STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

In re:	)	
Request for Regulatory	)	**2000 OAL Determination No. 4**
Determination filed by JOHN	)	
K. REISS concerning Job	)	**[Docket No. 99-006]**
Training Partnership Office	)	
Policy/ Procedure Directives	)	**February 2, 2000**
issued by the EMPLOYMENT	)	
DEVELOPMENT	)	**Determination pursuant to**
DEPARTMENT[1]	)	**Government Code Section 11340.5;**
		Title 1, California Code of
		Regulations, Chapter 1, Article 2

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

HERBERT F. BOLZ, Supervising Attorney
GEORGE P. RITTER, Senior Staff Attorney
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law has concluded that four directives issued by the Employment Development Department to interpret, implement, and make specific the federal Job Training Partnership Act contain "regulations" which are invalid because they should have been, but were not, adopted pursuant to the Administrative Procedure Act. The directives also contain material that does no more than restate existing law, and thus is not subject to the Administrative Procedure Act.

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

The Office of Administrative Law ("OAL") has been requested to determine whether four directives issued by the Employment Development Department are "regulations" which must be adopted pursuant to the Administrative Procedure Act ("APA").[7] The challenged directives establish procedures governing the administration of the Job Training Partnership Act ("JTPA") in the State of California and are listed below.

1) Job Training Partnership Act Directive D98-6

2) Job Training Partnership Act Directive D87-7

3) Job Training Partnership Act Information Bulletin B98-2

4) Job Training Partnership Act Interim Directive 94-16.

The Office of Administrative Law finds that:

1) The APA is generally applicable to the Employment Development Department;

2) The challenged Directives all contain rules which have general applicability and make specific the terms of the JTPA and federal regulations;

3) No general exceptions to the APA requirements apply to the challenged rules;

4) The rules established by the four directives, except those that restate existing law, violate Government Code section 11340.5, subdivision (a).

REASONS FOR DECISION

I. AGENCY, REQUEST FOR DETERMINATION

The California Employment Development Department ("Department" or "EDD") provides many services. It acts as a broker between employers and job seekers; pays benefits to eligible unemployed or disabled persons; collects payroll taxes;

helps disadvantaged persons to become self-sufficient; gathers and shares information on California's labor markets; administers the Job Training Partnership Act program; and ensures that its activities are coordinated with activities of other organizations that also provide employment, training, tax collection and benefit payment services.[8]

Previous Requests for Determination

In December 1990, John K. Riess, then Deputy City Attorney for the City of San Diego, filed a request for determination challenging EDD's JTPO [Job Training Partnership Office] Policy/Procedure Bulletin # 84-8, dated June 18, 1984, governing "Grievance and Hearing Procedures Under the Job Training Partnership Act." OAL issued a determination on June 16, 1998, finding that the challenged Bulletin was a "regulation" which should have been adopted under the APA.[9]

In January 1999, Mr. Riess then filed a second request challenging another EDD bulletin and five EDD directives, all of which implemented, interpreted, and made specific JTPA procedures. OAL issued a determination on January 18, 2000, finding that the challenged bulletin and directives were "regulations" which should have been adopted under the APA.[10]

This Request for Determination

In January 1999, Mr. Riess filed the current request that challenges Job Training Partnership Act procedures contained in four additional EDD directives. These directives were issued to: Service Delivery Areas, Private Industry Councils, Program Operators, EDD Job Service Offices, and Job Training Partnership Office Staff.[11] OAL published a summary of this request for determination in the California Regulatory Notice Register, along with a notice inviting public comment. EDD filed a response to this request. The basis for OAL's determination is set forth below.

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

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."[12] EDD is in neither the judicial nor legislative branch of state government. Clearly, EDD is a "state agency" within the meaning of the APA. EDD also has been given the authority under Unemployment Insurance Code section 305 to adopt regulations pursuant to the APA. Further, EDD has not called our attention to nor have we located any statutory provision expressly exempting EDD rules from the APA.

