

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

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In re:)
 Request for Regulatory) 1998 OAL Determination No. 46
 Determination filed by the)
 CALIFORNIA STATE) [Docket No. 97-003]
 EMPLOYEES ASSOCIATION)
 regarding DEPARTMENT) December 16, 1998
 OF WATER RESOURCES')
 rules concerning) Determination Pursuant to
 employees' Request for) Government Code Section
 Absences and Use of Sick) 11340.5; Title 1, California
 Leave¹) Code of Regulations,
) Chapter 1, Article 3
)

Determination by: EDWARD G. HEIDIG, Director

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Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether rules concerning employees' request for absences and use of sick leave issued by the Department of Water Resources ("DWR" or "Department") contain "regulations," which are invalid unless adopted pursuant to the Administrative Procedure Act ("APA").

Applied to DWR employees who have attendance problems, the rules place conditions on (1) requests for absences (e.g., vacation, personal holiday, personal

6

leave, leave without pay, Saturday holiday, compensating time off, etc.) and (2) use of sick leave.

OAL has concluded that:

(1) the rule requiring employees to submit all requests for absences (except for sick or family sick leave) one day in advance of the planned leave is a “regulation” under the APA, but is nonetheless exempt from the APA because it relates solely to the internal management of DWR and does not involve a matter of serious consequence involving an important public interest.

(2) rules concerning the use of sick leave 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.

The challenged DWR rules concerning use of sick leave 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, those concerning verification of sick leave) 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:² (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 process³ and approved by the Legislature, and (3) by DWR,⁴ through a regulation adopted pursuant to the APA, if such a DWR 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."⁵ Though uncodified rules 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.

ISSUE

The California State Employees Association ("CSEA" or "requester"), has asked OAL to determine whether DWR rules concerning requests for absences and use of sick leave were issued in violation of the APA.

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE DEPARTMENT OF WATER RESOURCES?

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."⁶ The Department is in neither the judicial nor legislative branch of state government.⁷ Clearly, the Department is a "state agency" within the meaning of the APA, and unless the Department is expressly

exempted from the APA, the APA is generally applicable to the Department.

II. DO THE DEPARTMENT'S RULES CONCERNING REQUESTS FOR ABSENCES AND USE OF SICK LEAVE 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*,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 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.]¹¹

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

Background of the Challenged Rules

The challenged rules (requests for absences and use of sick leave) were set forth in a "Corrective Memorandum" that was issued to a DWR employee by a DWR manager, and was attached to CSEA's request for determination.¹² In particular, CSEA challenges the following provisions of the corrective memorandum:

"Request for Absences (except sick/family sick leave)

All requests for absences (vacation, personal holiday, personal leave, leave without pay, Saturday holiday, compensating time off, etc.) must be submitted ... *at least one day in advance of planned leave*. Requests for absences, except for sick/family sick leave, will be submitted on the

"Absence Request" DWR Form 2874 regardless of the amount of time off requested.

"Sick/Family Sick Leave

"Routine medical and dental examinations *must be approved at least two working days in advance* or the absence will not be approved. Unexpected illnesses which prevent you from coming to work at the beginning of the day *shall be reported by 9:00 a.m. . . .*

"Upon your return to work, you will be expected to produce a *signed physician's substantiation*. The substantiation will provide the following *specific information* concerning the illness of yourself or family member:

- a. The nature of your illness. In the case of illness of a family member, the substantiation must state the nature of the illness, and that your care was required.
- b. Did [the physician] personally see you or family member, and provide treatment during this illness?
- c. Did [the physician] authorize disability for this illness? If so, the beginning and ending dates of the disability shall be furnished.
- d. If disability was not authorized, what symptoms made it necessary for you to be off work.

"Failure to follow these procedures or to provide adequate substantiation will result in denial of the sick leave request and any absence will be recorded as AWOL [absence without leave]

"[Par.]

". . . Unless you show immediate and substantial improvement in the areas of punctuality, attendance, . . . disciplinary actions up to, and including, termination may be taken against you. [Emphasis added.]"

