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# STATE OF CALIFORNIA

# OFFICE OF ADMINISTRATIVE LAW

## 2000 OAL Determination No. 7

**April 17, 2000**

**Requested by:** CALIFORNIA STATE EMPLOYEES ASSOCIATION

**Concerning:** STATE BOARD OF EQUALIZATION **rules on production standards in the Taxpayer Records Unit, Cashiers Unit, and Return Processing Unit**

**Determination issued pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3**

## ISSUE

The Office of Administrative Law ("OAL") has been requested by the California State Employees Association to determine whether various job production standards utilized by the State Board of Equalization ("Board") in its Taxpayer Records Unit, Cashiers' Unit, and Return Processing Unit are "regulations" as defined in Government Code section 11342, subdivision (g), and therefore invalid unless adopted as regulations and filed with the Secretary of State in accordance with rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with section 11340), Division 3, Title 2, Government Code; hereafter, "APA").[1]

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1. This request for determination was filed by the California State Employees Association (Jeffrey Young, Labor Relations Representative), 1108 O St. Sacramento, CA 95814, (916) 444-8134. The Board of Equalization's response was filed by John W. Wallace, Tax Counsel, 450 N St., Sacramento, CA 94279-0082, (916) 323-2481. This request was given a file number of 99-009. This determination may be cited as "**2000 OAL Determination No. 7.**"

## CONCLUSION

Job production standards applying to a small number of state employees at the State Board of Equalization although "regulations" within the meaning of the APA, are exempt from the APA because they relate only to the internal management of the Board.

## ANALYSIS

A determination of whether the Board's production standards are "regulations" subject to the APA depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the board, (2) whether the challenged standards contain "regulations" within the meaning of Government Code section 11342, and (3) whether those challenged standards fall within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government and not expressly exempted are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Government Code sections 11342, subdivision (a); 11346.) In this connection, the term "state agency" includes, for purposes applicable to the APA, "every state office, officer, department, division, bureau, board, and commission." (Government Code section 11000.) The Board is an executive branch state agency that has not been expressly exempted. Thus, OAL concludes that APA rulemaking requirements generally apply to the Board. (See *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).)

(2) 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, subdivision (b), authorizes OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements. It provides that:

> "If [OAL] is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (g) of Section 11342."[2]

In *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251[3] the California Court of Appeal upheld OAL's two-part test[4] as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g).

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2. See also *California Coastal Com'n v. OAL* (1989) 210 Cal.App.3d 758, 763, 258 Cal.Rptr. 560, 563 (OAL is empowered "to issue advisory opinions as to whether or not a particular action or rule is a regulation.")

3. 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, 59 Cal.Rptr.2d 186, 198. Grier, however, is still good law, 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.*

4. 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 or administered 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*]."

Under this test, a rule is a "regulation" for these purposes if (1) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (2) the challenged rule was 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, 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.* [Emphasis added.]" (219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.)

For an agency policy to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556. 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).)

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

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

> result in individual supervisors being required to comply with the APA when imposing a rule that employees not eat at their desks. . . ."[5]

Indeed, it appears that the challenged standards apply only to a small group of people. However, the size of the group to which rules apply is not the pivotal legal issue. According to the California Court of Appeal, the issue is whether or not the rules apply generally to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556.) In the matter at hand, the work production standards apply to all members of the class of clerks or office assistants employed by the Board in its Taxpayer Records Unit, Cashiers' Unit, and Return Processing Unit. The standards are thus "standards of general application."

With respect to whether the challenged standards implement, interpret or make specific the law enforced or administered by the Board or govern the Board's procedure, the Board maintains that the challenged standards do not implement the law enforced by the Board and thus do not satisfy the second part of the two-part test. The Board states:

> "Clearly the matters presented to OAL . . . have nothing to do with the implementation or interpretation of the tax laws under the authority of the Board of Equalization. Further, it cannot be said that the rules in question govern the procedure utilized by BOE in enforcing or administering the tax law, nor do they implement the statutory mandates imposed on the BOE."[6]

Nonetheless, the challenged work standards implement at least two statutes administered by the Board. Government Code section 15606, subdivision (a), directs the Board to "[p]rescribe rules for its own government and for the transaction of its business." Clearly, this section empowers the Board to adopt rules for the transaction of its business. The challenged production standards concern "the transaction of [Board] business" by employees in the Taxpayer Records Unit, Cashiers Unit, and Return Processing Unit. Presumably, these employees are opening or sorting mail containing tax returns, filing tax return documents, or entering data from these returns. The standards set acceptable hourly rates for these repetitive tasks. Some of these production standards were

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5. Agency Response, pp. 3-4.

6. Agency Response, p. 4.

contained in duty statements describing the positions. It is hard to imagine what could be more central to the transaction of Board business than the processing of tax returns. Moreover, Government Code section 11152 provides in part: ". . . [s]o far as consistent with law the head of each department may adopt such rules and regulations as are necessary to govern the activities of the department and may assign to its officers and employees such duties as he sees fit. . . ." This statute is applicable to all departments. (*Stockton v. Department of Employment* (1944) 25 Cal.2d 264 (construing Political Code section 350, the predecessor of Government Code section 11152).)

Clearly, Government Code section 11152 empowers the Board to adopt rules necessary to govern "the activities of the agency." Again, processing of tax returns is a critical activity of a tax agency, a function intimately related to the enforcement of tax laws. Thus, we conclude that the challenged rules implement, interpret, and make specific Government Code sections 15606 and 11152 and are "regulations" within the meaning of the APA.

(3) With respect to whether the Board's 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. (Government Code section 11346; *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411.) ("*When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language.*" [Emphasis added.])

