

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

ENDORSED FILED
IN THE OFFICE OF

2012 AUG 15 PM 3: 33

2012 OAL DETERMINATION NO. 8
(OAL FILE NO. CTU2012-0207-01)


DEBRA BOWEN
SECRETARY OF STATE

REQUESTED BY: JASON DAVIS, REPRESENTING CALIFORNIA BUSINESS ENVIRONMENTS INC. dba FRANKLIN ARMORY

CONCERNING: PERMITS FOR ASSAULT WEAPONS

DETERMINATION ISSUED PURSUANT TO GOVERNMENT CODE SECTION 11340.5.

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of “regulation” as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of “regulation,” but was not adopted pursuant to the APA and should have been, it is an “underground regulation” as defined in California Code of Regulations, title 1, section 250.¹ OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

CHALLENGED RULE

The specific rule challenged by the Petitioner is stated in a variety of correspondence between the Firearms Bureau of the Department of Justice (Department) and the Petitioner. The most succinct iteration of the rule is in a letter from the Department to the Petitioner dated May 5, 2006:

The Department issues assault weapon permits to corporations and other business entities. However, such permits are issued to individuals authorized to act on behalf of corporations or other business entities. The authorization is not transferable to other persons, or to activities that are not undertaken on behalf of the corporation. ...

¹ As defined by title 1, section 250(a), an

“Underground regulation” means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

DETERMINATION

OAL determines that the Department rule as stated in the letter from the Department to the Petitioner dated May 5, 2006, as quoted above meets the definition of "regulation" that should have been adopted pursuant to the APA.

FACTUAL BACKGROUND

On February 7, 2012, OAL received a petition from Jason Davis, the Petitioner, alleging that the Department has issued, used, enforced or attempted to enforce an underground regulation. The Petitioner represents California Business Environments Inc. doing business as Franklin Armory. The petition alleges that the Roberti-Roos Assault Weapons Control Act of 1989 and the .50 Caliber BMG Regulation Act of 2004 (Roberti-Roos Act) (Pen. C. section 30500 et seq.) permit "persons" to be issued a permit to possess or to sell or offer or expose for sale assault weapons. "Person," as defined in Penal Code section 16970 includes corporations, limited liability companies, associations and other groups and entities:

As used in Sections 16790 and 17505 and in Chapter 2 (commencing with Section 30500) of Division 10 of Title 4, "person" means an individual, partnership, corporation, limited liability company, association, or any other group or entity, regardless of how it was created.

The petition alleges that rather than issuing a permit for an assault weapon to a business entity that submitted the permit application, the Department issues the permit to a person authorized to act on behalf of the business entity, as stated in a letter from the Department to the Petitioner, dated May 5, 2006:

The Department issues assault weapon permits to corporations and other business entities. However, such permits are issued to individuals authorized to act on behalf of corporations or other business entities. The authorization is not transferable to other persons, or to activities that are not undertaken on behalf of the corporation. ...

In its response to the petition, the Department agrees that this is an accurate statement of its policy.

POSSESSION OF ASSAULT WEAPONS

The Roberti-Roos Act sets out the statutory requirements for possession and control of assault weapons.

Penal Code section 30605 makes it generally illegal to possess assault weapons in California; however, Penal Code section 30675(a)(2) states that section 30605 does not apply to a person who has a permit to possess an assault weapon or a .50 BMG rifle issued pursuant to Penal Code section 31005:

31005. (a) The Department of Justice may, upon a finding of good

cause, issue permits for the manufacture or sale of assault weapons or .50 BMG rifles for the sale to, purchase by, or possession of assault weapons or .50 BMG rifles by, any of the following:

(1) The agencies listed in Section 30625, and the officers described in Section 30630.

(2) Entities and persons who have been issued permits pursuant to this section or Section 31000.

(3) Federal law enforcement and military agencies.

(4) Law enforcement and military agencies of other states.

(5) Foreign governments and agencies approved by the United States State Department.

(6) Entities outside the state who have, in effect, a federal firearms dealer's license solely for the purpose of distribution to an entity listed in paragraphs (3) to (5), inclusive.

(b) Application for the permits, the keeping and inspection thereof, and the revocation of permits shall be undertaken in the same manner as specified in Article 3 (commencing with Section 32650) of Chapter 6. [Emphasis added.]