CSEA argues that:

"This request for determination on the [DWR] is contained in the Corrective Memorandum This rule is a policy of the DWR Statewide and I (Mac Proctor) was informed of this by Robert Highhill of the DWR Labor Relations staff. The entire Corrective Memo is attached. . . . The pertinent portion of the Corrective Memorandum is contained in the sections on page 3. 'Request for Absences (except sick/family sick leave) and Sick/Family Sick Leave.' This is DWR's Policy on Attendance Restriction Guidelines.

"This rule is being used to AWOL and Dock employees of DWR. This rule is being used in Adverse Actions, because [when] an excuse is required and ordered the employee has to pay a \$5.00 co-pay each time for a doctor's excuse. Single parents such as [the employee] are being economically disadvantaged because they have to pay to go to and from the doctor when their children are sick. This rule is clearly an abuse of administrative authority.

"The [DWR] is in violation of Government Code Section 11347.5 [now section 11340.5] and has created regulation as defined in Government Code Section 11342.

"It should be noted that because the rule requires 'the nature of your illness[,] the rule is a circumvention of [1990] OAL Determination No. 16 (Docket No. 89.023) This rule has no MOU provision. This is a Statewide rule and has public applicability under APA[,] [i.e.,] family members are not state employees and the nature of family member illness is also requested."¹³

The determination, 1990 OAL Determination No. 16 (referred to above in the fourth paragraph of CSEA's quoted argument), concerned the standard state government form "634." This form's full designation 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 DPA policy violated the APA.¹⁴

In its response to the request for determination, DWR argues that the challenged rules in the corrective memorandum are nothing more than a reflection of the comprehensive labor relations Memorandum of Understanding (“MOU”)¹⁵ negotiated between the California State Employees Association and the State of California for Bargaining Unit 1. DWR states:

“... [T]hese instructions do nothing more than notify [the employee] that, due to her poor attendance, the provisions of the Memorandum of Understanding (hereinafter ‘MOU’) allowing the employer to require substantiation of sick leave will be applied. This does not create new obligations for the employee.”¹⁶

In an effort to determine whether the rules in the corrective memorandum 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 of the MOU and determined that DWR has the authority, under contract, to define the conditions for verification of an employee’s need for sick leave:

“Article 8: Leaves

“8.2 Sick Leave

“(a) As used in this Section, ‘sick leave’ means the necessary absence from duty of an employee because of:

(4) Absence from duty for attendance upon the employee’s ill or injured mother, father, husband, wife, son, daughter, brother, or sister, or any person residing in the immediate household.

“(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 verification, a 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.

“(e) An employee shall not be required to provide a physician’s verification, or a licensed practitioner’s verification of sick leave when he/she uses up to two (2) consecutive days of sick leave *except when:*

- (1) the employee has a demonstrable pattern of sick leave abuse; or
- (2) the supervisor believes the absence was for an unauthorized reason; or
- (3) the employee has an above average use of sick leave.¹⁷
[Emphasis added.]”

OAL must also review statutes administered by the Department of Personnel Administration (“DPA”). The Government Code mandates DPA 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.¹⁸ [Emphasis added.]”

The DPA has adopted regulations which permit the state agencies, including DWR, to implement a policy of verification of the need for sick leave. Title 2, CCR, section 599.749 (last amended substantively in 1954)¹⁹ 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.²⁰ [Emphasis added.]”

There are no MOU provisions, statutes or statewide regulations that *specifically* address the conditions required for the verification and substantiation of illness that constitute sick leave.²¹ The same is true for the requirement that requests for anticipated absences be submitted one day in advance.

Do the DWR Challenged Rules 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.²²

DWR argues that the challenged rules are not rules of general application:

“The memorandum to [the employee] instructing her to produce a physician’s substantiation upon return to work is not a rule of general application. It *does not apply to all employees and it is not used by other State agencies.* . . .²³ [Emphasis added.]”

OAL understands DWR’s argument to be that the substantiation rules do not apply to all *state* employees, and therefore, are not rules of general application.

CSEA argues that:

“ . . . This is a Statewide rule and has *public applicability* under APA[,] [i.e.,] family members not state employees and the nature of family member illness is also requested.²⁴ [Emphasis added.]”

