

STATE OF CALIFORNIA

93750-2 01/1/22

OFFICE OF ADMINISTRATIVE LAW



In re:)	1998 OAL Determination No. 40
Request for Regulatory)	
Determination filed by)	[Docket No. 96-008]
THOMAS THORNHILL)	
regarding the PST)	December 9, 1998
Retirement Plan of the)	
DEPARTMENT OF PERSONNEL)	Determination Pursuant to
ADMINISTRATION for part-)	Government Code Section
time, seasonal and temporary)	11340.5; Title 1, California
state employees ¹)	Code of Regulations,
_____)	Chapter 1, Article 3

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
CINDY PARKER, Administrative Law Judge
on special assignment
Regulatory Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether the Department of Personnel Administration's PST Retirement Plan for part-time, seasonal and temporary state employees contains "regulations" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA"). A preliminary issue is whether OAL has the authority to review and issue a determination regarding the Plan.

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OAL has concluded that:

- (1) OAL has the authority to issue a determination regarding the PST Retirement Plan.
- 2) The PST Retirement Plan contains "regulations" which are invalid unless adopted pursuant to the *applicable* provisions of the APA.

If the Department of Personnel Administration wishes to exercise its discretion to issue rules governing this matter, it may adopt regulations pursuant to the applicable portions of the APA.

ISSUE

OAL has been requested to determine whether the policies contained in the PST Retirement Plan of the Department of Personnel Administration are "regulations" required to be adopted pursuant to the APA.² Thomas Thornhill filed this request.

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF PERSONNEL ADMINISTRATION'S QUASI-LEGISLATIVE ENACTMENTS?

The Department of Personnel Administration ("DPA") was created in 1981³ "for the purposes of managing the nonmerit aspects⁴ of the state's personnel system."⁵ The Department succeeded to specific duties and responsibilities of four state departments: (1) the State Personnel Board "with respect to the administration of salaries, hours and other personnel related matters, training, performance evaluations, and layoffs and grievances"; (2) the Board of Control; (3) the Department of General Services "with respect to the administration of miscellaneous employee entitlements"; and (4) the Department of Finance "with respect to the administration of salaries of employees exempt from civil service and within range salary adjustments."⁶

The Director of Personnel Administration also serves as the Governor's representative in negotiations with state employee organizations on matters "regarding wages, hours, and other terms and conditions of employment"⁷

The APA applies to all state agencies, except those "in the judicial or legislative departments."⁸ Since the Department is in neither the judicial nor the legislative branch of state government, OAL concludes that APA rulemaking requirements generally apply to the Department.⁹

Furthermore, Government Code section 19815.4, subdivision (d), states:

"The Director of [Personnel Administration] shall:

"(d) Formulate, adopt, amend, or repeal rules, regulations, and general policies¹⁰ affecting the purposes, responsibilities, and jurisdiction of the department and which are consistent with the law and necessary for personnel administration." [Emphasis added.]

OAL reads the phrase "consistent with the law" to mean (among other things) that rules and regulations adopted under this section must be adopted in conformity with the law governing administrative rulemaking, i.e., the APA.

II. DOES OAL HAVE THE AUTHORITY TO ISSUE A DETERMINATION REGARDING THE PST RETIREMENT PLAN FOR PART-TIME, SEASONAL AND TEMPORARY STATE EMPLOYEES?

DPA contends that the language of Government Code section 19999.21 exempts the PST Retirement Plan from *all* provisions of the APA, including Government Code section 11340.5, which authorizes OAL to issue determinations concerning alleged "underground regulations."¹¹ Section 19999.21 provides:

"The Department of Personnel Administration shall administer the retirement program established by this chapter. The department shall provide by rule for the regulation of the retirement program and the method by which the benefit payments would be made to eligible recipients."

"The regulations shall not be subject to the review and approval of the Office of Administrative Law, pursuant to Chapter 3.5 (commencing with

section 11340) of Part 1 of Division 3 of Title 2. The regulations shall become effective immediately upon filing with the Secretary of State.”
(Emphasis added.)

