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STATE OF CALIFORNIA

Bill Jones
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SECRETARY OF STATE

OFFICE OF ADMINISTRATIVE LAW

In re:)	
Request for Regulatory)	1999 OAL Determination No. 20
Determination filed by ANDRE)	
NIZETICH concerning the)	[Docket No. 98-004]
policy of the BARBERING AND)	
COSMETOLOGY PROGRAM of)	August 24, 1999
the DEPARTMENT OF)	
CONSUMER AFFAIRS that only)	Determination Pursuant to
one apprentice may be)	Government Code Section 11340.5;
designated to each licensee)	Title 1, California Code of
who is an approved trainer¹)	Regulations, Chapter 1, Article 3
_____)	

Determination by: CHARLENE G. MATHIAS, Deputy Director

HERBERT F. BOLZ, Supervising Attorney
CRAIG S. TARPENNING, Senior Counsel
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law concludes that the policy that only one apprentice may be designated to each licensee who is an approved trainer constitutes a "regulation" which is invalid because it should have been, but was not, adopted pursuant to the Administrative Procedure Act.

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DECISION^{2, 3, 4, 5, 6}

The Office of Administrative Law ("OAL") has been requested to determine whether a requirement that only one apprentice be designated to each licensee who is an approved trainer is a "regulation" and thus subject to the requirements of the Administrative Procedure Act ("APA").

OAL has concluded that this requirement constitutes a "regulation."

DISCUSSION

I. AGENCY; REQUEST FOR DETERMINATION

The Barbering and Cosmetology Program ("Program") is located within the Department of Consumer Affairs. The Program is responsible for the licensing of, among others, cosmetologists. Formerly, this function was the responsibility of the Board of Barbering and Cosmetology and any use of the term "board" in the Business and Professions Code now refers to the Barbering and Cosmetology Program established by the Department of Consumer Affairs.⁷

On July 16, 1999, OAL received a letter dated July 13, 1998 providing information supplementing a request for determination from Mr. Andre Nizetich alleging that the policy of the Program requiring each apprentice to be assigned to a specific licensee is counterproductive and is not included in regulation. Attached to the July 13, 1998 letter from the requester was a letter dated August 23, 1995 from the Board of Barbering and Cosmetology returning the second of two applications for an apprenticeship license because ". . . each licensee can only train one apprentice . . ." and ". . . each apprentice must have their own designated trainer (licensee)."

II. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE DEPARTMENT?

Government Code section 11000 states:

"As used in this title [Title 2. "Government of the State of California" (which title encompasses the APA)], 'state agency' includes every state office, officer, department, division, bureau, board, and commission."

The APA narrows the definition of "state agency" from that in section 11000 by specifically excluding "an agency in the judicial or legislative departments of the

state government."⁸ The Program is in neither the judicial nor legislative branch of state government. There is no specific statutory exemption which would permit the Program to conduct rulemaking without complying with the APA at this time.

In fact, section 7312 of Business and Professions Code provides in part:

“The board shall do all of the following:

(a) Make rules and regulations in aid or furtherance of this chapter in accordance with the Administrative Procedure Act.

....”

In its response, the Program has cited this statute as providing general rulemaking authority by the Program and acknowledges that such rules and regulations must be adopted in accordance with the APA.⁹

OAL, therefore, concludes that APA rulemaking requirements generally apply to the Program.¹⁰

III. DOES THE CHALLENGED RULE CONTAIN “REGULATIONS” WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

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, authorizing OAL to determine whether agency rules are “regulations,” and thus subject to APA adoption requirements, provides in part:

“(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general

application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]”

In *Grier v. Kizer*,¹¹ the California Court of Appeal upheld OAL’s two-part test¹² as to whether a challenged agency rule is a “regulation” as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been 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, OAL must conclude that 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.*”¹³ [Emphasis added.]”

