

OFFICE OF ADMINISTRATIVE LAW

*Bill Jones*  
SECRETARY OF STATE

In re: ) 1999 OAL Determination No. 7  
 Request for Regulatory )  
 Determination filed by the ) [Docket No. 97-012]  
 CALIFORNIA ASSOCIATION OF )  
 PROFESSIONAL SCIENTISTS ) March 12, 1999  
 regarding the *California State* )  
*Restriction of Appointments* ) Determination Pursuant to  
*Policy and Procedure Manual* ) Government Code Section  
 of the DEPARTMENT OF ) 11340.5; Title 1, California  
 PERSONNEL ADMINISTRATION<sup>1</sup> ) Code of Regulations,  
 \_\_\_\_\_ ) Chapter 1, Article 3

Determination by: CHARLENE G. MATHIAS, Deputy Director

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SYNOPSIS<sup>2</sup>

The issue presented to the Office of Administrative Law ("OAL") is whether the *California State Restriction of Appointments Policy and Procedure Manual* ("SROA Manual" or "Manual") of the Department of Personnel Administration ("DPA") contains "regulations" and is therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA"). A preliminary issue is whether OAL may legally issue a determination regarding the Manual.

OAL has concluded that (1) applicable law requires OAL to issue the duly-requested determination regarding the Manual and (2) the Manual contains

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“regulations” which are invalid unless (a) adopted pursuant to the APA or (b) expressly stated in approved<sup>3</sup> memoranda of understanding.<sup>4</sup>

### In More Detail

The Government Code<sup>5</sup> provides that state employees facing layoff due to management-initiated changes be provided interdepartmental assistance in locating, preparing to qualify for, and being placed in other positions in the state civil service. DPA is authorized by statute to *restrict* the authority of other state agencies to *appoint* candidates to vacant positions, thus the phrase “state restriction of appointments,” often referred to in practice by the cumbersome abbreviation “SROA.” For instance, when the SROA program is in effect, staff toxicologists facing layoff in department “A” are given preferential consideration by department “B” as that latter department seeks to fill vacant staff toxicologist positions. Typically, department “B” may not fill the vacant positions with new hires or accept persons voluntarily transferring from a department *not* threatened with layoff. However, a hiring department may be exempted from the requirement that it hire persons from the SROA list, if the department can demonstrate to DPA that SROA candidates lack needed knowledge, skills, and background, and that appropriate training would take so long as to jeopardize the effectiveness of the program the hiring department seeks to implement. SROA rules affect (1) members of the general public applying for civil service positions, (2) state employees seeking to transfer to a different state agency, (3) state employees threatened with layoff, (4) state agency managers, supervisors, and personnel specialists responsible for laying off or hiring employees, and (5) DPA staff responsible for administering the SROA program.

If the Department of Personnel Administration wishes to exercise its discretion to issue rules governing the SROA program, it may adopt regulations pursuant to the APA.<sup>6</sup> Indeed, a few of the SROA rules have already been adopted pursuant to the APA, but these duly adopted rules apply solely to one small category of employees--excluded employees. Insofar as the Manual merely restates these CCR provisions, without further interpretation, the Manual is not an underground regulation, *as applied solely to excluded employees*. However, the CCR provisions total only 3 pages, while the Manual is at least 15 pages in length.

Rules governing the SROA program could also be expressly stated in memoranda of understanding (“MOUs”) between the State of California and the various employee bargaining units. Pursuant to the Ralph C. Dills (formerly the State Employer-Employee Relations) Act,<sup>7</sup> such MOUs are developed through the collective bargaining process and approved by the Legislature.<sup>8</sup>

### ISSUE<sup>9, 10</sup>

OAL has been requested to determine<sup>11</sup> whether or not the *California State Restriction of Appointments Policy and Procedure Manual* (“SROA Manual” or “Manual”) of the Department of Personnel Administration contains “regulations” required to be adopted pursuant to the APA.<sup>12</sup> The Manual is subtitled “SROA Manual for Agency Personnel Officers.” The California Association of Professional Scientists (“CAPS”) filed this request.

SROA rules affect not just CAPS, but also (1) all members of the general public applying for civil service positions, (2) all state employees seeking to transfer to a different state agency, (3) all state employees threatened with layoff, (4) all state agency managers, supervisors, and personnel specialists responsible for laying off or hiring employees, and (5) all DPA staff responsible for administering the SROA program.

CAPS submitted a “request for determination” to OAL, requesting review of the Manual under Government Code section 11340.5. CAPS stated that DPA had not submitted changes to the Manual to OAL for review and approval, which we take as an allegation of non-compliance with the APA. We interpret statements in the request involving an alleged failure of DPA to offer to meet and confer concerning SROA program changes as part of an argument that there was insufficient public input on a series of significant policy changes. OAL expresses no opinion on the separate issue of whether, by changing SROA rules without offering to meet and confer, DPA violated applicable labor law requirements.<sup>13</sup> This determination is limited to the issue of whether the “state agency rule”<sup>14</sup> submitted by the requester (the Manual) is a “regulation” as defined in Government Code section 11342, subdivision (g), which is invalid and unenforceable unless (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or, (2) it has been expressly exempted by statute from the requirements of the APA.<sup>15</sup>

## ANALYSIS

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

The Department of Personnel Administration ("DPA") was created in 1981<sup>16</sup> "for the purposes of managing the nonmerit aspects<sup>[17]</sup> of the state's personnel system."<sup>18</sup> The Department succeeded to specific duties and responsibilities of four state departments: (1) the State Personnel Board "with respect to the administration of salaries, hours and other personnel related matters, training, performance evaluations, and layoffs and grievances"; (2) the Board of Control; (3) the Department of General Services "with respect to the administration of miscellaneous employee entitlements"; and (4) the Department of Finance "with respect to the administration of salaries of employees exempt from civil service and within range salary adjustments."<sup>19</sup>

The Director of Personnel Administration also serves as the Governor's representative in negotiations with state employee organizations on matters "regarding wages, hours, and other terms and conditions of employment . . . ." <sup>20</sup> The results of these negotiations are labor contracts, referred in the statute as memoranda of understanding ("MOUs").<sup>21</sup>

The APA applies to all state agencies, except those "in the judicial or legislative departments."<sup>22, 23</sup> Since the Department is in neither the judicial nor the legislative branch of state government, OAL concludes that APA rulemaking requirements generally apply to the Department.

