



interpret, or make specific the law enforced or administered by the agency or govern the agency's procedure." Instead, OAL concluded that DLSE's policy simply states the only legally tenable interpretation of the term "hours worked," and therefore is not a regulation.

After making this determination, OAL disagreed with DLSE's overall position that Labor Code section 1198.4, which requires DLSE to "make available to the public any enforcement policy statement or interpretations of orders of the [Commission]," exempts DLSE's enforcement policies from the scope of the APA. OAL noted that Government Code section 11346 specifically states that APA requirements are applicable to any exercise of quasi-legislative power unless expressly exempted by the legislature.

Privatization of Publication of CCR. Southern California state depository librarians and law libraries are contemplating sponsoring legislation to require the state to reimburse them for purchasing the Revised Official California Code of Regulations, now published by Barclays Law Publishers instead of the state. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 47 for background information.) OAL General Counsel John Smith reports that OAL may aid the librarians in sponsoring this funding proposal.

As reported previously, the Barclays version represents the new uniform format resulting from a six-year revision of codified state regulatory law. Because the State Printer decided to cease publishing the CCR, OAL contracted with Barclays to print it. Whereas the State Printer had always provided a free subscription to the CCR to all 153 depository libraries in California, no such requirement was included in OAL's contract with Barclays. Under the Public Records Distribution Act (Government Code section 14900 *et seq.*), 100 state government depository libraries and all county clerks will receive the Barclays version of the CCR free, courtesy of OAL. However, the remaining depositories must pay for their subscriptions, which cost \$4,000 per set plus \$2,000 per year for the update service.

LITIGATION:

OAL's motion for summary judgment was recently denied in *Fair Political Practices Commission v. Office of Administrative Law, et al.*, No. 512795 (Sacramento County Superior Court). In this action, FPPC challenges OAL's authority to review FPPC regulations under the APA as it has been amended

since 1974. The FPPC contends that its regulations are subject to review under the APA only as it existed at the time of the electorate's approval of the Political Reform Act (PRA), which, *inter alia*, created the FPPC. OAL (and its role in reviewing regulatory agency rulemaking) was not created until 1980. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 47 for background information.) On August 15, the parties agreed to a briefing schedule, and a hearing in this matter was scheduled for late November.

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 County Superior Court), an August 2 status conference—one of many scheduled and then postponed due to the parties' collective determination to engage in extensive settlement negotiations—was unsurprisingly postponed and rescheduled once again for October 5. OAL General Counsel John Smith reports that a settlement is now expected soon and more than likely will moot or cause a further postponement of the scheduled October 5 status conference.

The parties are litigating the validity of the Board of Chiropractic Examiners' (BCE) adoption and OAL's approval of section 302 of BCE's regulations, which defines the scope of chiropractic practice. Mr. Smith expects that the eventual settlement will cause BCE to amend section 302. OAL is only peripherally involved in the action at its present level, and has not been a party to the ongoing negotiations. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 47; Vol. 9, No. 4 (Fall 1989) p. 127; and Vol. 9, No. 3 (Summer 1989) p. 118 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-935 (June 1990) concerns purchasing practices and conflict of interest policies in the selection of school textbooks for use in elementary and high schools. The report notes that the state Board of Education (Board) is responsible for approving textbooks and other instructional materials that it determines are suitable for use in California's elementary schools. From the list of materials adopted by the Board, local school districts select most of the textbooks and instructional materials that they purchase. In researching these issues, OAG reviewed two recent state adoptions and the subsequent purchase of textbooks by four school districts.

The report found that certain publishers failed to provide instructional materials free of charge to schools districts which purchased their textbooks, as required by Education Code §60061. Also, certain publishers failed to report to the state Department of Education (Department) when free instructional materials became available to districts, as required by their contracts. According to the report, publishers erroneously charged fifteen districts at least \$60,000 for such materials. In one case, a publisher provided a \$10,000 grant to one district that it did not provide to other districts.



Additionally, OAG found that local school districts' policies regarding prohibition of financial or other incompatible relationships with publishers and the reporting of such relationships are not as comprehensive as the policies of the state. Further, some school districts lack comprehensive conflict of interest policies. As a result, districts risk having the public and others question the credibility of their decisions. Further, districts may not be buying the instructional materials that are best suited for the needs of their pupils.

OAG also found that publishers hold many seminars, workshops, and other events to present their instructional materials to school officials, occasionally providing refreshments, transportation, lodging, and small gifts. Four of the eight publishers surveyed by OAG reported that they hosted approximately 300 such events from 1987-89.

After reviewing the current situation, OAG offered a variety of recommendations, including the following:

- The Department should pursue any payments and penalties due from publishers which charged school districts for instructional materials the districts should have received free and for materials they were entitled to receive free but did not receive at all;

- The Department should require publishers to pay a penalty when they fail to notify the Department of instructional materials they are offering for free but which do not already appear in their contracts with the Board;

- The Department should require publishers to make any grants available to the same extent to all school districts; and

- The legislature should mandate "incompatible activities requirements" for school officials involved in textbook procurement.

