STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

SECRETARY OF STATE

In re:	)	
Request for Regulatory	)	**2000 OAL Determination No. 2**
Determination filed by JOHN	)	
K. REISS concerning Job	)	**[Docket No. 99-004]**
Training Partnership Office	)	
Policy/ Procedure Directives	)	**January 18, 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 six 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 six directives or bulletins 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 Office Policy/ Procedure Bulletin 84-13

2) Job Training Partnership Act Directive D97-11

3) Job Training Partnership Act Directive D98-9

4) Job Training Partnership Act Directive D97-6

5) Job Training Partnership Act Directive D98-11

6) Job Training Partnership Act Directive D98-5.

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, federal regulations, and Unemployment Insurance Code sections;

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

4) The rules established by the six 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 Request 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 procedures, titled "State Grievance and Hearing Procedures Under the Job Training Partnership Act." These procedures were contained in EDD's "JTPO Policy/Procedure Bulletin # 84-8, dated June 18, 1984. After EDD filed a response to this request, 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]

This Request for Determination

Mr. Riess then filed a second request in January 1999, which is the subject of this determination. This request challenged EDD's procedures, contained in the one bulletin and five directives described above.[10] These directives were issued to: Service Delivery Areas, Private Industry Councils, Program Operators, EDD Job Service Offices, and Job Training Partnership Office Staff.[11] On October 29, 1999, OAL published a summary of this request for determination in the California Regulatory Notice Register, along with a notice inviting public comment. On December 13, 1999, 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. 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 "STANDARD[S] 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 six contain standards of general application.

1) **<u>EDD Policy Procedure Bulletin 84-13</u>** provides in part that:

"The purpose of this bulletin is to establish policy and procedures regarding the audit resolution process that will govern entities receiving funds under Title II and III of the Job Training Partnership Act (JTPA).

* * * *

It is the policy of the State of California that guidelines included herein *will govern the resolution of audits of the JTPA program. Subrecipients will be responsible for adhering to these procedures.* [Emphasis added.]"[23]

The Bulletin defines "subrecipient" as:

"Any person, organization or other entity which receives JTPA funds directly from the Governor of the State of California."[24]

2) **EDD Directive No. D97-11** regarding debt collection likewise "*applies to all JTPA subrecipients*." The purpose of this directive is to "[transmit] federal rules *and state requirements* for debt collection. [Emphasis added.]"[25]

3) **EDD Directive No. D98-9**:

"[T]ransmits the policy and procedures for identifying service providers who are indebted to the State or a Service Delivery Area (SDA) and excluding them from the Job Training Partnership Act (JTPA) program."

The directive applies to "*all subrecipients that receive JTPA funds provided by and through the State of California.* [Emphasis added.]"[26]

4) **EDD Directive No. D97-6**:

"[P]rovides combined state and federal guidance regarding the procurement of goods and services by the Job Training Partnership Act (JTPA) recipients and subrecipients."[27]

5) **EDD Directive No. D98-11**:

"[P]rovides policy relating to the security of confidential information . . . . .

* * * *

[It] applies to *all programs* funded under JTPA and must be implemented by the *subrecipients* of these funds."[28]

6) **EDD Directive D98-5**:

"[C]ontains instructions for preparing and submitting the Annual Report to the Governor . . . pursuant to Section 104(b)(13) of the Job Training Partnership Act (JTPA).

* * * *

All Service Delivery Areas (SDA) are required to prepare and submit an Annual Report to the Governor based on the instructions in this Directive. [Emphasis added.]"[29]

"A Service Delivery Area (SDA)" is defined in the federal regulations as "a service delivery area designated by the Governor pursuant to [the JTPA] . . . . SDA may also refer to the entity that administers the JTPA program within the designated area."[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." For instance, *all* JTPA subrecipients are subject to directives designated above as numbers 1 through 5. Similarly, the last directive covers *all* Service Delivery Areas throughout the state. Therefore, all six directives are clearly standards of general application.