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

"The Director of [Personnel Administration] *shall*:

"(d) *Formulate, adopt, amend, or repeal rules, regulations, and general policies* [<sup>24</sup>] affecting the purposes, responsibilities, and jurisdiction of the department and which are *consistent with the law* and necessary for personnel administration."  
[Emphasis added.]

Section 19815.4 has two significant features. First, it unequivocally states that the Director of Personnel Administration “shall” adopt rules, regulations, etc., which are necessary for personnel administration. Second, the phrase “consistent with the law” means (among other things) that rules, regulations, and general policies formulated under this section must be adopted in conformity with the law governing administrative rulemaking, i.e., the APA.

## **II. IS OAL PRECLUDED FROM ISSUING A DETERMINATION CONCERNING THE SROA MANUAL BECAUSE THE REQUESTER LACKS STANDING, OR, IS OAL REQUIRED BY APPLICABLE LAW TO ISSUE THE DULY REQUESTED DETERMINATION?**

DPA argues in substance that OAL may not issue a determination pursuant to Government Code section 11340.5 because the requester, CAPS, is limited to remedies provided under the Dills Act. We reject this argument on the grounds that neither the Dills Act nor the APA says anything about prohibiting employee associations from filing requests for determination. (The Dills Act aspect of this argument is discussed in more detail in part III.C. of this determination.) There simply are no standing requirements connected with filing requests for determination. The duly adopted regulation governing request procedures states clearly that “any person” may file a request. (Title 1, CCR, section 121 (b).)<sup>25, 26</sup>

And, once OAL has (1) accepted a request and (2) published the notice of active consideration in the California Regulatory Notice Register, “. . . OAL *shall issue a written determination as to whether the state agency rule is a regulation*, along with the reasons supporting its determination.” (Title 1, CCR, section 126; emphasis added.)

Nothing in the Dills Act, the APA, or the procedural regulations governing requests filed under Government Code section 11340.5, requires or permits OAL to decline to further consider requests, once they have been accepted.<sup>27</sup> Title 1, CCR, section 126 expressly requires OAL to issue a written determination “as to whether the state agency rule is a regulation” within the meaning of the APA. Thus, OAL is required by the California Code of Regulations to determine whether or not the SROA Manual is a “regulation” issued in violation of the APA.

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

#### Background

A deeply-rooted tradition of the State Personnel Board (the principal predecessor of DPA), for the past 50 years or more, has been to adopt some regulations into the CCR, while issuing most regulatory material in the form of either manuals or bulletins.<sup>28</sup> Typically, a brief regulation on a given topic will be adopted pursuant to the APA and printed in the CCR, but the bulk of the key rules needed to implement the program will be located in a manual devoted to that particular program.<sup>29</sup> As noted by the California Supreme Court in the 1978 case of *Armistead v. State Personnel Board*, SPB was specifically criticized for this practice in 1955 by the State Senate Interim Committee on Administrative Regulations.<sup>30</sup> The tradition continued despite the critical 1955 legislative report and the unanimous 1978 holding in *Armistead* that a provision in the Board's Personnel Transactions Manual violated the APA.

When certain personnel functions were transferred from SPB to DPA in the early 1980's, the duly adopted regulations, the manuals, and the bulletins related to those functions were also transferred from SPB to DPA. DPA thus inherited not only many CCR provisions, but also a large number of uncodified rules, many of which had initially been issued in violation of the APA.

For instance, in 1987, DPA defended an SPB policy denying administrative hearings to state employees protesting transfers, unless the transfer was "geographical," i.e., would reasonably require a change in the place of residence. A statute guaranteed employees the unqualified right to protest a transfer if allegedly "made for the purpose of harassing or disciplining the employee." A state employee alleged that her intra-agency reassignment, not involving a change in residence, had been made for such improper reasons. DPA refused to provide the statutory hearing, citing the longstanding change-in-residence requirement. The state employee obtained a writ of mandate in Superior Court directing DPA to grant an administrative hearing.

DPA appealed, resulting in a Court of Appeal decision upholding the trial court. As noted by the Court of Appeal in *Johnston v. Department of Personnel Administration*, following *Armistead*, DPA's official interpretation of the transfer statute "is not found in any regularly promulgated regulation, but is contained in a series of inter-departmental communications [i.e., bulletins issued by SPB]."31 The bulletins had interpreted the statute as applying solely to geographical transfers. Since this administrative interpretation had not been properly adopted pursuant to the APA, the *Johnston* court concluded that it was not entitled to the deference ordinarily given to formal agency interpretation of a statute. Thus, the court overturned the DPA decision denying the hearing based upon the uncodified interpretation.

1990 OAL Determination No. 16<sup>32</sup> involved a complaint about a DPA policy mandating that individual state employees specify the "nature of the illness" each time they used sick leave. The request for determination was submitted by an individual employee in bargaining unit 1 (the professional administrative, financial and staff services unit). It was subsequently supported by public comments submitted by the California State Employees Association (Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21), CAPS (Bargaining Unit 10), the Alliance of Trades and Maintenance (then representing Bargaining Unit 12), the Association of California State Attorneys and Administrative Law Judges (Bargaining Unit 2), and the Professional Engineers in California Government (Bargaining Unit 9).

DPA responded in detail to the initial request and to the public comments. DPA argued that the challenged rule had been incorporated into the contract through the "supersession clause," which stated that if any part of the contract conflicted with specified Government Code sections or with rules implementing those Code sections, that *that part of the contract* superseded the Government Code section or the implementing rule. CSEA strongly disputed the proposition that by agreeing to the supersession clause, it had agreed that employees were obligated to reveal the specific nature of each illness. (The contract in question did not contain an express provision requiring employees to reveal the specific nature of each illness.)

