

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: )  
Request for Regulatory )  
Determination filed by )  
the Prison Law Office )  
concerning the Board )  
of Prison Term's )  
Administrative Directive )  
No. 86/4 (establishing )  
procedures concerning )  
the evaluation, )  
treatment, and parole )  
of prison inmates who )  
have severe mental )  
disorders related to the )  
offense for which they )  
are incarcerated).<sup>1</sup> )

1987 OAL Determination No. 13  
[Docket No. 3087-002] 1987  
September 30, 1987 EU  
SECRETARY OF STATE

Determination by:

  
JOHN D. SMITH  
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney  
Craig Tarpenning, Sr. Staff Counsel  
Rulemaking and Regulatory  
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law was whether Administrative Directive No. 86/4 issued by the Board of Prison Terms is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the Board of Prison Terms has unlawfully established procedures for the evaluation, treatment, and parole of prison inmates who have severe mental disorders related to the offense for which they are incarcerated.

September 30, 1987

THE ISSUE PRESENTED 2

The Office of Administrative Law ("OAL") has been requested to determine whether Administrative Directive No. 86/4, issued by the Board of Prison Terms ("Board"), which establishes procedures for the evaluation and treatment of prison inmates for severe mental disorders and the continuation of treatment as a condition of parole, is a "regulation" as defined in Government Code section 11342, subdivision (b), and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the Administrative Procedure Act ("APA").

THE DECISION 3, 4, 5, 6

The Office of Administrative Law finds that Administrative Directive No. 86/4 (1) is subject to the requirements of the APA, (2) is a "regulation" as defined in the APA and (3) is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA.<sup>7</sup>

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

On July 1, 1977, the Community Release Board succeeded the Adult Authority and the California Women's Board of Terms and Paroles, which were abolished.<sup>8</sup> On January 1, 1980, the Community Release Board was renamed the Board of Prison Terms.<sup>9</sup> The Board meets periodically concerning parole matters at each prison.<sup>10</sup>

Authority 11

Penal Code sections 5076.1 and 5077 provide that the Board shall hear parole applications and shall determine parole length, conditions, and whether revocation is appropriate. Penal Code section 2962 provides that the chief psychiatrist of the Department of Corrections shall certify to the Board that:

" . . . the prisoner has a severe mental disorder, that the disorder is not in remission, or cannot be kept in remission without treatment, and that the severe mental disorder was one of the causes or was an aggravating factor in the prisoner's criminal behavior . . . ."

The Board is also the hearing body in the event of a dispute as to the certification or the manner of treatment.<sup>12</sup>

Penal Code section 5076.2, subdivision (a), provides in part that:

"Any rules and regulations, including any resolutions and policy statements, promulgated by the Board of Prison Terms, shall be promulgated and filed pursuant to [the APA] . . . ." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA applies to all state agencies, except those "in the judicial or legislative departments."<sup>13</sup> Since the Board is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Board.<sup>14</sup>

In any event, subdivision (a) of Penal Code section 5076.2, cited above, specifies that the Board's rulemaking is subject to the APA.

September 30, 1987

Background

The following undisputed facts and circumstances have given rise to the present determination.

Senate Bill No. 1296 ("SB 1296") was enacted by the Legislature in 1985 in an attempt to reduce the danger posed to society from the release of prison inmates who are severely mentally disordered.<sup>15</sup> The Legislature found that there were prisoners who have a treatable, severe mental disorder which was a cause or factor in the commission of the crime for which they were incarcerated. The Legislature found that if the disorder is not in remission at the time of parole or cannot be kept in remission without mandatory treatment, a danger to the public would result.<sup>16</sup> SB 1296 provides for the evaluation of each prisoner for severe mental disorders during the first year of the prisoner's sentence and provides for treatment of those inmates having such a severe mental disorder. It also conditions parole upon continued treatment if the mental disorder was a cause or factor in the commission of the prisoner's offense and is not in remission or cannot be kept in remission without further treatment.<sup>17</sup> This is accomplished largely through a certification and hearing system which was contained in Penal Code section 2960, as adopted by SB 1296.<sup>18</sup>