Having concluded that each of the directives or bulletins contain 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. EDD Policy Procedure Bulletin 84-13: Audit Resolution

EDD is the state agency charged with the responsibility for administering the JTPA program. Funding for this program is provided to the State by the federal government pursuant to statutory formulas.[31]

To maintain the integrity of JTPA, the State is required to establish a program of periodic audits.[32] States are also required to include within their auditing procedures a resolution process and appeal rights.[33] EDD is also required by state law to develop procedures for fiscal control.[34] EDD Policy/Procedure Bulletin 84-13 ("Bulletin 84-13") was promulgated to implement these state and federal requirements.[35]

EDD takes the position that many of the requirements in Bulletin 84-13 simply repeat or restate federal law. For instance, it notes that:

> "The JTPO Policy/Procedure requires the resolution of audit findings by subrecipients to carry out the Governor's responsibility to dispose of questioned audit costs. [Citation.] The Policy/Procedure also repeats the federal requirements for the resolution of audits including: (1) an initial determination regarding the allowability of questioned costs or activities; (2) an opportunity for informal resolution during which documentation or argument may be presented to resolve the matter, and (3) a final determination with a statement of costs in controversy, establishment of a debt, corrective actions, and possible sanctions and the hearing procedure for appeals."[36]

OAL acknowledges that Bulletin 84-13 does contain some provisions that merely restate federal procedure or requirements. For instance, OAL agrees in principle with EDD that the procedures cited above simply restate provisions of federal law.

Bulletin 84-13, however, goes much further. EDD readily acknowledges this. To its credit, it sets out in its response a fairly exhaustive list of "State-imposed requirements which [it] admits are regulatory."[37] Here are some sample quotations from Bulletin 84-13 which we do not intend to be exhaustive.

1) "Subrecipients are to promptly evaluate findings and recommendations reported by auditors, determine proper actions in response to audit findings and recommendations, and complete, within established timeframes, all actions that correct or otherwise resolve the matters brought to the subrecipient's attention." (Sec. II.A.) **OAL Comment:** These requirements appear to be specific methods being utilized by the State to insure "each subrecipient complies with applicable audit requirements." (20 CFR 627.480(d)(1).

2) "Copies of documentation presented by a program operator to support allowability of costs which are accepted by the subrecipient must be maintained by the subrecipient." (Sec. II.B.) **OAL Comment:** Subrecipients are required to maintain an "audit resolution file." (20 CFR 627.480(d)(3).) This regulation appears to give specific instructions as to what should be in that file.

3) Requirement that an initial determination regarding the findings of the final audit report be made by the JTPO (Job Training Partnership Office) within 110 days after it has been received by the subrecipient. (Sec. III.B.) **OAL Comment:** There does not appear to be any comparable time period specifically set out in the federal regulations.

4) Administrative findings shall include a "statement as to whether the State accepts the subrecipient's proposed or corrective action taken. . . ." (Sec. III.B.1.c.) **OAL Comment:** The State is required to submit an audit resolution report including planned corrective actions. (20 CFR 627.480(e)(2).) This regulation adds more specificity to this federal requirement.

5) Administrative findings shall include an "implementation plan which will include . . . [a] description and timetable of specific actions to be taken." (Sec. III.B.1.d.i.) **OAL Comment:** Again, this regulation requires detailed and specific information regarding corrective actions.

6) The final determination following receipt of the final audit report will include, among other things, an "indication as to interest to be charged on a delinquent debt." (Sec. III.D.7.) **OAL Comment:** This regulation appears to implement 20 CFR 629.54(d)(3)(ii)(D),

which requires the final determination to "[e]stablish a debt if appropriate."

In addition, there were numerous provisions in Bulletin 84-13, which, while clearly based on federal law, either implemented it or made it more specific. For example:

1) EDD asserts that Section III.B.2.c. of Bulletin 84-13 restates 29 CFR 96.503(a). The two, however, are not the same. 29 CFR 96.503(a) governs the content of the initial determination. "Such determination shall be based on applicable statutes, regulations, administrative directives, or grant/contract conditions. Section III.B.2.c. *adds to this* the requirement that the decision "to allow costs questioned or recommended for disallowance shall be clear and convincing and , where appropriate, supported by legal opinion(s)."

2) Section III.C., para. 4 provides that the "subrecipient should be prepared to present documentary evidence to support the allowability of costs." EDD claims this is a federal requirement, citing 20 CFR 629.54(d)(2) and 29 CFR 96.401. Neither, however, appear to create such a requirement. Rather, 29 CFR 96.401 permits responsible officials to "have access" to books and papers of the entity receiving federal funds. 20 CFR 629.54(d)(2) provides that adverse actions shall not be taken without first providing the *opportunity* to present documentation.

3) Section III.D.2 requires that the final determination list "those items still in . . . disagreement by both parties and the reasons for the disagreement." EDD claims this requirement repeats 20 CFR 629.54(d)(3). That federal regulation, however, merely requires that the final determination "[l]ist those matters upon which the parties continue to disagree." Nothing is said about the *reasons* for the disagreement.

Even by EDD's own admission, Bulletin 84-13 contains numerous provisions which either supplement or implement federal law. Thus, Bulletin 84-13 contains numerous rules implementing federal JTPA requirements. As such, these provisions are "regulations" subject to the APA.