In order for a rule to have general application, it need not apply to *all* employees of the state or *all* employees of one state department; it need not have applicability to the public. A rule has “general application” if it applies to all members of a class, kind or order.²⁵

In its request, CSEA also states that:

“This rule is a policy of the DWR Statewide and [a CSEA representative] was informed of this by Robert Highhill of the DWR Labor Relations staff.”²⁶

Except for DWR’s argument quoted above, in which DWR apparently indicates that the rules do not apply to *all* state employees, DWR does not dispute **this specific allegation that CSEA was informed by a DWR Labor Relations spokesperson that the rules are a DWR policy applied throughout the Department statewide.**

OAL concludes, therefore, that even though the challenged rules were in a corrective memorandum issued to one employee, the rules are a DWR statewide policy. The challenged DWR rules apply to all DWR employees who are identified as having attendance problems, in part because of possible misuse of sick leave and untimely or unapproved requests for absences. OAL further concludes that the rules are standards of general application because they apply to all DWR employees identified as having attendance problems.

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

The Department argues that:

“[T]he substantiation requirement is not intended to either implement, interpret or make specific the laws enforced by the Department, nor does it govern the agency’s procedure. The Department succeeds to and is vested with all of the powers, duties, purposes, responsibilities, and jurisdiction in matters pertaining to water or dams. (Water Code section 123) The Department is not the enforcement agency for state employment issues. Additionally, the substantiation requirement is not remotely related to water or dams.”²⁷

OAL does not agree with DWR's argument. The Department has been delegated rulemaking power by the Legislature to adopt rules and regulation that are necessary to govern the Department's activities. These activities include not only matters pertaining to water and dams,²⁸ but also to activities of the Department's employees. In particular, Water Code section 124, which incorporates by reference pertinent provisions of the Government Code, provides:

“Except to the extent inconsistent with the provisions of this code, the provisions of Chapter 2 (commencing at Section 11150), Part 1, Division 3, Title 2 of the Government Code, shall govern and apply to the conduct of the Department of Water Resources in every respect the same as if such provisions were herein set forth at length, and whenever in that chapter the term ‘head of the department’ or similar designation occurs, for the purposes of this section it shall mean the director. [Emphasis added.]”

Section 11152 (of Chapter 2, Part 1, Division 3, Title 2) of the Government Code states in part:

“. . . So 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 and may assign to its officers and employees such duties as he sees fit. . . . [Emphasis added.]”

There is no doubt that employment issues of DWR employees are “activities of the department.” Therefore, the challenged rules (Request for Absences and Sick/Family Sick Leave) implement Water Code section 124 and the incorporated by reference provision of Government Code section 11152.

Additionally, OAL concludes that the rules that establish what constitutes verification of illness (“Sick/Family Sick Leave”) implement, interpret, and make specific the sick leave statute and CCR provision quoted above in part II.A. (Government Code section 19859, subdivision (a); Title 2 CCR section 599.749.) The language of section 599.749 makes DWR responsible for the administration and enforcement of rules concerning verification of sick leave:

“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.*"

Water Code section 124, Government Code section 11152, and section 599.749 of title 2 of the CCR make it clear that DWR is responsible for administering and enforcing activities involving its employees ("state employment issues"), and not just "matters pertaining to water or dams."²⁹

We note that both challenged rules amplify the provisions of the MOU for Bargaining Unit 1, negotiated by representatives of the California State Employees Association and the State. In particular, the MOU describes in section 8.2 (d) the conditions required for the verification and substantiation of illness that constitute sick leave:

"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.³⁰ [Emphasis added.]"

Clearly, the following challenged provisions for requesting approval of sick leave and submitting verification of illness 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. "Routine medical and dental examinations must be approved at least two working days in advance or the absence will not be approved."
2. "Unexpected illnesses which prevent you from coming to work at the beginning of the day shall be reported by 9:00 a.m. . . . The message is to include a telephone number where you can be reached."

