

OFFICE OF ADMINISTRATIVE LAW



In re:)
 Request for Regulatory) **1999 OAL Determination No. 1**
 Determination filed by)
 WILLIAM T. MAYO, ESQ.) [Docket No. 97-006]
 regarding the BOARD OF)
 EXAMINERS IN VETERINARY) **January 7, 1999**
 MEDICINE'S (1) citation and)
 fine guidelines, (2) citation) **Determination Pursuant to**
 procedures manual, and (3)) **Government Code Section**
 complaint procedures¹) **11340.5; Title 1, California**
 _____) **Code of Regulations,**
) **Chapter 1, Article 3**

Determination by: CHARLENE G. MATHIAS, Deputy Director

HERBERT F. BOLZ, Supervising Attorney
 DEBRA M. CORNEZ, Staff Counsel
 Regulatory Determinations Program
 JULIA CLINE NEWCOMB, Administrative Law Judge
 On Special Assignment to
 Regulatory Determinations Program

SYNOPSIS

The issues presented to the Office of Administrative Law ("OAL") concern three policy documents of the Veterinary Medical Board ("VMB"). OAL has been asked to determine whether: (1) the Citation and Fine Guidelines, (2) the Citation Procedures Manual, and (3) the Complaint Procedures contain "regulations," which are without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA"). OAL concludes that each of the listed

8

policy documents contains “regulations,” issued in violation of the APA. If the VMB wishes to exercise its discretion to issue rules governing these topics, it may adopt regulations pursuant to the APA. OAL further concludes that the policy documents also contain (1) “regulations” that fall within the internal management exception to the APA, as well as (2) restatements of existing law.

ISSUE

The OAL has been requested to determine whether VMB’s policies are “regulations” required to be adopted pursuant to the APA.² The policies, among other things, (1) set presumptive penalties for violations of statutory provisions governing the practice of veterinary medicine, (2) set out procedures to be followed upon receipt of complaints leading to investigation for possible citation or sanction, and (3) set out procedures to be followed once the decision to issue a citation is reached.

OAL received the request for determination on January 5, 1995. The VMB asserts that in approximately July 1996 it discontinued the use of the “Citation and Fine Guidelines.”³ The other documents challenged in the request for determination were in effect at the time the request was made, and continue in effect to the present. OAL has found previously⁴ that subsequent laws or actions (e.g., rescission of the policy) by an agency do not change the obligation of OAL under its own statutes and regulations to issue a determination based upon the law and facts at the time the request was filed.

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE VETERINARY MEDICINE BOARD’S QUASI-LEGISLATIVE ENACTMENTS?

The Board of Examiners in Veterinary Medicine (“VMB”) was established in the Department of Professional and Vocational Standards in 1938.^{5,6} In 1972, the Department of Consumer Affairs replaced the Department of Professional and Vocational Standards.⁷

The VMB is responsible for regulation and discipline of those working in the field of veterinary medicine, whether licensed practitioners or not. It is responsible, among other things, for issuing licenses to practice veterinary medicine,⁸

inspecting the premises in which veterinary medicine, dentistry or surgery is being practiced,⁹ and enforcing cleanliness and sanitary requirements established by the VMB.¹⁰ In addition to other available sanctions including criminal prosecution, the VMB has the power to revoke, limit the scope of, or suspend the license of any person to practice veterinary medicine, for cause, after notice and hearing.¹¹

Guidelines and rules pertaining to all sanctions or penalties must be adopted pursuant to the APA. Government Code section 11425.50, subdivision (e), provides:

“A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule subject to Chapter 3.5 (commencing with Section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340).”¹²

The VMB recognizes that its “. . . rules and regulations must be adopted in accordance with the APA. The Board acknowledges that it is subject to the APA.”¹³

Business and Professions Code section 4808 provides in part:

“The [VMB] may *in accordance with the provisions of the Administrative Procedure Act*, adopt, amend, or repeal such rules and regulations as are reasonably necessary to carry into effect the provisions of [chapter 11, titled 'Veterinary Medicine']. . . .” [Emphasis added.]

Further, Business and Professions Code section 4875.4 requires:

“(a) The board [VMB] shall, *in the manner prescribed in Section 4808*, adopt regulations covering the assessment of civil penalties under this article which give due consideration to the appropriateness of the penalty with respect to the following factors:

- (1) The gravity of the violation.
- (2) The good faith of the person being charged.
- (3) The history of previous violations.