In a 43-page opinion issued in December 1990 (1990 OAL Determination No. 16), OAL thoroughly analyzed the various arguments presented by the parties and by

the commenters. OAL rejected the supersession argument, observing that there was no express language in the MOU which was in conflict with the sick leave statute or its implementing rules. Noting that Government Code section 19859 stated that DPA "shall provide by rule [i.e., by adopting rules into the CCR pursuant to the APA] for the regulation . . . of sick leave," OAL concluded in this 1990 determination that the "nature of the illness" rule had been issued in violation of the APA. DPA filed a petition for judicial review in Sacramento Superior Court in February 1991,<sup>33</sup> but abandoned it the following month.<sup>34</sup> To our knowledge, the determination has not been reviewed by any court.

Though it has amended both the APA and the Dills Act a number of times since December 1990, the Legislature has not acted to counteract OAL's conclusion<sup>35</sup> concerning the supersession clause, i.e., the conclusion that such a clause does *not* have the effect of incorporating into the contract and exempting from the APA all uncodified rules interpreting specified Government Code sections. It appears that DPA and at least one employee association resolved the matter by including express language in a July 1992 contract. This express language stated that an employee requesting sick leave ordinarily needed to list only the "general nature of the illness."<sup>36, 37</sup>

In June 1995, CAPS filed this request for determination pursuant to Government Code section 11340.5 challenging DPA's *The California State Restriction of Appointments Policy and Procedure Manual: SROA Manual for Agency Personnel Officers* (revised July 1993). (As noted, this document is referred to as "the SROA Manual" or "the Manual.") CAPS stated that changes to the Manual made in 1993 "should have been reviewed and approved by the Office of Administrative Law."<sup>38</sup>

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*,<sup>39</sup> the California Court of Appeal upheld OAL's two-part test,<sup>40</sup> as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

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

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

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

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

". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, . . . ,

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.]<sup>41</sup>

Three California Court of Appeal cases provide additional guidance on the proper approach to take when assessing claims that agency rules are *not* subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in "a statutory scheme which the Legislature has already established. . . ." <sup>42</sup> But "to the extent that any of the [agency rules] depart from, or embellish upon express statutory authorization and language, the [agency] will need to promulgate regulations. . . ." <sup>43</sup>

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon" in administrative bulletins. For example, *Union of American Physicians and Dentists v. Kizer* (1990)<sup>44</sup> held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation.<sup>45</sup> Statutes may legally be amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993), made clear that reviewing authorities focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

" . . . the . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.* . . ." [Emphasis added.]<sup>46</sup>

Thus, we will first analyze whether the challenged rules are standards of general

application or modifications or supplements to such a rule or standard; and secondly, whether the challenged rules (1) interpret, implement, or make specific the law enforced or administered by the agency, or (2) govern the agency's procedure. DPA's response to the request for determination does not specifically address either element of the two-part statutory test.

The SROA Manual (revised July 1993) contains a large number of rules.

### **Example 1--Number of employees eligible for SROA list**

*Only three employees per position being abolished are permitted to submit their names for inclusion on the SROA list. SROA Manual, section III.B.2, p. 3. (Section III.B. is headed "Eligibility for Placement on SROA Lists.")*

According to the requester, an earlier policy--more advantageous to the threatened employee--allowed *all* employees in the classification to submit their names. For instance, under the current Manual, if Department X plans to abolish five of its 50 Office Technician positions in Sacramento, the 15 employees with the least seniority may place their names on the SROA list. Under the earlier approach, all 50 persons in the Office Technician classification at Department X would have been permitted to submit their names for inclusion on the SROA list.

### **Example 2--Prior DPA approval of hiring department exemption requests**

*Departments desiring to bypass the SROA list and, for instance, make a new hire may request a special exemption from DPA. (The new hire would typically be a member of the general public, or in other words, someone from outside the state civil service system.) According to SROA Manual section VII.:*

*"Some types of appointments may be considered for special exemptions due to extraordinary circumstances. Special exemptions must be requested in writing and approved in advance by the SROA Unit at DPA. Blanket special exemptions will not be granted. (DPA Rule 599.854.4). . . ."*  
[Emphasis added.]

*Three special exemption categories are recognized in Manual section VII, pages 13-15: (1) limited-term appointments, (2) transfers, voluntary demotions, or*

*training and development assignments to different departments, and (3) critical hiring needs.*<sup>47</sup> This requirement of prior authorization from DPA in order to bypass the SROA list is the critical enforcement element of the SROA program. Hiring departments will always have tendency to want to hire the person they have, after a substantial investment of time and energy, selected through the civil service examination process as the best person for the job. Apparently, hiring departments have been wont to argue that the SROA list candidates (i.e., state employees threatened with layoff) should generally be bypassed in favor of whoever the departments originally had set their sights on. In the 1990 version of the SROA Manual (page 13), DPA found it necessary to state: "Appointing powers are cautioned not to confuse desirable qualifications with critical hiring needs." DPA also warned in that same document that it might be necessary to review the classification at issue if the hiring department argued that critical hiring needs included "extraordinary skill requirements or specialized knowledge and abilities" beyond the criteria outlined in the class specification.

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

An agency rule is a standard of general application if it applies generally to all members of a class, kind, or order.<sup>48</sup> The SROA Manual applies to (1) all members of the general public applying for civil service positions, (2) all state employees seeking to transfer to a different state agency, (3) all state employees threatened with layoff, and (4) all state agency managers, supervisors, and personnel specialists responsible for laying off or hiring employees. The Manual thus applies generally to all members of four classes. Therefore, we conclude that the Manual is a standard of general application.

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

Government Code section 19998 provides in part:

*"(a) It is the policy of the state that when an employee is to be separated from state service because the tasks he or she was assigned are to be eliminated or substantially changed due to management-initiated changes,*

including but not limited to automation or other technological changes, *steps should be taken on an interdepartmental basis to assist such employee in locating, preparing to qualify for, and being placed in other positions in the state civil service.* This provision shall not be construed to restrict the authority of the executive branch or the Legislature to effect economies or to make organizational or other changes to increase efficiency in state government.” [Emphasis added.]

Government Code section 19998.1 provides in part:

“(a) The [Department of Personnel Administration] may *temporarily restrict* the choice of *methods of appointment* available to an appointing power if such restriction is deemed necessary in the placement in other state civil service positions of employees whose positions have been or are about to be changed substantially or eliminated by such management-initiated changes.”[Emphasis added.]

