

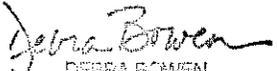
STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

2009 OAL DETERMINATION NO. 7
(OAL FILE # CTU 2008-0919-02)


DEBRA BOWEN
SECRETARY OF STATE

REQUESTED BY: Edmund Carolan

CONCERNING: Department of Personnel Administration Personnel Management Liaison memorandums No. 90-07, No. 90-07A (Hiring-Above-Minimum Standards for Extraordinary Qualifications), and No. 2007-026 (Delegation of Personnel Management Functions Update)

DETERMINATION ISSUED PURSUANT TO GOVERNMENT CODE SECTION 11340.5.

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of a "regulation" as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

ISSUE

On September 19, 2008, Edmund Carolan (Petitioner) submitted a petition to OAL challenging the Hiring-Above-Minimum (HAM) salary provisions found in three Personnel Management Liaison (PML) memorandums issued by the Department of Personnel Administration (Department). The challenged HAM provisions are in PML 90-07, PML 90-07A (Hiring-Above-Minimum Standards for Extraordinary Qualifications), and PML 2007-026 (Delegation of Personnel Management Functions Update). (Attached as Exhibits A, B and C, respectively.)

The challenged provisions pertain to the application of standards for offering a competitive salary above-the-minimum salary rate of a class to obtain for state agencies the employment of persons with extraordinary qualifications. The following summarizes the challenged provisions in PML 90-07 and are listed according to the headings as found in that PML (unless otherwise specified, quotations in this discussion of the Issue are directly from PML 90-07):

Standards

A HAM request “should be reviewed against the following standards:”

- 1) Extraordinary qualifications “may” be indicated by: (a) Expertise in a particular area that “should be well beyond the normal requirements of the class”; (b) The scope and depth of unique talents, abilities or skills as demonstrated by previous job experience; (c) The degree to which a candidate exceeds minimum qualifications “should be a guiding factor,” but not a determining factor; and (d) Qualifications and hiring rates of current state employees in the same class “should be carefully considered” to avoid questions for salary equity.
- 2) The specific extraordinary skill “should be difficult to recruit.”
- 3) The prospective candidate's current salary or other bona fide salary offers “must be above-the-minimum rate,” “must be verified and appropriately documented,” and the current salary “should have [a] duration of at least one year.” Competing offers “must be verified” where candidates are from a “suppressed occupational area” and are “unemployed or are facing layoff or relocation.” Competing offers from other state agencies “cannot be used as justification.”
- 4) In order for prior state employees to qualify for a higher rate of pay than they received in prior state employment, “they must clearly have enhanced their qualifications above those they possessed in the prior State employment.”

Current State Employees

Current state employees “may” be eligible under the following circumstances: (a) “There must be a verifiable competing offer from another prospective non-State employer”; (b) “A promotional relationship cannot exist between the employee's current class and the prospective class”; (c) Such hires “represent a career change for the individual”; and (d) Offering this type of HAM “is typically necessary” to recruit candidates for the class. Department approval “is required” in all cases for current state employees. “Delegated HAM authority does not apply.”

Documentation

“Departments must document the basis for each HAM request. HAM requests up to the third step may be approved in advance of documentation being provided to DPA [Department]. Fourth and fifth step HAMs may be expedited by DPA with a verbal approval following review of documentation. HAMs for current State employees, regardless of amount, requires DPA's pre-review of documentation and approval.” “A copy of the approved request, as well as a statement of justification for delegated approvals, should be maintained by the requesting department in a separate file for post-audit purposes.”

The stated purpose of PML 90-07A was solely to correct a typographical error in PML 90-07. Otherwise, it repeats the provisions in PML 90-07 and does not add/delete portions of PML 90-07.

Only two paragraphs of PML 2007-026 are specifically applicable to HAM standards and the petitioner does not challenge the other non-HAM related paragraphs in that PML. The following is the challenged rule in PML 2007-026:

“Departments are now delegated the authority to approve exceptions to the HAM criteria for extraordinary qualifications without prior review/approval by the PSB [Personnel Services Branch]¹ for all new State employees.”

Petitioner challenges the HAM provisions in these PMLs as alleged underground regulations² issued in violation of Government Code section 11340.5.³ The scope of this determination is limited to these challenged HAM provisions.

DETERMINATION

OAL determines that some of the challenged HAM provisions meet the definition of “regulation” as defined in section 11342.600. These provisions are specifically identified in the “Analysis” section below. They do not fall within any express APA exemption, and therefore, should have been adopted pursuant to the APA. There is insufficient information for OAL to determine whether the other challenged provisions are discretionary or meet the definition of “regulation.”