2. <u>EDD Directive D97-11: Debt Collection</u>

The stated purpose of the directive is to establish debt collection procedures.[38] EDD readily admits that many of the debt collection procedures set out in this directive are regulations. As a general practice, EDD is required by law to set out state-imposed requirements in bold italics.[39] In its response to the request for determination, it states:

> "State-imposed requirements [italicized by EDD in the directive] and provisions not identified as summaries or restatements of law or regulations are regulatory and subject to the APA. To the extent that parts of this Directive do restate federal law and regulations or State law as set forth below, those provisions are not subject to the APA."[39]

EDD also adds:

> "Unemployment Insurance Code section 15061 . . . . requires the state to establish debt collection procedures to ensure the proper disbursal of and accounting for state and federal funds. For the State to ensure such proper disbursal and accounting, the State must, in turn, require SDAs which receive JTPA funds to establish debt collection procedures. *The specific process set forth in the Directive, however, is State-imposed and EDD admits that these provisions are regulatory.* [Emphasis added.]"[40]

Similarly:

> "The provisions regarding an SDA's relief of liability for a subrecipient's debt are, in part, based upon Title 20 C.F.R. section 627.706 and JTPA section 164(e) [Title 29 U.S.C.A. § 1574(e)(1)]. *The specific instructions, however, are State-imposed and regulatory.* [Emphasis added.]"[41]

OAL concurs with EDD's assessment. While parts of Directive D97-11 do restate federal or state law, its primary purpose is to implement that law by establishing new procedures for debt collection and relief of liability. As such, Directive D97-11 is a "regulation" subject to the APA.

3. <u>EDD Directive D98-9: Debarment of Service Providers</u>

California Unemployment Insurance Code Section 15061, subdivision (b), mandates that service providers against whom a final debt has been established shall be "barred from receiving [JTPA] funds in the future. . . ." EDD

characterizes Directive D98-9 as transmitting:

> [T]he policy and procedures for identifying service providers who are indebted to the State or a Service Delivery Area (SDA) and excluding them from the Job Training Partnership Act (JTPA) program.[42]

Portions of the text of the directive submitted with EDD's response were italicized. EDD acknowledges that these italicized portions are "State-imposed."[43] Inspection of this directive reveals that approximately seventy-five percent (75%) of its substantive provisions were italicized.[44] Thus, EDD's statement is an implicit admission that this directive supplements federal policy and is therefore a "regulation."

This conclusion is buttressed by the fact that the directive sets out specific consequences for service providers who are determined to be indebted. For instance, the directive imposes February 28th as a payment deadline date. It also establishes procedures for creation of a list of indebted service providers. Finally, service providers "identified on the JTPD debarment list issued on May 1" lose JTPA funding "beginning July 1." [45]

Thus, it is clear that directive D98-9 was written to implement federal and state law concerning cessation of JTPA funding to indebted service providers. Directive D98-9 is therefore a "regulation" which is subject to the APA.

4. <u>EDD Directive D97-6: Procurement</u>

The stated purpose of directive D97-6 is to:

> "[Provide] combined state and federal guidance regarding the procurement of goods and services by the Job Training Partnership Act (JTPA) recipients and subrecipients."[46]

Significant portions of the text of the directive submitted to OAL were italicized by EDD. Again, to its credit, EDD acknowledged that:

> "State-imposed requirements in italics and those provisions not identified as restatements of law or regulations are regulatory and therefore, subject to the APA."[47]

But even portions of the *non-italicized* text embellish upon controlling federal law.

For example, 20 CFR 627.420(b)(2) provides that:

> Each State and subrecipient shall have written procedures for procurement transactions. These procedures shall ensure that all solicitations:
> (i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured (including quantities). Such description shall not, in competitive procurements, contain features which unduly restrict competition; and
> (ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

By contrast, the EDD directive requires that:

> "Each subrecipient must have written procurement procedures [which] include:
>
> - identification of the allowable methods of procurement that the entity will use;
> - description of the conditions under which each method is appropriate;
> - a description of noncompetitive procurement and the circumstances under which it can be used;
> - circumstances under which bids will be rejected;
> - proposed evaluation for Request for Proposals (RFP), if applicable;
> - a description of failed competition and the rights and options in the event of a failure;
> - dispute resolution process which is separate and distinct from the JTPA grievance process;
> - code of conduct;
> - conflict of interest policy including sanctions for failure to comply; and
> - description of the documentation process including where the documentation will be located."[48]

In addition, directive D97-6 includes five attachments which give detailed instructions on bidding and procurement procedures as well as the content of announcements to prospective bidders.[49] Moreover, subrecipients are responsible for administering this process pursuant to the very specific requirements set forth in directive D97-6.