(b) In no event shall the civil penalty for each citation issued be assessed in an amount greater than two thousand dollars (\$2000). [Emphasis added.]”

Finally, the APA generally applies to all state agencies, except those "in the judicial or legislative departments. . . ." ¹⁴ Since the VMB is in neither the judicial nor the legislative branch of state government, APA rulemaking requirements generally apply to the VMB. Therefore, OAL concludes that APA rulemaking requirements generally apply to the VMB's quasi-legislative enactments.¹⁵

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

Government Code section 11342, subdivision (g), defines "regulation" as:

" . . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. . . . [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ["]regulation["] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,¹⁶ the California Court of Appeal upheld OAL's two-part test¹⁷ 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?

In applying the first part of the two-part test, the admonition of the *Grier* court is pertinent:

"... 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.]"¹⁸

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

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

The VMB is entrusted by statute with oversight and regulation of the practice of veterinary medicine in California. To that end, the VMB is authorized to sanction veterinarians and persons involved in the practice of veterinary medicine who operate without a license, for violations of the Business and Professions Code. The sanctions include criminal prosecutions and penalties:

"Any person, who violates . . . any . . . provision of [chapter 11, titled 'Veterinary Medicine,'] is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than five hundred dollars (\$500), nor more than two thousand dollars (\$2000), or by imprisonment in

a county jail for not less than 30 days nor more than one year, or by both the fine and imprisonment.”¹⁹

In addition, the VMB may invoke civil penalties, including but not limited to the denial, revocation, or suspension of a license,²⁰ assessment of a fine, order of abatement, or referral for criminal prosecution,²¹ or alternative sanctions, including an interim suspension order,²² a temporary restraining order,²³ issuance of an infraction citation,²⁴ placement of the violator on probationary status, with the requirement of supplemental study, service, examination,²⁵ or restriction of the scope or type of practice.²⁶

In the determination of appropriate sanctions for violations, the VMB is mandated to consider the gravity of the violation, the good faith of the person being charged, and the history of previous violations.²⁷

The VMB’s first challenged rule, the Citation and Fine Guidelines, was used in connection with the VMB’s citation program and applied to all licensed and unlicensed persons subject to the sanctions of the VMB. In its response to the request for determination, the VMB described the guidelines as follows:

“It identifies the statutory and regulatory grounds upon which the Board may initiate disciplinary action against a person who violates the laws and regulations relating to the practice of veterinary medicine in this state. Following each of the enumerated grounds for disciplinary action is a chart which is divided into categories. There are two major categories, the first being entitled ‘Felony/Admin Hearing’ and the second being labeled Misdemeanor with three subcategories based upon the three categories of citations authorized by regulation section [2043.²⁸] Each of the enumerated grounds for discipline appears to identify the appropriate disciplinary action, i.e., administrative action, or citation, to be taken, based upon the nature of the violation.”²⁹

The VMB maintains: “[t]he Board does not believe that the document in question mandates that any particular sanction be taken based upon a particular violation. Accordingly, the Citation and Fine Guidelines are not a standard of general application.”³⁰ Thus, the VMB asserts that because the Citation and Fine Guidelines document provides for discretionary application of sanctions, rather than mandatory penalties, it is not a standard of general application.³¹

However, the definition of “regulation” found in Government Code section 11342, subdivision (g), is not restricted to statements which contain express language stating they are binding or mandatory. According to the California Court of Appeal, it is not necessary that the rule require affirmative conduct by an affected party. “Whether a regulation requires affirmative conduct is not dispositive.”³² The statutory test requires only that the statement contain a general rule which implements, interprets, or makes specific the law the agency enforces. More important than the agency’s characterization of the challenged rule is the nature of the effect and impact of the rule on the public.³³ The two-pronged analysis described in *Grier*, above, which defines a “regulation,” is the appropriate analysis to determine whether the contents of the challenged documents are subject to the APA.

For an agency policy to be of “general application,” it need not apply to all citizens of the state. It is sufficient if the rule applies to members of a class, kind or order.³⁴ Just as in *Tidewater Marine Western, Inc. v. Bradshaw*³⁵ where the California Supreme Court found the policy to apply wage orders to maritime employees operating off the coast to be a rule of general application, the standards challenged in the matter at hand are expressly applicable to all persons who work in the practice of veterinary medicine in this state.

