STATE OF CALIFORNIA

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BILL JONES
SECRETARY OF STATE

OFFICE OF ADMINISTRATIVE LAW

In re:	)	
Request for Regulatory Determination filed by the CALIFORNIA STATE EMPLOYEES ASSOCIATION concerning STATE BOARD OF EQUALIZATION rules on minimum key strokes and minimum daily machine time for key data operators[1]	)	**2000 OAL Determination No. 3** **[Docket No. 99-005]** **February 2, 2000** **Determination pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3**

Determination by: **CHARLENE G. MATHIAS, Deputy Director**

HERBERT F. BOLZ, Supervising Attorney
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law concludes that job production standards applying to a small number of state employees at one particular state agency, the State Board of Equalization, though "regulations," are nonetheless not subject to the Administrative Procedure Act because they relate solely to the internal management of that particular state agency.

DECISION [2, 3, 4, 5, 6]

The Office of Administrative Law ("OAL") has been requested to determine whether two job production standards issued by the State Board of Equalization ("Board") are "regulations" as defined in Government Code section 11342, subdivision (g), and therefore invalid unless adopted as regulations and filed with the Secretary of State in accordance with the APA.[7]

OAL has concluded that the standards (minimum key strokes and minimum daily machine time for key data operators):

(1) constitute "regulations" within the meaning of the APA, but

(2) are not subject to the APA because both standards relate only to the internal management of the Board, and thus fall within an express statutory exemption from the APA.

REASONS FOR DECISION

I. AGENCY, REQUEST FOR DETERMINATION

The State Board of Equalization ("Board") was created by former Article 13, section 9 of the California Constitution of 1879. Language establishing the Board is currently found in California Constitution, Article 13, section 17. The Board is charged with administering numerous tax programs, including the Sales and Use Tax Program, for the support of state and local governmental activities.

BACKGROUND

This request for determination was submitted by the California State Employees Association, which is, among other things, the exclusive bargaining agent for state employees in bargaining unit 4 (Office and Allied Employees). In January 1999, the Board filed disciplinary charges against a member of bargaining unit 4 employed as a key data operator. The Board sought to demote the employee for various reasons, including (1) refusal to assist in another unit when the workload in her permanently-assigned unit was low and (2) failure to "maintain a minimum of 8,000 key strokes per hour in the category of entry and 8,500 key strokes per

hour in the category of verify." [8] The charging document also stated that the employee had failed to satisfy the requirement of minimum daily machine time of five hours and 52 minutes, but did not expressly make this a ground for discipline.

In response to this disciplinary action, the employee, apparently represented by CSEA, appealed the action to the State Personnel Board. The keystroke issue was removed from the disciplinary charge. The Board concluded that discipline was appropriate, but reduced the penalty. Not only did the employee appeal to the State Personnel Board, but CSEA also filed an unfair labor practice charge against the Board with the Public Employment Relations Board ("PERB"). According to the Board, this charge is currently pending before PERB.[9]

II. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE BOARD?

Government Code section 11000 states:

> "As used in this title [Title 2. "Government of the State of California" (which title encompasses the APA)], 'state agency' includes every state office, officer, department, division, bureau, *board*, and commission. [Emphasis added.]"

The APA narrows the definition of "state agency" from that in section 11000 by specifically excluding "an agency in the judicial or legislative departments of the state government."[10] The Board is in neither the judicial nor legislative branch of state government.

OAL, therefore, concludes that APA rulemaking requirements generally apply to the Board.[11]

III. DO THE CHALLENGED STANDARDS 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*,[12] the California Court of Appeal upheld OAL's two-part test[13] 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*
- 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" subject to the APA. In applying the two-part test, we are 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.*[14] [Emphasis added.]"