Report No. P-971 (June 1990) reviews the California Department of Transportation's (Caltrans) cost estimates for Regional Measure One Projects. Regional Measure One Projects are improvement and construction projects authorized by the legislature and the voters in seven counties to reduce traffic congestion in the San Francisco Bay Area.

Between October 1987 and March 1990, Caltrans provided cost estimates to various entities, including the legislature and the Metropolitan Transportation Commission. For the four projects reviewed by OAG, the October 1987 estimates totalled \$447.1 million. By March 1990, Caltrans had revised its cost estimates to \$595 million, an increase of \$147.9 million (33%). Cal-

trans reportedly changed its estimates because of project scope revisions, the use of more detailed procedures to estimate costs based on engineering studies, and the fact that two methods were used to estimate costs.

OAG reported that, when presenting cost estimates to the legislature and other interested parties, Caltrans did not consistently incorporate all costs into the estimates, including the effects of inflation. Also, Caltrans failed to include in its estimates project support costs, which comprise Caltrans' costs for project development and construction engineering, including construction inspection and administrative overhead costs.

OAG also noted that Caltrans expects its estimates to change as each project's scope is further defined and developed, and that inflation, schedule changes, scope changes, and environmental issues will affect the cost of the projects.

Report No. A-001 (July 1990) highlights certain audits completed by OAG from January 1, 1989 to June 30, 1990. During that period, OAG issued 60 audit reports addressing the operation of state agencies, school districts, transit districts, and local governments. According to the report, implementation of many of OAG's recommendations in those reports could save state taxpayers more than \$75 million and produce significant benefits to the agencies audited and the citizens of California.

The report arranges OAG's audits into six major areas of government: education, health and safety, environment and transportation, justice, government operations, and financial administration.

Report No. F-958 (July 1990) examines the Business Enterprise Program for the Blind administered by the Department of Rehabilitation (Department). The Program provides training and employment for legally blind persons in the management of food service and vending facilities on public and private properties throughout California. The purpose of OAG's audit was to independently evaluate the Department's internal controls over equipment used within the program.

OAG determined that the Department maintained inadequate control over the purchase and use of equipment, citing two examples when the Department purchased equipment that was already available in Department warehouses. OAG found that the Department needlessly spent at least \$15,000 in federal and vendor trust funds; and that unnecessarily long storage of equipment diminishes the Department's opportunity to use the equipment's warranty and delays the productive use of the equipment.

OAG further found that the Department maintains inadequate control over the transfer and disposal of equipment. Specifically, OAG noted that the Department does not maintain a system, such as a numerical listing, to account for all transfers of equipment between vending locations. OAG noted that such weaknesses in the controls over the transfer and disposal of equipment diminish the Department's ability to prevent or detect lost or stolen equipment.

OAG recommended that the Department take the following actions in order to improve its management of the purchase, use, transfer, and disposal of equipment used in the program:

- Before purchasing needed equipment, verify that similar equipment is not available in its warehouses;

- Reduce the equipment stored in its warehouses by putting usable equipment into service;

- Develop a system to identify all transfers of equipment between vending locations; and

- Ensure that equipment records contain timely information by promptly recording transfer and disposal activity.

Report No. P-856 (August 1990) reviews specific activities of the Fish and Game Commission (FGC) and the Department of Fish and Game (DFG) to answer questions about FGC's annual pack trip; determine whether any FGC member had been hosted on other fishing or hunting trips; and determine whether either FGC or DFG had released confidential information to unauthorized persons.

Since 1969 (with the exception of 1986 when there was no trip), FGC has sponsored an annual pack trip, generally held in a remote location of the High Sierras. According to a former DFG director, the purpose of the pack trip is to bring together people interested in resource management to discuss issues of common interest in a remote setting. No specific agenda is set for the trip, and the atmosphere is casual. Participation in the pack trip has been by invitation, and past participants have included legislators and their staff, representatives of the U.S. Forest Service, personnel from the state resources agencies, and members of the public. No more than two FGC commissioners have participated in each trip since 1985; on two pack trips, no commissioners participated.

OAG determined that FGC did not use state funds to finance its annual pack trip, as participants pay to attend and commissioners make up the any extra expenses with voluntary contributions.

OAG noted that DFG has used its aircraft to transport DFG officials and pack



trip participants to an airport near the trip site. According to OAG, the most that DFG spent to use its aircraft to transport pack trip participants was approximately \$2,000 in 1987. Sections 743-744 of the State Administrative Manual list specific conditions under which DFG may use its aircraft, such as if commercial flights to the area cannot meet DFG's scheduling needs and if the trip is longer than two hours by car. OAG determined that DFG's use of its aircraft did not violate the State Administrative Manual. In 1989, for example, OAG found that no scheduled flight met DFG's needs, and the trip was more than five hours by car.

