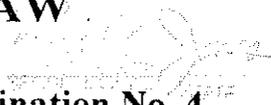


STATE OF CALIFORNIA

02-111-0 PW 1/29

OFFICE OF ADMINISTRATIVE LAW



In re:) 1999 OAL Determination No. 4
 Request for Regulatory)
 Determination filed by DAVID) [Docket No. 97-009]
 WILLIAM FINNEY regarding)
 the policy of the BOARD OF) January 8, 1999
 PRISON TERMS, concerning)
 the application of parole) Determination Pursuant to
 consideration guidelines for) Government Code Section
 life prisoners sentenced) 11340.5; Title 1, California
 under the Indeterminate) Code of Regulations,
 Sentence Law¹) Chapter 1, Article 3
)

Determination by: CHARLENE G. MATHIAS, Deputy Director

HERBERT F. BOLZ, Supervising Attorney
 RAYMOND G. SAATJIAN, Staff Attorney
 CINDY PARKER, Administrative Law Judge on
 Special Assignment
 Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether Administrative Directive No. 83/2 ("directive") of the Board of Prison Terms ("Board") contains "regulations" which are without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

The Directive: (1) provides that life prisoners who committed their offenses prior to July 1, 1977 and who have been found suitable for parole under post-1977

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guidelines are entitled to have parole dates established under the guidelines in effect prior to July 1, 1977, and (2) establishes procedures for scheduling and conducting hearings to establish those parole dates.

OAL has concluded that:

- (1) Some portions of the directive are statements of fact and restatements of existing law; and
- (2) Some portions of the directive are “regulations” which are invalid unless adopted pursuant to the APA.

ISSUE

OAL has been requested to determine whether policies contained in the Board’s January 24, 1983 Administrative Directive No. 83/2 which:

- (1) provide life prisoners who committed their offenses prior to July 1, 1977 and who have been found suitable for parole under the post-1977 guidelines are entitled to have parole dates established under guidelines in effect prior to July 1, 1977, and
- (2) establish procedures for scheduling and conducting hearings to establish those parole dates,

are “regulations” which are without legal effect until adopted pursuant to the APA.²

ANALYSIS

I. BACKGROUND

The Uniform Determinate Sentencing Law (“DSL”) of 1976 reflected a substantial change in the statutory scheme governing imprisonment in California, according

to the court in *In re Stanworth*.³ The Legislature declared that the purpose of imprisonment was now punishment rather than social rehabilitation. Whereas the length of sentences served before parole under the old Indeterminate Sentence Law ("ISL") had been based upon the Adult Authority's judgment of the adjustment and social rehabilitation of the individual, effective July 1, 1977, under the new DSL it would be based upon a framework of uniform terms for similar offenses. The Board of Prison Terms (as the Adult Authority's successor) was authorized to establish guidelines for the setting of parole release dates, and it now had less discretion to deviate from the guidelines than had existed under the ISL. The court explained:

"We may summarize the differences between ISL and DSL rules by noting that the new regulations set a longer range of base terms for first degree murder and require the imposition of set additional terms for particular enhancements unless deviation from the norms is expressly justified. Moreover, the new rules generally reflect an attempt to achieve uniformity and stress the criminal activities of the inmate rather than any social or personal factors."⁴

I. IS THE APA GENERALLY APPLICABLE TO THE BOARD OF PRISON TERMS' QUASI-LEGISLATIVE ENACTMENTS?

In 1944 the Legislature created the Adult Authority and the California Women's Board of Terms and Paroles to consider the granting and revocation of parole and the fixing of sentences for prisoners in California prisons.⁵ On July 1, 1977, the Community Release Board succeeded the Adult Authority and the California Women's Board of Terms and Paroles, which were abolished.⁶ On January 1, 1980, the Community Release Board was renamed the "Board of Prison Terms."⁷ The Board of Prison Terms meets periodically concerning parole matters at each prison.⁸

Penal Code sections 3040, 5076.1 and 5077 provide that the Board shall hear parole applications, shall have the power to grant parole, and shall determine

parole length, conditions, and whether revocation is appropriate. The Board must establish criteria for the setting of parole release dates under Penal Code section 3041.

Penal Code section 5076.2, subdivision (a), further provides in part:

"Any rules and regulations, including any resolutions and *policy statements*, promulgated by the Board of Prison Terms, *shall be promulgated and filed pursuant to [the APA]*" (Emphasis added.)

