

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:

-December 7, 1988, OAL Determination No. 21, Docket No. 87-028. OAL determined that the State Teachers' Retirement System's (STRS) Administrative Directive concerning the Reduced Work-

load Program is a regulation within the meaning of the APA, thus requiring its adoption in accordance with APA rule-making procedures. OAL found that Administrative Directive 81-6 sets forth STRS's interpretation of provisions of the Education Code governing Reduced Workload Programs for certificated employees of California public schools, and is a standard of general application as it is addressed to "all County Superintendents of Schools, District Superintendents of Schools, and Other Employing Agencies." Further, the Directive is intended to implement various sections of the Education Code. Government Code section 11347.5 requires that such a standard be adopted pursuant to the APA.

-December 21, 1988, OAL Determination No. 22, Docket No. 88-001. In this determination, OAL examined the Department of Corrections' (Department Administrative Bulletin 86/68, which outlines a policy of classifying, identifying, and processing inmates as "public interest" cases. OAL found that the Department policy contained in the Administrative Bulletin is a standard of general application as well as a supplement to section 3375, Title 15 of the California Code of Regulations (CCR), regarding the Department's inmate classification system.

OAL concluded that insofar as the policy is used for the purpose of classifying an inmate in determining length of confinement, institution placement, transfer between institutions, or program participation, the policy is subject to the rulemaking requirements of the APA as the classification system would affect the inmate's level of placement. However, OAL also found that insofar as the policy relates only to internal management procedures and does not substantially affect the interests of inmates, it is not subject to APA requirements. Thus, AB 86/68 is not required to comply with the APA so long as it is used only for the Department's internal recordkeeping.

-January 18, 1989, OAL Determination No. 1, Docket No. 88-003. OAL

determined that the State Board of Control's policy of not granting requests for reconsideration of its denials of victim restitution claims in the absence of new information is a regulation within the meaning of the APA. This policy was in violation of the APA until October 1, 1988, when the Board adopted emergency regulations concerning the challenged policy.

The State Board of Control is the administrative board responsible for adjudicating monetary claims filed against the State of California. The Board is responsible for reviewing and paying claims filed under the Victims of Crime Program, which assists residents in obtaining restitution for losses suffered as a result of a criminal act. OAL found that the Board's reconsideration policy is a standard of general application which interprets and implements the California Victims of Violent Crimes Act (sections 13959-13969.2 of the Government Code). Because the Board adopted emergency regulations concerning the reconsideration policy, OAL found it is no longer in violation of the APA.

-February 1, 1989, OAL Determination No. 2, Docket No. 88-004. OAL determined that operations plans issued by ten Department of Corrections (Department) institutions pertaining to inmate grievance procedures are regulations requiring APA approval.

In a prior determination (see CRLR Vol. 8, No. 3 (Summer 1988) p. 35 for OAL Determination No. 6, Docket No. 87-012, April 27, 1988), OAL concluded that Chapter 7300 of the Department's Administrative Manual establishing inmate appeal procedures was subject to the requirements of the APA. In the instant determination, the OAL found that since each of the ten "local institution" operations plans concerning inmate grievance procedures substantially mirrors the regulatory provisions of Chapter 7300 of the Administrative Manual, they must also comply with APA rulemaking requirements.

Although OAL found that a vast majority of the rules set forth in the ten operations plans are standards of general application which implement, interpret, or make specific the law administered by the Department, portions of the rules which mirror section 7310 of the Administrative Manual fall under the "internal management" exception to APA rulemaking requirements.

In making its determination, OAL declared that "[t]he Department cannot shield its rules or standards of general application from the scrutiny of the APA



by reissuing them as 'operations plans' of individual institutions."

-February 21, 1989, OAL Determination No. 3, Docket No. 88-005. OAL found that chapters 100 through 1900 (noninclusive) of the Department of Corrections' Case Records Manual, which establish procedures for use of case records for each inmate, are regulations required to be adopted in compliance with the APA. OAL determined that the challenged rules are standards of general application governing the establishment, maintenance, use, and disposition of inmates' information records which substantially affect all inmates statewide. OAL also found that section 927, entitled "Release to Subsequent Prison Commitments", is not subject to APA rulemaking requirements because this section falls under the internal management exception.

OAL Offers Training. OAL, through the Department of Personnel Administration, is offering classes to state employees on how to conduct a rulemaking action under the California APA. One of the goals of the training program is to promote serious consideration by state agency staff of public comments in the rulemaking process. More than 400 people are expected to receive the training by the end of the fiscal year.

Technical Changes to OAL's Regulations. OAL recently adopted, approved, and filed minor changes to numerous sections of its own regulations, which appear in Title 1 of the CCR. Due to the enactment of AB 2540 (Leonard) (Chapter 1375, Statutes of 1987), which made several amendments to the rulemaking portion of the APA, three types of changes were made to OAL's regulations: (1) changes to statutory section numbers referenced in the regulations; (2) changes in publication names; and (3) other minor clarifying changes. OAL's amendments to Title 1, sections 10-12, 14, 16, 20, 40, 42, 44-46, 56, 84, 86, 90, 100, and 120-28 are effective at this writing.

LITIGATION:

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, is still pending in Sacramento Superior Court. Plaintiffs challenge, *inter alia*, OAL's approval of regulatory section 302 of the Board of Chiropractic Examiners' regulations. (See CRLR Vol. 8, No. 3 (Summer 1988) p. 36 for background information.) The court is currently hearing motions for reconsideration

of two previous rulings against the Board (see *infra* agency report on BCE for further information).

OFFICE OF THE AUDITOR GENERAL

Acting Auditor General: Kurt Sjoberg (916) 445-0255

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:

In March, Acting Auditor General Kurt Sjoberg issued a report criticizing the financial health of the state of California. According to the report, the state loses millions of dollars each year because of inefficiencies in collecting debts, control of expenditures, and management of cash. The OAG audit estimated that California ended fiscal year 1987-88 with a \$590 million deficit.

The report also criticizes the differing accounting systems used by state financial reporting agencies. Sjoberg recommends that all agencies use Generally Accepted Accounting Principles, or GAAP. This system is a nationally recognized set of accounting principles which would allow the state to be compared with other states.

The report recommends modifications to a variety of spending restrictions to avoid future fiscal problems. These restrictions include the Gann constitutional spending limit, mandatory education spending levels under Proposition 98, and automatic cost-of-living increases for health and welfare programs.

OAG's report is the latest of several audits which have all reached differing conclusions on the severity of the state's deficit depending on the items considered and the accounting method used. State Controller Gray Davis arrived at a \$1.4 billion deficit figure; Legislative Analyst Elizabeth Hill concluded that the state ended 1987-88 with a \$200 million deficit; and the Commission on State Finance found a \$97 million deficit.

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

Executive Director:

Jeannine L. English

Chairperson: Nathan Shapell

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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