Therefore, the Citations and Fine Guidelines document is a rule of general application, or a rule that applies statewide to all members of the class of licensed and unlicensed veterinary practitioners.

The second policy at issue in this determination is the VMB’s Citation Procedures Manual (“Citation Procedures Manual.”) The VMB describes this manual as follows:

[The “Citation Procedures Manual”] . . . is used by Board staff as a guide for administering the Board’s [s] citation program. The Citation Procedures Manual summarizes the laws and regulations governing citations. It reviews the provisions of regulation [CCR] section 2043 which separates citation violations into three separate categories with corresponding categories of civil penalties. It reviews the procedures for issuing citations, including such items as specifying the information which Board investigators must include in their reports of a case investigation, the format of reports, and factors to be considered when making recommendations to

issue citations. [It] also specifies the Board personnel who are responsible for recommending and making final decisions to issue citations and procedures to be followed where one of these persons disagrees with a citation report. [It] specifies the Board staff which is responsible for processing a citation following a decision to issue a citation and the protocol to be followed, including a description of the information and documents to be included in a citation. Finally, the Citation Procedures Manual summarizes the law regarding a cited person's ability and options for appealing a citation."³⁶

The VMB asserts the Citation Procedures Manual is exempt from the rulemaking procedures of the APA because it falls "... within the 'internal management' exception or accurately summarize[s] existing law and regulations."³⁷ Discussion of the appropriate application of the internal management exception will be found under the heading for general exceptions to the APA (see part IV), below.

The third policy document at issue in this determination is titled "Complaint Procedures Referring to Complaint Review, Investigations and Citations," ("Complaint Procedures"). The VMB describes the Complaint Procedures policy document as follows:

"[The 'Complaint Procedures' document] is used by the Board's staff as its protocol for receiving and processing consumer complaints. It identifies the Board personnel who are responsible for performing the initial review of the complaint to determine if the Board has jurisdiction over the complaint, how to respond to the complaint if the Board has or does not have jurisdiction over the complaint, time lines for Board personnel to follow up on requests for medical records or statements. It also specifies the information which Board consultants and investigators are to include in their reports concerning the complaint."³⁸

With respect to this policy document, the VMB also asserts the Complaint Procedures are exempt from the APA because they accurately summarize existing law and regulations, or fall within the "internal management" exception, which is discussed below under the heading of general exceptions to the APA.

OAL finds that the Citation Procedures Manual and the Complaint Procedures, as well as the Citations and Fines Guidelines, are utilized by the VMB in the

enforcement of regulatory standards for the practice of veterinary medicine.³⁹ Each of these policy documents contain standards or rules of general application which affect veterinary practitioners, licensed and nonlicensed, statewide.

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

Citation and Fine Guidelines

Having established that the first challenged policy document (the Citation and Fine Guidelines) is a rule of general application, OAL must determine if it interprets, implements or makes specific a law enforced or administered by VMB, or governs its procedure. The VMB asserts that the Citation and Fine Guidelines merely restate existing law.

California Court of Appeal cases provide guidance on the proper approach to take when assessing claims that agency rules are *not* subject to the APA because they merely restate the law. According to *Engelmann v. State Board of Education*, agencies need not adopt as regulations those rules contained in:

“[a] *statutory scheme* which the Legislature has established. . . .”⁴⁰

“But to the extent any of the [agency rules] depart from, or *embellish* upon express statutory authorization and language, the [agency] will need to promulgate regulations [Emphasis added.]”⁴¹

The provisions of the Citation and Fine Guidelines (“Guidelines”) do not merely mirror the statute. Indeed, the Guidelines omit the prohibition of Business and Professions Code section 4883, subdivision (g)(2)(B), which proscribes the use of specified dangerous drugs or alcohol to the extent or in such a manner to be dangerous or injurious “to any other person or to the public, or to the extent that the use impairs the ability . . . to conduct with safety the practice authorized by the license; . . .”

In addition, the Citation and Fine Guidelines include a provision not referred to in Business and Professions Code section 4883. The Guidelines include as a violation of veterinary medicine the following: “(i)(b) Negligence and/or

incompetence.” Since provision (i)(a) proscribes “Fraud, deception, negligence or incompetence in the practice of veterinary medicine,” the prohibition of negligence and/or incompetence appearing in (i)(b) appears to refer to such acts committed *not* in the practice of veterinary medicine. The VMB fails to cite any statute purportedly restated in this provision.