Clearly, the APA generally applies to the Board's quasi-legislative enactments.⁹

II. DOES THE CHALLENGED "DIRECTIVE" CONTAIN "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

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

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

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

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

In *Grier v. Kizer*,¹⁰ the California Court of Appeal upheld OAL's two-part test¹¹ as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

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

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

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule satisfies both parts of the two part test, OAL must conclude that it is a "regulation" and subject to the APA. In applying the two-part test, OAL is mindful of the admonition of the *Grier* court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.*" (Emphasis added.)¹²

This Request for Determination

On May 22, 1995 David William Finney requested a determination whether:

"... AD 83/2, attached, is an 'underground regulation' of providing for parole consideration hearing using the pre-July 1, 1977 guidelines, and which class of prisoners are eligible for these hearings. The BPT's AD 83/2 is a 'regulation' that is required to be adopted in compliance with the Administrative Procedures Act."¹³

In its response, the Board contends that Administrative Directive No. 83/2 interprets the case of *In re Stanworth*¹⁴ as clarified by *In re Seabock*¹⁵ and *In re Duarte*,¹⁶ and that the Directive does not contain “regulations” which must be adopted in compliance with the APA.¹⁷

The Directive provides that life prisoners who committed their offenses before July 1, 1977, and who were therefore sentenced under the ISL guidelines, are entitled to hearings to establish parole dates under ISL guidelines *if they have been found suitable for parole under DSL (post-1977) guidelines*. The directive also establishes procedures for scheduling and conducting these hearings.

The requester objects that the entire directive is an “underground regulation.” His primary concern is that ISL parole date hearings are only scheduled for those ISL life prisoners who have been found suitable for parole under DSL guidelines.

OAL received a comment during the public comment period supporting the requester’s concern and contending that *In re Stanworth* did not limit eligibility for ISL parole hearings to those ISL life prisoners who had already been determined suitable for parole under the DSL.¹⁸

In *Stanworth*, the defendant was sentenced to death on two counts of first degree murder. After his sentence was overturned by the California Supreme Court, the defendant was then sentenced to “life imprisonment” on each count of murder. The defendant was then considered and rejected for parole release under the ISL in 1974, 1976 and 1977. After the DSL became effective on July 1, 1977¹⁹, the defendant was considered and rejected for parole release by the Board’s predecessor, the Adult Authority. In 1979, the defendant was again considered for parole, at which time the Adult Authority fixed a parole date that was unsatisfactory to the defendant.

Defendant Stanworth appealed the Adult Authority’s decision, claiming that by choosing a parole release date in 1979, the Adult Authority had violated the “ex post facto” clause of the United States and California Constitutions by applying only DSL standards, and not the ISL standards which were in effect at the time he was sentenced in 1974.

The California Supreme Court in *Stanworth* held that:

“Prisoners with release dates set under prior regulations retain that date and are also reviewed in accordance with the new regulations. They are to be released on the earlier of the two dates.”²⁰

In *Stanworth* the court did not specifically limit its holding to only those ISL life prisoners who had been found suitable for parole under the DSL standards. However, inmate Stanworth had been found suitable for parole under the DSL standards. In later cases two different District Courts of Appeal clarified that only those ISL life prisoners who have been found suitable for parole under DSL guidelines were entitled to hearings to set parole dates based on ISL standards.²¹

A. DOES THE CHALLENGED DIRECTIVE CONTAIN POLICIES WHICH ARE “STANDARDS OF GENERAL APPLICATION?”

OAL next considers whether the challenged policy is one of general application. For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.²²

It is clear that the challenged Directive is a standard of general application that applies to all ISL life prisoners who have been found suitable for parole under DSL standards.

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

Administrative Directive No. 83/2, dated January 24, 1983, consists of five typed pages. The first two pages consist almost entirely of statements of fact and restatements of case law.

(1) Statements of Fact

Paragraphs two and three of page one, consist of statements of fact regarding the Board's opinion and expectations for the procedures established by the directive.

“This Directive establishes the procedures for implementing *Stanworth* in a manner that will permit the hearings to be accomplished in a fair and orderly fashion with minimum disruption to other hearings mandated by statute and already scheduled. Since approximately 362 prisoners are affected by *Stanworth* the Board expects it will take until May 1, 1984 to afford *Stanworth* hearings to all eligible prisoners. Implementation of these procedures has required and will continue to require a great deal of coordination between the Board of Prison Terms and the Department of Corrections. Training of staff and preparation of additional Board reports will also be required to conduct the hearings mandated by *Stanworth*.

“Given the Board's limited resources, the Board has determined that the procedures specified in this Directive are the most efficient and least costly method of complying with *Stanworth* while ensuring that eligible prisoners receive the hearings in a timely manner.”