Therefore, DPA argues, OAL does not have the authority to review the Plan to determine whether it contains “regulations” which are invalid unless adopted pursuant to the APA, because no part of the Plan need be adopted pursuant to the APA.¹²

Government Code section 11346 requires that all exemptions from the APA be express. Some general principles of statutory construction will be useful in determining the meaning of the exemption language covering the PST Retirement Plan in Government Code section 19999.21.

As stated by the California Court of Appeal:

“When a statute contains an exception to a general rule laid down therein, that exception is strictly construed.”¹³

As stated by the California Supreme Court, “[i]t is well established that a specific provision should be construed with reference to the entire statutory scheme of which it is a part.”¹⁴

Finally, in interpreting a statute, it is proper to consider the consequences that will flow from a particular interpretation.^{15, 16}

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

“The APA was enacted to establish *basic minimum procedural requirements* for the adoption, amendment or repeal of *administrative regulations promulgated by the State's many administrative agencies*. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) Its provisions are *applicable to the exercise of any quasi-legislative power conferred by statute*. (Section 11346.) The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section

11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (*Armistead v. State Personnel Board*) (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744.” (Footnote omitted; emphasis added.)¹⁷

The Administrative Procedure Act is codified in Chapter 3.5 of Part 1, Division 3, Title 2 of the Government Code, beginning at section 11340. Chapter 3.5, entitled “Administrative Regulations and Rulemaking,” consists at present of nine articles. Until January 1, 1995,¹⁸ there were seven articles. The following chart illustrates the old and new articles.

<u>Old</u>		<u>New</u>	
Article 1	General	Article 1	General
Article 2	Rules and Regulations	Article 2	Rules and Regulations
Article 3	Filing and Publication	Article 3	Filing and Publication
Article 4	California Administrative Register and Code	Article 4	California Administrative Register and Code
Article 5	Procedure for Adoption of Regulations	Article 5	Public Participation; Procedure for Adoption of Regulations
Article 6	Review of Regulations	Article 6	Review of Proposed Regulations
Article 7	Judicial Review	Article 7	Review of Existing Regulations
		Article 8	Judicial Review
		Article 9	Special Procedures

After review of the APA and the cases interpreting it, OAL has identified six primary APA purposes and the articles of Chapter 3.5 which further those

purposes.¹⁹

1. Meaningful Public Participation (upholding democratic values)²⁰
Article 5
2. Complete Administrative Record (Effective Judicial Review)²¹
Articles 5 and 8.
3. Insuring Clarity, Necessity, and Legality (Independent OAL review)²²
Article 6.
4. Central, Accessible Publication (All agency rules in one place)²³
Articles 3 and 4.
5. Control of Underground Regulations (Channel agency rules into APA process)²⁴ Article 1.
6. Reducing the number of adopted regulations (preventing the issuance of unnecessary regulations)²⁵ Articles 2, 6 and 7.

The statutory language which DPA contends exempts the PST Retirement Plan from all APA provisions and requirements is found in Government Code section 19999.21.

“The Department of Personnel Administration shall administer the retirement program established by this chapter. The department shall provide by rule for the regulation of the retirement program and the method by which the benefit payments would be made to eligible recipients.”

“The [proposed] *regulations* shall *not* be *subject* to the *review and approval* of the Office of Administrative Law, pursuant to Chapter 3.5 (commencing with section 11340) of Part 1 of Division 3 of Title 2. The regulations shall become effective immediately upon filing with the Secretary of State.”
(Emphasis added.)

OAL will examine the nine articles of Chapter 3.5 of the APA to determine which article(s) contain language regarding OAL’s review and approval of proposed regulations.

Article 1 is entitled “General,” and contains Government Code section 11340.5, which 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 this chapter.

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

Section 11340.5 contains neither the word “review” nor the word “approval.”

Further, there is no language in section 11340.5 stating that OAL may not issue a determination unless the agency rule under review has first been determined to be fully or partially subject to the APA. Indeed, since 1986, OAL regulations have provided that a possible outcome for a determination proceeding is the legal conclusion that agency rule under review “has been exempted by statute from the requirements of the APA.”²⁶ For example, 1998 OAL Determination No. 10, concluded that state guidelines concerning preparation of hazardous waste management plans had been “expressly exempted by statute from the APA.” The purpose of the request for determination process is to permit citizens and interested parties to *obtain* an OAL legal opinion on whether a particular agency rule has been legally issued, in light of APA requirements.