Although Business and Professions Code section 4831 authorizes misdemeanor prosecutions for violations of any provision of Chapter 11, no provision of that chapter authorizes felony prosecutions. The Citation and Fine Guidelines, by contrast, specify those acts or omissions which qualify for referral for felony prosecution.

The Citation and Fine Guidelines do not incorporate two of the mitigation factors which are to be considered pursuant to Business and Professions Code section 4875.4: (1) the gravity of the violation, and (2) the good faith of the person being charged. Arguably, the third statutory mitigation factor, e.g., history of previous violations, could be viewed as being part of the Guidelines because the Guidelines establish the range of fines to be assessed based on whether the violation is a first offense or a repeated offense. Exclusion of the first two statutory factors to be considered in mitigation clearly indicates the chart modifies the statutory scheme it is intended to implement.

Additionally, the Guidelines modify Title 16, California Code of Regulations, section 2043, which in 1989 the VMB duly adopted to implement, interpret, or make specific Business and Professions Code section 4875.4. In general, section 2043 establishes the tripartite system for assessing civil penalties. The assessment is based on criteria establishing a particular “class” of violations. In summary:

- (a) a “Class A” violation is a violation of a statute or regulation which meets the criteria for a Class B violation and the person has been issued two or more prior citations for a Class B violation within the 24-month period immediately preceding the act serving as the basis for the citation.
- (b) a “Class B” violation is either (1) a violation of a statute or regulation related to the practice of veterinary medicine, by a person while engaged in the practice of veterinary medicine, that has caused bodily injury to an animal which is either (a) not significant and substantial in nature or (b) presents a substantial probability that death or serious harm would result

from the injury, or (2) a violation which meets the criteria for a Class C violation and the person has two or more prior citations for a Class C violation within the 24-month period immediately preceding the act serving as the basis for the citation.

(c) a "Class C" violation is a violation of a statute or regulation related to the practice of veterinary medicine, by a person while engaged in the practice of veterinary medicine, that has not caused either death or bodily injury to an animal patient and which does not present a substantial probability that death or serious harm to an animal patient would result from any injury committed.

In its response, VMB explains that:

"[The Citation and Fine Guidelines are] divided into categories. There are two major categories, the first being entitled 'Felony/Admin Hearing' and the second being labeled Misdemeanor with three subcategories *based upon the three categories of citations authorized by regulation section [2043]* [Emphasis added.]"⁴²

The three categories in the Guidelines are labeled as follow:

"MISDEMEANOR

Repeated Offense with Injury or Death A. \$1,001 - \$1,500	Repeated Offense B. \$501 - \$1000	First-Time & Minor Offense C. \$50 - \$500"
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While the three subcategories may be *based* on the three categories of citations authorized by section 2043, the headings of the subcategories appear to be written in such a way that they establish criteria different from the criteria established in section 2043; in other words, the subcategories do not "mirror" the criteria established in section 2043. For example, in order for a violation to fall under subcategory B, the violation need only be a repeated offense. Pursuant to section 2043, a violation could be considered a Class B violation (same penalty range as subcategory B) if it has resulted in "bodily injury to an animal which is not

significant and substantial in nature or . . . presents a substantial probability that death or serious harm would result [from the injury].” Under the Guidelines criteria, however, such a violation would be considered a subcategory A violation (Repeated Offense with Injury or Death, \$1001 - \$1,500 fine), not a subcategory B violation (Repeated Offense, \$501 - \$1000 fine).

The law is well settled that agency rules properly promulgated as regulations (i.e. California Code of Regulations, or “CCR” provisions) may be restated, but not “embellished upon” in administrative bulletins or other communications.⁴³ The Citation and Fine Guidelines clearly embellish upon or modify the existing codified regulation.

Complaint Procedures

With respect to the Complaint Procedures policy memorandum, the VMB maintains the policy “. . . accurately summarize(s) existing law and regulations.”⁴⁴ However, the VMB does not cite to any statute or regulation which addresses the manner of processing complaints. The Complaint Procedures address the procedure to be followed from the moment a complaint is received, until it is referred to the VMB for civil sanctions.

