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SUSAN LAPSLEY
 Director

Date: October 10, 2007

To: Jack Graham

From: Chapter Two Compliance Unit

Subject: **2007 OAL DETERMINATION NO. 19(S)**
(CTU 07-0823-01)
 (Issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 270(f)(2)(E))

Petition challenging as an underground regulation the rule that a student's academic record may not be changed after the date of graduation

On August 23, 2007, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether the rule that a student's academic record may not be changed after the date of graduation is an underground regulation. The rule was issued by California State University, Long Beach (CSULB), and may be found on pages 65 and 66 of CSULB's school catalog.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600, which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).¹ Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

Generally, a rule which meets the definition of "regulation" in Government Code section 11342.600² is required to be adopted pursuant to the APA. In some cases, however, the Legislature has chosen to establish exemptions from the requirements of the APA. Education Code section 89030 states:

(a) The trustees [of the California State University system] shall adopt rules and

¹ Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

² "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

regulations not inconsistent with the laws of this state for the government of all of the following:

- (1) The trustees.
- (2) The appointees and employees of the trustees.
- (3) The California State University.

(b) The adoption of these rules and regulations **shall not be subject to Chapter 3.5** (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. (Emphasis added)

Chapter 3.5 of the Government Code contains the rulemaking requirements and procedures of the APA.

The trustees, then, are responsible for the government of the California State University system. In the “Standing Orders of the Board of Trustees of the California State University” adopted March 15, 2006 (Standing Orders), the trustees delegated to the Presidents of the California State University campuses the

... authority and responsibility, with appropriate consultation, to take whatever actions are necessary, consistent with Trustee and Chancellor’s policy, and applicable law, for the appropriate functioning of each of their campuses, which includes:

a. Development of curricular and instructional plans

...

e. Oversight of student affairs

....

This list is not inclusive, and is not intended to limit the necessary actions of the Presidents as the chief executive offices of their campuses.

The rules in a university’s catalog may be adopted by the President of each university; however, they are adopted pursuant to the authority delegated to the President by the trustees in the Standing Orders for the development of curricular and instructional plans and the oversight of student affairs. They are, then, rules for which the trustees have ultimate authority. Since rules adopted by the trustees of the California State University system are exempt from the APA’s rulemaking requirements, the challenged rule prohibiting changes to a student’s academic record after the date of graduation in the CSULB catalog is exempt from the requirements of the APA.³

We note that Education Code section 89030.1 establishes a procedure for the trustees to use when

³ For this reason, pursuant to subdivision (f)(2)(E) of section 270, a rule which is included in a statutory exemption is the proper subject of a summary disposition letter. California Code of Regulations, Title 1, section 270, subdivision (f) provides:

(f)(1) If facts presented in the petition or obtained by OAL during its review ... demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be used to conclude that a challenged rule is an underground regulation.

(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:

(A) The challenged rule has been superseded.

(B) The challenged rule is contained in a California statute.

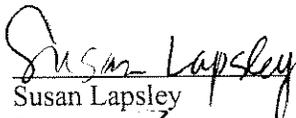
(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

(D) The challenged rule has expired by its own terms.

(E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule. (Emphasis added.)

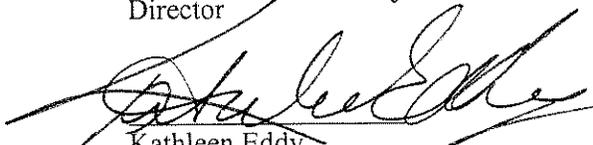
adopting regulations. Whether this procedure has been used in the case of this particular rule is not an issue OAL has the authority to determine.

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