As stated in Penal Code section 31005, subdivision (b), the application for permits shall be undertaken in the same manner as specified in Article 3 of Chapter 6 of the Penal Code, commencing with section 32650. In Article 3, Penal Code section 32655 sets out the requirements for a permit:

(a) An application for a permit under this article shall satisfy all of the following conditions:

(1) It shall be filed in writing.

(2) It shall be signed by the applicant if an individual, **or by a member or officer qualified to sign if the applicant is a firm or corporation.**

(3) It shall state the applicant's name.

(4) It shall state the business in which the applicant is engaged.

(5) It shall state the applicant's business address.

(6) It shall include a full description of the use to which the firearms are to be put.

(b) Applications and permits shall be uniform throughout the state on forms prescribed by the Department of Justice.

(c) Each applicant for a permit shall pay at the time of filing the application a fee determined by the Department of Justice. The fee shall not exceed the application processing costs of the Department of Justice.

(d) A permit granted pursuant to this article may be renewed one year from the date of issuance, and annually thereafter, upon the filing of a renewal application and the payment of a permit renewal fee, which shall not exceed the application processing costs of the Department of Justice.

(e) After the department establishes fees sufficient to reimburse the department for processing costs, fees charged shall increase at a rate not to exceed the legislatively approved annual cost-of-living adjustments for the department's budget. [Emphasis added.]

Additionally, Penal Code section 30600 makes illegal, among other things, keeping for sale or offering or exposing for sale an assault weapon; however, pursuant to Penal Code section 30650, section 30600 does not apply to persons who are issued a permit pursuant to Penal Code section 31005.

Pursuant to the authority granted by the Legislature to the Department in Penal Code section 30520(c), the Department has adopted regulations setting out the requirements for issuance of a permit to possess an assault weapon.²

California Code of Regulations, title 11, section 4128 states that no person shall possess, transport, or sell any dangerous weapon³ unless he/she has been granted a license and/or a permit.

California Code of Regulations, title 11, section 4138 requires that the Department investigate an applicant for a dangerous weapon permit:

The DOJ shall conduct investigations of applicants for dangerous weapon licenses/permits to establish grounds for the issuance or denial of the application as follows:

(a) Related Persons. Additional persons who may be investigated are:

- (1) Persons with 10 percent or more interest in the licensee/permittee's business.
- (2) Persons with authority to make management decisions for the licensee/permittee.
- (3) Persons who have access to the dangerous weapon(s).⁴

(b) Applicant's Business Role and/or Control of the Business. The following areas may be investigated concerning the applicant's business role and/or control of the business:

- (1) Primary function of the business.
- (2) Law enforcement's comments on the business.
- (3) Applicant's financial interest in the business and source of funds.

²Penal Code section 30520(c) states:

The Attorney General shall adopt those rules and regulations that may be necessary or proper to carry out the purposes and intent of this chapter.

³ The definition of "dangerous weapon" includes assault weapons, pursuant to California Code of Regulations, title 11, section 4127(l).

⁴ We note that this regulation requires the Department of Justice to conduct an investigation of any person who has access to dangerous weapons. However, it does not require that those persons be named as persons authorized to act on behalf of the business entity.

- (4) Applicant's role in and/or control of the business.
 - (5) Spouse's association with the business.
- (c) Applicant's Personal Qualifications. The following areas may be investigated concerning the applicant's personal background:
- (1) Character assessment by personal and/or business acquaintances and appropriate law enforcement and government agencies.
 - (2) Criminal history and driving record.
 - (3) Military record.
 - (4) Past employment or expertise related to the weapon to be covered by the requested license/permit.
 - (5) Medical history.

And lastly, as noted in the Factual Background above, "person" is defined in Penal Code section 16970:

As used in Sections 16790 and 17505 and in Chapter 2 (commencing with Section 30500) of Division 10 of Title 4, "person" means an individual, partnership, corporation, limited liability company, association, or any other group or entity, regardless of how it was created.

