

**STATE OF CALIFORNIA**  
**OFFICE OF ADMINISTRATIVE LAW**

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**2008 OAL DETERMINATION NO. 15**  
**(OAL FILE # CTU 2008-0108-01)**

*[Handwritten signatures]*

**REQUESTED BY:** John K. Riess

**CONCERNING:** Employment Development Department – An Agreement Between the Employment Development Department and the California Unemployment Insurance Appeals Board, Dealing with Workforce Investment Act Audit Appeals

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 a "regulation" as defined in Government Code section 11342.600<sup>1</sup> and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of a "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.<sup>2</sup> OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

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<sup>1</sup> Government Code 11342.600:

"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.

<sup>2</sup> 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.

## ISSUE

On January 8, 2008, Mr. Riess (Petitioner) submitted a petition to OAL challenging an agreement between the Employment Development Department (Department) and the California Unemployment Insurance Appeals Board (Board) dated March 4, 2005, (Agreement) as an underground regulation issued in violation of Government Code section 11340.5.<sup>3</sup> The Agreement requires the Board to conduct audit appeals resulting from audits of subrecipients of funds received from the Workforce Investment Act (WIA)<sup>4</sup>.

## DETERMINATION

OAL determines that those provisions of the Agreement which are not contained in state or federal law meet the definition of a "regulation" as defined in section 11342.600 and do not fall within any express APA exemption. They should, therefore, have been adopted pursuant to the APA. Those provisions which restate applicable state or federal law or are the only legally tenable interpretation of the state or federal law need not be adopted pursuant to the APA.

## FACTUAL BACKGROUND

The WIA is a federal program that superseded the Job Training Partnership Act. WIA is designed to benefit job seekers, disabled individuals, laid off workers, youth etc. This program is an effort to improve the quality, productivity and competitiveness of the workforce.<sup>5</sup> Participating states are required to enter into an agreement between the state and the federal Secretary of Labor. The state is also required to adopt a state plan for the implementation of the WIA. WIA funds are granted to the state. The state then funnels the funds to local boards, or subrecipients, to administer WIA programs.<sup>6</sup> The WIA requires that the subrecipients<sup>7</sup> of WIA funds be audited and that the audit findings may be appealed by the subrecipient.<sup>8</sup>

The Agreement between the Department and the Board states that "The [audit appeal] hearing [required by the WIA] shall be conducted in accordance with Chapter 8

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<sup>3</sup> Unless otherwise specified code references are to the California Government Code.

<sup>4</sup> Workforce Investment Act (Pub. L. No. 105-220 (August 7, 1998), 112 Stat. 936)

<sup>5</sup> California Employment Development Department. "WIA Overview." [Online] May 23, 2008. <http://www.edd.ca.gov/wiarep/wiaind.htm>.

<sup>6</sup> Workforce Investment Act (Pub. L. No. 105-220 (August 7, 1998), 112 Stat. 936)

<sup>7</sup> A "subrecipient" is defined in title 20, Code of Federal Regulations (CFR), section 641.142 as a "subgrantee." A "subgrantee" is defined in the same section as "...the legal entity to which a subaward of financial assistance, which may include a subcontract, is made by the grantee (or by a higher tier subgrantee or recipient), and that is accountable to the grantee for the use of the funds provided. ...". Briefly, the grantee is the state, and the subgrantee or subrecipient, is the local agency that receives WIA funds from the state and administers WIA programs.

<sup>8</sup> See title 20, CFR, sections 667.410 and 667.500(a)(2).

(commencing with Section 1951), Part 1, of Division 1 of the Unemployment Insurance Code and the Rules of the Appeals Board.”<sup>9</sup> The rules of the Board are found in title 22, California Code of Regulations, section 5000 et seq.

The petitioner argues that the Agreement contains specific directions to the Board that are regulatory.

In its response to the petition, the Department asserts that:

- (1) The Agreement is the only legally tenable interpretation of a provision of law and therefore is not subject to the APA;
- (2) The Agreement is a mere restatement of federal and state laws and regulations, including Unemployment Insurance Code section 1951 et seq.;
- (3) The Agreement is between the Department and the Board and therefore does not apply generally and is not an underground regulation; and
- (4) The Agreement is not a regulation subject to the rulemaking requirements of the APA because it is nothing more than the delegation of hearing authority to the Board as required by title 29, Code of Federal Regulations (CFR), section 667.500(a)(2).

The Petitioner submitted a rebuttal to the agency’s response to OAL on May 12, 2008. The rebuttal raised no new issues or arguments that were not presented in the original petition.