Article 6, entitled “Review of Proposed Regulations” does contain the key words from Government Code section 19999.21: “review” and “approval.” Section 11349 defines the six standards applied by OAL in reviewing regulations. These

standards are necessity, authority, clarity, consistency, reference, and nonduplication. Section 11349.1, entitled “*Review of Regulations*,” provides in part as follows:

“(a) The office shall *review* all regulations adopted pursuant to the procedure specified in Article 5 (commencing with Section 11346) and submitted to it for publication in the California Regulatory Code Supplement and for transmittal to the Secretary of State and make determinations using all of the following standards: (1) Necessity. (2) Authority. (3) Clarity. (4) Consistency. (5) Reference. (6) Nonduplication.

In *reviewing* regulations pursuant to this section, the office shall restrict its *review* to the regulation and the record of the rulemaking proceeding. The office shall *approve* the regulation or order of repeal if it complies with the standards set forth in this section and with this chapter.”

Section 11349.3, entitled “Approval or Disapproval; Return Upon Request of Agency,” provides in part:

“(a) The office shall either *approve* a regulation submitted to it for review and transmit it to the Secretary of State for filing or *disapprove* it within 30 working days after the regulation has been submitted to the office for review.”

None of the articles of Chapter 3.5, other than Article 6, contain references to review and approval by OAL. The fact that the specific language regarding review and approval of regulations by OAL appears only in Article 6 plainly indicates that Government Code section 19999.21 exempts DPA rules concerning the PST Retirement Plan only from the provisions of Article 6.

Next, OAL will compare the language of the exemption in Government Code section 19999.21 to other existing APA exemptions in order to determine the scope of the exemption at issue.

Exemptions from the APA may be either special or general. Special exemptions excuse an agency’s compliance with Chapter 3.5 regarding a specific topic or topics. General exemptions excuse all of an agency’s rulemaking from compliance with the APA. Within each of these categories there are (1)

exemptions from specific parts of Chapter 3.5 and (2) complete exemptions from Chapter 3.5.

An example of a general exemption, granted by the voters to the State Lottery Commission, is found in section 8880.26 of the Government Code, which provides in part:

“(a) The *provisions of Chapter 3.5* (commencing with Section 11340) of Part 1 of Division 3 are *not applicable* to any rule or regulation promulgated by the commission.” (Emphasis added.)

This statute exempts the rulemaking of the State Lottery Commission from all provisions of all articles of Chapter 3.5.

Article 9 of Chapter 3.5 contains, among others, exemptions for the Public Utilities Commission (“PUC”) and the Workers’ Compensation Appeals Board (“WCAB”).

Government Code section 11351, provides:

“(a) Except as provided in subdivision (b), Article 5 (commencing with Section 11346), Article 6 (commencing with Section 11349), Article 7 (commencing with Section 11349.7), and Article 8 (commencing with Section 11350) shall not apply to the Public Utilities Commission or the Workers’ Compensation Appeals Board, and Article 3 (commencing with Section 11343) and Article 4 (commencing with Section 11344) shall apply only to the rules of procedure of these state agencies.

(b) The Public Utilities Commission and the Workers’ Compensation Appeals Board shall comply with paragraph (5) of subdivision (a) of Section 11346.4 with respect to regulations that are required to be filed with the Secretary of State pursuant to Section 11343.

(c) Article 8 (commencing with Section 11350) shall not apply to the Division of Workers’ Compensation.”

This exemption clearly specifies which articles do not apply to the PUC and the WCAB. It applies to all rulemaking activities of the two agencies, and is therefore

a general exemption. The section creates a complete exemption for the agencies from Articles 6-8 and a partial exemption from Articles 3, 4 and 5. The exemption as to Article 5 would be a complete exemption, except subdivision (b) of section 11351 requires the agencies to publish notice of proposed regulations in the California Regulatory Notice Register pursuant to section 11346.4 of Article 5 if the regulations must be filed with the Secretary of State's Office. Thus, the Legislature determined and clearly specified that the PUC and the WCAB are exempt from Articles 6-8 of the APA and from all provisions of Article 5, except that which requires publication of notice of proposed rules in the Notice Register.