Three California Court of Appeal cases provide additional guidance on the proper approach to take when determining whether an agency rule is subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in “a statutory scheme which the Legislature has [already] established. . . .”¹⁴ But “to the extent [that] any of the

[agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . .”¹⁵

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations (“CCR”) provisions) cannot legally be “embellished upon” in administrative bulletins. For example, *Union of American Physicians and Dentists v. Kizer* (1990)¹⁶ held that a terse 24-word definition of “intermediate physician service” in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went “far beyond” the text of the duly adopted regulation.¹⁷ Statutes may legally be amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993), made clear that reviewing authorities are to focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

“. . . [The] Government Code . . . [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.* . . . [Emphasis added.]”¹⁸

A. DOES THE CHALLENGED RULE CONSTITUTE A “STANDARD OF GENERAL APPLICATION”?

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 members of a class, kind, or order.¹⁹

The challenged rule applies to all persons applying to the Program to become an apprentice in cosmetology, or to train such apprentices in California, and is thus a “standard of general application.”

Having concluded that the challenged rule is a standard of general application, OAL must consider whether the challenged rule meets the second prong of the two-part test.

B. DOES THE CHALLENGED RULE IMPLEMENT, INTERPRET OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE PROGRAM OR GOVERN THE PROGRAM'S PROCEDURE?

Chapter 10 of Division 3 of the Business and Professions Code commencing with section 7301 is known as the Barbering and Cosmetology Act. Section 7332 of the Business and Professions Code provides:

“An apprentice is any person who is licensed by the board to engage in learning or acquiring a knowledge of barbering, cosmetology, skin care, nail care, or electrology, in a licensed establishment *under the supervision of a licensee approved by the board.*” (Emphasis added.)

In its response, the Program states that:

“The question is whether the statutory requirement that only one apprentice may be designated to each licensee who is an approved trainer is a regulation that must be promulgated under the APA. We believe that this provision reflects existing statutes and regulations and thus is not a rule, which requires further specification or duplication under the APA.”²⁰

In general, if the agency does not add to, interpret, or modify a statute, it may legally inform interested parties in writing of the statute and its application. Such an enactment is simply “administrative” in nature, rather than “quasi-judicial” or “quasi-legislative.” If, however, the agency makes new law, i.e., supplements or “interprets” a statute or other provision of law, such activity is deemed to be an exercise of quasi-legislative power. If a rule simply applies an *existing* constitutional, statutory or regulatory requirement that has only *one* legally tenable “interpretation,” that rule is not quasi-legislative in nature--no new “law” is created.

Section 7333 of the Business and Professions Code provides in part:

“The apprentice training program shall be conducted in compliance with the Shelley-Maloney Apprentice Labor Standards Act of 1939, Chapter 4 (commencing with Section 3070) of Division 3 of the Labor Code, according to apprenticeship standards approved by the administrator of apprenticeship
...”

The Shelley-Maloney Apprentice Labor Standards Act of 1939 does not contain any provision *specifically* requiring only one apprentice to be designated to each licensee who is an approved trainer.

On May 20, 1994 and October 24, 1994, regulations adopted by the Board of Barbering and Cosmetology to implement the apprenticeship program in California were filed with the Secretary of State. These provisions are contained in title 16 of the California Code of Regulations commencing with section 901. Subsection (a) of section 916 in title 16 provides in part that:

“Full-time apprenticeship means employment and training in an approved program for at least 32 hours per week.”

The Program states in its response that:

“Since a cosmetology apprentice is required to work at least 32 hours per week under the supervision of his or her trainer, it would inconsistent, if not impossible, for a trainer to have multiple apprentices under his or her supervision. The requirements of a valid apprenticeship could not be met. That is, a trainer could not provide the requisite supervision in all work processes performed by an apprentice if he or she was to have multiple apprentices who are ‘continuously employed.’ For example, a trainer who is attempting to supervise two apprentices would be required to be on the job at least 64 hours per week. Although this is not impossible, it would be extremely difficult to maintain such a schedule over any prolonged period. Based upon the above-cited statutes and regulations, the provision that only one apprentice may be designated to each licensee who is an approved trainer is the only reasonable explanation that can be taken.”²¹

Is the requirement that only one apprentice be designated to each licensee who is an approved trainer the only legally tenable interpretation of the language in section 916 of title 16, which provides that full-time apprenticeship means employment and training in an approved program for at least 32 hours per week? Clearly, it is not. The imposition of a minimum requirement of 32 hours per week of employment and training simply does not address the issue of *who* will be supervising the work of the apprentice.