3. "The [physician's] substantiation will provide the following *specific information* concerning the illness of yourself or family member:
- a. The nature of your illness. In the case of illness of a family member, the substantiation must state the nature of the illness, and that your care was required.
 - b. Did [the physician] personally see you or family member, and provide treatment during this illness?
 - c. Did [the physician] authorize disability for this illness? If so, the beginning and ending dates of the disability shall be furnished.
 - d. If disability was not authorized, what symptoms made it necessary for you to be off work. [Emphasis added.]"

Accordingly, OAL concludes that the challenged rules implement, interpret and make specific the Department's enabling act. Furthermore, because the rules 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 requesting expected absences and of "substantiating" sick leave, the challenged rules contain "regulations" within the meaning of the key provision of Government Code section 11342, subdivision (g).

III. DO THE CHALLENGED RULES, WHICH HAVE BEEN FOUND TO BE "REGULATIONS," FALL WITHIN ANY *SPECIAL*³¹ EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

In its response, the Department does not contend that any special exemption applies. OAL concurs. *No special exemption applies to the challenged rules.*

IV. DO THE CHALLENGED RULES 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.³² 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]."

"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"34

The internal management exception has been judicially determined to be narrow in scope.³⁵ 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,³⁶ and (2) does not address a matter of serious consequence involving an important public interest.³⁷

(1) FIRST, DO THE CHALLENGED RULES DIRECTLY AFFECT ONLY THE EMPLOYEES OF THE ISSUING AGENCY?

The answer to the first part of the inquiry is "yes." The challenged DWR rules affect *only* Department of Water Resources employees.³⁸ In the response, the following DWR statement agrees with this answer:

" . . . To establish this [internal management] exception, the Department must show that . . . the challenged rule affects only the employees of the Department As stated above, the use of substantiation requirements of the Department does not affect employees of other Departments."³⁹

On page 10 of this determination, OAL noted that DWR also stated in its response that: "... [The substantiation rule] does not apply to all employees and it is not used by other State agencies."

(2) **SECOND, DO THE CHALLENGED RULES ADDRESS A MATTER OF SERIOUS CONSEQUENCE INVOLVING AN IMPORTANT PUBLIC INTEREST?**

The Department argues that the second prong of the internal management exception is also met:

"To establish this [internal management] exception, the Department must show . . . that the challenged rule does not address a matter of serious consequence involving an important public interest. . . . [The use of substantiation] requirements [do not] involve a matter of serious consequence involving an important public interest. This argument is supported by OAL's findings in [1989] OAL's Determination No. 5. . . . In that determination, OAL considered whether the Department of Corrections' requirement that employees call in sick at least two hours before a shift was a matter of serious consequence involving an important public interest. In reaching this conclusion, the OAL stated in pertinent part on page 193:

'In contrast, the attendance policy specified in the challenged memorandum does not significantly affect either the general prison population or the general public. Additionally, there is *no legislative statement declaring that a public interest exists* in the time frame in which an employee must call in sick to a supervisor, regardless of the time period specified. . . .' [Emphasis added.]"

DWR argues that 1989 OAL Determination No. 5 ("1989 OAL D-5") supports its argument that the use of substantiation requirements do not address a matter of serious consequence involving an important public interest. In 1989 OAL D-5 (Department of Corrections), OAL compared its finding regarding the "two-hour rule" to its finding in 1988 OAL Determination No. 3 (1988 OAL D-3"). In the 1988 OAL D-3 determination, 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." OAL explained that:

"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." [Endnote omitted; emphasis original.]"

In regard to the challenged rule that requires requests for absences (except for sick/family sick leave) to be submitted one day in advance, OAL agrees with DWR that this rule is not a matter of serious consequence involving an important public interest. There is no statement of legislative intent that would indicate that these particular challenged rules, e.g., when an employee must submit requests for expected absences, involve an important public interest. This conclusion would also apply to the first two rules concerning advance requests for absences set forth under the "Sick/Family Sick Leave" rules (see page 13, *supra*):

1. "*Routine* medical and dental examinations must be approved at least two working days in advance or the absence will not be approved."
2. "Unexpected illnesses which prevent you from coming to work at the beginning of the day shall be reported by 9:00 a.m. . . . The message is to include a telephone number where you can be reached. [Emphasis added.]"