Special exemptions may be broad or narrow in scope. Board exemptions may cover numerous rulemaking topics or an entire program, while narrow special exemptions may cover only one or two requirements regarding a single topic.

An example of a broad special statutory APA exemption is contained in section 11353 of the Government Code, which is entitled "State water quality control policies, plans, and guidelines; adoption or revision; application of chapter; review; procedures; requirements" and provides in part:

"(a) Except as provided in subdivision (b), *this chapter does not apply* to the adoption or revision of state policy for water quality control and the adoption or revision of water quality control plans and guidelines pursuant to Division 7 (commencing with Section 13000) of the Water Code."
(Emphasis added.)

This is a special exemption from Chapter 3.5 (the APA) because it exempts only those rulemaking actions of the agency regarding *specific* topics. It does not exempt *all* rulemaking activity of the agency. It exempts rules adopted by the Water Resources Control Board ("WRCB") prior to June 1, 1992 by specifying:

"The following actions are not subject to this chapter"

Subdivision (b) of section 11353 specifies which APA requirements apply to the agency rulemaking by describing those requirements rather than referring to them by article.

Subdivision (b)(4) of section 11353 provides that OAL shall review the proposed regulations for compliance with the six standards of necessity, authority, clarity,

consistency, reference and nonduplication. Section (b)(5) provides that the regulations are subject to the approval of OAL. It is clear from this exemption that all rules adopted prior to June 1, 1992 by the WRCB are exempt from Articles 1-8 of the APA.

Another broad special exemption, which is also an exemption for an entire program of the Office of Emergency Services, is found in section 25533 of the Health and Safety Code and provides in part as follows:

“The state’s implementation of the federal program adopted by the Environmental Protection Agency is *not subject to Chapter 3.5* (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.” (Emphasis added.)

The program which this language exempts from the provisions of Chapter 3.5 is the program for the prevention of accidental releases of regulated substances.

Another special exemption, which applies to the State Board of Education and is more limited in scope, is found in section 60005, subdivision (3)(c)(1) of the Education Code provides as follows:

“The following shall not be subject to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code:

- (A) The content of curriculum frameworks.
- (B) Evaluation criteria and worksheets developed to supplement curriculum frameworks.”

Essentially, this language exempts rules regarding the content of curriculum frameworks, evaluation criteria and worksheets that supplement curriculum frameworks. A subsequent section indicates that the exemption does not apply to the procedures for developing and adopting the framework, criteria and worksheets.

A much narrower exemption is contained in Chapter 4.5 of the APA, governing procedures for administrative adjudication, in Government Code section 11400.20, subdivision (b)(3):

“Permanent regulations are subject to all the provisions of Chapter 3.5 (commencing with Section 11340), except that if by December 31, 1998, an agency has submitted the regulations for review by the Office of Administrative Law, the regulations are *not subject to review for necessity* under Section 11349.1 or 11350.” (Emphasis added.)

This language exempts agencies which have submitted permanent regulations regarding administrative adjudication before December 31, 1998 (when all interim regulations expire) from that part of Article 6 which provides for “review” by OAL as to necessity, one of the six standards ordinarily applied by OAL.

All of these examples demonstrate that the Legislature has found numerous ways to state exemptions from the APA which are clear in scope.

As mentioned above, this interpretation of this exemption language is consistent with the fact that the terms “review” and “approval” by OAL are found in Article 6 and not in the other articles of Chapter 3.5. Moreover, in contrast to the language of the exemptions cited for the Lottery Commission, PUC, WCAB and Water Resources Control Board, the language in Government Code section 19999.21 exempting specific rules from OAL review and approval is more limited in scope.

DPA also contends that the final sentence of Government Code section 19999.21 indicates that the Legislature intended to exempt the PST Retirement Plan rules from all nine articles of Chapter 3.5 of the APA. That language states:

“The regulations shall become effective immediately upon filing with the Secretary of State.”