UNDERGROUND REGULATIONS

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

(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 [Government Code] Section 11342.600, 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].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of Government Code section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency has issued, utilized, enforced, or attempted to enforce a rule that meets the definition of "regulation" as defined in Government Code section 11342.600 and should have been adopted pursuant to the APA (Gov. Code, sec.11340(b)). An OAL determination is not enforceable against the agency

through any formal administrative means, but it is entitled to “due deference” in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

ANALYSIS

OAL's authority to issue a determination extends only to the limited question of whether the challenged rule is a “regulation” subject to the APA. This analysis will determine (1) whether the challenged rule is a “regulation” within the meaning of Government Code section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in Government Code section 11342.600 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.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).⁵

As stated in *Tidewater*, the first element used to identify a “regulation” is whether the rule applies generally. A rule need not apply to all persons in the state of California; it is sufficient if the rule applies to a clearly defined class of persons⁶ or situations.⁷

In this case, the Department, in the challenged rule, states that it issues assault weapon permits to corporations and other business entities. The permits, however, are issued to individuals authorized to act on behalf of the corporation or other business entity. The rule applies to any corporation or other business entity that applies for a permit to possess or sell an assault weapon. Corporations and other business entities that apply for a permit to possess or sell assault weapons are a clearly defined class of persons or situations.

The first element of the *Tidewater* case is, therefore, met.

⁵Government Code section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

⁶ Pursuant to Government Code section 17 “person” means:

“Person” includes any person, firm, association, organization, partnership, limited liability company, business trust, corporation, or company.

⁷ See also *Roth v. Department of Veterans Affairs*, (1980) 110 Cal.App.3d 14, 19; 167 Cal.Rptr. 552, 557.

The second element used to identify a “regulation” as stated in *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency’s procedure.

Penal Code sections 31005(b) and 32655 provide that the Department may issue permits for the possession and/or sale of assault weapons if specified conditions are met. In particular, Penal Code section 32655 specifically includes the procedure for an application for a permit by a business entity. In addition, the Department has adopted California Code of Regulations, title 11, section 4128 prohibiting the possession, transportation, or sale any dangerous weapon without a permit. California Code of Regulations, title 11, section 4138 sets out the investigation the Department will conduct in evaluating an application for a permit.

The challenged rule further implements, interprets and makes specific Penal Code sections 31005 and 32655 and California Code of Regulations, title 11, sections 4128 and 4138, the law enforced or administered by the Department. The second element of *Tidewater* is, therefore, met.

The challenged rule, therefore, meets the definition of “regulation” in Government Code section 11342.600.

The final issue to examine is whether the challenged rule falls within an express statutory exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to Government Code section 11346, the procedural requirements established in the APA “shall not be superseded or modified by any subsequent legislation **except to the extent that the legislation shall do so expressly.**” (Emphasis added.)

In its response to the petition, the Department stated that the exemption known as “only legally tenable interpretation” applies to the challenged rule.

Government Code section 11340.9 establishes several exemptions from the APA. Subdivision (f) exempts a regulation that “embodies the only legally tenable interpretation of a provision of law.”

In its response, the Department argues that the Penal Code sections addressing the issuance of a Certificate of Eligibility require the Department to conduct criminal background checks which can only be done for natural persons.

Penal Code section 26700 et seq. establishes the procedure for the issuance, forfeiture, and condition of license to sell, lease, or transfer firearms at retail. Penal Code section 26705 states that the duly constituted licensing authority of a city, county, or a city and county shall accept applications for, and may grant licenses permitting the sale of firearms at retail within the city, county, or city and county. The applicant must comply with several requirements, including the requirement in Penal Code section 26710 that the applicant have a Certificate of Eligibility issued by the Department. The Certificate of Eligibility is issued only to applicants who are not prohibited by state or federal law from possessing firearms.

The Department notes that to determine if an applicant is prohibited from possessing firearms by state or federal law, it must conduct a background check on the applicant. It cannot conduct a background check on a corporation or other business entity, therefore, the challenged rule is the only legally tenable interpretation of law.

The rule challenged by the Petitioner and addressed in this determination concerns the permit issued pursuant to the Roberti-Roos Act. The issuance of the Certificate of Eligibility is not part of the Roberti-Roos Act. Our determination is limited to the terms of the rule challenged by the Petitioner, i.e., the issuance of a permit or license pursuant to the Roberti-Roos Act. The Certificate of Eligibility, issued pursuant to Penal Code section 26700 et seq., is not part of the rule challenged by the Petitioner; therefore, the only legally tenable interpretation of Penal Code section 26700 et seq. does not apply in this matter.