Routine medical and dental examinations are usually scheduled many days, or even weeks, in advance, which would give the employee sufficient time to submit a request for absence two days in advance. The rule that requires employees with unexpected illnesses to call the office by a certain time (another "timely notice" rule) and leaving a telephone number where they can be reached also does not involve an important public interest.

OAL therefore finds that the following rules do not to involve an important public interest: (1) requiring an employee to submit a request for *expected* absences one day in advance, (2) requiring an employee to submit requests for absences for *routine* medical and dental examinations two days in advance, and (3) requiring an employee to call the office *by a certain time* and leaving a telephone number when the employee has an unexpected illness.

The remaining challenged rules concerning verification of sick leave are:

“The [physician’s] substantiation will provide the following *specific information* concerning the illness of yourself or family member:

- a. The nature of your illness. In the case of illness of a family member, the substantiation must state the nature of the illness, and that your care was required.
- b. Did [the physician] personally see you or family member, and provide treatment during this illness?
- c. Did [the physician] authorize disability for this illness? If so, the beginning and ending dates of the disability shall be furnished.
- d. If disability was not authorized, what symptoms made it necessary for you to be off work. [Emphasis added.]”

These provisions of the “Sick/Family Sick Leave” rule which specifically prescribe the manner and method of verifying sick leave requests contain “regulations” that interpret, implement and make specific the sick leave provisions of the Government Code, the duly adopted CCR provision on sick leave, and amplify the provisions of the MOU for Bargaining Unit 1.

Having determined that these rules are “regulations,” OAL next examines whether the rules fall within 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. The consequences are not solely confined to school administration or affect only the academic community."⁴⁰ In *Poschman v. Dumke*, the challenged rule applied solely to the employees of one state agency, but nonetheless was deemed to violate the APA because the rule was a matter of serious consequence involving an important public interest.

A provision of the "Sick/Family Sick Leave" rule describes the consequence for the failure by a Department employee to produce sufficient information to verify sick leave, namely a failure "to provide adequate substantiation will result in denial of the sick leave request and any absence will be recorded as AWOL."⁴¹ Another provision of the corrective memorandum included the following statement:

"... Unless you show immediate and substantial improvement in the areas of ... attendance ... disciplinary actions up to, and including, termination may be taken against you."⁴²

Clearly, the challenged rules that implement and interpret the applicable statutes and regulations concerning the verification of DWR 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 DWR employees. Having fair and appropriate standards governing the suspension, demotion, and dismissal of public employees is an important public

interest.”

The challenged rules also require employees to reveal *specific information* about their illness and to reveal *specific information* about the illness of any family member that required the care of the employee. Privacy of medical history and records is a matter of serious consequence involving an important public interest.

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 challenged rules concerning verification of sick leave 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 challenged rules “circumvent” a prior regulatory determination issued by OAL, i.e., 1990 OAL Determination No. 16,⁴⁴ where OAL concluded that the Department of Personnel Administration policy requiring state employees using sick leave to reveal the specific nature of their illness on a standard state form was a “regulation” required to be adopted in compliance with the APA.

DWR responded to this issue raised by CSEA as follows:

“...[CSEA] is misapplying that decision. Determination No. 16 (1990) addressed, among other things, forms that the Department of Personnel Administration provided to State agencies for use by State employees who were requesting sick leave. The Department of Personnel Administration is, by statute, the agency vested with the authority to establish policies regarding sick leave. The Department of Water Resources is not. Consequently, [Determination] No. 16 (1990) is not applicable to the issues presented here.”

OAL disagrees with DWR’s argument that 1990 Determination No. 16 is not applicable. As noted above in part II., B., Water Code section 124 and

Government Code section 11152 authorize the Department to adopt regulations that are necessary to govern the Department's activities, including activities involving DWR employees. To the extent that DWR has required that employees submit information regarding the *specific* nature of illness as a condition of verifying sick leave, as is required by the DPA policy, and the Department has yet to adopt such a "regulation" pursuant to the APA, such a requirement contained in the "verification of sick leave" rules is invalid unless and until it is adopted pursuant to the APA.