In 1990, pursuant to the APA, DPA adopted into the CCR Article 20.5 “State Restriction of Appointments,” consisting of five sections, covering such topics as the scope and purpose of the article, eligibility, SROA lists, list clearance requirements, and exemptions. The sections are Title 2, CCR, sections 599.854, 599.854.1, 599.854.2, 599.854.3, and 599.854.4. None of these sections has ever been substantively amended. *All apply exclusively to “excluded employees.”*

The SROA Manual clearly implements, interprets, and makes specific the two Government Code provisions and the five CCR provisions. The Manual provision limiting placement on the SROA list to three employees per threatened position (example 1, above) implements Government Code section 19998.1, subdivision (a). This same Manual provision interprets CCR section 599.854.1(b), which provides in part that:

“Employees in the class(es) of layoff will be placed on the SROA lists based on the following criteria:

(1) employees who may be subject to layoff or demotion-in-lieu of layoff will be considered as eligible for the SROA program.

(2) *Additional* employees may be placed on SROA for the class(es) of layoff when the Department of Personnel Administration determines that their participation in the SROA program will help to prevent the layoff of other employees.” [Emphasis added.]

The Manual provision not only sets forth a freestanding rule with regard to *represented* employees, but apparently also interprets or modifies CCR section 559.854.1.(b) with regard to *excluded* employees.

The Manual’s special exemption provisions (example 2, quoted in part above) implement Government Code section 19998.1, subdivision (a). These exemption provisions also interpret CCR section 599.854.4 (exemptions). Section 599.854.4 provides that DPA *must approve in advance* requests for exemptions in, for instance, the category of “reasonable accommodation placements.” The regulatory requirement of prior authorization by DPA is a critical means of maintaining discipline among hiring departments. If departments can easily bypass hiring from the SROA list, then the fundamental purpose of the program will have been defeated.

However, the Manual waives the written request/prior DPA approval requirement codified in section 599.854.4 (b-c). The Manual omits the reasonable accommodation category from its prior authorization list in section VII, pages 13-15. Indeed, on pages 11-12 (Section VI), the Manual unequivocally states that reasonable accommodation placements require “no prior approval.”<sup>49</sup> The Manual applies by its terms to “all appointments” (page 1), presumably including excluded employee appointments.<sup>50</sup> While the interaction between the CCR provisions and the Manual is not absolutely clear, a reasonable inference is that the Manual is treated in practice as having superseded the CCR provisions in the area of prior authorization by DPA.

We conclude that the Manual implements, interprets, and makes specific the two listed Government Code sections and the five CCR provisions. We also conclude that the Manual contains rules which “govern [SROA] procedure,” within the meaning of Government Code section 11342, subdivision (g).

Further, for the reasons outlined above, we conclude that the challenged Manual contains “regulations” within the meaning of Government Code section 11342,

subdivision (g). The challenged rules are standards of general application, and were issued to interpret, supplement, implement, and make specific laws enforced by the Department or to govern the Department's procedure. Unless an express statutory exemption applies, these "regulations" should have been adopted pursuant to the APA.

### **III. DO THE CHALLENGED RULES FOUND TO BE "REGULATIONS" FALL WITHIN ANY RECOGNIZED 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.<sup>51</sup> In *United Systems of Arkansas v. Stamison* (1998),<sup>52</sup> the California Court of Appeal rejected an argument by the Director of the Department of General Services that language in the Public Contract Code had the effect of exempting rules governing bid protests from the APA.

According to the *Stamison* Court:

*"When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language. (See, e.g., Gov. Code, section 16487 ['The State Controller may establish procedures for the purpose of carrying out the purposes set forth in Section 16485. These procedures are exempt from the Administrative Procedure Act.']; Gov. Code, section 18211 ['Regulations adopted by the State Personnel Board are exempt from the Administrative Procedure Act']; Labor Code, section 1185 [orders of Industrial Welfare Commission 'expressly exempted' from the APA].) [Emphasis added.]"*<sup>53</sup>

Express statutory APA exemptions may be divided into two categories: special and general.<sup>54</sup> *Special* express statutory exemptions 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 typically: (1) apply across the board to all state agencies and (2) are found in the APA. An example of an express *special* exemption is Penal Code section 5058, subdivision (d)(1), which exempts pilot programs of the Department of Corrections under specified conditions. An example of an express *general* exemption is Government Code section 11342,

subdivision (g), part of which exempts “internal management” regulations of all state agencies from the APA.

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

The Department has not cited a particular statute, arguing that it constitutes a special express statutory exemption.

Our research has disclosed Government Code section 19817.1, subdivision (a), which provides in part:

“The department is exempt from the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3).”

Government Code section 19817.1 is narrowly limited in scope to rules affecting four of the 21 recognized bargaining units, not including unit 10. Thus, this section does not effectively exempt the SROA Manual, which applies to (1) all members of the general public applying for civil service positions, (2) all state employees seeking to transfer to a different state agency, (3) all state employees threatened with layoff, (4) all state agency managers, supervisors, and personnel specialists responsible for laying off or hiring employees, and (5) all DPA staff responsible for administering the SROA program.<sup>55</sup>

However, section 19817.1 does show that when the Legislature desires to exempt DPA rules from the APA, that it knows what to say.

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

Generally, all “regulations” issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.<sup>56</sup> Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.<sup>57</sup>

## Internal Management

The APA excepts policies which pertain solely to the internal management of a single state agency from the notice and hearing requirements of the Act.<sup>58</sup>

Government Code section 11342, subdivision (g) states:

"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 that relates only to the internal management of the state agency.* [Emphasis added.]"

However, as the *Grier* Court found: ". . . the definition of regulation is broad, as contrasted with the scope of the internal management exception, which is narrow."<sup>59</sup> Internal management policies are those designed to govern the internal operations of the Department. The exception does not apply to ". . . the rules necessary to properly consider the interests of all . . . under the . . . statutes . . ."<sup>60</sup>

The SROA Manual does not apply solely to DPA staff. SROA rules also affect (1) members of the general public applying for civil service positions, (2) state employees threatened with layoff, (3) state employees seeking to transfer to a different state agency, and (4) state agency managers, supervisors, and personnel specialists responsible for laying off or hiring employees. Crafting of SROA rules is a sensitive and complex process, involving the careful balancing of a number of interests, each of them legitimate and deserving of thoughtful consideration.<sup>61</sup> APA public notice and comment procedures ensure such consideration.