FACTUAL BACKGROUND

On January 31, 2008, Petitioner submitted a petition to OAL pursuant to section 11340.5 alleging that HAM provisions in the California Department of Corrections and Rehabilitation’s Department Operations Manual are underground regulations. During the review of that petition, the California Department of Corrections and Rehabilitation asserted that its authority to regulate certain aspects of HAM salaries for new state employees is derived from the Department, whose authority is derived from section 19836. On August 4, 2008, without rendering an opinion on the validity of the underlying Department HAM policy issued in the Department’s PMLs or other Department guidelines, OAL issued a determination (2008 OAL Determination No. 18) which found that the HAM provisions in the California Department of Corrections and Rehabilitation Department Operations Manual are underground regulations in that they had not been adopted in compliance with the APA.

On August 8, 2008, Petitioner submitted a petition to the Department pursuant to section 11340.6⁴ asking the Department to formally adopt regulations to implement section 19836 in compliance with the APA. As of the date of this Determination, the Department has not yet

¹ Personnel Services Branch is a unit within the Department of Personnel Administration.

² An underground regulation is defined in title 1, California Code of Regulations, section 250:
“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.

³ Unless otherwise specified code references are to the California Government Code.

⁴ Section 11340.6 provides an interested person with the opportunity to petition a state agency to promulgate regulations, and is separate from the petition process afforded in section 11340.5 for challenging state agency rules as alleged underground regulations.

submitted to OAL a decision for publication in the California Regulatory Notice Register pursuant to section 11340.7(d).⁵

On September 19, 2008, Petitioner filed a petition with OAL pursuant to section 11340.5 challenging the Department's HAM provisions in the three named PMLs as underground regulations, which is the basis for this determination. OAL received a response to this petition from the Department on January 20, 2009. Petitioner submitted a rebuttal to the Department's response to the petition on January 27, 2009. The rebuttal disagrees with the Department's response, particularly with its characterization of the PMLs as "merely suggestions." OAL received no comments from the public.

UNDERGROUND REGULATIONS

Section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the APA. It states as follows:

(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 Section 11342.600, 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].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency issues, utilizes, enforces, or attempts to enforce a rule that meets the definition of "regulation" as defined in section 11342.600 and should have been adopted pursuant to the APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference" in any subsequent litigation of the issue pursuant to *Grier v. Kizer*.⁶

ANALYSIS

A determination of whether the challenged rule is a "regulation" subject to the APA depends on (1) whether the challenged rule meets the definition of "regulation" pursuant to section

⁵ Section 11340.7(d) provides:

Any decision of a state agency denying in whole or in part or granting in whole or in part a petition requesting the adoption, amendment, or repeal of a regulation pursuant to Article 5 (commencing with Section 11346) shall be in writing and shall be transmitted to the Office of Administrative Law for publication in the California Regulatory Notice Register at the earliest practicable date.

⁶ (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244.

11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in section 11342.600 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.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw*,⁷ the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).⁸

The first element of a regulation is whether the rule applies generally. As *Tidewater* pointed out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations. The HAM provisions apply to the procedures and criteria that state agencies must use to hire an applicant at a higher than minimum salary. The HAM provisions apply to applicants for state employment, including both those who have previously been employed by the state and those who are new to state employment. State agencies and applicants for employment are both clearly defined classes of persons. The first element is, therefore, met.

The second element is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure. The statute that authorizes the administration of HAM salaries is section 19836, subdivision (a), which provides:

The department may authorize payment at any step above the minimum salary limit to classes or positions in order to meet recruiting problems, to obtain a person who has extraordinary qualifications, to correct salary inequities resulting from actions by the department or State Personnel Board, or to give credit for prior state service in connection with appointments, promotions, reinstatements, transfers, reallocations, or demotions. Other salary adjustments within the salary range for the class may be made upon the application of the appointing power and with the approval of the director. Adjustments within the salary range authorized

⁷ (1996) 14 Cal.4th 557, 571.

⁸ Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

by this section may be either permanent or temporary and may be made retroactive to the date of application for this change.

The first sentence of section 19836 expressly authorizes the Department to address hiring employees above the minimum salary.⁹ All three PMLs contain rules that implement, interpret or make specific the HAM provision of section 19836, the law enforced or administered by the Department. The following rules, by section in the PMLs, specify requirements, provide criteria that must be present or actions that must be taken, prohibit other actions, and use language that is reasonably understood to create a legal obligation.

Standards

In PML 90-07 and PML 90-07A, the rule states that the candidate's current salary or bona fide salary offer "must be above-the-minimum rate" and "must be verified and appropriately documented." In addition, specified competing offers "must be verified" and competing offers from state agencies "cannot be used" as justification for hiring at an above-the-minimum salary. This section also includes the requirement that prior state employees "must clearly have enhanced their qualifications" in order to qualify for a higher rate than they received in prior state employment.