OAL, therefore, concludes that APA rulemaking requirements generally apply to EDD.[13]

III. DO THE CHALLENGED DIRECTIVES 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*,[14] the California Court of Appeal upheld OAL's two-part test[15] 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.*[16] [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 . . . ."[17] 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. . . ."[18]

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)[19] 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.[20] 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.]"[21]

A. DO THE CHALLENGED DIRECTIVES 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 members of a class, kind, or order.[22]

A review of the EDD directives in question clearly indicates all four contain standards of general application.[23]

1) **<u>EDD Directive No. D98-6</u>** provides in part that:

> "The purpose of this directive is to establish procedures for reporting to the Compliance Review Division (CRD) of the Employment Development Department (EDD) all suspected or known instances of fraud, abuse, or other criminal activity related to programs funded under the Job Training Partnership Act (JTPA).

Scope:

This directive applies to service delivery areas (SDA) and other subrecipients of programs funded under JTPA."[24]

The directive defines "subrecipient" to mean:

"SDAs [Service Delivery Areas] and other subrecipients that receive JTPA funds directly from the state."[25]

The directive further mandates that:

"All California SDAs shall review the procedures specified in this directive and ensure that their policies and procedures, as well as those of their subrecipients, are in accordance with these state and federal requirements."[26]

2) **EDD Directive No. D87-7** provides in part that:

"This Directive provides standard definitions of key terms and words for use by State and local officials responsible for any facet of the Job Training Partnership Act (JTPA) program policy making, planning, management, administration, operation or oversight."[27]

3) **EDD Information Bulletin No. B98-2** sets out the following procedure:

"The Job Training Partnership division (JTPD) will identify SDAs that meet or exceed their [Youth Employability Enhancement] performance standards for PY 1997-98 . . . . JTPD will randomly select a statistically valid sample of the youth outcomes claimed for PY 1997-98 and provide the [Compliance Review Division] monitors with a list of the case files to be reviewed in each SDA."[28]

4) **EDD Interim Directive No. D94-16** states that its purpose is to:

"[P]rovide allowable cost principles and guidelines for administering the Job Training Partnership Act (JTPA)."[29]

In addition, all of these directives are addressed to:

1) Service Delivery Area Administrators;

2) Private Industry Council Chairpersons;

3) Job Training Partnership Division Program Operators;

4) EDD Job Service Office Managers; and

5) Job Training Partnership Division Staff.[30]

From the above, it is clear that each of the directives by its own terms applies generally to members of various "classes, kinds or orders." Alternatively, each directive also imposes standards or procedures which are to be followed by any entity receiving JTPA funding from the State of California. Therefore, all four directives contain standards of general application.

Having concluded that each of the directives contains standards of general application, OAL must consider whether they meet the second prong of the two-part test.

B. DO THE CHALLENGED DIRECTIVES IMPLEMENT, INTERPRET OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY EDD OR GOVERN ITS PROCEDURE?

1. Job Training Partnership Act Directive D98-6: Reporting Fraud and Abuse

Pursuant to federal law, the California Legislature has enacted a statutory framework permitting implementation of the JTPA program in this State.[31] EDD is the state agency charged with the responsibility for administering this program. Funding for the program is provided to the State by the federal government pursuant to statutory formulas.[32]

To maintain the integrity of JTPA, the State is required to establish a program of periodic audits.[33] EDD is also required by state law to develop procedures for fiscal control.[34] In addition, federal regulations mandate that instances of criminal fraud and abuse be immediately reported to the Office of Inspector General.[35] EDD has implemented this federal reporting mandate using directive D98-6.

Federal law has also established procedures that a state must follow when it implements such mandates. For instance, EDD is required by federal law to identify any "state-imposed" requirements contained in its directives in bold, italic type.[36]

EDD concedes that directive D98-6 thus contains what it characterizes as "state-imposed" requirements that are not simply restatements of federal law. According to EDD, "[directive] D98-6 identifies state-imposed requirements in bold, italic type."[37]

While OAL appreciates EDD's candor in identifying "state-imposed" requirements in its directive, this cannot be the end of the inquiry. The scope of the APA is broader. It prohibits state agencies from "issu[ing], utiliz[ing], enforc[ing], or attempt[ing] to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule."[38] Thus, the issue of whether a rule is "state-imposed" *as defined by the agency* is not the criterion OAL must apply in determining whether the rule is subject to the APA. Rather, OAL must determine whether EDD has interpreted, implemented, or made specific state or federal law.[39]