For these reasons, OAL concludes that the "State-imposed" requirements in

directive D97-6 go beyond the text which EDD italicized. This conclusion underscores the fact that directive D97-6 is clearly a "regulation" subject to the APA.

5. EDD Directive D98-11: Confidential Information

As with previous directives:

> "EDD admits that State-imposed requirements (italics) and provisions not identified . . . as summaries or restatements of law or regulations are regulatory and subject to the APA."[50]

Directive D98-11 thus implements several key state and federal laws governing the privacy rights of individuals. It sets out detailed policies and procedures aimed at insuring that "Subgrantors" and "Subgrantees" comply with this statutory law. Key provisions of this policy are provided in italics. Thus, OAL concurs with EDD that the italicized portions of Directive D98-11 are "regulations" which are subject to the APA.

6. EDD Directive D98-5: Annual Report Instructions

EDD readily admits this directive:

> "[A]lso contains State-imposed requirements in italics which . . . are regulatory and subject to the APA."[51]

OAL concurs. Directive D98-5 adds new reporting requirements pertaining to the placement of women in non-traditional occupations. As noted by EDD, these requirements implement 29 U.S.C., section 1532(b)(6). That federal statute mandates preparation of "a summary of the reports . . . detailing promising service delivery approaches developed in each service delivery area." Directive D98-5 does this by requiring SDAs to report on types of activities which are not specifically or expressly addressed by the statute. As such, directive D98-5 is a "regulation" which is 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 exempted by statute.[52] In *United Systems of Arkansas v. Stamison* (1998),[53] the California Court of Appeal rejected an argument by the Director of the Department of General Services that language in the Public Contract Code had the effect of exempting rules governing bid protests from the APA.

According to the *Stamison* Court:

> *"When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language.* (See, e.g., Gov. Code, section 16487 ['The State Controller may establish procedures for the purpose of carrying out the purposes set forth in Section 16485. These procedures are exempt from the Administrative Procedure Act.']; Gov. Code, section 18211 ['Regulations adopted by the State Personnel Board are exempt from the Administrative Procedure Act']; Labor Code, section 1185 [orders of Industrial Welfare Commission 'expressly exempted' from the APA].) [Emphasis added.]"[54]

Express statutory APA exemptions may be divided into two categories: special and general.[55] *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?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.[56] Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.[57]

Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Government Code section 11343, subdivision (a) (3).)

EDD claims the rules it promulgated are directed "to specifically named people."[58] In support of this proposition, it cites Government Code section 11343 (a) (3), which provides in part that:

> "Every state agency shall:
>
> (a) Transmit to the office [of Administrative Law] for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one which:
>
> . . . (3) Is directed to a specifically named person or to a group of persons *and does not apply generally throughout the state.* [Emphasis added.]"

In order to qualify for an APA exemption pursuant to Government Code section 11343, subdivision (a) (3), however, state agency communications must meet both parts of the two-prong test, that is, the regulation must be directed to a specific person or group of persons *and* not apply generally throughout the state.

Review of the legislative history of the APA indicates that the Legislature has strictly limited APA exemptions, with an eye toward making a much greater proportion of *state* agency rules subject to public notice and comment requirements than Congress sought to achieve in the federal APA regarding *federal* agency rules.[59]

EDD argues, however, that the list of JTPA service providers and administrators are "closed" classes or "specifically named people."[60] It relies on *Faulkner v. California Toll Bridge Authority* (1953)[61] where the California Supreme Court held that resolutions of the California Toll Bridge Authority were not subject to the APA because they only applied to one particular bridge.[62]

EDD's reliance on *Faulkner* is misplaced. EDD's directives *generally* apply to all members of named classes. For instance, five of the six directives apply to all JTPA "subrecipients." The sixth one applies to all SDAs. No one particular SDA or subrecipient is singled out as the only entity to whom a directive is addressed.

If OAL were to accept the Department's argument that the group of persons listed on the memo fell within the "specifically named person or to a group of persons" exemption, then to issue a memo to "All California Residents" would also qualify as a "specifically named person or group of persons."

EDD also ignores the second part of Government Code section 11343, subdivision (a)(3) which states "... *and does not apply generally throughout the state.*" (Emphasis added.) Clearly, as determined in the discussion above, each of the six of the directives applies generally throughout the state to all SDAs, subrecipients or other entities listed in them.