Current State Employees

In PML 90-07 and PML 90-07A, this section requires the following for current state employees: there "must be a verifiable competing offer from another prospective non-State employer;" "[a] promotional relationship cannot exist between the employee's current class and the prospective class"; and Department approval "is required." In addition, this section includes an element that might be considered a requirement but is not as clearly stated. The statement that such hires "represent a career change" implies that this is a condition for approval of an above-the-minimum salary.

Documentation

In PML 90-07 and PML 90-07A, this section requires that "[d]epartments must document the basis for each HAM request." It also requires the Department pre-review of documentation and approval for HAM requests for current state employees.

PML 2007-026 delegates the authority to state departments "to approve exceptions to the HAM criteria for extraordinary qualifications" for all new state employees. This PML acknowledges that there are specified "HAM criteria," for which exceptions must be approved. These criteria are not listed in statute or regulation, but are listed in PML 90-07 and PML 90-07A.

By specifying requirements, providing criteria that must be present or actions that must be taken, prohibiting other actions, and using language that is reasonably understood to create a legal

⁹ Only the first sentence of section 19836 regards HAM salaries. The remaining portion of section 19836 regards other salary adjustments within the salary range for each class. Department regulations that implement, interpret and make specific this statute are located in Title 2 of the California Code of Regulations. Although there are regulations in Title 2 that implement, interpret or make specific the provisions regarding other salary adjustments in section 19836, there are none that implement, interpret or make specific the HAM provision in section 19836.

obligation, these challenged HAM provisions implement, interpret, or make specific section 19836. Therefore, the second element in *Tidewater* is met.

We note that some of the challenged HAM provisions are couched in terms of “should” rather than “shall.” For example:

- Standards*: A HAM request “should be reviewed against the following standards.”
- *Standards*: The specific extraordinary skill “should be difficult to recruit.”

While these and similar provisions appear to be discretionary, we are mindful of the ruling in *State Water Resources Control Board v. OAL*,¹⁰ in which the Court held:

The Legislature established the OAL as a central office with the power and duty to review administrative regulations. The Legislature expressed its reasons in no uncertain terms stating, in essence, that it was concerned with the confusion and uncertainty generated by the proliferation of regulations by various state agencies, and that it sought to alleviate these problems by establishing a central agency with the power and duty to review regulations to ensure that they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Gov. Code sections 11340, subd. (e), and 11340.1.) In order to further that function, the relevant Government Code sections are 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.)

OAL cannot, from the information available, determine whether the provisions couched in discretionary terms “looks like a regulation, reads like a regulation, and acts like a regulation,” and therefore, cannot determine whether these provisions meet the definition of “regulation.”

Accordingly, we conclude that, except for the provisions regarding the authority of the Department to approve HAM salaries¹¹ and the provisions couched in discretionary terms, the challenged provisions identified above meet the definition of “regulation” as defined in section 11342.600. OAL reaches no determination as to the discretionary language in the PMLs.

The final issue to examine is whether the challenged HAM provisions fall within an exemption from the APA. Pursuant to section 11346, the procedural requirements established in the APA “shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.” Express statutory exemptions from the APA can be general exemptions that apply to all state rulemaking agencies.¹² Express statutory exemptions may also

¹⁰ (1993) 12 Cal.App.4th 697, 702.

¹¹ Section 19836 provides that “The department may authorize payment at any step above the minimum salary limit” The requirement that HAM salaries require the approval of the Department is contained in all three PMLs. If a challenged rule merely restates existing law, and does not further implement, interpret or make specific existing law, it does not meet the definition of “regulation” in section 11342.600, and therefore, is not an underground regulation. The PML provisions that require the Department’s approval for a HAM salary merely restate section 19836, do not further implement, interpret or make specific section 19836, and thus, do not meet the definition of “regulation.”

¹² See Government Code section 11340.9.

be specific to a particular rulemaking agency or a specific program.¹³ We were not able to ascertain, nor did the Department identify, any statutory APA exemptions that would apply to the challenged HAM provisions.

AGENCY RESPONSE

The following addresses the arguments made by the Department in its response to the petition.

1. The Department was not acting in a quasi-legislative manner when it issued PML 90-70, PML 90-70A and PML 2007-026 because the information contained in the PMLs was an interpretation of language already codified in section 19836(a).

Agency actions fall within three broad categories: quasi-legislative, quasi-judicial, and administrative. The rulemaking portion of the APA generally governs the exercise of quasi-legislative power by state agencies. In its response, the Department in referring to *Aguilar v. Association for Retarded Citizens*,¹⁴ states:

In determining whether the agency acted in a quasi-legislative manner, a distinction is made between the promulgation of a new regulation and the application and/or interpretation of an existing one.

In *Aguilar*, one agency, the Industrial Welfare Commission, had promulgated regulations in a Wage Order and another agency, the Department of Labor Standards Enforcement, was responsible for enforcing those regulations. The Court held that, "Adoption of an interpretation consistent with the language and intention of the Wage Order as a prelude to enforcement does not require compliance with the APA."