Directive D98-6, *by its own terms*, "contains state-imposed requirements that are shown in ***bold, italic*** type."[40] Thus, by EDD's own admission, directive D98-6 contains requirements which are not simply restatements of federal law. These "state-imposed" requirements admittedly are imposed by EDD as part of its implementation of federal law. Thus, at a minimum, the "state-imposed" requirements in directive D98-6 fit the definition of a "regulation" subject to the APA.[41]

An example of a section characterized as "state-imposed" directs subrecipients to establish reporting procedures to "ensure that [the Compliance Review Division of EDD] is notified immediately of any allegations of JTPA-related fraud, abuse, or criminal activity."[42] In its response, EDD states that such a provision is necessary to comply with JTPA reporting requirements.[43] In other words, directive D98-6 is necessary in order to *implement* reporting requirements mandated by federal law.

To its credit, EDD further notes specific provisions contained in the directive that are "state-imposed," or either implement or supplement federal law. To this extent, EDD has apparently either implicitly or explicitly acknowledged that these provisions are subject to the APA. For instance:

1) "All of the language in bold, italic type in D98-6 in the section entitled 'General" is already acknowledged to be state-imposed rules. Therefore, the provisions in bold, italic type are not restatements of federal law."[44]

2) "[T]he statement of subrecipient responsibility as quoted above does not appear to be in existing law and therefore should be adopted pursuant to the APA."[45]

3) "Although this definition of 'complaint' is not found in existing law, . . . this narrowing of the definition for D98-6 is the EDD's implementation of existing law."[46]

4) "The definition of 'Lower-tier subrecipient' is implied in 20 CFR section 626.5 because there is a reference to 'higher-tier subrecipient.' However, the specific definition in D98-6 of 'lower-tier subrecipient' is not in existing law."[47]

Attached to the agency response is a document issued by the U.S. Department of Labor entitled "TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 6-84" ("Guidance Letter"). It was issued "[t]o transmit procedures for reporting known or suspected incidents of fraud, program abuse, or criminal conduct."[48]

EDD notes in its response that many of the provisions in directive D98-6 merely repeat the procedures of the Guidance Letter. The Guidance Letter, however, has never been formally adopted as a federal regulation.[49] Thus, it is arguable that the Guidance Letter is not valid federal law. If that were the case, then EDD would be hard put to claim that those provisions of directive D98-6 which were merely a restatement of the Guidance Letter were also restatements of controlling law and thus exempt from the APA.

EDD takes the position that the lack of formal adoption of the Guidance Letter under the federal APA should not matter. It notes that:

> "For all practical purposes, the EDD and other JTPA entities in the State must comply with the [Guidance Letter].
>
> ** * *

> To the extent that EDD is simply passing on federal requirements as set forth in the [Guidance Letter], then D98-6 simply repeats the federal rules."[50]

OAL need not determine whether the Guidance Letter is valid federal law. Even assuming that it were, EDD directive D98-6 contains numerous provisions which either implement, interpret or make specific the provisions of the Guidance Letter.

The subject of the Guidance Letter is "*States'* Responsibilities."[51] The EDD directive, however, sets forth reporting requirements for *other* entities which are *subject to* state regulation. Thus, by its very nature, directive D98-6 is not simply a restatement of federal law.

The Guidance Letter also requires further, more specific implementation by state regulation. Under the heading "Necessary Action," (which presumably is addressed to the states), the TEGL provides in part that:

> "a. Establish procedures for use by State and sub-State personnel (e.g., SDAs, subrecipients, contractors, etc.) to ensure that the States fulfill their responsibilities to forward [Incident Reports] to the appropriate [Regional Administrators] within one work day of the discovery of the occurrence."[52]

In addition, there are a number of provisions in directive D98-6 which implement, interpret, or make more specific the provisions of the Guidance Letter. For example:

1) The Guidance Letter defines the term "fraud" as "any alleged deliberate action which is apparently in violation of Federal statutes and regulations. This category includes, but is not limited to, indications of bribery, forgery, extortion, embezzlement, theft of participant checks, kickbacks from participants, intentional payments to a contractor without the expectation of receiving services, payments to ghost enrollees, misuse of appropriated funds, and misrepresenting information in official reports."[53] Directive D98-6, by contrast, defines "Fraud" as "any deceitful act or omission, or willful device used with the intent to obtain some unjust advantage for one party, or to cause an inconvenience or loss to another party." Then it lists some examples which replicate in part those found in the Guidance Letter definition.[54]

It should be readily apparent that the federal and state definitions of "fraud" are significantly different. The Guidance Letter definition centers on violations of federal law. By contrast, the EDD definition encompasses "any deceitful act or omission," a concept which appears to be much broader.

