STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2007 OAL DETERMINATION NO.1
(OAL FILE # CTU 06-0724-01)

REQUESTED BY: JAMES MCRITCHIE

CONCERNING: "NOTICE OF ELECTION" ISSUED BY THE CALIFORNIA PUBLIC EMPLOYEES RETIREMENT SYSTEM

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 is a "regulation" as defined in Government Code section 11342.600, and must, therefore be adopted pursuant to the Administrative Procedure Act (APA). OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

ISSUE

On July 24, 2006, James McRitchie (Petitioner) submitted a petition to OAL alleging that the California Public Employees Retirement System (CalPERS) issued, used, enforced, or attempted to enforce an underground regulation[1] in violation of Government Code section 11340.5.[2] The alleged underground regulations concern election to the CalPERS Board and are found in the "Notice of Election", specifically, the "Procedures for Becoming a Candidate" and the "Election Schedule." The challenged rules include requirements for personal identifying information on election forms, and various

[1] An underground regulation is defined in Title 1, California Code of Regulations, section 250:

> "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.

[2] Unless specified otherwise code references are to the California Government Code.

procedures and dates for submitting election materials. The Petitioner also challenges the wisdom of requiring partial Social Security Numbers. As noted above, OAL cannot base its decision on the wisdom or policy of an alleged underground regulation; but must limit its review to issues of administrative law.

DETERMINATION

OAL determines that the Notice of Election, which includes the Procedures for Becoming a Candidate and the Election Schedule, contains underground regulations.

FACTUAL BACKGROUND

CalPERS is administered by a 13-member Board of Administration, six of which are elected. The remaining members are designated by law to be on the Board. The Board of Administration is responsible for the management and control of CalPERS, including the exclusive control of the administration and investment of the Retirement Fund.

Section 20096 gives the Board broad authority to conduct the election of members:

> The board shall cause ballots to be distributed to each active and retired member of the system in advance of each election, and shall provide for the return of the voted ballots to the board without cost to the member, and shall develop election procedures. The results shall be certified by the Secretary of State. The board may require all persons who perform election duties to certify, under penalty of perjury, that they properly performed those duties.

CalPERS has adopted regulations setting forth the procedures for conducting the election. Section 554.2 of Title 2 of the California Code of Regulations deals with the "Notice of Election":

> The Election Coordinator shall distribute a Notice of Election in advance of each election containing candidate nomination and election procedures, eligibility criteria for candidates and voters, and the schedule of events. The Notice shall contain a statement of whether or not the incumbent intends to be a candidate for reelection.
> Agency Election Officers shall provide such notification to eligible active members by direct distribution of the Notice of Election to members or posting in employee work areas. The Election Coordinator shall provide employers with sufficient copies of the Notice of Election to allow widespread notice to employees.
> The Election Coordinator shall cause the Notice of Election to be mailed directly to eligible retired members by PERS.

Each Notice of Election is adopted by the Board before each election. The Notice of

Election is considered as an agenda item and is discussed at an open meeting of the Benefits and Program Administration Committee. The committee's recommendation is sent to the Board for its action. The notice for the 2006 election was recommended for approval by the committee and was adopted by the Board on November 16, 2005. (CALPERS response, p. 3)

PETITIONER'S ARGUMENT

The Petitioner argues that various parts of the Notice of Election are underground regulations. The specific areas are the schedule for election, the forms required by the Notice of Election and the information required in the Notice of Election, such as name, address, last six numbers of the Social Security Number, etc. The Petitioner argues that these elements meet the definition of "regulation" in Government Code section 11342.600 and must be adopted pursuant to the APA.

AGENCY RESPONSE

CalPERS argues in response that the requirements in the Notice of Election are consistent with statutory and regulatory requirements and are not underground regulations. The forms referred to in the Notice of Election fall under the forms exception to the APA and are not, therefore, underground regulations.

UNDERGROUND REGULATIONS

Section 11340.5, subdivision (a), prohibits state agencies from issuing rules unless the rules comply with the APA. It states, 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 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 section 11340.5 it creates an underground regulation. "Underground regulation" is defined in title 1, Cal. Code Regs. § 250 as follows:

> "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.

OAL is empowered to issue its determination as to whether or not an agency employs an underground regulation pursuant to section 11340.5 subdivision (b). An OAL determination that an agency is using an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference"[3] in any subsequent litigation of the issue.

ANALYSIS

To determine that an agency is in violation of section 11340.5, it must be demonstrated that the alleged underground regulation actually is a regulation as defined by section 11342.600, that it has not been adopted pursuant to the APA, and that it is not subject to an express statutory exemption from the APA.