(2) Restatements of Case Law

A large part of the directive consists of provisions which correctly restate the holding of *In re Stanworth* as clarified by *In re Seabock* and *In re Duarte*. This includes the first paragraph of page one; section 2 entitled “Prisoners Eligible for

PBR Hearing Under *Stanworth*;"section 3a, entitled "Eligible Life Prisoners;" and section 5, "Guidelines To Be Used."

(3) Restatements of Statutes

Section 6.a. and a portion of section 6.b. of the directive restate part of Penal Code section 3042, which requires 30 days' notice to the prisoner of the parole setting hearing. None of these restatements of existing case law or statute is a "regulation" which must be adopted pursuant to the APA.

(4) Only reasonable interpretation of *Stanworth*

Section 1, entitled "Terminology," defines the terms necessary to implement *Stanworth*. They are not merely a restatement of the holding of *Stanworth*. Although definitions are typically "regulations," the definitions in this case appear to be part of the only reasonable interpretation of *Stanworth*. Therefore, they are not "regulations."

(5) Procedural provisions constitute "regulations"

Subsection 11342(g) of the Government Code provides in part:

"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

The second sentence of section 6.b. states:

"The notice shall indicate that the prisoner is scheduled for a PBR hearing and shall include a copy of this Directive."

This sentence, the final sentence on page two, and pages three, four and five of the directive describe, with several exceptions, procedures which are not prescribed in

Stanworth, Seabock or *Duarte*, but which implement those cases, and which govern the Board's procedure. Therefore, they are "regulations" which are without legal effect unless adopted pursuant to the APA.

For example, the final sentence on page two, located in section 3.a., provides for the Board and the staff of the Department of Corrections to review prisoners' records to determine if they are entitled to PBR (ISL) hearings and for notice to prisoners of their eligibility no later than May 1, 1983. Life prisoners who believed they were eligible but did not receive a notice of eligibility were to appeal as soon as possible after May 15, 1983. Scheduling was to be done by the Board for life prisoners with the earliest DSL parole dates scheduled first to the extent feasible.

There is still another basis for concluding that several of the provisions which govern the agency's procedure are "regulations." They also interpret statutes or regulations, although in a way which apparently conflicts with those provisions.

For example, section 7.d., entitled "Attorney Representation" provides that:

"Representation by an attorney or other advocate on behalf of the inmate will not be permitted at the PBR hearing."

Both in 1995, when the request for determination was filed, and at present, section 3041.7 of the Penal Code has provided in part:

"At any hearing for the purpose of setting . . . a parole release date of a prisoner under a life sentence such prisoner shall be entitled to be represented by counsel"

Section 7.d. appears to conflict with the 1995 and 1998 versions of Penal Code section 3041.7.

Another example of the directive interpreting a statute in a way which conflicts with the statute is found in section 7.g. entitled "Record of the Hearing," which provides:

"The hearing shall be recorded using whatever means the Board finds accurate and efficient. Upon request the Board shall send a copy of the decision to the prisoner."

Penal Code Section 3041.5 provides in part:

At all hearings for the purpose of . . . the setting . . . of parole dates . . . The prisoner shall be permitted to request and receive a stenographic record of all proceedings."

The directive is silent as to the inmates' access to a record of the proceedings, whereas Penal Code section 3041.5 provides that the inmate may receive a stenographic record of the parole-setting hearing. Thus, section 7.g. of the directive not only implements *Stanworth* and governs the Board's procedure, but it makes specific Penal Code section 3041.5, although apparently conflicting with it.

Section 7.c. of the directive states:

"At this hearing the prisoner shall have the rights specified in Parole Board Rules (15, Cal. Adm. C., Div. 2, Reg. 76, No. 21, 5/22/76) Sections 2110-2119, which are attached to this Directive."

The reference to the CCR is to the ISL duly adopted regulations, which were repealed before the request for determination was filed. These sections differed from the corresponding sections in the DSL regulations, at least with regard to witnesses. *Stanworth* did not require that ISL hearing rights be applied in these hearings. Therefore, the Board's application of them, when there was a choice between the ISL and the DSL regulations, interprets *Stanworth* and is a "regulation" which is invalid unless adopted in compliance with the APA.

The procedural provisions in the directive establish due dates for notification to prisoners of hearing eligibility and for filing of appeals. OAL has concluded in a prior regulatory determination,²³ that "due dates" established by the Department of

Parks and Recreation in a manual requiring the submission of grant requests for funds to manage State of California resources were in fact intended to implement, interpret and make specific provisions of the Off-Highway Motor Vehicle Act,²⁴ and were in fact “regulations” unless adopted pursuant to the APA. The due dates in the directive govern that Board’s procedure, and are therefore “regulations.”