In a document entitled Administrative Directive No. 86/4,<sup>19</sup> dated November 19, 1986, the Board ". . . establishes the procedures for implementing SB 1296." (Emphasis added.) This document restates a number of provisions contained in SB 1296, but, in addition, includes provisions not specified in the bill. Those supplemental provisions include:

- o the time periods within which certifications are to be forwarded to the Board, the content of the certifications, and the place the evaluation is to be performed;
- o the procedure whereby the certifications are to be reviewed;
- o the notice provided to the prisoner or parolee;
- o the prisoner/parolee's options following notification;
- o the standard of proof required at the certification and placement hearings, representation by counsel, time guidelines;
- o records maintained, information provided, etc., at the hearings;

September 30, 1987

- o parole violations; and
- o discharge review.<sup>20</sup>

A Request for Determination was filed with OAL on January 30, 1987, concerning Administrative Directive No. 86/4. The Requester in this determination proceeding is the Prison Law Office. The Requester contends that the document ". . . is a set of regulations within the meaning of section 11342(b) and must be declared invalid unless promulgated under the APA." In a letter to OAL dated August 28, 1987, the Board stated that it did not intend to respond to the Request and that it was ". . . preparing appropriate regulations on the subject . . . ."21

## II. DISPOSITIVE ISSUES

There are two main issues before us:<sup>22</sup>

- (1) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In pertinent part, Government Code section 11342, subdivision (b) defines "regulation" as:

". . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such 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 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of application

September 30, 1987

. . . has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

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

Second, does the informal rule either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

With respect to Administrative Directive No. 86/4, the answer to both parts of this inquiry is "yes."

For an agency rule or standard to be "of general application" within the meaning of the APA, 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.<sup>23</sup> It has been judicially held that ". . . rules significantly affecting the male prison population . . ." are of "general application."<sup>24</sup> Administrative Directive No. 86/4 is just such a rule. Its provisions are intended to apply to all members of a class, i.e., all prison inmates ". . . whose term of imprisonment began before or after July 1, 1986."<sup>25</sup>

Administrative Directive No. 86/4 also meets the second test of a "regulation." The Directive supplements SB 1296 by providing procedures for psychiatric certification of prison inmates with severe mental disorders, the review of such certifications, the conduct of certification and placement hearings, etc. For example, Penal Code section 2966, subdivision (a), provides that a prisoner may challenge the certification of severe mental disorder at a hearing held by the Board and that the burden of proof at the hearing shall be on the issuer of the certification. Paragraph VII of Administrative Directive No. 86/4 adds to the statute by specifying the standard of proof required, the rights of the prisoner, that the prisoner is to be represented by counsel, that the hearing is to be recorded, etc. In issuing such supplemental provisions, the Directive ". . . establishes the procedures for implementing SB 1296."<sup>26</sup>

WE CONCLUDE THAT THE CHALLENGED RULES ARE "REGULATIONS" AS

September 30, 1987

DEFINED IN GOVERNMENT CODE SECTION 11342, SUBDIVISION  
(b).<sup>27</sup>

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.<sup>28</sup> However, none of the recognized exceptions (set out in footnote 28) apply to the Administrative Directive No. 86/4.

Although the Board has not responded to the Request, a copy of a letter included with the Request indicated some exceptions the Board may have been originally relying upon in issuing the Directive without conducting a rulemaking. The letter, dated December 24, 1986, is written on Board letterhead and signed by Stephen Blank for Ron E. Koenig, Chairman. It is addressed to the Requester. In the letter, the Board stated that it was not seeking to promulgate a rule when it issued the Directive, but rather was seeking to advise staff and interested persons of the new provisions of SB 1296 and of the ". . . internal procedures for its implementation." The Board stated that the APA ". . . does not apply to a rule relating only to the internal management of a state agency or to any form prescribed by a state agency or any instructions relating to the use of the form." However, neither the "internal management" nor "forms" exceptions apply to Administrative Directive No. 86/4.