We note, however, that the court in *Tidewater* emphasized that a policy is "a regulation within the meaning of the APA" when it is "a standard of general application interpreting the law" enforced by the agency. The court in *Tidewater* stated:

A written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how an agency will decide future cases is essentially legislative in nature even if it merely interprets applicable law.¹⁵

This is further emphasized in *Morning Star Company v. State Board of Equalization, et al.*¹⁶ *Morning Star* confirms the holding in *Tidewater* by stating that "absent an express exception, the APA applies to all generally applicable administrative interpretations of a statute."

¹³ For example, see Penal Code section 5058 that establishes an exemption for rules established by individual prisons.

¹⁴ (1991) 234 Cal.App.3d 27.

¹⁵ *Tidewater, supra*, at 574-575.

¹⁶ (2006) 38 Cal.4th 324, 335, 42 Cal.Rptr.3d 47.

As determined by OAL in its analysis above, PML 90-70 and 90-70A contain rules of general application that further implement, interpret, or make specific the HAM provision of section 19836. Therefore, the rules in these PMLs meet the definition of “regulation.” Additionally, provisions of PML 90-70 and PML 90-70A are intended to be used to decide whether to approve future HAM requests presented to the Department and are, therefore, quasi-legislative in nature.

2. The Department's delegation of authority with respect to HAMs does not constitute an underground regulation.

Section 19836 states: “The department may authorize payment at any step above the minimum salary limit” The remainder of section 19836 does not provide for the delegation of that authority. The challenged HAM provision in PML 2007-026 delegates this authority in limited circumstances to other state agencies. Rather than requiring that the approval of all HAM salaries must be made by the Department, the Department has chosen to implement its statutory authorization through a generally applied delegation to other state agencies to approve HAM requests in specified circumstances. Therefore, the HAM provision in PML 2007-026 meets the definition of “regulation.” In addition, the procedures and criteria that state agencies are required to use pursuant to these PMLs are regulations, as discussed above.

3. The interpretations offered in the PMLs are merely suggestions to state agencies describing how the Department has interpreted each of the criteria in previous cases and the interpretations of the criteria have no legal effect.

As noted above, some provisions of PML 90-07 and 90-07A appear to be discretionary, but OAL does not have sufficient information to determine whether these provisions meet the definition of “regulation.” However, as identified above, most of the HAM provisions in PML 90-07 and 90-07A are found to meet the definition of “regulation.”

4. The PMLs merely restate the justifications for hiring someone above the minimum and that each of the items discussed in the PMLs are found in section 19836(a), and therefore, do not constitute underground regulations.

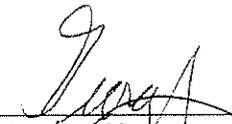
Other than permitting the Department to authorize a HAM salary, section 19836 describes the circumstances in which a HAM request might be permissible: 1) “in order to meet recruiting problems”; 2) “to obtain a person who has extraordinary qualifications”; 3) “to correct salary inequities resulting from actions by the department or State Personnel Board”; or 4) “to give credit for prior state service in connection with appointments, promotions, reinstatements, transfers, reallocations, or demotions.” Section 19836 does not include any procedures or criteria that are to be used when assessing or approving such requests. In *Engelmann v. State Board of Education*,¹⁷ the court held that to the extent any of the contents of an agency publication “depart from, or embellish upon, express statutory authorization and language” the agency will need to promulgate regulations. The challenged HAM provisions embellish upon the express statutory language and implement, interpret and make specific section 19836 by establishing procedures and criteria to be used in assessing and approving HAM requests.

¹⁷ 2 Cal.App.4th 47, 62.

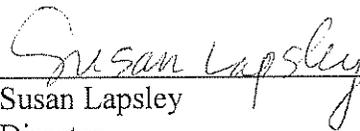
CONCLUSION

The challenged HAM provisions, as identified in the "Analysis" section above, in PML 90-07, PML 90-07A (Hiring-Above-Minimum Standards for Extraordinary Qualifications), and PML 2007-026 (Delegation of Personnel Management Functions Update) meet the definition of "regulation" as defined in section 11342.600.¹⁸ They do not fall within any express APA exemption, and therefore, should have been adopted pursuant to the APA. There is insufficient information for OAL to determine whether the other challenged provisions are discretionary or meet the definition of "regulation."

Date: April 6, 2009



George Shaw
Staff Counsel



Susan Lapsley
Director

¹⁸ A court may find that the language which is couched in discretionary terms may also meet the definition of "regulation" as defined in Government Code section 11342.600; however, OAL was not provided sufficient information necessary to make such a determination.