2) Directive D98-6 defines "Standards of Conduct Violations" to encompass "violations of terms and conditions stipulated in the subgrant agreement." The definition then gives a list of the "relevant stipulations" in these agreements.[55]

Again to its credit, EDD admits that this definition is not found in the Guidance Letter.[56] The regulatory impact of creating such a definition becomes apparent when one reads the prefatory language in the glossary of directive D98-6. It states in part that:

> "The definitions that follow [including "Standard of Conduct Violations"] are provided for use as a guide in the identification of fraud, abuse, and other criminal activity. Since the definitions cannot address every possible activity, questions as to whether an activity is reportable under this policy should be referred to your assigned Job Training Partnership Division program manager for clarification and guidance."[57]

The implication of this language is that violation of one of the relevant "terms and conditions stipulated in a subgrant agreement" must be reported to both EDD and designated federal authorities.

Finally, the federal directive is a "GUIDANCE" letter. EDD is utilizing directive D98-6 to provide *further* "guidance" to various entities responsible for the administration of the JTPA. Government Code Section 11340.5(a) prohibits state agencies from issuing, among other things, regulatory "*guidelines*" unless they have been adopted pursuant to the APA.

OAL does concur in large part with EDD regarding the fact that directive D98-6 repeats or restates a number of procedural requirements and definitions found either in the Guidance Letter or the federal regulations. However, as noted above,

there were numerous provisions in directive D98-6 which, while clearly based on federal JTPA law, either implemented, interpreted the law or made it more specific.

2. EDD Directive D87-7: Glossary and Addendum

In 1987 EDD issued a "GLOSSARY OF JOB TRAINING PARTERNERSHIP ACT TERMS" which is approximately 123 pages in length. It was followed in 1989 by an addendum of updated definitions.

EDD argues that the definitions:

> "[H]ave no regulatory effect simply because they are listed in the Glossary. The regulatory effect (if there is any regulatory effect) will occur when they are used in other EDD administrative documents . . ..
>
> * * * *
>
> . . . . To evaluate the regulatory effect of any definitions in [the Glossary], it is necessary to examine these definitions as they are used in other documents EDD issues."[58]

OAL does not concur. First, EDD assessment of the non-regulatory impact of the Glossary is undercut by its very terms. Directive D87-7 provides in part that:

> "This Directive provides *standard* definitions of key terms and words for use by State and local officials responsible for any facet of the Job Training Partnership Act (JTPA) program policy making, planning, management, administration, operation or oversight. It is intended to promote comparable terminology usage throughout the State and enhance clear communication in these functional areas. . . .
>
> * * * *
>
> This third revision of the Glossary incorporates thirty-seven (37) changes and additions. . . .
>
> * * * *

> . . . .With two exceptions, *the definitions are effective May 1, 1987.* However, at the option of the Service Delivery Area (SDA), the effective date may be backdated to July 1, 1986. . . .
>
> Each SDA is responsible for consistency in implementing the new definitions, regardless of the implementation date. This means that all revised and new definitions must be adopted as of the same date (either July 1, 1986 or May 1, 1987), and the revised and new definitions must be applied uniformly to all participants and applicants involved with the program as of that date. [Emphasis added.]"[59]

Thus, *by its own terms*, EDD's Glossary of JTPA terms imposes guidelines and standards on Service Delivery Areas (SDAs). Moreover, EDD acknowledges that *not every definition* contained in the Glossary is a restatement of federal law. EDD states that "*to the extent* that these definitions used in other EDD administrative documents are restatements of federal law, . . . then the definitions do not need to be adopted pursuant to the APA. [Emphasis added.]"[60] OAL interprets this statement to mean that there are a number of definitions contained in the glossary which *do not* restate federal law and therefore *are* subject to the APA.