We conclude that the SROA Manual does not fall within the internal management exemption, nor within any other general express statutory exemption.

### **C. ARGUMENT THAT THE UNIT 10 MOU SUPERSESSION CLAUSE HAS THE EFFECT OF EXEMPTING VARIOUS UNCODIFIED STATE PERSONNEL RULES FROM THE APA**

Section 13.6 ("Supersession") of the bargaining unit 10 MOU ( effective July 1, 1992 through June 30, 1995) provides in part:

“The following enumerated Government Code Sections . . . and all existing rules, regulations, standards, practices and policies which implement the enumerated Government Code sections . . . are hereby incorporated into this Agreement. *However, if any other provision of this Agreement alters or is in conflict with any of the Government Code sections . . . enumerated below, the Agreement shall be controlling and supersede said Government Code sections . . . or parts thereof and any rule, regulation, standard, practice or policy implementing such provisions.* The Government Code sections listed below are cited in Section 3517.6 of the Dills Act.” [Emphasis added.]

Section 13.6 continues with a three page listing of Code sections, including Government Code section 19998.

We infer from DPA’s response that it may believe that MOU section 13.6 has the effect of exempting from the APA any agency-issued rules which implement the listed Government Code sections, including section 19998.

In 1990 OAL Determination No. 16<sup>62</sup> (discussed in section II of this determination) OAL rejected the DPA argument that the Dills Act had impliedly exempted from the APA not only all rules expressly stated in an MOU, but also “all existing rules, regulations, standards, practices and policies” which implement numerous Government Code sections. DPA, in substance, renews that argument in its 1998 response to the CAPS request for determination. We reject the argument, again, for the reasons stated in 1990 OAL Determination No. 16, and the reasons stated in this determination. In the discussion that follows, we will highlight changes in the legal landscape since 1990 that bear upon this implied exemption argument.

We reject this implied exemption argument for the following reasons.

**First**, when the APA is read together with the Dills Act and with DPA’s enabling act, it is clear that DPA is mandated both (1) to perform its duties as the Governor’s representative in collective bargaining, and (2) to adopt regulations “necessary for personnel administration.”<sup>63</sup>

It seems clear from the Dills Act, that the Legislature intended to preserve the power of DPA to adopt regulations pursuant to the APA, even though those regulations might impact matters “within the scope of representation.” There is no

indication in the Dills Act of legislative intent (1) to eliminate DPA's authority to adopt regulations pursuant to the APA, (2) to in effect repeal the APA as applied to DPA, or (3) to supplant mandated APA procedures with new and different rule adoption procedures.

Since 1947, the APA has provided in substance:

It is the purpose of this chapter to establish *basic minimum* procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in section 11346.1, the provisions of this chapter are applicable to the exercise of *any* quasi-legislative power conferred by *any* statute heretofore or hereafter enacted, but nothing in this chapter repeals or diminishes additional requirements imposed by *any* statute. This chapter shall not be superseded or modified by *any* subsequent legislation except to the extent that the legislation shall do so *expressly*." [Government Code section 11346, formerly 11420; emphasis added.]

Government Code section 11346 makes clear that (1) the APA applies to all quasi-legislative actions of all state agencies, (2) "minimum" APA procedural requirements may be superseded or modified only by express legislation, and (3) any special requirements imposed on any particular agency by its enabling act apply to that agency's quasi-legislative actions in addition to the "basic" APA requirements.<sup>64</sup>

The Dills Act recognizes that "the employer," that is, the State, may adopt regulations concerning matters within the scope of representation during the terms of memoranda of understanding. Government Code section 3516.5 provides:

"Except in cases of emergency as provided in this section, the employer *shall give reasonable written notice* to each recognized employee organization affected by any law, rule, resolution, or regulation directly related to matters within the scope of representation proposed to be adopted by the employer, and *shall give* such recognized employee organizations *the opportunity to meet and confer* with the administrative officials or their delegated representatives . . . .

"In cases of emergency when the employer determines that a law, rule,

resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials . . . shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following adoption of such law, rule, resolution, or regulation.” [Emphasis added.]

Section 3516.5 fits nicely within the framework established by section 11346: section 3516.5 requires that DPA, when adopting regulations, must give affected employee organizations “reasonable notice” and “the opportunity to meet and confer.” These special requirements are easily harmonized with APA procedures: notice to employee organizations could be given the same day that the 45-day public APA notice is published; the DPA letter containing the notice required by section 3516.5 could contain an offer to meet and confer. Such a meeting or meetings could take place during or after the 45-day APA comment period.

As noted in 1989 OAL Determination No. 4: “The courts have . . . accepted the fact that agencies might have to conform to two sets of rules governing their actions in given arenas.”<sup>65</sup> The courts have determined that (1) the State Water Board has to comply with both the APA and the Porter-Cologne Act in adopting regional water quality control plans, (2) the Division of State Forestry has to comply with both the California Environmental Quality Act and the Z’Berg-Nejedly Forest Practice Act of 1973 in reviewing timber harvest plans, and (3) the California Highway Patrol has to comply with both the California Fair Employment and Housing Act and Article 7 of the California Constitution (giving the State Personnel Board jurisdiction over state civil service examinations) in the matter of complaints of discrimination by applicants for civil service positions.

**Second**, the language of section 13.6 does not satisfy the Government Code section 11346 requirement that the all APA exemptions be “express.”<sup>66</sup> Since 1990 OAL Determination No. 16 was issued, case law has clarified the kind of statutory language that courts will as constituting an APA exemption. The courts have declined to recognize *implied* exemptions, even when state agencies have presented passionate<sup>67</sup> policy arguments. DPA’s argument that the SROA Manual cannot be a “regulation,” because (roughly) it is an “MOU provision” is strikingly similar to the State Water Board’s argument that the definition of the term “wetland” could not a “regulation” within the meaning of the APA because the term was found a document labeled a “plan.”