Three California Court of Appeal cases provide additional guidance on the proper approach to take when determining whether an agency rule is 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. . . ."[15] 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. . . ."[16]

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)[17] 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.[18] 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 are to 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.]"[19]

A. DO THE CHALLENGED STANDARDS CONSTITUTE "STANDARDS OF GENERAL APPLICATION"?

For an agency policy to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order.[20]

The Board argues that the standards under review cannot be deemed to constitute rules of "general application." The Board states:

> "Even under the most liberal construction of the term 'general application,' such a phrase would not apply to a rule that applies only to a select few employees in a single section of a single agency of the State of California. Here, the challenged [key data operator] policy applies to approximately 30 employees. . . . None of the rules apply to all, or even a substantial portion of the 4,000-plus employees of the BOE. None of the individual policies in question apply to a group large enough to be considered a rule of general application. . . .
>
> "To conclude that the rules at issue in this case are 'of general application' opens the door to absurd results. For example, such a conclusion could result in individual supervisors being required to comply with the APA when imposing a rule that employees not eat at their desks. . . ."[21]

We agree with Board that the challenged standards apply to a small group of people. However, the size of the group to which rules apply is not the pivotal legal issue. According to the California Court of Appeal, the issue is whether or not the rules apply generally to all members of a class, kind, or order. In the matter at hand, the work production standards apply to all members of the class of key data operators employed by the Board. The standards are thus "standards of general application." From the legal perspective, the number of persons in the group is not determinative: indeed, a rule could be drafted in such a way as to in fact apply to only one person or entity.

We also note that rules that apply only to a few employees at a single agency may well fall within the internal management exception to the APA. Whether or not an agency rule is a standard of general application is not the final step in the legal analysis. (Indeed, the fact that the Legislature enacted the internal management exception indicates an awareness that the very broad statutory definition of

"regulation" would on occasion result in particular agency rules becoming subject to the APA, absent an express statutory exemption covering rules used solely for purposes of internal agency management).

Having concluded that the challenged standards are standards of general application, OAL must consider whether the standards meet the second part of the two-part test.

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

The Board argues that the challenged standards do not implement the law enforced by the Board and thus do no satisfy the second part of the two part test:

> "Clearly the matters presented to OAL . . . have nothing to do with the implementation or interpretation of the tax laws under the authority of the Board of Equalization. Further, it cannot be said that the rules in question govern the procedure utilized by BOE in enforcing or administering the tax law, nor do they implement the statutory mandates imposed on the BOE."[22]

We cannot accept the Board's argument. The challenged work standards implement at least two statutes administered by the Board.[23]

Government Code section 15606, subdivision (a), directs the Board to "[p]rescribe rules for its own government and for the transaction of its business." Clearly, this section empowers the Board to adopt rules for the transaction of its business. The two challenged production standards concern "the transaction of [Board] business" by employees in the Return Analysis Data Entry Unit, Return Analysis and Allocation Division. Presumably, these employees are entering data from tax returns. It is hard to imagine what could be more central to the transaction of Board business than the processing of tax returns.

Government Code section 11152 provides in part: ". . . [s]o far as consistent with law the head of each department may adopt such rules and regulations as are necessary to govern the activities of the department and may assign to its officers and employees such duties as he sees fit. . . ." This statute is applicable to all departments. [24]

Clearly, Government Code section 11152 empowers the Board to adopt rules necessary to govern "the activities of the agency."[25] Again, processing of tax returns is a critical activity of a tax agency, a function intimately related to the enforcement of tax laws.

We conclude that the challenged rules implement, interpret, and make specific the two quoted Government Code sections.[26]

Thus, OAL concludes that the two challenged standards are "regulations" within the meaning of the APA.

IV. DO THE CHALLENGED STANDARDS 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[27] by statute.[28] In *United Systems of Arkansas v. Stamison* (1998),[29] 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 impliedly 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.]"[30]

Express statutory APA exemptions may be divided into two categories: special and general.[31] *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 *special* express

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 *general* express 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 STANDARDS FALL WITHIN ANY *SPECIAL* EXPRESS APA EXEMPTION?

The Board does not contend that any special statutory exemption applies. Our independent research having also disclosed no special statutory exemption, we conclude that none applies.

B. DO THE CHALLENGED STANDARDS FALL WITHIN ANY *GENERAL* EXPRESS APA EXEMPTION?

Internal Management

The Board argues that, if the challenged standards are deemed to be "regulations," they are "regulations" related only to the internal management of the Board and are thus exempt from the APA.