Government Code section 11340.5 provides in part that:

> (a) No state agency shall *issue*, utilize, enforce, or attempt to enforce any guideline, . . . standard of general application, or other rule, . . . unless [it] has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter. [Emphasis added.]"

Thus, the mere *issuance* of the definitions contained in the Glossary is sufficient by itself to constitute a violation of section 11340.5. Their presence in other administrative publications underscores the point that not only were the definitions *issued*, but they either were or are being *utilized and enforced* as well.

Moreover, EDD's argument cannot stand in light of the direct language contained in directive 87-7. It mandates *implementation* and *adoption* of the definitions contained in the glossary. Directive D87-7 therefore imparts more than definitional information. It *requires* action on the part of the SDAs.

For all these reasons, OAL concludes that Directive D87-7 including its addendum are "regulations" subject to the APA.

3. EDD Information Bulletin B98-2: Data Validation

Federal statutory law requires that each governor award incentive grants to JTPA programs which exceed certain standards.[61] In order to make such determinations, the "awarding agency," which is EDD, reviews various data submitted by SDAs or subrecipients.[62] The overall incentive grant process is governed by timelines established by federal statutory and regulatory law.[63]

EDD acknowledges that Information Bulletin B98-2 was issued to implement this program. EDD states:

> "The September 30 deadline to report [to] the Secretary of Labor is therefore imposed by federal law.
>
> * * * *
>
> EDD is the awarding agency for the funds distributed to the SDAs. (20 CFR 626.5.) Clearly, it is necessary for the EDD to impose a timeframe for its review that will allow it to meet the September 30 deadline for sending information to the DOL. *The specific two-month period set forth in B98-2 for the EDD's review is an implementation of the federal requirements.* [Emphasis added.]"[64]

EDD further acknowledged that other aspects of the information bulletin were for the purpose of implementing and making specific federal JTPA requirements.

> "The review of the SDAs' files appears to make specific the general requirements stated in 20 CFR section 627.425
>
> * * * *
>
> . . . . The opportunity for the SDAs to submit revised reports is an implementation of the EDD's responsibilities to validate the performance information from the SDAs."[65]

Thus, it is clear that Information Bulletin B98-2 was written to implement federal law concerning JTPA incentive awards. Bulletin B98-2 is therefore a "regulation" which is subject to the APA.

4. EDD Interim Directive 94-16: Allowable Cost Principles

The stated purpose of directive 94-16 is to:

> [P]rovide allowable cost principles and guidelines for administering the Job Training Partnership Act (JTPA).[66]

Directive 94-16 even announces in substance that *it is a regulation.*

> "All of the requirements contained in this directive, even though most were derived from Office of Management and Budget (OMB) cost circulars, *are adopted as state imposed requirements.*"[67]

EDD notes that federal regulation 20 CFR 627.435(i):

> "[R]equires the Governor to prescribe and implement guidelines on allowable costs for the SDAs that are consistent with the cost principles and allowable costs set forth in that regulation; the Governor is also required to determine whether a list of 16 items, including building space costs and interest expense, are allowable or unallowable JTPA costs. If the costs are allowable, the Governor is also required to provide guidelines on the conditions or extent of the allowability, documentation requirements and any prior approval requirements."[68]

Guidelines which implement the above federal regulation are contained in Directive 94-16. It includes almost eleven pages of specific cost categories in a table. The table indicates whether the particular cost item is allowable and, if so, whether pre-approval is required. While the cost categories specified in the federal regulations are repeated, they are in a distinct minority. For instance, 20 CFR 627.435 subdivision (a) sets out general guidelines on which costs are allowable. Subdivision (e) follows with eight categories of non-allowable costs. Subdivisions (f), (g) and (h) provide ground rules for allowing legal, travel and incidental expenses as well as contributions to a reserve self-insurance program. Subdivision (i) requires the Governor to establish:

> "[G]uidelines on allowable costs . . . and, if allowable, guidelines on conditions or the extent of allowability, documentation requirements, and any prior approval requirements applicable to such cost items . . .."

Sixteen additional cost categories are then set out in the remainder of subdivision (i).