The Complaint Procedures speak to an initial determination of complaints which are “jurisdictional” or “non-jurisdictional.” It further specifies that a board consultant will review the gathered facts and either close the file or refer the complaint “. . . to the complaint review committee (crc).” The Complaint Procedures continue with listed questions to be investigated and resolved, as well as possible resolutions or sanctions regarding the complaint.

The procedure goes well beyond that specified in Business and Professions Code section 4875.2. Section 4875.2 commences “. . . upon completion of an investigation, . . .” and continues through the issuance of a citation. Section 4875.2 also includes the following:

“. . . Before any citation may be issued, the executive officer shall submit the alleged violation for review and investigation to at least one designee of the board The review shall include attempts to contact the veterinarian

or unlicensed person to discuss and resolve the alleged violation. Upon conclusion of the board designee's review, the designee shall prepare a finding of fact and a recommendation. . . ."

The Complaint Procedures cover the steps to be followed in identifying those complaints to be investigated and the nature of the investigation to be completed. Its final step is the determination whether to issue a citation. Accordingly, the specific time frames and procedures set forth in the Complaint Procedures are not addressed in section 4875.2. Nor, has the VMB identified any other statute or regulation the Complaint Procedures restate.

In the absence of a specific citation to any statute or regulation which are allegedly restated in the Complaint Procedures, it is concluded that the Complaint Procedures implement, interpret, and make specific the laws administered and enforced by the VMB.

Citation Procedures Manual

Similarly, the VMB's Citation Procedures Manual addresses the processing of complaints, referring to another uncodified manual, the "Enforcement Manual." The Citation Procedures Manual refers to the three types of citations defined in Title 16, CCR, section 2043. However, it specifies the evidence to be presented in an investigative report at page 4, and expands the number and detailed nature of the factors to be considered in the determination to issue a citation at page 4.

In addition, the Citation Procedures Manual provides that some complaints will be referred for criminal prosecution despite informal adjudication of the complaints. The determination of which complaints to refer for legal action is based on the "best interest of the public" at page 5, although that standard is not found in statute or regulation.

The Citation Procedures Manual *mandates* that all citations be accompanied by an order of abatement, although that sanction is made discretionary in the Business and Professions Code. Also, it provides alternative resolutions if the executive officer does not concur with the citation, at pages 5 and 6. Thus, the Citation Procedures Manual clearly implements, interprets and makes specific the laws enforced by the VMB.

As to all three challenged policy documents, both elements of the two-part test of the APA have been satisfied. OAL concludes the three challenged policy documents contain “regulations” within the meaning of Government Code section 11342.

III. DO THE CHALLENGED RULES FALL WITHIN ANY *SPECIAL*⁴⁵ 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.⁴⁶ The VMB does not contend that any special exemption applies. Indeed, the VMB acknowledges that its rules are to be promulgated pursuant to the APA provisions.

IV. DO THE REGULATIONS FALL WITHIN ANY GENERAL EXCEPTION TO THE REQUIREMENTS OF THE APA?

VMB claims the “Citation Procedures Manual” and the “Complaint Procedures” documents qualify for the “internal management” exception because they “. . . were prepared for and are used by the Board’s staff in the administration of the Board’s citation and enforcement programs. . . . In this context, such statements resemble duty statements and relate exclusively to the management of the Board’s own employees and how they are to perform their jobs.”⁴⁷

OAL notes that the Court of Appeal has opined: “The case law, which is sparse, discloses generally, that the definition of regulation is broad, as contrasted with the scope of the internal management exception, which is narrow.”⁴⁸

Rules concerning certain activities of state agencies are not subject to the procedural requirements of the APA.⁴⁹ 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 (g), 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 board 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].⁵⁰

"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”⁵¹

The Citation and Fine Guidelines at issue here have an important, albeit indirect, impact on the general public. In a case which held a rule affecting the tenure of teachers invalid for failure to comply with the APA, the Court of Appeal found tenure within any school system to be a matter of serious consequence involving an important public interest.⁵² This is also true in the case of those responsible for the care and treatment of animals, such as, animals carrying bacteria potentially quite harmful to the human population or beloved pets. Thus, the regulation and discipline of those practicing, or assisting in the practice of veterinary medicine, is a matter of serious consequence involving an important public interest. The Citation and Fines Guidelines concern sanctions for professional misconduct, a matter of import to all persons, licensed or not.