### **UNDERGROUND REGULATIONS**

Section 11340.5, subdivision (a), prohibits state agencies from issuing a rule unless the rule complies with the APA. It states as follows:

- (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 section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations (CCR), section 250.

OAL may issue a determination as to whether or not an agency issues, utilizes, enforces, or attempts to enforce a rule that meets the definition of a "regulation" as defined in section 11342.600 and should have been adopted pursuant to the APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is not enforceable against the agency through any formal

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<sup>9</sup> Page 2 of the Agreement between the Board and the Department.

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

A determination of whether the challenged rule is a “regulation” subject to the APA depends on (1) whether the challenged rule contains a “regulation” within the meaning of section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

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.4<sup>th</sup> 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. The Agreement contains directions for hearings based on audit reports or other reports disallowing costs that are applicable to all subrecipients receiving WIA funds. As *Tidewater* pointed out, 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 persons or situations. The Agreement includes requirements that subrecipients of WIA funds must follow if they want to appeal an audit decision. Although the Agreement is between the Department and the Board, the requirements in the Agreement also apply to subrecipients. Subrecipients are a clearly defined class of persons. The first element 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. The WIA is created in federal law.<sup>10</sup> The WIA requires that states wishing to receive federal funding must adopt a state plan approved by the Secretary of Labor.<sup>11</sup> California's state plan is

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<sup>10</sup>Workforce Investment Act (Pub. L. No. 105-220 (August 7, 1998), 112 Stat. 936)

<sup>11</sup>Workforce Investment Act (Pub. L. No. 105-220 section 112 (August 7, 1998), 112 Stat. 936)

titled “California’s Strategic Two-Year Plan For Title I of the Workforce Investment Act of 1998 and the Wagner-Peyser Act, As Revised for the Period of July 1, 2007 – June 30, 2009” (state plan) adopted by the Governor. The state plan establishes the state Workforce Investment Board (WIB) to assist the Governor in developing the policies required by the WIA. Once the policies are adopted by the Governor and the WIB, the Department is required by the state plan to “implement policy.”<sup>12</sup>

The state plan continues:

Federal laws are normally implemented in California through enabling legislation. State enabling legislation assigns authority for developing State regulations. The State elected to implement the WIA, however, through an Executive Order issued by the Governor. As a result, California has not developed and implemented its own regulations for the WIA, but follows federal law and regulation. (*Id.* at p. 64)

In the usual case of similar federal grant programs which require a state plan, the responsibilities of the various state agencies are established in statute.<sup>13</sup> In the case of the WIA, however, the state plan specifically states that there is no enabling legislation. The state plan establishes the Department as the administrative and enforcement agency for purposes of the WIA. The federal law through the state plan, then, is the law enforced or administered by the Department in the issuance of the Agreement.

As noted above, the WIA requires that the subrecipients of WIA funds be audited and that the audit findings may be appealed by the subrecipient. Title 20, CFR, section 667.500 (a)(2) requires the state to use “...the audit resolution, debt collection and appeal procedures that it uses for other Federal grant programs.” The Agreement states that “The [audit appeal] hearing shall be conducted in accordance with Chapter 8 (commencing with Section 1951), Part 1, of Division 1 of the Unemployment Insurance Code and the Rules of the Appeals Board.”<sup>14</sup> The rules of the Board are found in title 22, California Code of Regulations, section 5000 et seq.

The Agreement, however, also contains provisions which are not contained in state or federal law. These examples are not intended to be an exhaustive list of all provisions in the Agreement that meet the definition of “regulation”:

- The [Administrative Law Judge (ALJ)] may order a prehearing conference at which the representatives of the Director and Subrecipient shall be prepared to discuss the matter under appeal and to make stipulations or admissions where appropriate. The parties shall confer in person or by correspondence before

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<sup>12</sup> California Employment Development Department. “California’s Strategic Two-Year Plan For Title I of the Workforce Investment Act of 1998 and the Wagner-Peyser Act, As Revised for the Period of July 1, 2007 – June 30, 2009.” [Online] 26 June 2008 p. 13 [http://www.calwia.org/doc\\_files/Strategic%20Two-Year%20Plan%2007-09.pdf](http://www.calwia.org/doc_files/Strategic%20Two-Year%20Plan%2007-09.pdf).

<sup>13</sup> See, for example, the Medi-Cal program, Welfare and Institutions Code section 14000.03 and following.

<sup>14</sup> Page 2 of the Agreement between the Board and the Department.

the date assigned for this conference to reach agreement upon as many matters as possible. They shall prepare and submit to the ALJ at or before the conference a joint written statement of the factual and legal contentions remaining in dispute.