By way of comparison, directive 94-16 contains some 105 different cost categories. While OAL concurs with EDD that a number of the categories in directive D94-16 are simply restatements of federal law, many others are not. Many include very detailed descriptions of the types of expenses within that category which will be allowed. Even if one takes the position that the majority of the 105 categories were sub-categories of costs listed in the federal regulations, the result would be the same. This multiplicity of categories would still be a more specific enumeration of allowable costs than those described in the federal regulations.

One example of how directive 94-16 is more specific than the federal regulations should serve to illustrate this point. The federal regulations require the Governor to provide guidelines for allowing "interest expense."[69] Under the category "Interest," directive 94-16 provides:

> "Interest on borrowings (however represented), bond discounts, costs of financing (except as provided for as part of an allowable rental or lease cost) and refinancing operations, and any legal and professional fees paid in connection therewith, are unallowable unless pre-authorized by the state in writing."[70]

For all of these reasons, OAL concludes that directive D94-16 interprets, implements and makes specific federal law governing allowable costs under the Job Training Partnership Act. Therefore, directive D94-16 is clearly a "regulation" subject to the APA.

IV. DO THE CHALLENGED DIRECTIVES 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*[71] exempted by statute.[72] In *United Systems of Arkansas v. Stamison* (1998),[73] 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.]"[74]

Express statutory APA exemptions may be divided into two categories: special and general.[75] *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 a *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 a *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 DIRECTIVES FALL WITHIN ANY *SPECIAL* EXPRESS APA EXEMPTION?

The Department 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 DIRECTIVES FALL WITHIN ANY *GENERAL* EXPRESS APA EXEMPTION?

EDD does not contend that any general express exemption applies. Our independent research having also disclosed no general express statutory exemption, we conclude that none applies.

Since none of the challenged directives falls within any express statutory exemption from the APA, OAL concludes that they are without legal effect because they have not been adopted in compliance with the APA.

CONCLUSION

For the reasons set forth above, OAL finds that:

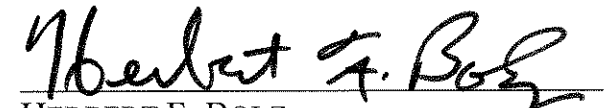
1. The APA is generally applicable to EDD.

2. The challenged Directives all contain rules which have general applicability and make specific the terms of the JTPA, federal regulations, and Unemployment Insurance Code sections;

3. No general exceptions to the APA requirements apply to the four directives;

4. The rules established by the four directives, except those which restate existing federal or state law, violate Government code section 11340.5, subdivision (a).

DATE: February 2, 2000



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ENDNOTES

1. This request for determination was filed by John K. Riess, Attorney at Law, 3579 Lomacitas Lane, Bonita, CA 91902, (619) 475-0256. The Employment Development Department responded to the request and was represented by Vera Sandronsky, Staff Counsel III, 800 Capitol Mall, P.O. Box 826880, Sacramento, Ca. 94280-0001, (916) 654-8410.

2. This determination may be cited as "**2000 OAL Determination No. 4.**"

   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 Department 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. The duties and services performed by EDD are set out in the Unemployment Insurance Code, sections 1 through 170002.

9. See **1998 OAL Determination No. 6**, CRNR 98, No. 26-Z, June 26, 1998, p. 1216.

10. **2000 OAL Determination No. 2**, CRNR 2000, No. 3-Z, January 21, 2000, p. 103.

11. See, for example, entities listed under the "TO" caption for each of the four directives.

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

13. 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).

14. (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.

    *Tidewate*r 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*

15. 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.

16. (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.

17. 2 Cal.App.4th 47, 62, 3 Cal.Rptr. 886, 891.

18. *Id.*

19. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.

20. *Id.*

21. (1993) 12 Cal.App.4th 697, 702, 12 Cal.Rptr.2d 25, 28.

22. *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).

23. EDD notes in its response that Directive 94-16 (Allowable costs) has been superseded and Bulletin 98-2 (Data Validation) expired on September 30, 1998. OAL appreciates this information. Government Code Section 11340.5, however, does not limit OAL review to agency "regulations" which are currently in force. Moreover, the validity of an expired or superseded "regulation" may well be significant for determining the past rights and duties of either an agency or its regulated entities.

24. EDD Directive No. 98-6, dated Sept. 21, 1998, p.1.

25. *Id.* at 2.

