1958) 161 Cal.App.2d 439, 448; *Nelson v. Dean* (1946) 27 Cal.2d 877 883; 8 Ops.Cal.Atty.Gen. 293 (1946).
3. Government Code section 19859, subdivision (a).
4. An MOU applies solely to members of one particular bargaining unit.
5. Mac Proctor, Labor Relations Specialist, California State Employees Association, (CSEA) 1108 "O" Street, Sacramento, CA 95814, (916) 444-8134.
6. State of California, Department of Motor Vehicles, "Attendance Restrictions", directed to Georgette Stevenson, Pos#741-1441-xxx, Betty Miller, OSSI, dated February 1, 1993, p. 1.
7. Government Code section 11342.
8. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 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, 601).
9. Government Code section 11346; Title 1, CCR, section 121 (a)(2).
10. (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*.

11. 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.

12. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.
13. Requester attached to its request a copy of the "Attendance Summary" of Georgette Stevenson for the period July 1992 to January 1993, as well as a copy of a "Visit Verification" from Kaiser Permanente as evidence that the application of the Guidelines constitutes an "underground regulation."
14. State of California, Department of Motor Vehicles, "Attendance Restrictions", directed to Georgette Stevenson, Pos#741-1441-xxx, Betty Miller, OSSI, dated February 1, 1993, p. 1.
15. Memorandum to Office of Administrative Law, by Mac Proctor, Labor Relations Representative, dated March 24, 1993, subject "Attendance Restriction Guidelines," Department of Motor Vehicles, p.1
16. Memorandum, Mac Proctor on behalf of CSEA, dated March 24, 1993, p.2.
17. MEMORANDUM OF UNDERSTANDING ("Contract") entered into by the State of California and the California State Employees Association, effective July 1, 1992 through June 30, 1995, for the benefit of Unit 4 (Office and Allied workers).

18. Department Response, Memorandum addressed to Edward G. Heidig, Director, Office of Administrative Law, by Sally R. Reed, Director, dated June 17, 1998.
19. MEMORANDUM OF UNDERSTANDING ("Contract") entered into by the State of California and the California State Employees Association, effective July 1, 1992 through June 30, 1995, for the benefit of Unit 4 (Office and Allied workers). Article 8.2(d).
20. Department Response, Memorandum addressed to Edward G. Heidig, Director, Office of Administrative Law, by Sally R. Reed, Director, dated June 17, 1998
21. Government Code, section 19859 (a).
22. Title 2, CCR, section 599.749 ("Evidence of Need for Sick Leave") was adopted by DPA in 1983. A predecessor section was originally adopted in 1945 by the State Personnel Board ("SPB"), the agency then responsible for overseeing sick leave (Title 2, CCR, section 406 originally published 3-22-45). This SPB regulation was revised in 1954. This SPB regulation was adopted verbatim by DPA in 1983, soon after authority over sick leave was shifted by statute from SPB to DPA. The SPB regulation was repealed in 1985.
23. CCR, Title 2, section 599.749.
24. *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 522. See, *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standards of general application applies to all members of any open class).
25. MEMORANDUM OF UNDERSTANDING ("Contract") entered into by the State of California and the California State Employees Association, effective July 1, 1992 through June 30, 1995, for the benefit of Unit 4 (Office and Allied workers). Article 8.2(d).
26. State of California, Department of Motor Vehicles, "Attendance Restrictions", directed to Georgette Stevenson, Pos#741-1441-xxx, Betty Miller, OSSI, dated February 1, 1993, p. 1.
27. 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. (e).)
 - 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.
28. *Grier* (1990) 219 Cal.App 3d 422, 436 fn.10, 268 Cal Rptr. 244, 252-253.) cites *Armistead* citing *Poschman* for support on this point. Note that *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, fn. 3, 149 Cal.Rptr. 1, 583 P.2d 744.)
29. (1990) 219 Cal.App.3d 422, 436, 268 Cal Rptr. 244, 252-253.
30. (1990) 219 Cal.App.3d 422, 436, 268 Cal Rptr. 244, 252-253.
31. See *Armistead v. State Personnel Board* (1978) 22 Cal. 3d 198, 149 Cal.Rptr. 1; *Stoneham v. Rushen (Stoneham I)* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr 130; *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596.
32. See *Poschman, supra*, 31 Cal.App.3d at 943, 107 Cal.Rptr. at 603; and *Armistead*, note 34, *supra*, 22 Cal.3d at 203-204, 149 Cal.Rptr. at 3-4. See also **1989 OAL Determination No. 5** (Department of Corrections, Docket No. 88-007), California Regulatory Notice Register, No. 23-Z, April 21, 1989, pp. 1120, 1126-1127; typewritten version, pp. 192-193.

33. See *Poschman*, note 17, *supra*.
34. **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.
35. Government Code section 13959.
36. Government Code section 19572, subdivision (I).
37. Government Code section 19570.