Government Code section 11343.4 provides that a regulation is effective on the 30th day after filing with the Secretary of State, unless the proposing agency requests an earlier effective date and makes a showing of good cause for the earlier date. The DPA language appears to be an exemption from the requirements of section 11343.4. In the absence of specific legislative history or intent²⁷ indicating the meaning of this language, the language itself does not support DPA’s contention that it exempts the PST Retirement Plan rules from all articles of Chapter 3.5, the rulemaking chapter, rather than from only the provisions of Government Code section 11343.4. Considering this language regarding when the

regulations become effective, in conjunction with the language exempting the rules from OAL review, it would be illogical to construe the former to mean that the PST Retirement Plan rules are exempt from Articles 1-8 of the rulemaking chapter, rather than solely from section 11343.4.

As "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly exempted* by statute, and as such exemptions are to be narrowly construed, OAL narrowly construes the DPA exemption. A narrow construction of both the "review and approval" language and the "effective immediately" language of Government Code section 19999.21 leads OAL to conclude that these sentences exempt the PST Retirement Plan rules (1) from the review and approval of OAL pursuant to Article 6 of Chapter 3.5 and (2) from the provisions of Government Code section 11343.4 regarding when regulations ordinarily become effective.

As the Plan rules are not exempt from Article 1, which contains section 11340.5, authorizing OAL to review agency rules to determine if they must be adopted pursuant to the APA, OAL has jurisdiction to consider and issue a determination regarding the PST Retirement Plan rules.

III. 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*,²⁸ the California Court of Appeal upheld OAL's two-part test²⁹ 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 meets both parts of the two-part test, OAL must conclude that it is a "regulation" and 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.)"³⁰

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

The challenged rules are contained in the 9-page PST Retirement "Plan Document." They provide for the administration of the PST Retirement Plan and require the participation of all part-time, seasonal and temporary state workers hired after August 1, 1991 who are not eligible for the Public Employees Retirement System ("PERS") retirement. This plan requires the designated workers to defer 7.5% of their annual salary for retirement purposes.³¹

For an agency rule to be of "general application," 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.³² The DPA Plan applies to all part-time, seasonal and temporary state employees hired after August 1, 1991 throughout the state. Therefore, this policy is a standard of general application.

Before reaching the dispositive issues of this determination, OAL first clarifies for the requester the scope of our inquiry. This determination does not address the requester's contention that the state should give employees the option of participating in Social Security or the contention that an inadequate financial return is provided on the amounts deferred from employees' pay. OAL jurisdiction does not extend to issuing determinations on substantive issues of this kind.

Upon a request for determination submitted pursuant to Government Code section 11340.5, OAL is required to provide a written determination as to whether the rule challenged by the requester is a "regulation," as defined under the APA. If the challenged rule is determined to be a "regulation," then the agency's failure to adopt the rule under the requirements of the APA renders the rule invalid and unenforceable. OAL's inquiry for purposes of determinations is limited in scope, and a contrary finding by OAL, i.e., that the rule is *not* a "regulation," does not mean that OAL has determined the rule to be legally valid, only that the rule does not meet the statutory definition of "regulation."

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

In 1991 Congress amended the statute governing employer taxes for Social

Security, requiring that state employers pay the tax on the income of workers employed by states who are not members of the retirement systems of those states.³³ Previously, state employers were not required to pay the Social Security excise tax for state workers, regardless of whether they were covered by the state retirement system.

The Federal regulations promulgated thereafter define the circumstances which qualify the employer for an exemption from the excise tax. They specify that at least 7.5% of an employee's compensation must be deferred to the retirement plan in order for the employer excise to be inapplicable.³⁴

In 1991 the California Legislature enacted Government Code sections 19999.2 and 19999.21.³⁵ These sections authorized DPA to develop and administer a retirement program in which state employees not covered by Social Security or by the Public Employees Retirement System could defer 7.5% of their wages.

DPA developed regulations regarding the PST Retirement Plan which provide as follows:³⁶

Enrollment.

All part-time, seasonal, or temporary (PST) employees who are ineligible for participation in the Public Employees' Retirement System shall be enrolled in the PST Retirement Plan.