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

> "Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of 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.]"

Grier v. Kizer provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (g), the *Grier* court states:

> "*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall

within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board'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.][[32]]

"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. . . ."[33]

The internal management exception has been judicially determined to be narrow in scope.[34] A brief review of relevant case law demonstrates that the "internal management" exception applies if the "regulation" at issue (1) affects only the employees of the issuing agency,[35] and (2) does not address a matter of serious consequence involving an important public interest.[36]

(1) Do the challenged standards affect only employees of the issuing agency?

The answer to the first part of the inquiry is "yes." The challenged standards affect only employees of the Board, indeed they affect only a small number of Board employees. We do not agree with CSEA's contention that the standards affect "the general population of the state for any party interested in applying for employment with [the Board]."[37] The standards have no effect on anyone other than those current employees of the Board working as key data operators.

(2) Do the challenged standards address a matter of serious consequence involving an important public interest?

Even if an agency rule affects only employees of the issuing agency, the internal management exception does not apply where an agency rule addresses a matter of serious consequence involving an important public interest. For example, the following "challenged rules" have been found to *involve a matter of serious consequence involving an important public interest.*

The court in *Poschman v. Dumke*, found that "[T]enure within any school system is a matter of serious consequence involving an important public interest."[38]

In 1988 OAL Determination No. 3,[39] OAL explored the issue of whether the following was a "regulation": the policy of the State Board of Control requiring psychotherapy expenses claimed at certain hourly rates to be reviewed by the Board prior to reimbursement of victims of crime under the Victims of Crime Act. In that determination, one factor that clearly substantiated the existence of an "important public interest" was the Legislature's express statement of intent:

> "The Legislature has clearly stated [in Government Code section 13959] that there is a public interest in assisting Californians in 'obtaining restitution for the pecuniary losses they suffer as a direct result of criminal acts.'" [Emphasis added.][40]

Though not directly addressing this pivotal "serious consequence/important public interest" issue, CSEA argues in substance that (1) members of public are affected by the standards in that some individuals might want to apply for the key data operator positions; (2) the standards serve as a basis for formal disciplinary action, (3) those disciplined based upon failure to adhere to the standards face difficulties in the terms of opportunities for promotion within the Board and transfer to other agencies; (4) the standards "have also contributed to a high rate level of repetitive motion injuries to affected employees."[41]

In its response, the Board argues as follows:

> "*These Rules do not pertain to a Matter of Serious Consequence Involving an Important Public Interest:* OAL has, in the past found that the 'internal management' exception can be overcome when challenged rules have been found to involve a matter of serious consequence involving an important public interest. To illustrate this narrow exception to the 'internal management' exception, OAL and the courts have applied it to a rule pertaining to tenure in a school system (*Poschman v. Dumke* (1973) 31 Cal.App.3d 932)[42]; rules implementing statewide discrimination policy (*1999 OAL Determination No. 3*); and a rule governing Board of Control payments to claimants for psychotherapy expenses (*1988 OAL Determination No. 3*). Again the scope of the rules in question in these cases reached far beyond the unit policies at issue in this case.
>
> Similarly, in *1998 OAL Determination No. 36*, the OAL concluded that aspects of DMV's sick leave policy dealing with attendance restrictions impacted discipline and medical privacy and therefore fell out of the 'internal management' exception. The attendance restriction policy also potentially affected all employees since the rule could be applied to any employee labeled a leave abuser. This too differs from the case at hand. Here the challenged rules are simply enunciation of the responsibilities of the employees in the agency. Moreover, there is no possibility that the other thousands of employees not in these units will be somehow subject to the rules at issue. Unlike an attendance restriction policy that potentially affects every employee and touches on privacy issues, the BOE's rules are simply unit rules of expected production and other job expectations.
>
> The rules challenged in these two requests for determination are more akin to the call-in-policy in *1989 OAL Determination No. 5*, which OAL concluded did not involve a matter of serious consequence. '[T]he attendance policy specified in the challenged memorandum does not significantly affect either the general "prison population" [footnote] or the general public. Additionally, there is no legislative statement declaring that a public interest exists in the time frame in which an employee must call in sick to supervisor, regardless of the time period specified.' *1998 OAL Determination No. 46* reaches a similar conclusion. 'There is no statement of legislative intent that would indicate that these particular challenged

rules....involve an important public interest' This same conclusion applies in this case."[43] . . . .