As noted by above by the *Stamison* court, when the Legislature intends to exempt agency enactments from the APA, it expresses this intention in clear and unambiguous language. Compare Government Code section 19817.1, subdivision (a).<sup>68</sup>

**Third**, a request for determination has the effect, according to Title 1, CCR, section 121(b), of eliciting an OAL opinion concerning whether a state agency rule is a “regulation,” as defined in Government Code section 11342, subdivision (g). The challenged SROA Manual applies to all state employees, both represented and non-represented, not merely to employees affiliated with bargaining unit 10. Even assuming for the sake of argument that section 13.6 of the bargaining unit 10 MOU had the effect of exempting the SROA Manual from the APA as that Manual is applied to employees in unit 10, the Manual would nonetheless be invalid as applied to employees in the other 20 bargaining units, not to mention as applied to employees who are members of no bargaining unit. Moreover, the Manual significantly affects managers in dozens of state agencies, who either (1) need to assist their surplus employees in finding new positions in other agencies or (2) are expected to hire surplus employees in lieu of making new hires. These state agencies have legitimate interests, distinct from the interests of the DPA staff members who administer the SROA program. Similarly, the Manual significantly affects private individuals seeking to enter state service. A private citizen may have spent several years diligently competing in the civil service examination process, may have been within days of accepting a position, only to find his or her appointment unexpectedly blocked.

**Fourth**, DPA appears to suggest that the body of uncodified rules covered by MOU section 13.6 may be expanded, *after* the MOU is signed by the parties and approved by the Legislature. DPA states:

“In July 1992 CAPS entered into a legitimate CBA [collective bargaining agreement] with the state. They agreed that the state’s policies then in force were part and parcel of their agreement. . . . CAPS members then ratified the contract and the California Legislature approved it. *The same agreement gives the state the right to make changes during the term of the agreement.* If CAPS is not happy with the changes or the procedure that the state took to make the changes, it has a mechanism of complaint through the contract. (CBA Article 9, . . .)” [Emphasis added.]<sup>69</sup>

Even assuming for the sake of argument that MOU section 13.6 has the effect of exempting from the APA all DPA underground regulations in existence on the date the MOU is signed or approved, DPA seems to be stretching too far when it argues that underground regulations *not yet written* are prospectively exempted the APA. This argument cannot be reconciled with Government Code section 19815.4, subdivision (d), which states that DPA “shall” adopt regulations necessary for personnel administration, or with Government Code section 3516.5, which requires DPA to give reasonable written notice of proposed regulation changes to recognized employee associations, except for emergencies. The prospective exemption argument, if it were accepted, would also raise questions about whether this was an improper delegation of legislative power.

**Fifth**, the plain language of the Dills Act provision creating the supersession procedure (Government Code section 3517.6) does not exempt anything from the APA, and cannot reasonably be interpreted to create an APA exemption.

GC 3517.6 lists specific *statutory* provisions that may be superseded in MOUs, but says nothing about “existing agency rules, regulations, standards, practices and policies.” One could conclude that the Legislature intended that any *duly adopted* regulation implementing Government Code sections specifically listed in section 3517.6 would also be superseded by MOU provisions which altered or conflicted with the listed Government Code sections. Generally speaking, if a statute has been properly rendered inoperative pursuant to Government Code section 3517.6, a *CCR provision* authorized by the inoperative statute would similarly be rendered inoperative.

However, the plain language of Government Code section 3517.6 provides no support for the additional proposition that the Legislature intended to exempt from the APA “all existing agency rules, regulations, standards, practices and policies” implementing Government Code section 19998 and the other listed Government Code sections. Similarly, the language of section 3517.6 does not support the proposition that the Legislature delegated to DPA the authority to exempt certain state agency rules from the APA by agreeing to certain MOU language. Though the language quoted in the first sentence of this paragraph may have several valid applications, we reject the proposition that it has the effect of exempting the SROA Manual from the APA.

## CONCLUSION <sup>70</sup>

For the reasons set forth, OAL finds that:

- (1) OAL is required by applicable law to issue a determination regarding whether or not the SROA Manual is a "regulation."
- (2) The SROA Manual contains "regulations" which are invalid unless adopted as prescribed by law: (1) pursuant to the APA and printed in the CCR or (2) expressly stated in a memorandum of understanding resulting from the collective bargaining process and approved by the Legislature.

DATE: March 12, 1999



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## ENDNOTES

1. This request for determination was filed by Kristen P. Haynie, Labor Relations Consultant, on behalf of the California Association of Professional Scientists, 660 J St., Suite 480, Sacramento, CA 95814, (919) 441-2629. The Department of Personnel Administration was represented by Joan Branin, Labor Relations Counsel, 1515 "S" St., North Building, Suite 400, Sacramento, CA 95814-7243, (916) 324-0512.
2. This determination may be cited as **"1999 OAL Determination No. 7."**

Pursuant to Title 1, CCR, section 127, this determination shall become effective on the 30th day after filing with the Secretary of State. This determination was filed with the Secretary of State on the date shown on the first page of this determination.

Government Code section 11340.5, subdivision (d) provides that:

"Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published."

3. Approved by the Legislature, pursuant to the Dills Act.
4. Since state employees excluded from collective bargaining are by definition not covered by MOU's, it would be necessary to adopt SROA rules in the form of APA regulations in order to legally apply them to excluded employees. The current CCR provisions are directed at excluded employees, but the CCR includes only a few of the regulatory elements of the SROA Manual. It would be necessary to adopt all regulatory elements the Manual into the CCR.

Conversely, the CCR provisions--which are expressly limited in application to excluded employees--cannot legally be applied to represented employees, unless these CCR provisions are expressly stated in the specific MOU's covering the respective represented employees.

Another alternative would be for DPA to adopt regulations pursuant to the APA, regulations which expressly applied not only to excluded, but also to represented employees. These regulations could then be superseded (insofar as they applied to represented employees) by express MOU provisions, pursuant to Government Code section 3517.6, if the parties to particular MOUs desired to modify particular elements of the statewide SROA program.

