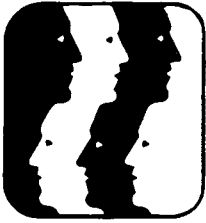


INTERNAL GOVERNMENT REVIEW OF AGENCIES



The Reporter summarizes below the activities of those entities within state government which regularly review, monitor, investigate, intervene or oversee the regulatory boards, commissions and departments of California.

OFFICE OF ADMINISTRATIVE LAW

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The Office of Administrative Law (OAL) was established on July 1, 1980, during major and unprecedented amendments to the Administrative Procedure Act (AB 1111, McCarthy, Chapter 567, Statutes of 1979). OAL is charged with the orderly and systematic review of all existing and proposed regulations against six statutory standards—necessity, authority, consistency, clarity, reference and nonduplication. The goal of OAL's review is to "reduce the number of administrative regulations and to improve the quality of those regulations which are adopted...." OAL has the authority to disapprove or repeal any regulation that, in its determination, does not meet all six standards.

OAL also has the authority to review all emergency regulations and disapprove those which are not necessary for the immediate preservation of the public peace, health and safety or general welfare.

Under Government Code section 11347.5, OAL is authorized to issue determinations as to whether state agency "underground" rules which have not been adopted in accordance with the Administrative Procedure Act (APA) are regulatory in nature and legally enforceable only if adopted pursuant to APA requirements. These non-binding OAL opinions are commonly known as "AB 1013 determinations," in reference to the legislation authorizing their issuance.

MAJOR PROJECTS:

AB 1013 Determinations. The following determinations were issued and published in the *California Regulatory Notice Register* in recent months:

-August 30, 1989, OAL Determination No. 13, Docket No. 88-019. OAL found that, until December 8, 1988, the

Department of Rehabilitation's Field Operations Division Directive No. 157 concerning vehicle purchases and/or modifications needed for a client to have access to the Department's vocational rehabilitation training services was a regulation within the meaning of the APA. On December 8, 1988, the Department rescinded the Directive and removed it from the regulatory realm; thus, it is no longer subject to the requirements of the APA.

-September 21, 1989, OAL Determination No. 14, Docket No. 89-001. OAL determined that portions of a bulletin issued by the Department of Corrections fall within the definition of a regulation requiring adoption in compliance with the APA.

The Department's Administrative Bulletin (AB 88/24) prescribes methods of calculating the minimum eligible parole date for inmates serving an indeterminate sentence. Indeterminate sentences are those set for a range of fifteen years to life, 25 years to life, or life imprisonment with possibility of parole.

Penal Code sections 2933 and 2934 provide for credit reductions of indeterminate sentences for inmates who participate in qualifying work programs. The Bulletin prescribes the procedure used to implement the worktime credit provisions. The challenge to AB 88/24 concerns whether inmates are entitled to a one-for-one reduction in their sentences for time participation pursuant to section 2933, or whether they earn only one-third or one-fourth worktime credit under section 2934.

The OAL determined that while parts of the Bulletin merely restate existing law, the portions which prescribe the method of calculation of minimum parole dates by applying the relevant Penal Code sections are regulations. As such, these provisions must be adopted in compliance with the APA.

-October 10, 1989, OAL Determination No. 15, Docket No. 89-002. Here, OAL found portions of Department and

Fair Employment and Housing Field Operations Directive No. 17 to be regulations subject to APA requirements. Field Operations Directive No. 17 provides for a waiver of complaints alleging pregnancy discrimination to the federal Equal Employment Opportunity Commission, except pregnancy discrimination complaints where the respondent employs fewer than fifteen people or has denied a four-month pregnancy leave of absence. Discrimination on the basis of pregnancy is generally prohibited by Government Code section 12945.

OAL found that Directive No. 17 effectively bars those filing pregnancy discrimination complaints from obtaining recourse at the state level, unless the complaint falls into either of the two enumerated categories; thus, that portion of Directive No. 17 is a regulation and must be adopted according to the APA.

LEGISLATION:

AB 2196 (Campbell), which would have exempted the Fish and Game Commission from certain provisions of the APA when conducting a rulemaking proceeding on a petition to list a species as endangered or threatened, died in the Assembly Committee on Water, Parks and Wildlife.

LITIGATION:

California Coastal Commission v. OAL, et. al., No. A039703 (1st Dist., May 17, 1989). Upon denial of OAL's petition for review by the California Supreme Court, OAL set aside its previous determination in Docket No. 85-003 that certain interpretive guidelines of the Coastal Commission are subject to APA requirements. (See CRLR Vol. 9, No. 4 (Fall 1989) p. 30; Vol. 9, No. 3 (Summer 1989) p. 28; and Vol. 9, No. 2 (Spring 1989) p. 37 for background information.)