EXHIBIT A

Date: November 16, 1990
Reference Code: 90-07
Effective Date: November 16, 1990
Expiration Date: Indefinite
Date of Issue: November 16, 1990

To: PERSONNEL MANAGEMENT LIAISONS

THIS MEMORANDUM SHOULD BE DISTRIBUTED TO:

All Personnel Officers and Labor
Relations Officers

From: Department of Personnel Administration
Classification and Compensation Division

Subject: Hiring-Above-Minimum Standards for Extraordinary
Qualifications

The purpose of this memorandum is to describe current and revised standards for recruiting new employees above-the-minimum salary rate of a class.

Government Code Section 19836 authorizes DPA to allow payments above-the-minimum rate in the salary range (HAM) in order to hire persons who have extraordinary qualifications. A HAM salary rate cannot be requested and approved after a candidate accepts employment.

The ability to offer a competitive salary above-the-minimum salary rate of a class allows the employer to obtain the services of extraordinarily qualified employees. Department personnel applying these standards must strike a balance between the need to hire highly qualified individuals and the need to keep the cost to the State as low as possible. This memorandum includes two revisions to current standards. One relates to the current or most recent salary of a prospective employee and the other allows HAM's to apply to State employees in limited circumstances.

Delegation to departments of HAM authority for extraordinary qualifications currently in effect prior to the release of this memorandum remain unchanged.

STANDARDS

Prior to submitting a HAM request to DPA or to approving a HAM under delegated authority for extraordinary qualifications, the request should be reviewed against the following standards:

1. Contribution to the Agency

Persons with extraordinary qualifications should contribute to the work of the department significantly

beyond that which other applicants offer.

- a. Extraordinary qualifications may provide expertise in a particular area of a department's program. This expertise should be well beyond the normal requirements of the class.
- b. Unique talent, ability, or skill as demonstrated by previous job experience may also constitute extraordinary qualifications. The scope and depth of such experience is more significant than its length.
- c. The degree to which a candidate exceeds minimum qualifications should be a guiding factor, rather than a determining one. When a number of candidates offer considerably more qualifications than the minimum, it may not be necessary to pay above the minimum to acquire unusually well-qualified people.
- d. The qualifications and hiring rates of State employees already in the same class should be carefully considered, since questions of salary equity may arise if new higher entry rates differ from previous ones.

2. Recruitment Difficulty

Recruitment difficulty is a factor to the extent that a specific extraordinary skill should be difficult to recruit, even though some applicants are qualified in the general skills of the class.

3. Current Salary and Other Job Offers

In all cases, the prospective candidate's current salary or other bona fide salary offers must be above-the-minimum rate. Current salary or other bona fide offers must be verified and appropriately documented. Current salary should have duration of at least one year.

It should be noted that current salary and/or most recent salary may not be appropriate justification for a HAM if recruitment difficulty does not currently exist for the class. For example, in a suppressed occupational area where candidates are unemployed or are facing layoff or relocation and would be willing to accept less than their current or most recent salary a HAM may not be unnecessary. In this instance, a competing offer must be verified. Competing offers from other State agencies cannot be used as justification for offering a HAM rate.

4. Prior State Employment

Prospective employees with prior State service should be evaluated in the same manner as other applicants. However, to qualify for a higher rate of pay than that

they received in prior State employment, they must clearly have enhanced their qualifications above those they possessed in the prior State employment.

CURRENT STATE EMPLOYEES

Appointing authorities may request extraordinary qualifications HAM's for State employees under certain circumstances as outlined below:

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- a. There must be a verifiable competing offer from another prospective non-State employer.
 - b. A promotional relationship cannot exist between the employee's current class and the prospective class.
 - c. Hires made under these standards represent a career change for the individual.
 - d. It is typically necessary to offer an extraordinary HAM to recruit candidates for the class.
- DPA approval is required in all cases. Delegated HAM authority does not apply.

DOCUMENTATION

Departments must document the basis for each HAM request. HAM requests up to the third step may be approved in advance of documentation being provided to DPA. Fourth and fifth step HAMS may be expedited by DPA with a verbal approval following review of documentation. HAMS for current State employees, regardless of amount, requires DPA's prereview of documentation and approval.

A copy of the approved request, as well as a statement of justification for delegated approvals, should be maintained by the requesting department in a separate file for post-audit purposes.

Questions should be referred to your departmental Classification and Compensation Division analyst.

Robert K. Painter, Section Manager
Classification and Compensation Division

EXHIBIT B

Date: December 7, 1990
 Reference Code: 90-07A
 Effective Date: November 16, 1990
 Expiration Date: Indefinite
 Date of Issue: November 16, 1990

To: PERSONNEL MANAGEMENT LIAISONS

THIS MEMORANDUM SHOULD BE DISTRIBUTED TO:

All Personnel Officers and Labor
 Relations Officers

From: Department of Personnel Administration
 Classification and Compensation Division

Subject: Hiring-Above-Minimum Standards for Extraordinary Qualifications

The purpose of this memorandum is to correct a typographical error found on page 2 of Management Memorandum 90-07 issued on November 16, 1990.