Government Code section 11342, subsection (b), provides in part:

"'Regulation' means every rule, regulation, order, or standard of general application . . . 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 which relates only to the internal management of the state agency. 'Regulation' does not mean to include . . . any form prescribed by a state agency or any instructions relating to the use of the form but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued." [Emphasis added.]

The scope of the "internal management" exception has been clarified by case law. In Armistead v. State Personnel Board<sup>29</sup>, the court determined that a "Personnel Transaction Manual" rule restricting an employee from withdrawing his or her resignation did not fall within the "internal management" exception. The court found that the rule was ". . . a matter of import to all state civil service employees . . ." [rather

September 30, 1987

than] . . . a rule governing the board's internal affairs." The court also pointed out that the fact that the rule was only intended for distribution to personnel officers was not persuasive. Indeed, this fact increased the court's concern over the rule. In Stoneham v. Rushen,<sup>30</sup> the court specifically held that ". . . a rule of general application significantly affecting the male prison population . . . is not exempt as a rule of internal management from compliance with the [APA]." In our earlier Determination concerning the Board of Chiropractic Examiners,<sup>31</sup> we similarly concluded that policies which effect a group of persons other than the employees of the originating agency do not fall into the "internal management" exception. The courts have held that this exception is to be construed "narrowly."<sup>32</sup>

The provisions contained in Administrative Directive No. 86/4 extend well beyond those matters relating solely to the "internal affairs" of the Board. The Directive establishes such matters of import to prisoners and parolees as the rights afforded them at the hearings and the standards of proof required.<sup>33</sup> Even where the Directive merely sets timelines, the entire process regulates a class of persons not employed by the agency, i.e., affected prisoners and parolees, and, as such, cannot be construed as a matter of "internal management." In City of San Marcos v. California Highway Commission,<sup>34</sup> application deadlines were held not to be within the "internal management" exception.

It is also apparent that the "forms" exception, does not apply. Although Administrative Directive No. 86/4 does make reference to two forms<sup>35</sup>, the Directive is not itself a form, nor instructions relating to the use of a form. It consists of eight pages of provisions and procedures unrelated to the filing of a form.

Although not discussed in the Board's letter to the Requester, it should nonetheless be noted that paragraph VII of the Directive states that the "[t]imelines set forth in these procedures for certifications and evaluations are suggested guidelines . . . ." <sup>36</sup> (Emphasis added.) However, this disclaimer does not immunize Administrative Directive No. 86/4 from the requirements of the APA.

First of all, only a few of the procedures established by the Directive are merely "time guidelines." As previously discussed, the provisions added to SB 1296 include such matters as the location of the certification examination as well as the standards of proof required at the hearings.<sup>37</sup> Secondly, the fact that the "time guidelines" are "suggested" and purportedly not intended as enforceable by the Board is not dispositive on the issue of APA applicability. In Winzler & Kelley v. Department of Industrial Relations,<sup>38</sup> the court found that whether an enactment is regulatory or not depends on the effect and impact on the public, rather



September 30, 1987

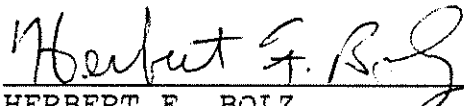
than the agency's characterization of the action. The impact on an affected prisoner or parolee of "advisory" time guidelines distributed by the controlling agency to those exclusively in control of the evaluation and certification process may well be substantial. It should also be remembered that Government Code section 11347.5 forbids state agencies not only from enforcing standards and guidelines without complying with APA procedures, but also from issuing them. In this regard, please see our discussions in prior Determinations on "advisory" provisions.<sup>39</sup>

WE CONCLUDE THAT NONE OF THE RECOGNIZED EXCEPTIONS APPLY TO ADMINISTRATIVE DIRECTIVE NO. 86/4.

III. CONCLUSION

For the reasons set forth above, OAL finds that the Board's Administrative Directive No. 86/4, which establishes procedures for the implementation of Senate Bill No. 1296, is (1) subject to the requirements of the APA, (2) is a "regulation" as defined in the APA, and (3) is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA.