In *California Chapter of the American Physical Therapy Ass'n et al., v. California State Board of Chiropractic Examiners, et al.*, Nos. 35-44-85 and 35-24-14 (Sacramento Superior Court), petitioners and intervenors challenge the Board's adoption and OAL's approval of section 302 of the Board's rules, which defines the scope of chiropractic practice. Following the court's August 1989 ruling preliminarily permitting chiropractors to perform physical therapy, ultrasound, thermography, and soft tissue manipulation, the parties engaged in settlement negotiations. A January 5 status conference was postponed until March 2. (See CRLR Vol. 9, No. 4 (Fall 1989) p. 30, Vol. 9, No. 3 (Summer



1989) p. 28, and Vol. 9, No. 2 (Spring 1989) p. 37 for background information on this case.)

OFFICE OF THE AUDITOR GENERAL

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The Office of the Auditor General (OAG) is the nonpartisan auditing and investigating arm of the California legislature. OAG is under the direction of the Joint Legislative Audit Committee (JLAC), which is comprised of fourteen members, seven each from the Assembly and Senate. JLAC has the authority to "determine the policies of the Auditor General, ascertain facts, review reports and take action thereon...and make recommendations to the Legislature...concerning the state audit...revenues and expenditures..." (Government Code section 10501.) OAG may "only conduct audits and investigations approved by" JLAC.

Government Code section 10527 authorizes OAG "to examine any and all books, accounts, reports, vouchers, correspondence files, and other records, bank accounts, and money or other property of any agency of the state...and any public entity, including any city, county, and special district which receives state funds...and the records and property of any public or private entity or person subject to review or regulation by the agency or public entity being audited or investigated to the same extent that employees of that agency or public entity have access."

OAG has three divisions: the Financial Audit Division, which performs the traditional CPA fiscal audit; the Investigative Audit Division, which investigates allegations of fraud, waste and abuse in state government received under the Reporting of Improper Governmental Activities Act (Government Code sections 10540 *et seq.*); and the Performance Audit Division, which reviews programs funded by the state to determine if they are efficient and cost effective.

RECENT AUDITS:

Report No. P-821 (December 1989) concerns the Laboratory Field Services (LFS) within the state Department of Health Services (DHS). DHS administrators California's clinical laboratory

licensing program. Clinical laboratories conduct diagnostic tests on tissue and other substances obtained from the human body at the request of physicians. The LFS, within DHS' Division of Laboratories, is responsible for ensuring that clinical laboratories comply with the laws and regulations governing clinical laboratories. State law and regulations require that all licensed clinical laboratories are maintained and operated without injury to the public and that laboratories have proper facilities, quality control procedures, and licensed personnel. The LFS determines compliance through on-site inspections and a program of proficiency testing services, in which laboratories are sent test samples to analyze once per quarter.

The Auditor General's report indicates a need for increased monitoring of the proficiency test results and prompt action by the LFS against laboratories which have failed proficiency tests during three or more quarters. In 1988, only about 22% of the test results were evaluated. OAG also found that a new statutory formula for the annual calculation of license fees for clinical laboratories and clinical laboratory personnel is not being implemented, resulting in undercharging of licensees. These licensing fees, once received by DHS, are not promptly endorsed and deposited.

OAG made several recommendations to DHS, which the Department plans to follow. OAG and DHS agree that there is a need for additional manpower until the Department can implement the automated system currently in development to evaluate proficiency test results. Also, legislation which would allow for staggered expiration of licenses would even out the workload over the year, allowing the cashiering group to promptly endorse and deposit fees. Another recommendation is to require all laboratories that fail proficiency tests to stop providing the applicable diagnostic tests to the public as soon as the staff at LFS determines that the laboratories are not passing the proficiency tests.

COMMISSION ON CALIFORNIA STATE GOVERNMENT ORGANIZATION AND ECONOMY (LITTLE HOOVER COMMISSION)

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The Little Hoover Commission was created by the legislature in 1961 and became operational in the spring of 1962. (Government Code sections 8501 *et seq.*) Although considered to be within the executive branch of state government for budgetary purposes, the law states that "the Commission shall not be subject to the control or direction of any officer or employee of the executive branch except in connection with the appropriation of funds approved by the Legislature." (Government Code section 8502.)

Statute provides that no more than seven of the thirteen members of the Commission may be from the same political party. The Governor appoints five citizen members, and the legislature appoints four citizen members. The balance of the membership is comprised of two Senators and two Assemblymembers.

This unique formulation enables the Commission to be California's only truly independent watchdog agency. However, in spite of its statutory independence, the Commission remains a purely advisory entity only empowered to make recommendations.

The purpose and duties of the Commission are set forth in Government Code section 8521. The Code states: "It is the purpose of the Legislature in creating the Commission, to secure assistance for the Governor and itself in promoting economy, efficiency and improved service in the transaction of the public business in the various departments, agencies, and instrumentalities of the executive branch of the state government, and in making the operation of all state departments, agencies, and instrumentalities and all expenditures of public funds, more directly responsive to the wishes of the people as expressed by their elected representatives..."

The Commission seeks to achieve these ends by conducting studies and making recommendations as to the adoption of methods and procedures to reduce government expenditures, the elimination of functional and service duplication, the abolition of unnecessary services, programs and functions, the definition or redefinition of public officials' duties and responsibilities, and the reorganization and or restructuring of state entities and programs.

MAJOR PROJECTS:

Report on California's Fish and