

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:

-May 12, 1988, OAL Determination No. 7, Docket No. 87-013. OAL reviewed Department of Rehabilitation policies relating to vocational rehabili-

tation counselor production goals and found these policies are regulations which had not been adopted in compliance with the APA.

The departmental policy which requires counselors in the Southern Region to work only with clients who are within ninety days of going to work and to offer these clients only clothing and job-seeking skills was found to be a regulation subject to APA rulemaking requirements. OAL also found some of the other challenged provisions to be elements of the legislative budget process.

-May 25, 1988, OAL Determination No. 8, Docket No. 87-014. OAL determined that the State Board of Equalization's County Assessors Letter No. 84/51 ("Valuation of Subdivision Lots") is a regulation within the meaning of the APA, thus requiring its adoption in accordance with APA rulemaking requirements.

The State Board of Equalization is charged with administering key features of property tax collection. The County Assessors Letter at issue in the OAL determination was created to "clarify the proper procedure for assessing newly created subdivision lots prior to sale and the method for handling the street, utility, and land improvements added during the subdivision development stage." OAL determined that the Letter is a regulation as defined in Government Code section 11342(b), and was not adopted pursuant to the APA.

-June 9, 1988, OAL Determination No. 9, Docket No. 87-015. OAL determined that a portion of the Department of Industrial Relations' Division of Labor Standards Enforcement's (DLSE) "Interpretive Bulletin No. 87-5" is a regulation required to be adopted in compliance with the APA.

The Industrial Welfare Commission (IWC) is authorized by Labor Code section 1173 to establish regulations governing the hours and conditions of labor and employment in various occupations, trades and industries in California. DLSE is responsible for enforcing vari-

ous provisions of the California Labor Code, including those involving wages, hours, and working conditions.

The regulatory portion of the Bulletin specifies how the driver's overtime exemption of the IWC wage orders is to be interpreted prior to the effective date of Senate Bill 230. The nonregulatory portion of the Bulletin concerns application of the overtime exemption as of the effective date of Senate Bill 230.

Senate Bill 230 sets forth the following statement: "It is the intent of the Legislature, in enacting Section 34501.9 of the Vehicle Code, that the Industrial Welfare Commission's wage orders regarding driver's overtime exemptions be enforced as of the date the wage orders become effective until the time that they are changed by the commission during its regular hearing process."

Vehicle Code section 34501.9 provides: "(a) Nothing in this division [Division 14.8, Safety Regulations, sections 34500-34508] or the regulations adopted under this division is intended to, or shall, affect the rate of payment of wages, including, but not limited to, regular, premium, or overtime rates, paid to any person whether for on-duty hours or driving hours or otherwise."

The effect of Senate Bill 230 on the application of driver's overtime exemption under the IWC wage orders was addressed in "Interpretive Bulletin No. 87-5," the subject of the OAL determination. The purpose of the Bulletin was to provide guidance to deputies in the interpretation and application of SB 230 as its related to the overtime exemption for drivers in the IWC wage orders. Because OAL found the Bulletin is a standard of general application intended to interpret the meaning of the driver's overtime exemption under SB 230, such standard must be adopted pursuant to the APA.

-June 22, 1988, OAL Determination No. 10, Docket No. 87-016. OAL determined that the Department of Corrections' policy of denying prison inmates "Credit for Participation" under section 3042, Title 15 of the California Code of Regulations, is not a regulation because it is the only legally tenable interpretation of the underlying law. Therefore, it is not subject to the requirements of the APA.

-July 6, 1988, OAL Determination No. 11, Docket No. 87-017. OAL determined that the Respiratory Care Examining Committee's "opinion" dated April 10, 1987, stating that parenteral medications may under certain conditions be administered by a respiratory



care practitioner, is a regulation because the "opinion" implements, interprets, or makes specific statutory law or supplements regulatory law which governs respiratory care practitioners. Government Code section 11347.5 requires that such a standard be adopted pursuant to the APA.

-July 22, 1988, OAL Determination No. 12, Docket No. 87-018. OAL concluded that certain design and construction requirements applied by the Office of the State Architect (OSA) to planned "essential services buildings" (ESBs) are regulations required to be adopted in compliance with the APA, while others were determined to be nonregulatory.