Please remove page 2 and insert the attached corrected copy into the original memorandum.

Robert K. Painter
 Classification and Compensation Division

- b. Unique talent, ability, or skill as demonstrated by previous job experience may also constitute extraordinary qualifications. The scope and depth of such experience is more significant than its length.
 - c. The degree to which a candidate exceeds minimum qualifications should be a guiding factor, rather than a determining one. When a number of candidates offer considerably more qualifications than the minimum, it may not be necessary to pay above the minimum to acquire unusually well-qualified people.
 - d. The qualifications and hiring rates of State employees already in the same class should be carefully considered, since questions of salary equity may arise if new higher entry rates differ from previous ones.
2. Recruitment Difficulty
- Recruitment difficulty is a factor to the extent that a specific extraordinary skill should be difficult to recruit, even though some applicants are qualified in the general skills of the class.
3. Current Salary and Other Job Offers

In all cases, the prospective candidates current salary or other bona fide salary offers must be above-the-minimum rate. Current salary or other bona fide offers must be verified and appropriately documented. Current salary should have duration of at least one year.

C It should be noted that current salary and/or most recent salary may
 H not be appropriate justification for a HAM if recruitment difficulty
 A does not currently exist for the class. For example, in a suppressed
 N occupational area where candidates are unemployed or are facing
 G layoff or relocation and would be willing to accept less than their
 E current or most recent salary a HAM may not be necessary. In this
 instance, a competing offer must be verified.

Competing offers from other State agencies cannot be used as justifica-
 tion for offering a HAM rate.

4. Prior State Employment

Prospective employees with prior State service should be evaluated in the
 same manner as other applicants. However, to qualify for a higher rate
 of pay than that they received in prior State employment, they must
 clearly have enhanced their qualifications above those they possessed in
 the prior State employment.

CURRENT STATE EMPLOYEES

Appointing authorities may request extraordinary qualifications HAM's
 for State employees under certain circumstances as outlined below:

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- a. There must be a verifiable competing offer from another prospec-
 tive non-State employer.
 - b. A promotional relationship cannot exist between the employee's
 current class and the prospective class.
 - c. Hires made under these standards represent a career change for the
 individual.
 - d. It is typically necessary to offer an extraordinary HAM to recruit
 candidates for the class.
- C
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- DPA approval is required in all cases. Delegated HAM authority does not
 apply.

DOCUMENTATION

Departments must document the basis for each HAM request. HAM requests up to
 the third step may be approved in advance of documentation being provided to
 DPA. Fourth and fifth step HAMS may be expedited by DPA with a verbal
 approval following review of documentation. HAMS for current State employees,
 regardless of amount, requires DPA's prereview of documentation and approval.

A copy of the approved request, as well as a statement of justification for
 delegated approvals, should be maintained by the requesting department in a
 separate file for postaudit purposes.

Questions should be referred to your departmental Classification and Compensa-
 tion Division analyst.

Robert K. Painter, Section Manager

Classification and Compensation Division

EXHIBIT C

**Department of Personnel Administration
Memorandum**

TO: Personnel Management Liaisons (PML)

SUBJECT: Delegation of Personnel Management Functions Update	REFERENCE NUMBER: 2007-026
DATE ISSUED: 09/25/07	SUPERSEDES:

This memorandum should be forwarded to:

Personnel Officers

FROM: Department of Personnel Administration
Classification and Compensation Division

CONTACT: Classification and Compensation Division
(916) 324-9381
Fax: (916) 327-1886

This memorandum updates the Department of Personnel Administration's (DPA) Personnel Management Delegation Program. Among the changes are some that were requested from Personnel Offices to help with your operational and business needs in the interim to HR Modernization. The delegated functions are also identified in the attached chart.

Backdating Allocations

Current practice requires departments to obtain DPA approval for all backdates beyond 60 workdays regardless of Modified Classification Review (MCR) designation or method of appointment (certification or transfer) for position allocations.

Departments are now delegated the authority to backdate position allocations beyond 60 workdays. Departments must document the circumstances which resulted in the delay and verify that the employee was assigned and performing the appropriate duties. Backdating of appointments should be conducted in accordance with the State Personnel Board's policy on backdating appointments.

Out-of-Class (OOC)

Important Reminder: Check MOU for OOC provisions.

Rank and File: There are no exceptions to request extensions of OOC assignments beyond the MOU provisions.

Excluded: All departments have delegated authority to approve OOC assignments for confidential, supervisory, managerial, and other excluded employees up to one year.

Managerial: As members of the management team, employees in managerial classes can reasonably be expected to perform work as needed to help the department function smoothly. For limited periods of time, a manager should be expected to fulfill a wide range of assignments not normally part of his/her assignment and classification without additional compensation. Current practice requires departments to obtain DPA approval prior to the assignment of OOC work.