III. DO THE POLICIES IN THE CHALLENGED DIRECTIVE FOUND TO BE “REGULATIONS” FALL WITHIN ANY GENERAL EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.²⁵ Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.²⁶

Government Code section 11342, subdivision (g)'s definition of "regulation" 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 such 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 which 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 implement

[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]."²⁷

"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"²⁸

The procedural provisions of the directive significantly affect ISL life prisoners entitled to ISL parole hearings under *Stanworth* in that they define the procedural rights of inmates entitled to the constitutional protection of *Stanworth*. OAL concludes that the procedures involved in implementing *Stanworth* are a matter of serious consequence involving an important public interest. The procedures do not relate solely to the internal management of the affairs of the Board. Therefore, the internal management exception does not apply.

The issue of the applicability of exceptions to APA requirements was not raised by either the requester or the Board. OAL's independent review discloses no applicable exceptions. No express statutory exemption applies.

CONCLUSION

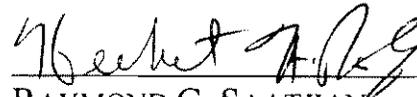
For the reasons set forth above, OAL has concluded that:

- (1) Some portions of the Directive are statements of fact and restatements of existing law; and
- (2) Some portions of the Directive are "regulations" which are invalid unless adopted pursuant to the APA.

DATE: January 8, 1999



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ENDNOTES

1. This Request for Determination was dated May 17, 1995 and was filed on May 22, 1995 by David Finney, B-62624, C2-144, P.O. Box 5002, Calipatria, CA 92233 (Current address P.O. Box 7500, Crescent City, CA 95532-7500). The agency's response was dated November 6, 1998 and was submitted by James W. Nielsen, Chairman, 428 J Street, 6th Floor, Sacramento, CA 95814, (916) 445-4072.
2. According to Government Code section 11370:

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

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.
3. *In re Stanworth* (1980) 33 Cal.3d 186,187; 187 Cal.Rptr. 783.
4. *In Re Stanworth* (1982) 33 Cal.3d 186, 187 Cal.Rptr. 783, 789.
5. Stats. 1944, ch. 2.
6. Stats. 1976, ch. 1139.
7. Stats. 1979, ch. 255.
8. Penal Code sections 5076.1 and 5077.
9. The APA would apply to the Board's rulemaking even if Penal Code section 5076.2, subdivision (a), did not expressly so provide. The APA applies generally to state agencies, as defined in Government Code section 11000, in the executive branch of Government, as prescribed in Government Code section 11342, subdivision (a).
10. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. 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.

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

11. The *Grier* Court stated:

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

OAL’s wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was published in *California Regulatory Notice Register* 96, No. 8-Z, February 23, 1996, p. 292. 1987 OAL Determination No. 10, *supra*, slip op’n., at p. 8.)

12. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

13. Request for Determination, p.1. The grammar and spelling used are those of the requester.

14. (1982) 33 Cal. 3d 176, 187 Cal.Rptr. 783 (Sup. 1982).

15. (1983) 140 Cal.App.3d 29, 140 Cal.App. 3d. 71.

16. (1983) 143 Cal.App.3d 943, 193 Cal.Rptr. 176.

17. Agency response, p. 3.

18. Comment by Donald A. Miller dated October 23, 1998.

19. Statutes of 1976, c.1139, operative July 1, 1977 (Determinate Sentencing Law enacted, Indeterminate Sentencing Law repealed,). [Penal code section 1170].
20. *In re Stanworth* (1982) 33 Cal.3d 186, 187 Cal.Rptr.783, 790.
21. *In re Seabock* (1983) 140 Cal.App.3d 29, 140 Cal.App. 3d. 71; *In re Duarte* (1983) 143 Cal.App.3d 943, 193 Cal.Rptr. 176.
22. *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App. 3d 622, 167 Cal.Rptr. 552.
23. **1998 OAL Determination No. 30** (Department of Parks and Recreation, October 30, 1998, Docket No.93-005), *California Regulatory Notice Register* 98, No.31-Z, July 31, 1998, p.1474.
24. Statutes of 1987, c. 1027.
25. Government Code section 11346.
26. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec.11342, subd. (g).)
 - c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342. subd. (g).)
 - f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found In 1991 OAL Determination No. 6, pp.

175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the idea that *City of San Joaquin* (cited above) was still good law.

27. *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.)
28. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.