Hence, EDD's directives:

1) Are *not* directed to a specifically named person or to a group of persons, but are directed to several groups, whose membership is not fixed (i.e., open class); and
2) They *do apply generally* throughout the state.

This exemption claim therefore fails because the EDD directives do not satisfy the two-part test contained in Government Code section 11343, subdivision (a)(3).[63]

Since none of the challenged directives falls within any general 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:

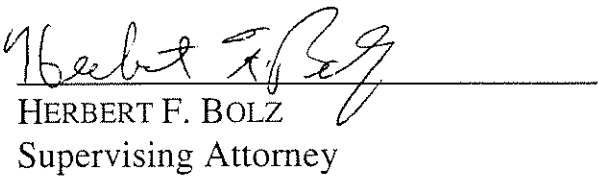
1. The APA is generally applicable to EDD.

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 six directives;

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

DATE: January 18, 2000



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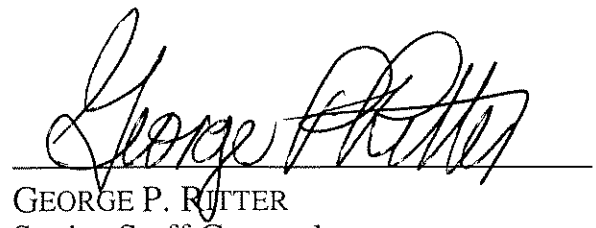

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ENDNOTES

1. This request for determination was filed by John K. Riess, Attorney at Law, 3579 Lomacitas Lane, Bonita, CA 91902.

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

   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 1988 OAL Determination No. 6, CRNR 98, No. 26-Z, June 16, 1998, p 1216.

10. See, for example, entities listed under the "TO" caption for any of the six directives.

11. For ease of reference the one bulletin and five directives will be referred to as the "six 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.

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.*

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.2d 264, 275, review denied.

18. *Id.*

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

20. *Id.*

21. (1993) 12 Cal.App.4th 697, 702, 16 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 Policy/Procedure Bulletin 84-13, dated July 13, 1984, p.1.

24. *Id.* at 2.

25. EDD Directive D97-11, dated Nov. 4, 1997, p. 1,2.

26. EDD Directive D98-9, dated Nov. 2, 1998, p. 1.

27. EDD Directive D97-6, dated Sept. 11, 1997, p. 1

28. EDD Directive 98-11, dated Dec. 22, 1998, p. 1.

29. EDD Directive 98-5, dated Sept. 1, 1998, p. 1.

30. 20 CFR 626.5.

31. 29 USC 1602(b), 1652(b).

32. 29 USC 1574(a); 20 CFR 627.480.

33. 20 CFR 627.480(d)(2); 20 CFR 627.481(c).

34. Un. Ins. C., section 15061.

35. See EDD Response to Request for Determination, dated Dec. 13, 1999, p. 2.

36. *Id*. at 3.

37. *Id*.

38. EDD Directive D97-11, Nov. 4, 1997, p. 1.

39. USC, section 1534.

40. EDD Response to Request for Determination, dated Dec. 13, 1999, p. 6.

41. *Id*.

42. *Id*.

43. EDD Directive D98-9, dated Nov. 2, 1998, p. 1.

44. EDD Response to Request for Determination, dated Dec. 13, 1999, p. 7.

45. EDD Directive D98-9, dated Nov. 2, 1998.

46. *Id*. at 2.

47. EDD Directive D97-6, dated Sept. 11, 1997, p. 1.

48. EDD Response to Request for Determination, p. 8.

49. EDD Directive D97-6, dated Sept. 11, 1997, pp. 3-4.

50. *Id*. at 9-13.

51. EDD Response to Request for Determination, p. 10.

52. EDD Response to Request for Determination, p. 11.

53. Government Code section 11346.

54. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.

55. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.

56. 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).

57. Government Code section 11346.

58. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec.11342, subd. (g).)

c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1); 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).)

f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, pp. 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.

57. EDD Response to Request for Determination, dated Dec. 13, 1999, p. 12.

58. Government Code section 11346; Armistead v. State Personnel Board (1978) 22 Cal. 3d 198, 201, 149 Cal. Rptr. 1,2.

59. Response at 12.

60. 40 Cal. 2d 317, 253 P.2d 659.

61. 40 Cal. 2d at 323 – 24.

62. **1987 OAL Determination No. 9**, CANR 87, No. 29-Z, July 17, 1987, p. B-31, B-39; typewritten version, p. 12 (letter addressed to one specifically named person which contained standard of general application did not fall within 11343(a)(3) exemption).