Departments are now delegated the authority to pay managerial OOC. There are rare circumstances when a department determines a managerial OOC assignment must continue beyond a short time frame and additional compensation is appropriate. Payment will commence on the 91st day. (Departments are still required to submit OOC assignments approval to exempt positions prior to the assignment of OOC work.)

Date of Entitlements (Backdating)

Current practice requires departments to obtain DPA approval prior to processing transactions that update or change employee salaries or pay history. The Personnel Services Branch (PSB) currently receives transactions and corrections of mandatory actions beyond three years for approval prior to submitting the request to the State Controller's Office (SCO) for payment.

Departments are now delegated the authority to backdate transactions to their date of entitlement without prior review/approval by PSB. Departments must document the basis for each date of entitlement request, and retain the documentation for review. Departments need to enter an 'X' in the 'On File for Audit' box within Line 10 of the PAR document, as well as complete PAR Item 215, Employment History Remarks, as instructed on page 2.36 of the Personnel Action Manual related to date of entitlement.

Hire Above Minimum (HAM)

Current practice requires departments to submit HAM requests in order to hire employees with extraordinary qualifications that do not meet the HAM requirements to DPA for review/approval.

Departments are now delegated the authority to approve exceptions to the HAM criteria for extraordinary qualifications without prior review/approval by PSB, for all new State employees. (Departments are still required to submit HAM approval for a current State employee to PSB in all cases.) Departments must document the basis for each HAM request and retain the documentation for DPA program review.

Merit Salary Adjustments (MSA)

Current practice requires departments to obtain DPA approval to allow employees to receive the maximum salary of a classification, instead of setting up an anniversary date, when the employee is \$25.00 or less from the maximum salary range of the classification.

Departments are now delegated the authority to approve movement to the maximum of the salary range when the salary is \$25.00 or less from the maximum rate. Departments with delegation must document the basis for each salary exception request and retain the documentation for review. Departments shall process the increase to the maximum of the salary range using the employment history SAL transaction reflecting the same effective date as the MSA transaction that resulted in the employee salary rate of \$25.00 or less. Reference this PML (e.g. PML 2007-026) in Item 215, Employment History Remarks, of the SAL transaction.

Career Executive Assignment (CEA)

As noted in PML 2007-022, departments may submit requests to DPA for exceptions to the CEA salary program when there is an extraordinary operational impact or severe salary compaction:

- to exceed the non-attorney/physician/engineer Level 5 rate; or
- to exceed the 10% salary movement in a fiscal year.

Requests must include a clear justification on the need for the exceptional request, including:

- title of CEA position and current level;
- subordinate staff classifications, salaries, and compaction issue;
- brief description of CEA role and an organization chart;
- specific salary or percentage increase requested; and
- appropriate signature authority (Agency Secretary, Director, or designee).

DPA views 5% as an acceptable differential between managerial positions due to compaction issues.

To address the critical need for succession planning, departments may allow an overlap of employees in a CEA position while the prior incumbent orients and mentors the new appointee. The duration of overlap for orientation/mentoring may last up to four months.

Position Allocation

A request to use another department-specific classification is considered an exceptional allocation and requires DPA approval via the 625 process. It is appropriate for departments to seek a courtesy approval from another department; however, DPA will make the final allocation decision.

The Pay Scale Section 1.3 will be modified to reflect departments' delegation authority.

Class Modifications

All staff calendar classification changes must be submitted through DPA for processing and union notification. Please do not submit items directly to the State Personnel Board (SPB).

Class Establishment

PML 2001-049 is obsolete. (The PML had placed a moratorium on classification changes.)

The priority order of Board Item review and processing is as follows:

Urgent/Important

1. Court-ordered mandates
2. Legislative mandate (by law) involving new program/department:
 - No existing civil service class or alternative
 - New scope of work

Important/Not Urgent

3. Legislative mandate (by law) involving revised Minimum Qualification:
 - New license or registration
 - Education
4. New/revised classification as a result of Memorandum of Understanding (MOU) mandated study
5. All other proposals
 - Priority is in date order as received by CCD

DPA and SPB are in the early stages of HR modernization efforts. As the HR modernization efforts move forward, different classification and bargaining units may be impacted. DPA will make assessments on class proposals that may be better addressed in the HR modernization process.

Delegation Requirements

Important Reminder: All departments are required to submit a complete set of organization charts annually on July 1st and prior to any major reorganization.

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For a complete list of the delegated functions, please refer to the attached revised chart. Changes to the Classification and Pay Guide are in progress. It is anticipated the updates to the guide will be online in the very near future. Please call your CCD analyst or PSB representative if you have any questions.