5. Sections 19998 and 19998.1.
6. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) An agency rule found to violate the APA could also simply be rescinded.
7. Government Code sections 3512-3524.
8. An MOU applies solely to members of one particular bargaining unit.
9. OAL does not review alleged underground regulations for compliance with the APA's six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. However, in the event regulations were proposed by the Department under the APA, OAL would review the *proposed* regulations for compliance with the six statutory criteria.
10. We are confident that the DPA staff members who prepared the various versions of the SROA Manual acted in good faith and conscientiously to make the program work fairly and efficiently. The issue, rather, is whether the rules thus developed are legally invalid because they were not then adopted in compliance with the APA. Agency house counsel can be of great value in working closely with program staff to ensure that proposed rules are adopted and issued in compliance with applicable law, including but not limited to the APA.
11. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

"'*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA."  
[Emphasis added.]

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied

(finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*"). We note 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, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *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*.

12. 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.*

13. OAL expresses no view on the related factual issue of whether or not the State failed to offer to meet and confer.
14. Title 1, CCR, section 121(c) provides in part that "state agency rule" means "any state agency . . . *manual* . . . which has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA." (Emphasis added.)
15. Title 1, CCR, section 121(a) (definition of "determination"); Government Code section 11346 (APA exemptions must be *expressly* stated in statute).
16. Stats. 1981, c. 230, sec. 55, page 708.
17. The Legislative Counsel's Digest of Senate Bill No. 668 (1981-1982 Reg. Session) states:

"The Governor's Reorganization Plan No. 1 of 1981, which became effective on \_\_\_\_\_, 1981, created the Department of

Personnel Administration to administer the nonmerit aspects of state employment for nonelected employees in the executive branch of government . . . ."

"Various functions previously performed by the State Personnel Board are administered by the department, including, among others, salary determination, working hours, vacations, sick leave, absences, training, performance reports, layoff, and grievances. . . ." [Emphasis added.]

18. Government Code section 19815.2.
19. Government Code section 19816.
20. Government Code section 3517.
21. Government Code section 3517.5.
22. Government Code section 11342, subdivision (a).
23. *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 the APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr.596, 603 (agency created by Legislature is subject to and must comply with APA).
24. In considering the meaning of the phrase "general policies," OAL notes the rule from Government Code section 11346 that APA exemptions must be "express." The reference to general policies cannot be deemed an express APA exemption because section 19814.5 fails to explicitly state that such policies are *not* subject to the APA. Furthermore, applying the well established rules of statutory construction to harmonize all provisions of a statute where possible, it would appear illogical for the Legislature to have included a phrase signifying an APA exemption after the "adopt, amend, or repeal rules, regulations" language which clearly refers to APA requirements. Further, Government Code section 19815.4 directs the Director of Personnel Administration to "adopt, amend, or repeal . . . general policies . . . which are *consistent* with the law . . . ." (Emphasis added.) Issuing regulatory general policies in the form of bulletins or manuals would not be consistent with Government Code section 11340.5, which states that "no state agency" shall issue bulletins or manuals which are "regulations" within the meaning of Government Code section 11342, subdivision (g).

25. 1990 OAL Determination No. 16, typewritten version, p. 489, CRNR 91, 1-Z, Jan. 4, 1991, p. 40, at p. 42 (prior request concerning DPA rule could have been submitted by anyone, including someone in the private sector; basic analysis is the same). Any “person” can submit a request--a federal agency, a foreign country, etc.
26. See 1986 OAL Determination No. 3, pp. 4-9, California Administrative Notice Register 86, 24-Z, June 13, 1986, p. B-10, at p. \_\_\_\_ (rejecting technical procedural objections raised by State Board of Equalization).
27. According to Government Code section 11346, APA procedural requirements apply to “the exercise [by any state agency] of any quasi-legislative power conferred by any statute” except where legislation has expressly superseded or modified the procedures required by the APA (i.e., where an express statutory exemption has been enacted). Though courts will, of course, be called upon to determine (1) whether specific statutory language constitutes an express statutory exemption (e.g., *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 74 Cal.Rptr.2d 407, review denied) and (2) the scope of a particular express statutory exemption (e.g., *California Coastal Commission v. Office of Administrative Law* (1989) 210 Cal.App.3d 758, 258 Cal.Rptr. 560, review denied), it seems clear that courts may not themselves create APA exemptions based solely upon public policy concerns. Pertinent principles concerning limitations on judicial power were stated in a 1987 APA case from the California Court of Appeal for the Third District: *Johnston v. Department of Personnel Administration* (1987) 191 Cal.App.3d 1218, 236 Cal.Rptr. 853, review denied. The *Johnston* court rejected a state agency’s argument that a statute be interpreted to include a criterion that reflected agency practice, a criterion that was not actually present in the statute. The Court stated:

“A court may not insert into a statute qualifying provisions not included or rewrite a statute to conform to an inferred intention that does not appear from its language. (*Mills v. Superior Court* (1986) 42 Cal.3d 951, 957, 232 Cal.Rptr. 141, 728 P.2d 211,)” (191 Cal.App.3d at 1223.)

Responding to an agency argument that failure to interpret the statute to include a criterion customarily included as a matter of agency practice would lead to a “deluge” of hearing requests, the Court also stated:

“DPA’s argument is more appropriately addressed to the Legislature. . . . The sole judicial function is to enforce statutes as written. This court is without the authority to determine the wisdom, desirability, or propriety of statutes enacted by the Legislature. (*Estate of Horman* (1971) 5 Cal.3d 62, 77, 95 Cal.Rptr. 433, 485 P.2d 785.)”

28. 1993 OAL Determination No. 5, CRNR 94, 2-Z, pp. 64-65.