In regard to the Citation Procedures Manual, deciding which employee is to perform the legal duty on behalf of an agency is ordinarily a matter within the discretion of the agency head and is not a matter of serious consequence involving an important public interest. Thus, specifying that “[t]he investigator is responsible for reporting the results of his/her investigation in the case report,” would fall within the internal management exception.⁵³ Similarly, identification of the format of the investigation report⁵⁴ would be excepted. In addition, requiring that “[t]he citation will describe with particularity the nature of the violations including a reference to the cited code sections which are alleged to have been violated,” would meet the internal management exception.⁵⁵

In the Complaint Procedures document, time frames are established for: (1) when the consumer will be notified that his or her complaint is being reviewed and the outcome of the review, (2) when medical records and statements are requested from the veterinarian and the subject, (3) when a follow-up request for responses will be sent out if not yet received from the veterinarian and the subject, (4) if the requested records and statements still have not been received, when the board consultant will make a follow-up call to a facility, and (5) if after another specified period of time the requested records and statements have not yet been received, the complaint will be turned over to the enforcement coordinator and a request for investigation will be prepared.

Though these time frames are written in a way that describes how the VMB staff will perform their duties when reviewing and handling complaints, these time frames actually set forth when veterinary medical records, statements and responses are due to be submitted to the VMB if the veterinarian chooses to respond. These time frames also serve the purpose of informing a consumer who has filed a complaint how his or her complaint will be reviewed.

Although not all time frames are subject to the APA, in this instance, these time frames concern matters of serious consequence involving an important public interest. A member of the public who files a complaint with VMB is interested in knowing what will happen to the complaint he or she has filed with VMB. Additionally, any person (licensed veterinarian or unlicensed person) who has had a complaint filed against them is interested in the time frames and procedures for responding to the complaint. These particular time frames, therefore, do *not* fall within the “internal management” exception.

The Complaint Procedures document, however, does contain provisions that do fall within the “internal management” exception: (1) the provisions under the heading “COMPLAINT REVIEW” merely describe the next action to be taken by the VMB staff or inform the staff, in general, that their written report should answer the fundamental questions of who, what, where, when, why and how; (2) the provisions under the heading “INVESTIGATION” require that, if the complaint is going to be referred to investigation, information answering specific questions needs to be provided by the VMB staff in the report; for example, is there more than one doctor that needs to be investigated, what should the investigator look for, why does the complaint need to be investigated, and should a board inspector or board consultant accompany the investigator; and (3) provisions under the heading “CITATION AND FINE” require that if the VMB staff is going to recommend that the doctor be cited and fined, then the staff needs to provide specific information regarding the Business & Professions Code section(s) that was violated, the date(s) of the violation(s) and a detailed summary of the violation(s).

Internal management policies are those designed to govern the internal operations of the department. The above provisions merely describe the necessary contents of a VMB staff report. The VMB is directing its staff on what is to be provided in a report so that there is “adequate evidence to support the allegations and warrant disciplinary action.”⁵⁶ All of these provisions are ordinarily matters within the

discretion of the agency head and are not matters of serious consequence involving an important public interest.

The internal management exception does not apply to “. . . the rules necessary to properly consider the interests of all who will seek consideration under the provisions of the statutes dealing with review and allocations.”⁵⁷ While some of the provisions in the policies at issue in this determination clearly deal with “. . . the interests of all who will seek consideration under the provisions of [Business and Professions Code, Chapter 11] . . . ,”⁵⁸ the provisions noted above fall within the internal management exception.

CONCLUSION

For the reasons set forth, OAL concludes that :

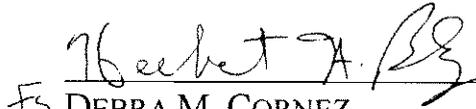
- (1) VMB’s “Citation and Fine Guidelines” contain “regulations” that are invalid because they should have been, but were not, adopted pursuant to the APA.
- (2) VMB’s “Complaint Procedures” contain “regulations” which are without legal effect unless adopted pursuant to the APA, except for those provisions that fall within the internal management exception dealing with what information a VMB employee is required to provide in a written report after reviewing a complaint.

- (3) VMB's "Citation Procedures Manual" contains "regulations" requiring promulgation and adoption pursuant to the APA in order to be valid, except for those provisions that fall within the internal management exception dealing with the responsibilities of a VMB employee in performing his or her job.