In the event a dispute arises over enrollment eligibility, the final determination shall be made by the Director or his/her designee.³⁷

Administration.

The Plan is an eligible deferred compensation plan that shall be administered by the Department of Personnel Administration in accordance with the Plan, as amended by the Department from time to time, regulations adopted by the Internal Revenue Service pursuant to the Omnibus Budget Reconciliation Act (OBRA) of 1990 (Internal Revenue Code Section 3121(b)(7)(F), as applicable, and Internal Revenue Code Section 457 and any and all regulations pertaining thereto.³⁸

Participant Contributions and Benefits.

An employee, subject to the Plan, shall contribute 7.5% of his or her gross pay into an account established for him or her in the Plan. These contributions shall be invested in an investment fund which shall insure preservation of principal. The employee's account shall be the sole source of funding his or her retirement benefits from the Plan.³⁹

Withdrawal of Funds

A return of contributions and earnings thereon shall only be permitted upon a separation from State service. The Department shall issue payments at least quarterly.⁴⁰

The PST Retirement Plan is a nine-page document which contains details regarding the administration of the Plan. The policies contained in the Plan specify that all part-time, seasonal and temporary employees designated by the Director shall participate in the plan and all eligible employees hired after August 1, 1991 shall become participants. The Plan also covers when distribution of the deferred funds occurs, the form of distribution, transfer of funds to other deferred compensation plans, beneficiary designation and the nonassignability of benefits.

Many of these provisions interpret a section of the regulations found in the California Code of Regulations. For example, three and one half pages of the Plan contain provisions regarding distribution of funds which are not contained in the state regulations or statute or in the federal regulations or statute. The distribution provisions clearly interpret section 599.945.1 of Title 2, providing for DPA administration of the Plan, and section 599.945.3 of Title 2, regarding withdrawal of funds. They are, therefore, "regulations" required to be adopted pursuant to the APA, with the exceptions discussed earlier that (1) they are not subject to review and approval of OAL, and (2) they would be effective immediately upon filing with the Secretary of State.

Likewise, the provisions that a participant may designate a beneficiary, that a participant may transfer accumulated funds to another eligible deferred compensation plan, and that the plan benefits are nonassignable interpret section 599.945.1, which provides for DPA administration of the Plan. They are also "regulations" which are invalid unless adopted pursuant to the applicable

provisions of the APA.

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

It was discussed at length in section II of this determination whether the challenged rules in the Plan fall within a special express statutory exemption from APA requirements. OAL concluded that the language in Government Code section 19999.21 exempts proposed PST Retirement Plan rules from OAL review and approval and from the provisions of Government Code section 11343.4, but not from the remaining APA requirements, such as public notice and comment.

V. 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.⁴¹ Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.⁴²

Section II of this determination contains a discussion of why the exemption language in Government Code section 19999.21 does not constitute a general express exemption.

CONCLUSION

For the reasons set forth, OAL finds that:

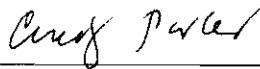
- (1) OAL has the authority to review and issue a determination regarding DPA's PST Retirement Plan.
- (2) The PST Retirement Plan contains "regulations" which are invalid unless adopted pursuant to the applicable provisions of the APA. The APA provisions which *do not* apply to PST Retirement Plan

regulations are (a) Article 6 of Chapter 3.5 (Government Code sections 11349 through 11349.6) (the OAL review and approval provisions) and (b) section 11343.4 of the Government Code (provision prescribing when regulations become effective following filing with the Secretary of State.).

DATE: December 9, 1998



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ENDNOTES

1. This Request for Determination was filed by Thomas Thornhill, P.O. Box 1755, Nevada City, CA 95959. The Department of Personnel Administration was represented by David J. Tirapelle, Director, 1515 "S" St., North Building, Suite 400, Sacramento, CA 95814-7243, (916) 324-9351.
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. Stats. 1981, c. 230, sec. 55, page 708.
4. The Legislative Counsel's Digest of Senate Bill No. 668 (1981-1982 Reg. Session) states:

"The Governor's Reorganization Plan No. 1 of 1981, which became effective on _____, 1981, created the Department of Personnel Administration to administer the nonmerit aspects of state employment for nonelected employees in the executive branch of government . . ."