- Within 90 days after the record is closed, the ALJ shall prepare a proposed written decision for the Director.
- The Director shall affirm, reverse, or modify the determination of the ALJ.

The Agreement, in addition to enforcing and administering the WIA and the state plan, contains provisions which govern the Department's procedures. For example, the requirement that the Director of the Department mail to the Board's Chief Administrative Law Judge the audit report, the protest or appeal and any relevant correspondence establish the Department's procedure for processing audit appeals, thereby implementing the state plan. Therefore, the second element of *Tidewater* is met.

The Agreement, therefore, meets the definition of a regulation in Government Code section 11342.600.

The final issue to examine is whether the Agreement falls within an exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies.<sup>15</sup> Exemptions may also be specific to a particular rulemaking agency or a specific program.<sup>16</sup> In all cases, an exemption from the procedural requirements established in the APA must be expressly stated in statute; 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."

As noted above, the state plan indicates that the state has elected to follow federal law and federal regulation. No express exemption has been established by state statute.

In addition, the state plan states:

The State elected to implement the WIA, however, through an Executive Order issued by the Governor. As a result, California has not developed and implemented its own regulations for the WIA, but follows federal law and regulation.<sup>17</sup>

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<sup>15</sup> See Government Code section 11340.9.

<sup>16</sup> For example, Penal Code section 5058.1 that exempts pilot programs within prisons and Education Code section 89030 that exempts rules and regulations adopted by California State University trustees from compliance with the APA.

<sup>17</sup> "California's Strategic Two-Year Plan For Title I of the Workforce Investment Act of 1998 and the Wagner-Peyser Act, As Revised for the Period of July 1, 2007 – June 30, 2009," *supra*, at p. 64.

This section of the state plan specifically states that California will not adopt implementing regulations but will follow federal law and regulation. This cannot be construed as an exemption from the APA because it is not an express statutory exemption.<sup>18</sup> Rather it is a requirement that only federal law and regulation be used to implement the WIA.

We find no express exemptions from the APA that would apply to the Agreement. We do note, however, that some sections of the Agreement are restatements of state or federal law. A restatement of law is not an exemption from the APA; rather, it repeats the law and does not further implement, interpret or make specific any provision of law. For example, a provision of the Agreement states:

Prior to the issuance of the proposed decision, the subrecipient may withdraw its protest or appeal.

This is a restatement of title 22, California Code of Regulations, section 5050. This section is part of the Board audit appeal procedures which are made applicable to WIA audit appeals pursuant to title 20, CFR, section 667.500 (a)(2) and the Agreement.

#### **DEPARTMENT'S RESPONSE**

In its response, the Department argues that the Agreement does not meet the definition of a regulation or, alternatively, is exempt from the APA for various reasons. We agree in part and disagree in part with the Department's arguments for the reasons discussed below.

1. The Agreement is the only legally tenable interpretation of a provision of law and therefore is not subject to the APA.

The Department, in their first argument, asserts that the Agreement is exempt from the rulemaking requirements of the APA because it is the only legally tenable interpretation of a provision of law. Section 11340.9, subdivision (f), states that the APA shall not apply to a "regulation that embodies the only legally tenable interpretation of a provision of law."

In its discussion of the "only legally tenable" exemption, the California Supreme Court in *Morning Star*<sup>19</sup>, stated:

...the exception for the lone "legally tenable" reading of the law applies only in situations where the law "can reasonably be read only one way" (1989 Off. Admin. Law Determination No. 15, Cal. Reg. Notice Register 89, No. 44-Z, pp. 3122, 3124), such that the agency's actions or decisions

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<sup>18</sup> Government Code section 11346. See, for example, *Voss v. The Superior Court of Tulare County*, (1996) 46 Cal.App.4th 900.

<sup>19</sup> *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 328, 132 P.3d 249.

in applying the law are essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute's plain language. (See Cal. Law Revision Com. com., 32D West's Ann. Gov.Code (2005 ed.) foll. § 11340.9, p. 94; 1989 Off. Admin. Law Determination No. 15, Cal. Reg. Notice Register 89, No. 44-Z, pp. 3124-3131 [reviewing an agency interpretation of the law for compliance with the APA and concluding that although the agency had a “well-supported” rationale for its view, its [sic] was not the only legally tenable interpretation of the pertinent statute].)

In the present case, the state plan requires that the WIA be implemented solely through federal law. The Department has implemented the federal requirement for audit appeal procedures by entering into the Agreement. The federal provisions, and the Board audit regulations, must, therefore, be examined carefully to determine if the Agreement contains the only legally tenable interpretation of federal and state provisions.