/s/Debbie Endsley

Debbie Endsley,
Chief Deputy Director

Attachment

Personnel Management Delegation Program Parameters

Topic	Delegation Provided	DPA Approval Required	Relevant References	DPA Contact for Exceptions or Questions
Delegation Requirements	All departments are required to submit a complete set of organization charts annually on July 1, and prior to any major reorganization. All departments are required to keep proper documentation of all delegated decisions according to the requirements outlined in the C&P Guide sections for the above topics.		Various Section 320 (Organization Chart format)	C&P Analyst or PSB
Position Allocation	All departments have delegated authority to approve position allocation decisions that meet the guidelines for most all classifications. The following departments have delegated authority to approve position allocations to the Attorney IV level: DOJ/AG, CDE, DFEH, DIR (Office of the Director & DLSE only), DPA, CalTrans, FTB, Office of the Legislative Counsel, CalPERS, PUC, and State Public Defenders. See Pay Scale Section 13 for MCR and departmental exceptions.	The following classes are MCR II: Staff Services Manager I (Specialist), Staff Services Manager II (Specialist). The following classes are MCR None: Data Processing Manager IV, Staff Counsel IV (see departmental exceptions), Labor Relations Specialist, Labor Relations Manager I, and Labor Relations Manager II. Departments must check with their C&P analyst to clarify delegation for approving headquarters peace officer positions. All exceptions to established criteria must continue to come to DPA for review and approval, including use of another department-specific class.	C&P Guide Sections 300, 320, and 335	C&P Analyst
Career Executive Assignment (CEA)	All departments may directly submit requests to establish new CEA positions to SPB with a concurrent copy (that includes a 625 cover sheet) sent to DPA for processing.	All exceptions to established CEA levels criteria must continue to come to DPA for review and approval. All requests for CEA salary exceptions must be submitted to DPA for review and approval.	C&P Guide Sections 400 to 499 PML 06-06 PML 06-37 Pay Scale Section 8	C&P Analyst
Class Modification		Non-hearing and Hearing Board Items must be submitted through DPA. DPA will handle all contact with the unions on all staff Board Items.	C&P Guide Sections 100 to 199	C&P Analyst
Class Establishment		All Non-hearing and Hearing Board Items either establishing new classes or revising existing classes will be submitted through DPA.	C&P Guide Sections 100 to 199 Section 200	C&P Analyst

Personnel Management Delegation Program Parameters

Topic	Delegation Provided	DPA Approval Required	Relevant References	DPA Contact for Exceptions or Questions
Staff Reductions/ Layoffs		All delegated functions are subject to cancellation during a staff reduction or layoff per discussions with departmental C&P representative and/or the Department of Finance (DOF) budget instructions.	Various	C&P Analyst or DOF Instructions
Hire Above Minimum (HAM)	All departments have delegated authority to approve HAM for extraordinary qualifications (including exceptions), former legislative employees, and former exempt employees.	HAM approval for current State employees must be approved by DPA.	C&P Guide Section 250 Government Code (GC) 19836	PSB
Red Circle Rate	All departments have delegated authority to approve red circle rates for general Civil Service employees and Career Executive Assignment (CEA) positions (90 days).		C & P Guide Sections 260 and 440 GC 19837	PSB
Exception to the Salary Rules	All departments have delegated authority to approve an exception to the salary rules under the following circumstances: when there is a salary loss upon transfer to a deep class; when there is a reappointment or reinstatement without a break in service.		DPA Rules 599.674-599.676	PSB
Date of Entitlements (Backdating)	All departments have delegated authority to backdate mandatory transactions beyond three years that update or change employee salaries or pay history to their date of entitlement.		DPA Rule 599.668	PSB
Merit Salary Adjustments	All departments have delegated authority to approve movement to the maximum of the salary range when the salary is \$25.00 or less from the maximum rate.		GC 19836	PSB
Administrative Time Off (ATO)	All departments have delegated authority to approve up to 30 days of ATO.	DPA must review ATO that exceeds 30 days.	GC 19991.10	PSB
Backdating Allocations	All departments have delegated authority to backdate position allocations.	SPB approval is required on backdated appointments for over 60 workdays.	C&P Guide Section 320	C&P Analyst

Personnel Management Delegation Program Parameters

Topic	Delegation Provided	DPA Approval Required	Relevant References	DPA Contact for Exceptions or Questions
Out-of-Class (OOC)	All departments have delegated authority to approve OOC assignments as provided in the Bargaining Unit Contracts. For confidential, supervisory, managerial, and other excluded employees, departments may approve OOC for up to one year.	OOC assignments to exempt positions must come to DPA for preapproval. Note: There are no exceptions to request extensions of OOC assignments beyond the MOU provisions.	C&P Guide Section 375 MOU (various)	C&P Analyst
Special Consultant	All departments have delegated authority to approve Special Consultants for situations that meet the guidelines.	DPA must review all exceptions, including salaries that exceed the maximum specified in the C&P Guide. Departments need to coordinate with the State Personnel Board (SPB). Any special consultant used pending exempt appointments must be approved by the DPA Exempt Unit.	C&P Guide Section 340	C&P Analyst or Exempt Unit