29. For instance a 1980 statute concerning affirmative action in order-of-layoff was the subject of APA regulations (for example, Title 2, CCR, section 472), but many key implementing rules were apparently located in the "AB 3001 Operations Manual." 1987 OAL Determination No. 5, p. 11 and note 12.
30. 22 Cal.3d 198, 203, 149 Cal.Rptr. 1, 3.
31. 236 Cal.Rptr. at 857.
32. 1990 OAL Determination No. 16, CRNR 91, 1-Z, Jan. 4, 1991, p. 40.
33. *State of California (Department of Personnel Administration) v. State of California (Office of Administrative Law)*, Sacramento Superior Court case no. 36620, filed Feb. 4, 1991.
34. Letter from M. Jeffrey Fine, DPA Deputy Chief Counsel, to Master Calendar Clerk, Sacramento Superior Court, dated March 21, 1991 (take matter off calendar until further notice).
35. Compare 1990 OAL Determination No.12 (November 1990: Department of Finance rules subject to the APA), following which the Legislature enacted urgency legislation exempting key Finance rules from the APA. Statutes of 1991, chapter 899 (S.B. 327), section 1, added Government Code section 11342.5, effective Oct. 14, 1991. Section 111342.5 has since been renumbered to section 11357, subdivision (b).
36. 1998 OAL Det. No. 36, p. 7
37. In 1993, CSEA filed a request for determination alleging that one particular state agency was routinely requiring certain employees to reveal the specific nature of each illness. 1998 OAL Det. No. 36 concluded that this agency rule supplementing the statute, CCR provisions, and the contract violated the APA.
38. Request for determination, p. 1.
39. (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*.

40. 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.)” (see endnote 3: *Grier*, disapproved on other grounds in *Tidewater*).

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.

41. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

41. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275-75, review denied.

43. Id.

44. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.

45. Id.

46. (1993) 12 Cal.App.4th 697, 702, 16 Cal. Rptr.2d 25, 28.

47. The rules governing requests for special exemptions based on “critical hiring needs” are in part as follows:

“Special exemptions to meet critical hiring needs will be considered only for the most sensitive positions. (DPA Rule section 599.864.4) Narrative requests must include:

1. The nature of the critical hiring need and why it can not be met through the SROA process; and
  2. A statement that ALL interested SROA list employees and surplus applicants were interviewed; and
  3. Copies of the applications of the SROA/surplus employees, and
  4. The application of the proposed appointee; and
  5. An analysis of why the need can not be met with one of the SROA/surplus employees; and
  6. An analysis of why the proposed appointee can meet the need; and
  7. A copy of the position’s duty statement and an organization chart; and
  8. The consequences of not being granted an exemption; and
  9. A statement that indicates if the appointment of the proposed appointee will create a vacancy which can be filled by the SROA process. If a vacancy does result but it can’t be filled by the SROA process, explain why; and.
  10. If necessary, DPA may require additional information necessary to substantiate the request, including historical data pertaining to the department’s participation in the SROA/surplus program.” [Emphasis in original.]
48. *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.)
49. Cf. Section 599.854.4(b), which states “no blanket exemptions will be granted.” It appears that a “blanket exemption” has been granted departments where reasonable accommodation placements are concerned, covering both represented and excluded employees. This may well be a reasonable and appropriate public policy decision, based upon years of administrative experience. However, the duly adopted regulation (a provision which has the force of law) should have been amended pursuant to the APA (with opportunity for interested parties to submit comments) to reflect this evolution in thinking.

50. Though we saw no indication of this in the SROA Manual, it is possible that two different sets of rules apply to SROA procedures for (1) excluded and (2) represented employees. Having two sets of rules with sharply contrasting prior authorization requirements would appear cumbersome.
51. Government Code section 11346.
52. 63 Cal.App.4th 1001,1010, 74 Cal.Rptr.2d 407, 411-12, review denied.
53. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.
54. 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).
55. A quick review of the CCR suggests that DPA has not yet adopted any regulations under the aegis of section 19817.1.
56. Government Code section 11346.
57. 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.

58. Government Code section 11342, subdivision (g).
59. *Grier v. Kizer, supra*, 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 251, disapproved on another point, *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198.
60. *City of San Marcos v. California Highway Commission, Department of Transportation* (1976) 60 Cal.App.3d 383, 408, 131 Cal.Rptr. 804, 820, quoted in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204-205 149 Cal.Rptr. 1, 3.
61. Finding that agency rules are exempt from the APA undercuts one of the main purposes of the APA, meaningful public participation in agency rulemaking. See 1993 OAL Determination No. 5 & 1989 OAL Determination No. 4.
62. pp. 499-505\*\*\*
63. Government Code section 19815.4, subdivision (d).
64. 1989 OAL Determination No. 4, pp. 126-128, 132 . . .
65. typewritten version, p. 132; CRNR 89, No. 16-Z, April 21, 1989, p. 1026, \_\_\_, upheld in *State Water Resources Control Board v. Office of Administrative Law* (1993) 12 Cal.App.4th 697.
66. 1989 OAL Determination No. 4, typewritten version, pp. 126-154; CRNR 89, No. 16-Z, April 21, 1989, p. 1026, \_\_\_.
67. Cf. *Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 172, 6 Cal.Rptr.2d 714, 722 (Government Code unambiguously precludes DPA from implementing final wage proposal at impasse).
68. As pointed out in 1990 OAL Determination No. 12, typewritten version, p. 504, a 1986 Sacramento Superior Court decision (case no. 337747) held in substance that even an express MOU provision was invalid, on the grounds that the staffing ratio rule later reflected in the MOU had *initially* been adopted in violation of the APA by SPB. *ACSA v. State of California, DPA & SPB*. This trial court decision was not appealed by DPA.

We think that those who would use this 1986 case to argue that express MOU provisions in general are subject to challenge under the APA go too far. However, DPA goes too far in the other direction by urging that personnel rules which (1) are not expressly stated in the MOU, (2) are not specifically referred to in the MOU (cf. Title 1, CCR, sec. 20 (c)), and (3) in many cases not even in existence when the MOU was signed are nonetheless exempt from the APA.

69. DPA response, p. 3.
70. The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, disapproved on other grounds in *Tidewater*. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule met the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987), CRNR 96, No. 8-Z, February 23, 1996, p. 293. The *Grier* court concurred with OAL's conclusion, stating that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) [now subd. (g)]. [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted to the court for consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of [a statute] by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due consideration.*" [*Id.*; emphasis added.]

See also *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886 (same holding) and note 5 of **1990 OAL Determination No. 4**

(Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384 (reasons for according due deference consideration to OAL determinations).