The Program argues that, although not impossible, it would be extremely difficult for one trainer to supervise two apprentices for 32 hours per week. The fact that one interpretation might be more difficult to comply with than another does not

mean that the easier route is the only “legally tenable interpretation.” In *Grier v. Kizer*,²² the Court of Appeal faced a restatement argument by the Department of Health Services similar to that made here by the Program. The Department argued that statistical sampling and extrapolation procedures were the only practical way to comply with its statutory auditing authority. The Court rejected the argument by finding that other auditing procedures, although not as feasible or cost effective, existed and that therefore the sampling method was not the only “tenable” interpretation of the statute.

Of course, the 32 hour minimum of employment and training specified in section 916 of title 16 does not address in any meaningful fashion the issue of whether an apprentice must be designated to a particular licensee.

The Program goes on to state:

“In addition, the terminology of the Program’s regulations relating to a licensee’s ability to supervise an apprentice is written in the singular not the plural. Specifically, regulation section 919 provides in, part, that:

‘A licensee who wishes to train *an apprentice* shall obtain board approval before employing or training an apprentice. . .’ (Emphasis added)

The language does not provide for Program approval of a licensee who wishes to train apprentices [in the plural, as opposed to in the singular]. (Emphasis added [i.e., the “s” in apprentices emphasized]) If the Program had intended to allow a licensee to train multiple apprentice [sic], the language of regulation section 919 would have specifically so provided. The language of regulation section 919 makes it clear that a licensee trainer can train only one designated apprentice at a time.”²³

Is the requirement that only one apprentice be designated to each licensee who is an approved trainer the only legally tenable interpretation of the language in section 919 of title 16 that a licensee who wishes to train an “apprentice” obtain Board approval? Once again, the answer must be “no.”

Subsection (a) of section 919 of title 16 of the California Code of Regulations provides:

“A licensee who wishes to train an apprentice shall obtain board approval before employing or training an apprentice. Application for approval of trainers shall be made on a form provided by the board (Form #35A-03, Application for Licensure as a Licensed Apprentice and for Approval of Trainers and Establishments, Rev. 5/94).”

Although section 919 requires Board approval of a licensee before employing or training an “apprentice,” the use of the singular here does not appear to be of such significance so as to preclude any and all interpretations other than that contained in the challenged rule. In fact, if we were to assume that the drafters of section 919 were performing their job well, we should ascribe no significance at all to the fact that the singular “apprentice” is used.

“A traditional principle of drafting legislation or a rule is to make the subject of a sentence singular rather than plural. When combined with the direction to use the active voice, this means that the actor in each sentence will be singular.

Use of the singular is important for several reasons. First, the singular makes the drafting process simpler because there is no need to worry about accidental shifting back and forth between the singular and plural in nouns or verbs. Second, the singular particularizes the effect of the provision being drafted on the individual rather than on the more anonymous group. Third, the singular makes it clear that the provision applies to each member of the class rather than only to the class as a separate group or body.

Even though proponents of good legal writing have long advocated use of the singular, drafters of legislation and rules still use the plural to an astonishing degree. This may be because the drafter fears that using the singular will cause courts to find that some person or entity intended to be covered by the provision is not covered. This fear is unwarranted. To say ‘*a*’ or ‘*an*’ is not the same as saying ‘*one*’ and courts do not so hold. One of the reasons for this is that the Uniform Statutory Construction Act in section 3 states that the singular includes the plural (and visa versa). The annotation to the section indicates that this provision is found in the statutory construction acts of 46 states.”²⁴

The “Uniform Statutory Construction Act” was promulgated in 1965 by the National Conference of Commissioners on Uniform State Laws and in 1975 the

name of the act was changed to the “Model Statutory Construction Act.” Section 3 of the act provided:

“The singular includes the plural, and the plural includes the singular.”

The act has since been revised and the “Uniform Statute and Rule Construction Act (1995),” as it is now known, provides in subsection 5(a):

“The use of the singular number includes the plural, and the use of the plural number includes the singular.”

In California, the general rules of statutory construction are contained in the preliminary provisions of the different codes.²⁵ Section 919 of title 16 of the California Code of Regulations implements the Business and Professions Code. Section 16 of the Business and Professions Code specifically provides:

“The singular number includes the plural, and the plural the singular.”