We find, therefore, that the “only legally tenable interpretation” exemption does not apply to the rule challenged by the Petitioner. OAL did not identify any other relevant exemptions.

AGENCY RESPONSE

In addition to the argument that the “only legally tenable interpretation” exemption applies in this matter, the Department also argues that the definition of “person” in Penal Code section 16970 does not apply to the permit issued pursuant to the Roberti-Roos Act. The Department argues that the legislative intent behind the adoption of Penal Code section 16970 was to prohibit individuals, partnerships, corporations, association, and any other group or entity, from advertising the sale of assault weapons.

Penal Code section 16970 states:

As used in Sections 16790 and 17505 and **in Chapter 2 (commencing with Section 30500) of Division 10 of Title 4**, "person" means an individual, partnership, corporation, limited liability company, association, or any other group or entity, regardless of how it was created. [Emphasis added.]

It is settled law that the legislative intent behind a statutory enactment can be examined only if there is ambiguity in the language of the statute. In *People v. Superior Court of San Joaquin County Respondent; Jose Francisco Zamudio, Real Party in Interest* (2000) 23 Cal.4th 183, 192-193 [96 Cal.Rptr. 2d 463] (referred to hereafter as *Zamudio*), the California Supreme Court set forth the following analytical framework:

...Initially, ‘[a]s in any case of statutory interpretation, our task is to determine afresh the intent of the Legislature by construing in context the language of the statute.’ (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159, 278 Cal.Rptr. 614, 805 P.2d 873) In determining such intent, we begin with the language of the statute itself. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 73, 276 Cal. Rptr. 130, 801 P.2d 373.) That is, we look first to the words the Legislature used, giving them their usual and ordinary meaning. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 90, 260 Cal.Rptr. 520, 776 P.2d 222.) ‘If there is no ambiguity in the language of the statute, ‘then the

Legislature is presumed to have meant what is said, and the plain meaning of the language governs.’ *Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268, 36 Cal.Rptr.2d 563, 885 P.2d 976.) But when the statutory language is ambiguous, ‘the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes.’ (*Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 724, 80 Cal.Rptr.2d 506, 968 P.2d 65.)

Giving the words of Penal Code section 16970 their “usual and ordinary meaning,” there is no ambiguity. Penal Code section 16970 clearly states that the definition of “person” applies to Chapter 2 of Division 10 of Title 4 of the Penal Code, the Roberti-Roos Act.

Chapter 2 includes sections 30500 to 31115, inclusive, including the provisions for the issuance of the permits for assault weapons that give rise to the challenged rule in this determination. We do not find any ambiguity in the language of Penal Code section 16970; therefore, it is not necessary to refer to the legislative intent behind the enactment of the section.

Finally, the Department responds to an allegation by the Petitioner that the challenged rule harms businesses. The allegation of harm to business in California is not relevant to the question of whether the rule meets the definition of “regulation” in Government Code section 11342.600; therefore, this allegation is outside the scope of this determination and will not be addressed here.

PUBLIC COMMENTS

OAL received comments from Clifton B. Monfort of Michel and Associates, P.C., Attorneys at Law, and Brandon Combs of California Association of Federal Firearms Licensees, Inc. Their comments included additional information about the challenged rule and its effect on their businesses. We thank them for their comments.

CONCLUSION

The rule challenged by the Petitioner is stated in a letter from the Department to the Petitioner, dated May 5, 2006:

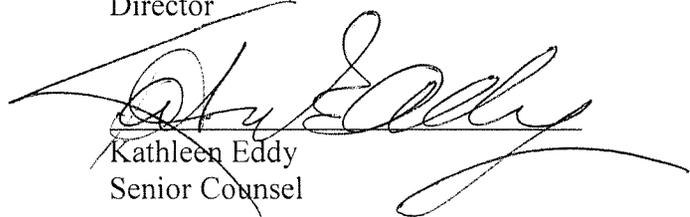
The Department issues assault weapon permits to corporations and other business entities. However, such permits are issued to individuals authorized to act on behalf of corporations or other business entities. The authorization is not transferable to other persons, or to activities that are not undertaken on behalf of the corporation. ...

In accordance with the above analysis, OAL determines that this rule meets the definition of "regulation" that should have been adopted pursuant to the APA.

Date: August 15, 2012



Debra M. Cornez
Director



Kathleen Eddy
Senior Counsel