Even more recently, in 1998 OAL Determination No. 36, OAL concluded that portions of the "Attendance Restriction Guidelines," issued by the Department of Motor Vehicles, 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.

CONCLUSION

For the reasons set forth above, OAL has concluded that provisions of the corrective memorandum, dealing with "Sick/Family Sick Leave" rules 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 DWR "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: December 16, 1998


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ENDNOTES

1. This request for determination was filed by Mac Proctor, Labor Relations Representative, California State Employees Association, (CSEA) 1108 "O" Street, Sacramento, CA 95814, (916) 444-8134. The Department of Water Resources was represented by Robert G. Potter, Chief Deputy Director, 1416 Ninth Street, Sacramento, CA 95814, (916) 653-5791.
2. **Of course, legislation would also be an option.**
3. **An MOU applies solely to members of one particular bargaining unit.**
4. Water Code section 124; 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).
5. Government Code section 19859, subdivision (a).
6. Government Code section 11342.
7. *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).
8. Government Code section 11346; Title 1, CCR, section 121 (a)(2).
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 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 422 436, 268 Cal Rptr. 244, 252-253.

12. The corrective memorandum was dated April 21, 1994.

13. CSEA also argues that the challenged rules (1) are "an abuse of administrative authority," (2) violate "the medical records act," (3) "[discriminate] against [single parents] and then [punish] them for abiding by the law," and (4) are "also a violation of the constitution of the State of California and the right to privacy." Additionally, CSEA requests OAL to issue a Notice of Cease and Desist to DWR until this determination is issued "because the [challenged] rule is a circumvention of OAL Determination No. 16 (Docket No. 89.023)...."

All of the issues raised above by CSEA are outside the scope of OAL's jurisdiction and are not addressed in this determination.

14. See 1990 OAL Determination No. 16 (Department of Personnel Administration, December 18, 1990, Docket No. 89-023), California Regulatory Notice Register 91, No. 1-Z, p. 40.

15. 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 covering Bargaining Unit 1 (Professional Administrative, Financial and Staff Services).

16. DWR's response, 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, covering Bargaining Unit 1 (Professional Administrative, Financial and Staff Services), Article 8, 8.2, p. 16.
18. **Government Code section 19859, subdivision (a).**
19. 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.
20. CCR, Title 2, section 599.749.
21. No statewide regulations have been adopted by either by DPA or by SPB, the agency responsible for administering the sick leave statute prior to 1982.
22. *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).
23. DWR response, p. 2.
24. CSEA request for determination, p. 2.
25. *Roth v. Department of Veterans Affairs, supra.*
26. CSEA request for determination, p. 1.
27. DWR's response, p. 3.
28. Water Code section 123.
29. DWR response, p. 3.

30. 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 Bargaining Unit 1 (Professional Administrative, Financial and Staff Services), Article 8, 8.2(d), p.16.
31. 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 Departments of 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.
32. 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.

33. ***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* distinguished *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, fn. 3, 149 Cal.Rptr. 1, 583 P.2d 744.)**
34. (1990) 219 Cal.App.3d 422, 436, 268 Cal Rptr. 244, 252-253.
35. (1990) 219 Cal.App.3d 422, 436, 268 Cal Rptr. 244, 252-253.
36. 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.
37. 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.
38. OAL notes that the challenged rules also require the employee to reveal specific medical information about the illness of any family member that required the care of the employee; however, this is an indirect effect of the challenged regulations, not a direct effect, and an analysis of this indirect effect would not result in a different outcome in this determination.
39. DWR's response, p. 4.
40. See *Poschman*, note 17, *supra*.
41. Corrective Memorandum, p. 4, (attached to the request for determination).
42. *Id.*
43. See, *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 124 Cal.Rptr.14.

44. 1990 OAL Determination 16 (Department of Personnel Administration, December 18, 1990, Docket No. 89-023), California Regulatory Notice Register 91, No. 1-Z, p. 40.