A regulation is defined in 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, 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).)

The first element of a regulation is whether the rule applies generally. For an agency rule 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 all members of a class, kind, or order.[4] In this case, the Notice of Election applies to all members of CalPERS who seek election to the Board. It sets forth requirements and procedures the members must follow to be elected to the

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[3] *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244

[4] *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556; see *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (a standard of general application applies to all members of any open class).)

Board. The class of members who seek election will change from election to election and is not static. The first element required by *Tidewater* is therefore met.

The second element is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure. In its response CalPERS argues that the statute instructs them to conduct the election. The Notice of Election is the means by which CalPERS fulfills its statutory duties. The issuance of the Notice of Election may be the choice that CalPERS makes to comply with its statutory obligation; however, the individual requirements in the Notice of Election, such as the partial Social Security Number, the specific number of signatures required, or the dates by which actions must be taken, are the options that CalPERS chooses to implement and make specific the general requirements of the statute. It is through the adoption of these individual requirements that CalPERS executes its statutory duties. The Notice of Election, then, implements, interprets or makes specific the law enforced or administered by CalPERS. The second element expressed in *Tidewater* is met.

OAL notes that the administration of elections will likely involve requirements that are individual to each election, such as the dates by which actions must be taken. For example, dates might change from election to election depending on the election cycle. CalPERS might adopt a regulation establishing the criteria for setting the dates for submission of documents and the election itself. For example, the regulation could say:

> The election shall take place three months before the expiration of the terms for which the election is held. The Notice of Election shall be prepared and issued three months before the election.

In this example, the actual dates could be established on a case-by-case basis based upon the regulatory requirements. But to the extent that requirements in the Notice of Election meet the definition of a "regulation" that information must be adopted pursuant to the APA.

The third step in the analysis is whether an exemption from the requirements of the APA applies to the challenged rule. Pursuant to section 11346, the procedures 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."

Section 11340.9 establishes several express exemptions from the APA. In its response, CalPERS alleges that the forms included in the Notice of Election are consistent with the statutory and regulatory election requirements and are, therefore, exempt from the APA pursuant to the "forms exemption" in section 11340.9 (c):

> This chapter does not apply to any of the following:
>
> ...

(c) A form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation on any requirement that a regulation be adopted pursuant to this chapter when one is needed to implement the law under which the form is issued.

This statutory provision contains a significant restriction on the use of the "forms" exemption. In a previous determination, OAL addressed the "forms exemption" from the APA:

> According to the leading case, *Stoneham v. Rushen*,[5] the [statutory] language quoted directly above creates a 'statutory exemption relating to *operational* forms.' (Emphasis added.) An example of an operational form would be a form which simply provides an operationally convenient space in which, for example, applicants for licenses can write down information that existing provisions of law already require them to furnish to the agency, such as the name of the applicant."
>
> "By contrast, if an agency form goes beyond *existing legal requirements*, then, under Government Code section 11342, subdivision (b), a formal regulation is '*needed to implement the law under which the form is issued.*' For example, a hypothetical licensing agency form might require applicants to fill in marital status, race, and religion—when none of these items of information was required by existing law. The hypothetical licensing agency would be making new law: i.e., 'no application for a license will be approved unless the applicant completes our application form, i.e., furnishes his or her name, marital status, race, and religion.' [Emphasis added.]"
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> "In other words, according to the *Stoneham* Court, if a form contains 'uniform substantive' rules which are used to implement a statute, those rules must be promulgated in compliance with the APA. On the other hand, a 'regulation is *not* needed to implement the law under which the form is issued' (emphasis added) insofar as the form in question is a simple operational form limited in scope to *existing* legal requirements. [Emphasis original.]"[6]

In the case of the Notice of Election, the information required on the forms not included in either the statutory or regulatory requirements for the conduct of an election. The law under which the form is issued does not include the identifying information, the last six digits of the Social Security Number, or other similar information.

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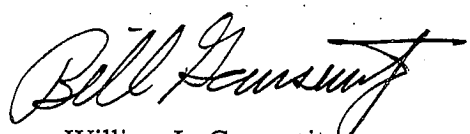
[5] *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130

[6] **1993 OAL Determination No. 5**, CRNR 94, No. 2-Z, January 14, 1994, p. 61, 105; typewritten version, p. 266.

OAL concludes that the "forms exemption" does not apply to the forms at issue in this determination because the information and requirements contained in the forms go beyond existing legal requirements.

CONCLUSION

For these reasons, OAL concludes that the Notice of Election and the elements included in the Notice of Election contain underground regulations.



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