"Finally, [CSEA] contends that all these standards are BOE's implementation of the discipline system applicable to state employees. While production standards may be considered in subsequent decisions concerning the employee's job, these rules are clearly not a part of the disciplinary process. OAL has already concluded this on similar facts in *1989 OAL Determination No. 5*. In that case OAL considered whether a call in policy of the Department of Corrections which required employees to call in at a certain time if they were not going to be able to work their shift was in fact an underground regulation. The policy clearly delineated the employee's responsibility. Clearly, repeated failure to comply with the policy could have resulted in discipline. Yet, OAL concluded the sick-leave policy *did not involve a matter of serious consequence.* Contrast this with OAL's conclusion that the attendance restriction portion of a sick leave policy did involve a matter of serious consequence because the attendance restriction policy was a step in imposition of discipline.

In this case the production rules were expectations of what employees are to do. It is not part of the disciplinary process. And the mere fact that noncompliance might result in discipline does not make the rule a matter of serious consequence involving an important public interest.. . . . ."[44]

We agree with the Board's analysis of this issue. Routine unit rules concerning quantity and quality of work are not matters of *serious* consequence involving an *important* public interest. Similarly, the APA does not require that routine position duty statements be adopted after public notice and comment. These are the sorts of internal agency rules which the Legislature intended to exempt from rulemaking requirements by enacting the internal management exception. It would be absurd, for instance, to require an agency to follow the APA regulation adoption process to modify a duty statement to indicate, for instance, that specified employees were expected to spend 60% of their time answering the phone rather than 40%.

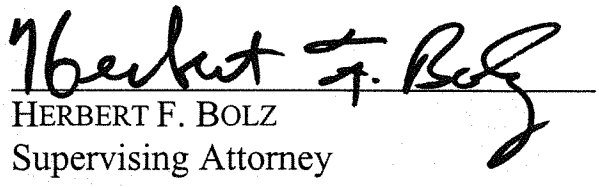
This is not to say that production standards are not significant or not subject to review in the appropriate venues. For instance, the Dills Act provides remedies for adjudicating unfair labor practice allegations. The State Personnel Board reviews specific disciplinary actions. Cal-OSHA has adopted regulations applying to repetitive motion injuries in the workplace.

We conclude that the challenged standards do not address a matter of serious consequence involving an important public interest, and thus fall within the internal management exception. Therefore, the standards are not subject to the APA.

CONCLUSION

For the reasons outlined above, OAL concludes that the challenged standards, though "regulations," are nonetheless not subject to the APA because they relate solely to the internal management of the Board of Equalization.

DATE: February 2, 2000



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ENDNOTES

1. This request for determination was filed by the California State Employees Association (Jeffrey Young, Labor Relations Representative), 1108 O St. Sacramento, CA 95814, (916) 444-8134 The Board of Equalization was represented by John W. Wallace, Tax Counsel, 450 N St., Sacramento, CA. 94279-0082, (916) 323-2481.

2. This determination may be cited as "**2000 OAL Determination No. 3.**"

   Pursuant to Title 1, CCR, section 127, this determination becomes effective on the 30th day after filing with the Secretary of State, which filing occurred 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 [in the California Regulatory Notice Register]."

   Determinations are ordinarily published in the Notice Register within two weeks of the date of filing with the Secretary of State.

3. 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.

4. 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 Board under the APA, OAL would review the *proposed* regulations for compliance with the six statutory criteria. (Government Code sections 11349 and 11349.1.)