26. *Id.* at 4.

27. EDD Directive D87-7, dated April 24, 1987, p. 1.

28. EDD Information Bulletin B98-2, dated July 3, 1998, p. 1.

29. EDD Interim Directive D94-16, dated Aug. 10, 1994, p. 1.

30. See, for example, entities listed under "TO" caption of all four directives.

31. 29 USC section 1536; Unemployment Insurance Code section 15003.

32. 29 USC sections 1602(b), 1652(b).

33. 29 USC section 1574(a); 20 CFR 627.480.

34. Unemployment Insurance Code section 15026.

35. 20 CFR 627.500(c).

36. 29 USC section 1534.

37. EDD Response to Request for Determination, dated Dec. 13, 1999, p. 4. ("Response.")

38. Government code section 11340.5, subdivision (a).

39. See Government Code section 11342, subdivision (g). Even if some of the provisions of directive D98-6 were not explicitly mandated by EDD, they would still fit the definition of a "regulation" subject to the APA. The statute does not restrict the term "regulation"

to agency rules that are described by the issuing agency as "imposed" or "binding" or "mandatory."

Similarly, an agency cannot legitimately claim that rules it has not adopted pursuant to the APA are not legally binding and therefore do not fit the definition of a "regulation." This argument confuses the concept of legal validity for purposes of enforcement with the definition of a "regulation." A rule or procedure does not have to be valid from a legal standpoint to meet the definition of a "regulation" under the APA. If it did, then the whole concept of the APA would be turned on its head.

An agency rule that is a "regulation" is not legally valid unless and until it has been duly adopted pursuant to the APA. *Armistead* (22 Cal. 3d at 201, 149 Cal. Rptr. at 2) (state agency could validate an invalid personnel rule by adopting it in compliance with the APA). An agency rule that is a "regulation," but has not been adopted pursuant to the APA is "void." *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198. Even though such a rule is legally void, it is nonetheless a "regulation" if it meets the definition found in Government Code Section 11342, subdivision (g).

40. Directive D98-6, p. 1. In addition, EDD acknowledges that: "All of the language in bold, italic type in D98-6 in the section entitled 'General' is already acknowledged to be state-imposed rules. Therefore, the provisions in bold, italic type are not restatements of federal law." Response, p. 5.

41. Government Code section 11342, subdivision (g).

42. Directive D98-6, p. 2.

43. Response, p. 3. EDD states that "in order to comply with [the reporting requirement found in 20 CFR 627.500(c)], the EDD needs to inform the SDAs and other subrecipients of JTPA funds as to the procedures for reporting criminal fraud waste, abuse or other criminal activity they discover."

44. Response, p. 5.

45. *Id.*

46. *Id.* at 4.

47. *Id.*

48. Training and Employment Guidance Letter No. 6-84, dated Mar. 5, 1985, p. 1.

49. Response, p. 7, n.6. See also Guidance Letter, p.2.

50. Response, p. 7, n.6; p. 8.

51. Guidance Letter, p. 1.

52. *Id.* at 3.

53. *Id.*, Attachment III.

54. Directive D98-6, p. 5.

55. *Id.*

56. Response, p. 11.

57. Directive D98-6, p. 5.

58. Response, pp. 11-12.

59. Directive No. 87-7, pp. 1-3. Similar language is found in the Addendum.

60. Response, p. 12,

61. 29 USC section 1516 subd. (b)(7).

62. See 29 USC section 106 subd. (j)(3); 20 CFR 626.5.

63. See Response, p. 13.

64. *Id.*

65. *Id.* at 14.

66. EDD Interim Directive No. 94-16, dated Aug. 10, 1994, p. 1.

67. *Id.* EDD repeatedly refers to Office of Management and Budget ("OMB") circulars as the basis for several of the provisions contained in directive 94-16 regarding cost allowability. Reliance on these circulars is problematical if they are not valid, enforceable federal regulations. As with the Training and Employment Guidance Letter cited earlier in this determination, OAL need not reach this issue.

68. Response, p. 16.

69. 20 CFR 627.435 subd. (i)(6).

70. Directive D94-16, p. 10.

71. 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.

72. Government Code section 11346.

73. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.

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

75. 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).