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

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

> "Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of 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, *except one that relates only to the internal management of the state agency.* [Emphasis added.]"

The internal management exception has been judicially determined to be narrow in scope. (*Grier v. Kizer* (1990) 219 Cal.App.3d 422, 436, 268 Cal.Rptr. 244, 252 - 253.) A brief review of relevant case law demonstrates that the "internal management" exception applies if the "regulation" at issue: (1) affects only the employees of the issuing agency: and (2) does not address a matter of serious consequence involving an important public interest. (See *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 203 – 204, 149 Cal.Rptr. 1, 3 - 4; *Stoneham v. Rushen (Stoneham I)* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.)

The challenged standards affect only employees of the Board; indeed, they seem to affect only a small number of Board employees. They involve work production rates such as the number of documents sorted or filed per hour, and rates assigned for handling incoming tax returns and associated materials.[7] The standards clearly have no effect on anyone other than those current employees of the Board working in the Taxpayer Records Unit, the Cashier's Unit, and the Return Processing Unit.[8]

Even if an agency rule affects only employees of the issuing agency, the internal management exception does not apply where an agency rule addresses a matter of serious consequence involving an important public interest. For example, the court in *Poschman v. Dumke* found that "[T]enure within any school system is a matter of serious consequence involving an important public interest." (31 Cal.App.3d at 943, 107 Cal.Rptr. at 603.) Likewise, in 1988 OAL Determination No. 3, the State Board of Control required psychotherapy expenses claimed at certain hourly rates to be reviewed prior to reimbursement of victims of crime under the Victims of Crime Act. OAL found an "important public interest" was involved because of the Legislature's express statement of intent: "that there is a public interest in assisting Californians in 'obtaining restitution for the pecuniary losses they suffer as a direct result of criminal acts.'" (Emphasis added.) (Government Code section 13959.)[9]

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7. See request for determination, attachments 1 – 7.

8. See related request for determination, dated Feb. 2, 2000, filed by CSEA, Docket No. 99-005. That request challenged Board rules on key strokes and machine time for key data operators. OAL determined that these rules were not subject to the APA because they related solely to the Board's internal management. 2000 OAL Determination No. 3, California Regulatory Notice Register 2000, No. 6-Z, February 11, 2000, p. 256.

9. 1988 OAL Determination No. 3, California Regulatory Notice Register 88, No. 12-Z,

Though not directly addressing this pivotal "serious consequence/important public interest" issue, CSEA argues that the Board's production standards "have led to increased repetitive motion injuries, including permanent damage to employees." CSEA also cites the "ultimate threat of dismissal," associated with these standards.[10]

In its response, the Board states that "rules applicable only to employees should be covered by an 'internal management' exception."[11] It further states:

> "*These Rules do not Pertain to a Matter of Serious Consequence Involving an Important Public Interest:* OAL has, in the past found that the 'internal management' exception can be overcome when challenged rules have been found to involve a matter of serious consequence involving an important public interest. To illustrate this narrow exception to the 'internal management' exception, OAL and the courts have applied it to a rule pertaining to tenure in a school system (*Poschman v. Dumke* (1973) 31 Cal.App.3d 932)[12]; rules implementing statewide discrimination policy (*1999 OAL Determination No. 3*); and a rule governing Board of Control payments to claimants for psychotherapy expenses (*1988 OAL Determination No. 3*). Again the scope of the rules in question in these cases reached far beyond the unit policies at issue in this case.
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> Similarly, in *1998 OAL Determination No. 36*, the OAL concluded that aspects of DMV's sick leave policy dealing with attendance restrictions impacted discipline and medical privacy and therefore fell out of the 'internal management' exception. . . . Unlike an attendance restriction policy that potentially affects every employee and touches on privacy issues,

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March 18, 1988, pp. 855, 864; typewritten version, p. 10.

10. Request for determination, p. 1.

11. Agency Response, p. 6.

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

the BOE's rules are simply unit rules of expected production and other job expectations."[13]

In principle, we agree that routine unit rules concerning quantity and quality of work are not matters of *serious* consequence involving an *important* public interest. Prior determinations where the "internal management" exception was found not to apply typically involved independent matters of important public policy. For instance, in 1999 OAL Determination No. 3, the policy in question impacted the manner an agency dealt with *discriminatory* practices affecting state employment. Likewise, in 1998 OAL Determination No. 36, the management rule adversely impacted employees' *privacy interests*.

Similarly, the APA does not require that routine position duty statements be adopted after public notice and comment. These are the sorts of internal agency rules which the Legislature intended to exempt from rulemaking requirements by enacting the internal management exception. This is not to say that production standards are not significant or not subject to review in the appropriate venues. For instance, the Dills Act provides remedies for adjudicating unfair labor practice allegations. (Government Code sections 3512 - 3524.) The State Personnel Board reviews specific disciplinary actions. (Government Code sections 18650 – 18720.5.) Cal-OSHA has adopted regulations applying to repetitive motion injuries in the workplace. (Title 8, CCR, section 5110.)

For all of the above reasons, we conclude that the challenged standards do not address a matter of serious consequence involving an important public interest, and thus fall within the internal management exception. Therefore, the challenged standards, though "regulations," are nonetheless exempt from the APA because they relate solely to the internal management of the Board of Equalization.

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13. *Id.* at 6 – 7.

DATE: April 17, 2000

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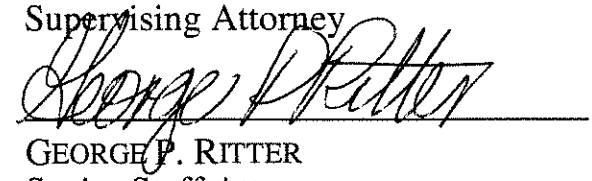

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