DATE: September 30, 1987

  
HERBERT F. BOLZ  
Coordinating Attorney

  
CRAIG TARPENNING  
Sr. Staff Counsel

Rulemaking and Regulatory  
Determinations Unit

CT:\samna\lcom\dpdet

September 30, 1987

- 1 This Request was filed by Donald Specter, Director, of the Prison Law Office, General Delivery, San Quentin, California 94964, (415) 457-9144. The Board of Prison Terms was represented by Staff Attorney James A. Browning, Jr., 545 Downtown Plaza, Suite 200, Sacramento, California, 95814, (916) 322-6729.
  
- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-011), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CAC). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396 n.5, 211 Cal.Rptr. 758, 764 n.5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems. In Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, \_\_\_, 236 Cal.Rptr. 853, 857, the court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute.
  
- 3 As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17

September 30, 1987

Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "The office's determination shall . . . be made available to . . . the courts." (Emphasis added.)

- 4 No public comments were received concerning this Request for Determination. The Board of Prison Terms did not submit a formal Response to the Request for Determination.
- 5 An OAL finding that a challenged rule is illegal unless adopted "as a regulation" does not of course exclude the possibility that the rule could be validated by subsequent incorporation in a statute.
- 6 Pursuant to Title 1, CAC, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State.
- 7 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.
- 8 Stats. 1976, ch. 1139.
- 9 Stats. 1979, ch. 255.
- 10 Penal Code sections 5076.1 and 5077.
- 11 We discuss the affected agency's rulemaking authority (see Gov. Code, section 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Administrative Code, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of necessity, authority, clarity,

consistency, reference, and nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

- 12 Penal Code sections 2962, 2964, and 2966.
- 13 Government Code section 11342, subdivision (a). See Government Code sections 11343; 11346. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).
- 14 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
- 15 Stats. 1985, ch. 1419, section 1, p. 995.
- 16 Penal Code section 2960.
- 17 Penal Code sections 2960 and 2962.
- 18 Penal Code section 2960 was amended and renumbered as sections 2960, 2962, 2964, 2966, 2968, 2970, 2972, 2974, 2976, 2978 and 2980. (Stats. 1986, ch. 858.)
- 19 Section 2017 of Title 15 of the California Administrative Code provides in part:

September 30, 1987

"(a) General. An Administrative Directive is a communication from the chairman concerning any information the chairman feels should be disseminated. . . .

(b) Internal Communications. The Administrative Directive may be used for the following internal communications:

- (1) Information concerning personnel changes, court decisions and other information which does not change procedures.
- (2) Changes in forms and instructions regarding the use and distribution of forms." [Emphasis added.]

It is apparent that Administrative Directive No. 86/4 does not come within the meaning of an "administrative directive" as that term is defined in Title 15, CAC, section 2017. Subdivision (b)(1) of section 2017 limits such documents to ". . . information which does not change procedures." Administrative Directive No. 86/4 in fact establishes a wide range of procedures to implement Senate Bill No. 1296. It should also be noted that even if a document met the definition of an "administrative directive" as specified in Title 15, CAC, section 2017, any provisions meeting the definition of a "regulation" under Government Code section 11342 would nonetheless have to be adopted pursuant to the APA. See 1987 OAL Determination No. 12 (California Community Colleges, September 22, 1987, Docket No. 87-001) pp. 11-14. See also 1987 OAL Determination No. 5 (State Personnel Board, April 30, 1987, Docket No. 86-011), California Administrative Notice Register 87, No. 20-Z, May 15, 1987, pp. B-40--B-62, typewritten version p. 12 (agency may not delegate to itself by regulation the power to avoid APA procedures).