OAG also investigated whether FGC commissioners' participation in the pack trips violated the Bagley-Keene Open Meeting Act (Government Code § 11120 *et seq.*). As a multimember state body, FGC is subject to the Open Meeting Act, and is required to conduct its proceedings openly so that the public may remain informed.

OAG requested a Legislative Counsel's opinion to determine whether the pack trips violated the Open Meeting Act. The Legislative Counsel identified two possible conditions under which the pack trip would violate this law. First, if participants discuss problems affecting management of fish and wildlife and three or more commissioners participate in those discussions, they have held a Commission meeting subject to the provisions of the Open Meeting Act. Second, if only two commissioners on the pack trip participate in discussions relating to the management of fish and wildlife, and if FGC has expressly delegated its authority to these two commissioners to act as a committee or appointed them to an advisory committee by formal action, the two commissioners may constitute a state body under the Open Meeting Act.

OAG determined that neither of the conditions identified by the Legislative Counsel applied to past FGC pack trips, since no more than two commissioners attended each trip, and only in 1989 did two attend. Following a review of FGC's 1989 minutes, OAG determined that FGC did not delegate authority to act for FGC to the two commissioners who went on the pack trip.

OAG further reported that no commissioner admitted receiving a gift of a subsidized hunting or fishing trip on the statements of economic interest filed annually by each commissioner since 1985.

Finally, after reviewing FGC and DFG records, OAG concluded that no personal and confidential information

was released to unauthorized individuals.

Report No. P-660 (August 1990) reviews the Department of General Services' (Department) implementation of a statewide property inventory (SPI) of all real property held by the state, as required by Government Code § 11011.15 (Chapter 907, Statutes of 1986). According to the report, the Department did not implement the SPI by January 1, 1989, the deadline for required implementation. Further, as of July 31, 1990, the Department had still not yet fully implemented the SPI.

Because the Department has not yet fully implemented the SPI, the state cannot ensure that it is fully utilizing its properties and that it is effectively transferring, leasing, and disposing of surplus properties and properties with no identified current or projected use. Also, the delays result in a continuing violation of Government Code § 11011.15.

Although the SPI is still being reviewed and verified and cannot be expected to be complete and accurate, OAG found certain deficiencies that the Department should correct as it fully implements the SPI, such as the failure of certain state agencies to report properties to the Department.

Report No. C-972 (August 1990). In 1977, the legislature adopted a *Capitol Area Plan (CAP)* to coordinate the development and use of state facilities in metropolitan Sacramento. The Office of Project Development and Management (OPDM), in response to the 1977 CAP, published the *Sacramento Facilities Plan, 1977-2000*, which set forth policies, plans, and recommendations to fulfill the legislature's goals as expressed in the CAP. This OAG report provides the legislature with independently developed information related to the state's policies and activities for planning and development facilities and office space as presented in *Sacramento Facilities Plan, Eighth Supplement: Implementation Issues, 1988*.

The report makes specific findings regarding the state's current policy toward planning procedures, including the following:

- There has not been effective leadership at a high level to ensure that the Sacramento Facilities Plan is implemented;

- OPDM has limited resources to maintain the plan and virtually no authority to implement it. Control over the capital acquisition process is dispersed and ill-defined;

- The procedures for obtaining authority and funding to build are complex,

uncertain, and extremely time-consuming;

- Capital outlay funds have essentially disappeared; and

- The ready availability of leasable space, at reasonable rents, has reduced the demand for construction by relieving overcrowding pressures.

Although the report includes numerous recommendations regarding the above concerns, its primary recommendation is that the state of California—including the new administration and the legislature—must decide whether it still wishes to implement the Capital Area Plan and the Sacramento Facilities Plan. If it does (or desires only minor modifications), a clear commitment to do so is required.

Other Reports. Also during the past few months, OAG has released the following reports: *A Review of Personnel Practices At the Military Department: Some Practices For State Active Duty Employees Need Improvement* (Report No. P-822.1, April 1990); *A Review of the Los Angeles Community College District's Management of Construction Projects* (Report No. C-948, June 1990); *Statement of Securities Accountability of the State Treasurer's Office* (Report No. F-903, June 1990); *The Alameda-Contra Costa Transit District: Seventh and Final Quarterly Monitoring Report* (Report No. P-861.7, July 1990); and *To Adequately Manage and Protect Its Assets, the Sweetwater Union High School District Needs To Improve Its Control Over Its Financial Operations* (Report No. F-962, July 1990).

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

Executive Director:

Jeannine L. English

Chairperson: Nathan Shapell

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INTRODUCTION:

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