DATE: January 7, 1999



HERBERT F. BOLZ
Supervising Attorney



For DEBRA M. CORNEZ
Staff Counsel



For JULIA CLINE NEWCOMB
Administrative Law Judge
On Special Assignment

Regulatory Determinations Program
Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 323-6225, CALNET 8-473-6225
Telecopier No. (916) 323-6826
Electronic mail: staff@oal.ca.gov

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ENDNOTES

1. This request for determination was filed by William T. Mayo, Esq., P.O. Box 5227, Chico, CA 95927-5227, at (530) 898-8468 or (530) 521-6285. The Board of Examiners in Veterinary Medicine was represented by Donald Chang, Legal Counsel for Veterinary Medical Board, 400 R Street, Suite 3090, Sacramento, CA 95814, at (916) 322-5252.
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. Agency Response, dated October 30, 1998, page 9.
4. **1991 OAL Determination No. 4**, p. 85 (Department of Corrections, April 1, 1991, Docket No. 90-006), CRNR 91, No. 27-Z, July 5, 1991, p. 910; *Memorial Inc., v. Harris* (9th Cir. 1980) 655 F.2d 905, 910, n.14. Also see, Title 1, CCR, section 126. OAL must respond to the request pursuant to its own regulations.
5. Statutes 1937, chapter 933, page 2567.
6. Business and Professions Code section 101.6 provides in part:

"The boards . . . in the department [Department of Consumer Affairs] are established for the purpose of ensuring that those private businesses and professions deemed to engage in activities which have potential impact on the public health, safety and welfare are adequately regulated in order to protect the people of California.
7. Statutes 1971, chapter 716, page 1404.
8. Business and Professions Code section 4808.
9. *Id.*, section 4809.5.
10. *Id.*, section 4809.6.
11. See Business and Professions Code sections 4875, 4876, and 4883.

12. This provision of the APA became operative on July 1, 1997. The attendant Comment of the Law Revision Commission is pertinent here:

“Subdivision (e) is consistent with the rulemaking provisions of the Administrative Procedure Act. See Section 11340.5 (‘underground regulations’). A penalty based on a precedent decision does not violate subdivision (e). Section 11425.60 (precedent decisions). If a penalty is based on an ‘underground rule’--one not adopted as a regulation as required by the rulemaking provisions of the Administrative Procedure Act--a reviewing court should exercise discretion in deciding the appropriate remedy. Generally the court should remand to the agency to set a new penalty without reliance on the underground rule but without setting aside the balance of the decision. Remand would not be appropriate in the event that the penalty is, in light of the evidence, the *only* reasonable application of duly adopted law. Or a court might decide the appropriate penalty itself without giving the normal deference to agency discretionary judgments. [Citations omitted.]” (Emphasis in original.)

13. Agency Response, dated October 30, 1998, page 1.
14. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5.
15. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746- 747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
16. (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*.

17. The *Grier* Court stated:

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

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

18. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

19. Business and Professions Code section 4831.

20. Business and Professions Code section 4883 provides:

"The board may deny, revoke or suspend a license or assess a fine as provided in Section 4875 for any of the following:

- (a) Conviction of a crime substantially related to the qualifications, functions or duties of veterinary medicine, surgery, or dentistry, in which case the record of the conviction shall be conclusive evidence.
- (b) For having professional connection with, or lending one's name to, any illegal practitioner of veterinary medicine and the various branches thereof.
- (c) Violation or attempting to violate, directly or indirectly, any of the provisions of this chapter.
- (d) Fraud or dishonesty in applying, treating or reporting on tuberculin or other biological tests.
- (e) Employment of anyone but a veterinarian licensed in the state to demonstrate the use of biologics in the treatment of animals.
- (f) False or misleading advertising.
- (g) Unprofessional conduct, that includes, but is not limited to, the following:

- (1) Conviction of a charge of violating (1) federal statutes or rules

or any statute or rule of this state, regulating dangerous drugs or controlled substances. . . .

(2)(A) The use of or prescribing for or administering to himself or herself, any controlled substance.

(2)(B) The use of any of the dangerous drugs specified in Section 4211, or of alcoholic beverages to the extent, or in any manner as to be dangerous or injurious to a person licensed under this chapter, or to any other person or to the public, or to the extent that the use impairs the ability of the person so licensed to conduct with safety the practice authorized by the license.