5. 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.*

6. *OAL Determinations Entitled to Great Weight in Court*

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**, CRNR 96, No. 8-Z, February 23, 1996, p. 293. The *Grier* court concurred with OAL's conclusion, stating that:

> "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 for its 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,** California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384, at p. 391 (reasons for according due deference consideration to OAL determinations).

7. 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.

8 Request, p. 1.

9. Agency Response, p. 2.

10. Government Code section 11342, subdivision (a).

11. 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).

12. (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.*

13. 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, . . . slip op'n., at p. 8.) [*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 96, No. 8-Z, February 23, 1996, p. 292.

14. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253. The same point is made in *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001,1010, 74 Cal.Rptr.2d 407, 412, review denied.

15. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.

16. *Id.*

17. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.

18. *Id.*

19. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.

20. *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).

21. Agency Response, pp. 3-4.

22. Agency Response, p. 4.

23. According to the Attorney General, even in the absence of express statutory authority to adopt regulations, state agencies may have implied authority to adopt "such rules and regulations as are reasonably related to the accomplishment of duties assigned [by statute] to him." 36 Ops.Cal.Atty.Gen. 43, 45 (1960). In this opinion, the Attorney General concluded that the Commissioner of the Department of the California Highway Patrol had implied authority to adopt rules and regulations prescribing a reasonable time within which an officer must be able to respond to on emergency call.

24. *Stockton v. Department of Employment* (1944) 25 Cal.2d 264 (construing Political Code section 350, the predecessor of Government Code section 11152).

25. According to the Attorney General, state agencies may adopt rules concerning personnel issues, if there is no statute or statewide regulation resolving the matter in question (such as one adopted by the State Personnel Board). 8 Ops.Cal.Atty.Gen 293 (1946).

26. We need not reach the question of whether the challenged standards interpret (1) statutory provisions on performance standards or (2) labor contract provisions.

27. The following agency enactments, among others, have been expressly exempted by statute:

    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); emphasis added.)

    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).)

    In addition, there is weak case law 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. 168-169, 175-177, CRNR 91, No. 43-Z, October 25, 1991, p. 1458-1459, 1461-1462. In *Grier v. Kizer* ((1990) 219 Cal.App.3d 422, 437-438, 268 Cal.Rptr. 244, 253), the court reached the same conclusion as OAL did in **1987 OAL Determination No. 10**, pp. 25-28 (summary published in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 63); complete determination published on February 23, 1996, CRNR 96, No. 8-Z, p. 293, 304-305), rejecting the idea that *City of San Joaquin* (cited above) was still good law.

28. Government Code section 11346.

29. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.

30. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.

31. 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).

32. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, n. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)

33. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.

34. (1990) 219 Cal.App.3d 422, 436, 268 Cal Rptr. 244, 252-253.

35. See *Armistead v. State Personnel Board* (1978) 22 Cal. 3d 198, 149 Cal.Rptr. 1; *Stoneham v. Rushen (Stoneham I)* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr 130; *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596.

36. See *Poschman, supra*, 31 Cal.App.3d at 943, 107 Cal.Rptr. at 603; and *Armistead, supra*, 22 Cal.3d at 203-204, 149 Cal.Rptr. at 3-4. See also **1989 OAL Determination No. 5**, CRNR, No. 23-Z April 21, 1989, pp. 1120, 1126-1127; typewritten version, pp. 192-193.

37 Request, p. 8.

38. See *Poschman*, note 17, *supra*.

39. **1988 OAL Determination No. 3** (State Board of Control, March 7, 1988, Docket No. 87-009), California Regulatory Notice Register 88, No. 12-Z, March 18, 1988, pp. 855, 864; typewritten version, p. 10.

40. Government Code section 13959.

41. Request, p. 8.

42. *Poschman*, supra, is also distinguishable in that it concerned issues subject to a vote of the Board of Trustees affecting tenure. This differs greatly from a policy that requires employees to file a certain number of documents, etc. [Footnote in Response.]

43. The opposite result would also imply that all duty statements had to be adopted pursuant to the APA. We do not believe that OAL would conclude that this was the case. [Footnote in Response.]

44. Agency Response, pp. 6-8.