An example of a provision that contains the only legally tenable interpretation of the WIA is that the WIA audit appeals will be conducted by the Board pursuant to its rules. Title 29, CFR, section 667.500(a)(2) requires that, “A State must utilize the audit resolution, debt collection and appeal procedures that it uses for other Federal grant programs.” The state plan establishes the Department as the entity responsible for implementation of WIA, so the reference to the state is, in California, a reference to the Department. Section 667.500(a)(2), therefore, requires that the Department use the audit resolution, debt collection and appeal procedures that “it”, that is, the Department, uses for other federal grant programs. The audit resolution procedures used by the Board<sup>20</sup> are the procedures the Department uses for other federal programs. The designation of the Board procedures as the audit procedures required by title 29, CFR, section 667.500(a)(2), is the only legally tenable interpretation of section 667.500(a)(2).

The Department has not identified the specific provisions it believes contain the only legally tenable interpretation of state or federal law. We have identified no other requirements in the Agreement that can be said to be the only legally tenable interpretation of applicable law.

2. The Agreement is a mere restatement of federal and state laws and regulations, including Unemployment Insurance Code section 1951 et seq.

As noted above, a restatement of law does not need to be adopted as a regulation pursuant to the APA because it does not meet the definition of “regulation.” A restatement must simply reiterate the applicable law. It cannot further interpret, implement or make specific the law. We find that some provisions of the Agreement do restate applicable law; however, most are not restatements. As noted above, the following are examples of regulatory provisions in the Agreement that depart from or embellish upon existing federal or state law. These examples are not intended to be an exhaustive list of all provisions in the Agreement that meet the definition of “regulation”:

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<sup>20</sup> The Board is established as part of the Department in Unemployment Insurance Code section 401.

- The ALJ may order a prehearing conference at which the representatives of the Director and Subrecipient shall be prepared to discuss the matter under appeal and to make stipulations or admissions where appropriate. The parties shall confer in person or by correspondence before the date assigned for this conference to reach agreement upon as many matters as possible. They shall prepare and submit to the ALJ at or before the conference a joint written statement of the factual and legal contentions remaining in dispute.
- Within 90 days after the record is closed, the ALJ shall prepare a proposed written decision for the Director.
- The Director shall affirm, reverse, or modify the determination of the ALJ.

The state grievance and hearing procedures set forth in the Agreement which are not found in federal provisions further implement and make specific the federal WIA and federal WIA regulations, and are not restatements of law.

3. The Agreement is between the Department and the Board and therefore does not apply generally and is not an underground regulation.

The Department argues that the Agreement does not meet the definition of a “regulation” because it does not have general applicability. As discussed above, a rule need not apply to all persons in the state of California.<sup>21</sup> It is sufficient if the rule applies to a clearly defined class of persons or situations. According to the Department’s response “...the provisions in the Agreement prescribe the appeal process for the subrecipients who receive funding under WIA.”<sup>22</sup> By the Department’s own description, the terms of the Agreement apply generally to subrecipients of WIA funding. This is sufficient to find that there is general applicability.

4. The Agreement is not a regulation subject to the rulemaking requirements of the APA because it is nothing more than the delegation of hearing authority to the Board as required by title 29 of the Code of Federal Regulations section 667.500(a)(2).<sup>23</sup>

As noted above, the Agreement requiring the use of the Board and its duly adopted procedures is the only legally tenable interpretation of title 29, CFR, section 667.500(a)(2). If the Agreement stopped with that simple requirement, the Agreement would be exempt from the procedures of the APA. However, the Agreement contains provisions which go beyond the Board procedures and is more than a mere delegation of hearing authority. The Agreement establishes hearing procedures and requirements for

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<sup>21</sup> See the discussion of *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4<sup>th</sup> 557, 571. *supra*.

<sup>22</sup> Department’s Response to Petition, p. 1.

<sup>23</sup> Sec. 667.500 (a)(2) A State must utilize the audit resolution, debt collection and appeal procedures that it uses for other federal grant programs.

the Board's Administrative Law Judge as well as subrecipients subject to these requirements. Those requirements meet the definition of "regulation" and must be adopted pursuant to the APA.

### CONCLUSION

Those provisions of the Agreement which are not contained in state or federal law meet the definition of a "regulation" as defined in section 11342.600 and do not fall within any express APA exemption. They should, therefore, have been adopted pursuant to the APA. Those provisions which restate applicable state or federal law or are the only legally tenable interpretation of the state or federal law need not be adopted pursuant to the APA.

July 23, 2008

  
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