However, even if we were to disregard the traditional principles of legislative drafting and the plain meaning of section 16 of the Business and Professions Code and accord some significance to the use of the word “apprentice” instead of “apprentices” in subsection (a) of section 919, interpretations other than that contained in the challenged rule are readily apparent. For example, the use of the singular in subsection (a) of section 919 may be interpreted to mean simply that a licensee must apply separately for Program approval of each apprentice that he/she wishes to train.

It should also be noted that the application required of a licensee who wishes to train an apprentice, Form #35A-03 (Rev. 5/94), is entitled “Application for Licensure as a Licensed Apprentice and for Approval of *Trainers* and *Establishments*.” [Emphasis added.] This form is incorporated by reference in subsection (a) of section 919 of title 16 (quoted above). If we were to accord the significance ascribed by the Program to the fact that “apprentice” instead of “apprentices” appears in the title of this form, we would likewise have to apply significance to the fact that “trainers” and “establishments” appear in the plural. If we were to apply the Program’s logic to the title of this form, it would seem that more than one trainer or establishment could be approved for each apprentice (although apparently on separate forms if more than one of either).

OAL, therefore, concludes that the Program's requirement that only one apprentice be designated to each licensee who is an approved trainer is a "regulation" and is subject to the requirements of the APA.

IV. DOES THE CHALLENGED RULE FOUND TO BE A "REGULATION" 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.²⁶ In *United Systems of Arkansas v. Stamison* (1998),²⁷ the California Court of Appeal rejected an argument by the Director of the Department of General Services that language in the Public Contract Code had the effect of exempting rules governing bid protests from the APA.

According to the *Stamison* Court:

*"When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language. (See, e.g., Gov. Code, section 16487 ['The State Controller may establish procedures for the purpose of carrying out the purposes set forth in Section 16485. These procedures are exempt from the Administrative Procedure Act.']; Gov. Code, section 18211 ['Regulations adopted by the State Personnel Board are exempt from the Administrative Procedure Act']; Labor Code, section 1185 [orders of Industrial Welfare Commission 'expressly exempted' from the APA].) [Emphasis added.]"*²⁸

Express statutory APA exemptions may be divided into two categories: special and general.²⁹ *Special* express statutory exemptions typically: (1) apply only to a portion of one agency's "regulations" and (2) are found in that agency's enabling act. *General* express statutory exemptions typically: (1) apply across the board to all state agencies and (2) are found in the APA. An example of an express *special* exemption is Penal Code section 5058, subdivision (d)(1), which exempts pilot programs of the Department of Corrections under specified conditions. An example of an express *general* exemption is Government Code section 11342, subdivision (g), part of which exempts "internal management" regulations of all state agencies from the APA.

A. DOES THE CHALLENGED RULE FALL WITHIN ANY *SPECIAL* EXPRESS APA EXEMPTION?

The Program does not contend that any special statutory exemption applies. Our independent research having also disclosed no special statutory exemption, we conclude that none applies.

B. DOES THE CHALLENGED RULE FALL WITHIN ANY *GENERAL* EXPRESS APA EXEMPTION?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.³⁰ Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.³¹

The APA excepts policies which pertain solely to the internal management of a single state agency from the notice and hearing requirements of the Act.³² Government Code section 11342, subdivision (g) states:

"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.]"

However, as the *Grier* Court found: ". . . the definition of regulation is broad, as contrasted with the scope of the internal management exception, which is narrow."³³ Internal management policies are those designed to govern the internal operations of the Department. The exception does not apply to ". . . the rules necessary to properly consider the interests of all . . . under the . . . statutes . . ."³⁴

The challenged rule does not apply solely to Program staff, but rather affects all members of the public applying to the Program to become an apprentice in cosmetology, as well as to all licensees seeking to train such apprentices in California.

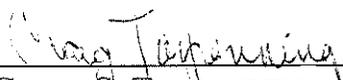
We conclude that the challenged rule does not fall within the internal management exemption; nor within any other general express statutory exemption from the APA.

CONCLUSION

For the reasons set forth above, OAL finds that the Program's requirement that only one apprentice be designated to each licensee who is an approved trainer is a "regulation" and without legal affect unless adopted pursuant to the APA.