(2)(C) The conviction of more than one misdemeanor or any felony involving the use, consumption or self administration of any of the substances referred to in this section or any combination thereof . .

(3) A violation of any federal statute, rule, or regulation or any of the statutes, rules, or regulations of this state regulating dangerous drugs or controlled substances.

(h) Failure to keep one's premises and all equipment therein in a clean and sanitary condition.

(I) Fraud, deception, negligence, or incompetence in the practice of veterinary medicine.

(j) Aiding or abetting in any acts that are in violation of any of the provisions of this chapter.

(k) The employment of fraud, misrepresentation, or deception in the obtaining of the license.

(l) The revocation, suspension, or other discipline by another state or territory of a license or certificate to practice veterinary medicine in that state or territory.

(m) Cruelty to animals, conviction on a charge of cruelty to animals, or both.

(n) Disciplinary action taken by any public agency in any state or territory for any act substantially related to the practice of veterinary medicine.

(o) Violation, or the assisting or abetting violation, of any regulations adopted by the board pursuant to this chapter."

21. Business and Professions Code section 4883.
22. Business and Professions Code section 494.
23. Business and Professions Code section 125.5.
24. Business and Professions Code section 146.5.
25. Business and Professions Code section 4876.
26. *Id.*

27. Business and Professions Code section 4875.4.
28. OAL assumes that VMB meant section 2043, even though its response refers to section 2041. California Code of Regulations, title 16, section 2041, sets forth criteria for VMB to consider when evaluating the rehabilitation of a license applicant and his or her present eligibility for a license when considering the denial of a license, or the suspension or revocation of a license on the ground that a person holding a license has been convicted of a crime.
29. Agency Response, dated October 30, 1998, page 6.
30. Agency Response, dated October 30, 1998, page 9.
31. Agency Response, dated October 30, 1998, page 9.
32. *Grier v. Kizer*, supra, 268 Cal.Rptr. at 253.
33. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.
34. *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.)
35. (1996) 14 Cal.4th 557, 572; 59 Cal.Rptr.2d 195.
36. Agency Response, dated October 30, 1998, page 6.
37. Agency Response, dated October 30, 1998, page 7.
38. Agency Response, dated October 30, 1998, page 6.
39. The VMB does not assert that the Citation Procedures Manual or the Complaint Procedures are not rules or standards of general application.
40. (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr. 2d 264, 274
41. *Id.*, 275.
42. Agency Response, dated October 30, 1998, page 6.
43. Government Code section 11342, subdivision (g); *Union of American Physicians v. Kizer* (1990) 223 Cal.App.3d 490, 501; 272 Cal.Rptr. 886, 889-892.
44. Agency Response, dated October 30, 1998, page 7.

45. All state agency "regulations" are subject to the APA unless expressly exempted by statute. Government Code section 11346. Express statutory APA exemptions may be divided into two categories: special and general. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120,126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself). *Special* express statutory exemptions, such as Penal Code section 5058, subdivision (d)(1), which exempts Corrections' pilot programs under specified conditions, typically: (1) apply only to a portion of one agency's "regulations" and (2) are found in that agency's enabling act. *General* express statutory exemptions, such as Government Code section 11342, subdivision (g), part of which exempts internal management regulations from the APA, typically apply across the board to all state agencies and are found in the APA.
46. Government Code section 11346.
47. Agency Response, dated October 30, 1998, page 7.
48. *Grier v. Kizer* (supra) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 251.
49. 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.

50. *Grier* (1990) 219 Cal.App.3d 422, 436 fn.10, 268 Cal Rptr. 244, 252-253.) cites *Armistead* citing *Poschman* for support on this point. Note that *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, fn. 3, 149 Cal.Rptr. 1, 583 P.2d 744.)
51. (1990) 219 Cal.App.3d 422, 436, 268 Cal Rptr. 244, 252-253.
52. *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943; 107 Cal.Rptr. 596, 603.
53. Citation Procedures Manual, at page 3.
54. *Id.*, page 4.
55. *Id.*, page 6.
56. Complaint Procedures, p. 2.
57. *City of San Marcos v. California Highway Commission, Department of Transportation* (1976) 60 Cal.App.3d 383, 408; 131 Cal.Rptr. 804, 820.
58. *Id.*