"Various functions previously performed by the State Personnel Board are administered by the department, including, among others, salary determination, working hours, vacations, sick leave, absences, training performance reports, layoff, and grievances. . . ." [Emphasis added.]
5. Government Code section 19815.2.
6. Government Code section 19816.
7. Government Code section 3517.
8. Government Code section 11342, subdivision (a).
9. See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.

10. In considering the meaning of the phrase "general policies," OAL notes the rule from Government Code section 11346 that APA exemptions must be "express." Furthermore, applying the well established rules of statutory construction to harmonize all provisions of a statute where possible, it would appear illogical for the Legislature to have included a phrase signifying an APA exemption after the "adopt, amend or repeal rules, regulations" language which clearly refers to APA requirements.
11. Agency response, p. 1.
12. In 1987 DPA contended that the following language in Government Code section 19990 exempted the incompatible activities statements of state agencies from the provisions of Chapter 3.5:

"The department shall adopt rules governing the application of this section. The rules shall include provision for notice to employees prior to the determination or proscribed activities and for appeal by employees from such a determination and from its application to an employee. Until the department adopts rules governing the application of this section, as amended in the 1985-86 Regular Session of the Legislature, existing procedures shall remain in full force and effect."

In an opinion approving the proposed DPA regulations implementing section 19990, OAL explained that APA exemptions are to be narrowly construed. The APA establishes minimum procedural requirements for rulemaking. The notice to employees in section 19990 establishes an additional notice requirement which goes beyond the minimum APA requirements, and thus does not conflict with the APA. See Government Code section 11346. The language which continues existing procedures was found by OAL to apply temporarily until the new procedures were in place. (Decision Regarding Approval of Regulatory Action in OAL File NO. 87-0925-04, November 24, 1987). Thus, as early as 1987, DPA was on notice that APA exemptions are narrowly construed, and what may have initially been perceived as a blanket exemption from the APA may in fact be a limited exemption or no exemption at all.

13. *Goins v. Board of Pension Commissioners* (1979) 96 Cal.App.3d 1005, 1009;158 Cal.Rptr. 470, 473.
14. *Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 489.
15. See note 13, supra.
16. *Fig Garden Park v. Local Agency Formation* (1984) 162 Cal.App.3d 336,343; 208 Cal.Rptr. 474, 478 (a statute should be construed with a view toward promoting rather than defeating its general purpose and the policy behind it).

17. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, ____, 268 Cal.Rptr. 244, 249.
18. Statutes of 1994, Chapter 1039.
19. Article 9, which is not listed below, contains some of the exemptions to the APA.
20. Government Code sections 11346.8 and 11346.4; *California Optometric Association v. Lackner* (1976) 60 Cal.App.3d 500, 131 Cal.Rptr. 744. See also Government Code section 11350.
21. Government Code section 11347.3; *California Optometric Association v. Lackner* (1976) 60 Cal.App.3d 500, 131 Cal.Rptr. 744. See also Government Code section 11350.
22. Government Code sections 11349 and 11349.1.
23. Government Code sections 11344 and 11343.
24. Government Code section 11340.5.
25. Government Code sections 11340 and 11340.1.
26. Title 1, CCR, section 121(a).
27. A search of the author's bill file for A.B. 702, the Republican Caucus file and the file for the Senate Governmental Operations Committee revealed no legislative intent regarding either of the sentences at issue in this determination.
28. (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 200, 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*.

29. **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.)

30. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

31. September 10, 1998 letter from requester.

32. *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).

33. Section 3121(b)(7)(F) of the Int. Rev. Code.

34. 26 C.F.R. sections 3121(b)(7) -1 and -2.

35. Stats. 1991, c.83, section 3.

36. The regulations were submitted to OAL for printing only and filed January 29, 1993.

37. Title 2, CCR, section 599.945.

38. Title 2, CCR, section 599.945.1.

39. Title 2, CCR, section 599.945.2

40. Title 2, CCR, section 599.945.3

41. Government Code section 11346.

42. 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.