- 20 Paragraphs III B, C, and D; IV A, 2nd and 3rd paragraphs of B, C, and D; V; VI; VII B, D, E, G, I, J, and K; IX B, D, E, F, H, I, and J; X; and XI. (This is not intended as a definitive listing of all regulatory provisions in Administrative Directive No. 86/4.)
- 21 On September 28, 1987, the Board submitted to OAL the emergency adoption of sections 2570 through 2580, inclusive, of Title 15 of the California Administrative Code. We applaud the Board's efforts in taking this action. The provisions of these regulations are largely the same as those contained in Administrative Directive No. 86/4. OAL has 10 days to review and either approve or disapprove this emergency adoption. (Gov. Code, sec. 11349.6, subd. (b).)

September 30, 1987

If approved by OAL, these regulations will become effective upon filing with the Secretary of State. (Gov. Code, sec. 11346.1, subd. (d).) However, no regulation adopted as an emergency shall remain in effect for more than 120 days unless the adopting agency completes the adoption process pursuant to the APA. (Gov. Code, sec. 11346.1, subd. (e).) As part of this process the public is given notice of the regulations and an opportunity to comment thereon. (Gov. Code, sec. 11346.4 through 11346.8.)

Due to the September 28, 1987 filing date of this emergency adoption and the time constraints for the issuance of this Determination, OAL will not have had sufficient time to review the emergency adoption at the time this Determination was issued. If this emergency adoption is approved by OAL, than the provisions in Administrative Directive No. 86/4 which are also contained in the emergency adoption would be valid for 120 days. If the certificate of compliance required by Government Code section 11346.1, subdivision (e), is timely filed with, and approved by, OAJ, than the provisions adopted as regulations by the Board become a permanent part of the California Administrative Code until such time as they are amended or repealed.

- 22 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
- 23 Roth v. Department of Veteran Affairs (1980) 110 Cal.App. 3d 622, 167 Cal.Rptr. 552.
- 24 Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal. Rptr. 122.
- 25 Administrative Directive No. 86/4, introductory paragraph.
- 26 Id.
- 27 Any doubts as to whether or not the Board must formally adopt Administrative Directive No. 86/4 as a "regulation" are removed by careful review of Penal Code section 5076.2, which states that not only "regulations," but also "resolutions and

policy statements . . . [must be] . . . promulgated and filed pursuant to [the APA] . . . ." By employing these additional terms, it is clear that the Legislature intended that APA notice and hearing requirements apply to a broader category of Board enactments than is the case with most agencies' general rulemaking statutes. Assuming arguendo that the challenged rules are not "regulations," we conclude they are "resolutions" or "policy statements" within the meaning of Penal Code section 5076.2.

28 The following provisions of law may also permit agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:

- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
- 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. (b).)
- c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a specifically named person or group of persons and which do not apply generally or 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. (b).)
- f. Contractual provisions previously agreed to by the complaining party. 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); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed);

September 30, 1987

see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning APA exceptions is contained in a number of previously issued OAL determinations. The Index of OAL Regulatory Determinations (available from OAL, (916) 323-6225) is a helpful guide for locating such information.

- 29 (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1.
- 30 (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.
- 31 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-10--B-18.
- 32 Poschman v. Dumke (1973) 31 Cal.App.3d 932, 942, 107 Cal. Rptr. 596, 603.
- 33 Paragraphs VI and IX.
- 34 (1976) 60 Cal.App.3d 383, 407-411, 131 Cal.Rptr. 804, 819-821.
- 35 Board of Prison Terms Forms 1400 and 1515.
- 36 Subparagraph G.
- 37 Paragraphs III B, VII B, and IX D.
- 38 (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744.
- 39 1987 OAL Determination No. 10 (Department of Health Services, August 6, 1987, Docket No. 86-016) pp. 12, 17-18; 1986 OAL Determination No. 6 (San Francisco Bay Conservation and



September 30, 1987

Development Commission, September 3, 1986, Docket No. 86-002), California Administrative Notice Register 86, No. 38-Z, September 19, 1986, pp. B-27--B-28, typewritten version, pp. 15 and 16; 1986 OAL Determination No. 3 (State Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, pp. B-24--B-25, typewritten version, pp. 12 and 13; and 1986 OAL Determination No. 2 (California Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, pp. B-36--B-37, typewritten version, p. 11.