OSA's requirement that the lease or purchase of the ESB is conditioned upon the completion and submission of certain forms to OSA was found to be a regulation, as well as OSA's requirement that ESB contractors conform to the school and hospital construction standards set out in Title 24 of the California Code of Regulations (CCR). However, OAL found that OSA's requirements for the design and construction of ESBs are not regulations insofar as they reflect Model Code provisions, Title 24 provisions not expressly limited to specified structures (e.g., hospitals or schools), or the Essential Services Seismic Safety Act of 1986.

Legislative Requests for OAL Review of Regulations. Government Code section 11340.5 provides that OAL shall, at the request of any standing, joint, or select committee of the legislature, initiate a "priority review" of any regulation, group of regulations, or series of regulations. Notice of such a request is published in the *Notice Register* and is sent to interested parties. OAL subsequently takes into consideration the comments of interested parties in determining whether the regulation complies with the six standards of review established under Government Code section 11349.1.

A priority review requested by legislators must be completed within ninety days of OAL's receipt of the request. If OAL determines that the challenged regulation does not satisfy any of the six APA standards, it must issue an order to show cause (OSC) as to why the regulation should not be repealed. If the agency which promulgated the challenged provision does not make the proper showing within the specified time period, OAL must pursue repeal of the regulation as provided by Government Code section 11340.15(c).

Recent OAL activities involving

legislative requests for priority review include the following:

-Section 16200(a)(3)(E), Title 8 of the CCR, was ordered repealed by OAL. In September 1987, Senator Bill Greene, Chair of the Senate Committee on Industrial Relations, requested that OAL determine if the Department of Industrial Relations exceeded its authority when it restricted holidays in determining prevailing rates to holidays that are recognized by federal and state law. The Senate Committee alleged that section 16200 was inconsistent with section 1773 of the Labor Code.

Following APA procedure, the Department responded to OAL's order to show cause why section 16200 should not be repealed, and OAL issued a statement that an order of repeal would issue following the thirty-day period of review by the Governor. As the Governor has not overruled OAL's decision to repeal, the OAL order to repeal will become effective.

Decisions of Disapproval. On July 28, the Department of Conservation submitted an emergency amendment to section 2606, Title 14 of the CCR, to OAL for review. On August 8, OAL notified the Department that its proposed regulatory action was disapproved.

The emergency amendment would have established a new procedure for the administrative processing and adjudication of alleged violations of certain specified provisions of the California Beverage Container Recycling and Litter Reduction Act. However, OAL determined that the proposed emergency amendment was not needed immediately to protect the public welfare under its authority to review emergency regulations.

On June 27, the California Student Aid Commission submitted regulatory action to OAL to adopt sections 30501 through 30517, Title 5 of the CCR. The proposed regulation would establish the "Paul Douglas Teacher Scholarship Program" in California. On July 27, OAL notified the Commission of its disapproval of the proposed regulation. OAL's disapproval of the proposed regulatory action was based on its failure to comply with the necessity, clarity, and consistency standards of the APA.

OAL Determinations Index. The July 1988 revision of the OAL Determinations Index is currently available from the Office of Administrative Law. The Index details "underground regulations" determinations issued in 1986, 1987, and the first ten determinations in 1988 pursuant to Government Code section

11347.5. The Index contains such information as which state agencies have requested or been affected by such determinations, rulemaking authority, and a table of where the determinations can be found in the *Notice Register*.

LEGISLATION:

AB 2732 (Felando) (reported in CRLR Vol. 8, No. 3 (Summer 1988) p. 24) would have provided that whenever a state agency, during the course of the APA rulemaking process, cites a statute or section of a statute as reference or authority for promulgation of a regulation which is later repealed or becomes ineffective, the correlative regulation shall be deemed to be repealed, ineffective, and inoperative coincident with the repeal of the statute upon which it relies. The bill was vetoed by the Governor.

LITIGATION:

In *California Chapter of the American Physical Therapy Association, et al. v. California State Board of Chiropractic Examiners, et al.* (see CRLR Vol. 8, No. 3 (Summer 1988) p. 36 for background information), the OAL took no action to appeal a Sacramento County Superior Court decision overruling its demurrer and denying its motions to strike various causes of action.

In this case, plaintiffs allege that OAL "did arbitrarily, capriciously, and unlawfully approve" section 302, Title 16 of the CCR, which was adopted by the Board of Chiropractic Examiners to define the scope of chiropractic practice.

At present, discovery requests have been served on OAL and remain outstanding. Plaintiffs Board of Medical Quality Assurance and California Medical Association have filed motions for summary judgment.

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..."