DATE: August 24, 1999


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ENDNOTES

1. This request for determination was filed by Andre Nizetich, L.A. County Cosmetology Apprenticeship Council, 28132 Western Ave., San Pedro, CA 90732, (310) 547-3711. The agency was represented by Donald Chang, Legal Counsel, Barbering and Cosmetology Program, 400 R Street, Suite 4080, Sacramento, CA 95814, (916) 445-4216.
2. This determination may be cited as **"1999 OAL Determination No. 20."**

Pursuant to Title 1, CCR, section 127, this determination becomes effective on the 30th day after filing with the Secretary of State, which filing occurred on the date shown on the first page of this determination.

Government Code section 11340.5, subdivision (d), provides that:

"Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published [in the California Regulatory Notice Register]."

Determinations are ordinarily published in the Notice Register within two weeks of the date of filing with the Secretary of State.

3. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) An agency rule found to violate the APA could also simply be rescinded.
4. OAL does not review alleged underground regulations for compliance with the APA's six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. However, in the event regulations were proposed by the Department under the APA, OAL would review the *proposed* regulations for compliance with the six statutory criteria. (Government Code sections 11349 and 11349.1.)
5. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121 (a), provides:

"'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA. [Emphasis added.]”

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*"). We note 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 authoritative, 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*.

6. *OAL Determinations Entitled to Great Weight in Court*

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, disapproved on other grounds in *Tidewater*. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule met the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10**, CRNR 96, No. 8-Z, February 23, 1996, p. 293. The *Grier* court concurred with OAL's conclusion, stating that:

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) [now subd. (g)]. [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted for its consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of [a statute] by those charged with its enforcement

and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.] [Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due consideration.*[*Id.*; emphasis added.]”

See also *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886 (same holding) and note 5 of **1990 OAL Determination No. 4**, California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384, at p. 391 (reasons for according due deference consideration to OAL determinations).

7. Business and Professions Code section 7301
8. Government Code section 11342, subdivision (a).
9. Agency response, p.1.
10. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 Cal.Rptr. 744, 746-747 (unless “expressly” or “specifically” exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of the APA when engaged in quasi-legislative activities); *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).
11. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. 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. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

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*.

12. 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 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*].”

OAL’s wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--**1987 OAL Determination No. 10**--was published in California Regulatory Notice Register 96, No. 8-Z, February 23, 1996, p. 292.

13. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253. The same point is made in *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001,1010, 74 Cal.Rptr.2d 407, 412, review denied.
14. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.
15. *Id.*
16. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.
17. *Id.*
18. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.
19. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. 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).
20. Agency response, p. 4
21. Agency response, p. 5
22. *Id.*, at 436; 268 Cal. Rptr., at 254.
23. Agency response, p. 5
24. *Drafting Legislation and Rules in Plain English*, 1991, Robert J. Martineau, p. 67.
25. Government Code section 9603.
26. Government Code section 11346.
27. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.
28. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.

29. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself).
30. Government Code section 11346.
31. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)
 - c. Rules that "[establish] or [fix], rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1); emphasis added.)
 - d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)
 - f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, pp. 168-169, 175-177, CRNR 91, No. 43-Z, October 25, 1991, p. 1458-1459, 1461-1462. In *Grier v. Kizer* ((1990) 219 Cal.App.3d 422, 437-438, 268 Cal.Rptr. 244, 253), the court reached the same conclusion as OAL did in **1987 OAL Determination No. 10**, pp. 25-28 (summary published in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 63); complete determination published on February 23, 1996, CRNR 96, No. 8-Z, p. 293, 304-305), rejecting the idea that *City of San Joaquin* (cited above) was still good law.
32. Government Code section 11342, subdivision (g).
33. *Grier v. Kizer, supra*, 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 251, disapproved on another point, *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198.
34. *City of San Marcos v. California Highway Commission, Department of Transportation* (1976) 60 Cal.App.3d 383, 408, 131 Cal.Rptr. 804, 820, quoted in *Armistead v. State*

Personnel Board (1978) 22 Cal.3d 198, 204-205, 149 Cal.Rptr. 1, 3.