CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Joric Pang of Fung Lum Restaurant concerning the Department of Industrial Relations, Division of Labor Standards Enforcement "Interpretive Bulletin 85-4"[1]	1987 OAL Determination No. 4 [Docket No. 86-010] March 25, 1987 Determination Pursuant to Government Code Section 11347.5; Title 1, California Administrative Code, Chapter 1, Article 2

Determination by:

LINDA HURDLE STOCKDALE BREWER, Director

Herbert F. Bolz, Coordinating Attorney
Gordon R. Young, Staff Attorney
Rulemaking and Regulatory
Determinations Unit

THE ISSUE PRESENTED [2]

Mr. Joric Pang of Fung Lum Restaurant (Fung Lum) has requested the Office of Administrative Law (OAL) to determine whether or not the Department of Industrial Relations, Division of Labor Standards Enforcement "Interpretive Bulletin 85-4" is a "regulation" as defined in Government Code section 11342(b) and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the California Administrative Procedure Act (APA).[3]

THE DECISION [4,5,6,7]

The Office of Administrative Law finds that the above noted Interpretive Bulletin (1) is subject to the requirements of the APA, (2) is a regulation as defined in the APA, and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA.

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The Division of Labor Standards Enforcement (a component of the California Department of Industrial Relations) was created in 1976 by amendment to Labor Code section 82. The California Labor Commissioner is Chief of the Division of Labor Standards Enforcement.[8]

The Division of Labor Standards Enforcement (hereinafter the "DLSE") is responsible for enforcing various portions of the California Labor Code, including those involving wages, hours, and working conditions.[9] The matter at hand concerns interpretation of Labor Code section 351, a provision which forbids employers from sharing in tips left by (for instance) restaurant patrons for employees. According to Labor Code section 355, responsibility for enforcement of section 351 rests with the Department of Industrial Relations. Presumably, this enforcement responsibility has been delegated to the DLSE.

Authority [10]

Due to the complexity of the organization of the Department of Industrial Relations, it is not immediately clear which officer(s) or or component(s) possesses the power to issue formal regulatory interpretations of the Labor Code provision at issue.[11] The Department itself has taken two different positions on this question, noting first in a July 16, 1986 letter from the State Labor Commissioner that "regulatory revision" by the Industrial Welfare Commission (a departmental component that, among other things, sets the state minimum wage) might resolve the controversy over interpretation of Labor Code section 351; but noting later in its Response to this Request for Determination that another provision of the Labor Code gives the Director "general authority to promulgate regulations".[12] As discussed in note 10, we need not resolve this "authority" question in the regulatory determinations context.

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

The APA applies by its terms to all state agencies, except those "in the judicial or legislative department."[13] Since the Division of Labor Standards Enforcement is in neither the judicial or legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Division.[14], [15]

Background

Section 351 of the California Labor Code governs employee tips or "gratuities". Section 351 states:

> "No employer or agent shall collect, take, or receive any gratuity or a part thereof, paid, given to or left for an employee by a patron, or deduct any amount from wages due an employee on account of such gratuity, or require an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer. Every such gratuity is hereby declared to be the sole property of the employee or employees to whom it was paid, given, or left for. This section shall not apply to any employment in which no charge is made to a patron for services rendered to the patron by an employee on behalf of his employer if both of the following conditions are met: (a) the employee is receiving a wage or salary not less than the higher of the state or federal minimum wage, regardless of whether such employee is subject to either such minimum wage law, and (b) the employee's wage or salary is guaranteed and paid in full irrespective of the amount of tips received by the employee."[Emphasis added.]

The DLSE issued "Interpretive Bulletin No. 85-4" on August 20, 1985, apparently in response to an inquiry to the DLSE "whether, under Labor Code Section 351, it is permissible for waitresses to enter into an agreement among themselves and/or other employees to 'split' or 'pool' their tips with busboys and/or other employees." The Bulletin, among other things, interprets Labor Code section 351 to prohibit any mandatory tip-sharing. (Interpretive Bulletin No. 85-4 is attached as Exhibit A).

The DLSE has applied the provisions of Interpretive Bulletin No. 85-4 to Fung Lum Restaurant to prohibit its policy of mandatory tip-sharing in its "Hong Kong" style restaurant. According to Fung Lum, a "Hong Kong" style restaurant has several of the same employee classifications, e.g., busboys, food service, beverage service, and food preparation, assigned to the same table. As a consequence, Fung Lum claims any tip is left for the benefit of several employees. Hence, the need for mandatory tip-sharing.

Fung Lum filed a Request for Determination with OAL on September 8, 1986 regarding DLSE Interpretive Bulletin No. 85-4.

II. PRELIMINARY ISSUES

The DLSE's Response to the Request for Determination makes the following procedural objections:

1. OAL's determination is jurisdictionally limited to a consideration of what DLSE claims were Fung Lum's initially stated objections to Interpretive Bulletin 85-4, namely that the bulletin "violates the Administrative Procedure Act . . . because it does not meet the necessity, authority, reference, clarity and consistency standards of Government Code §11349.1."[16]

2. The Interpretive Bulletin meets the standards of Government Code section 11349.1.

We will consider the procedural objections in order.

First, contrary to the DLSE's contention, Fung Lum's request did not limit the scope of OAL's determination to an analysis of compliance with the substantive standards of Government Code section 11349.1. DLSE's objection is based upon a mischaracterization of Fung Lum's request. Fung Lum filed a "Request for Regulatory Determination"(emphasis added) and stated in a letter dated September 5, 1986 that "[t]he request concerns Interpretive Bulletin No. 85-4 issued by the State of California Labor Commissioner as it relates to the interpretation and enforcement of Labor Code section 351."

That request is sufficient to trigger OAL review under Government Code section 11347.5. No grounds need be specified by the requestor either under that statute or under Title 1 California Administrative Code section 122. Further, specification of grounds in no way limits OAL's review.[17]

As required by Government Code section 11347.5, the scope of OAL's review is whether the challenged enactment is "a regulation as defined by subdivision (b) of Section 11342."

OAL's regulations governing the regulatory determination process also require OAL to decide whether or not the challenged enactment is a "regulation".

Title 1 CAC section 126 provides in part:

> "Within 75 days of the date of publication of the notice regarding the commencement of active consideration of the request for determination, [OAL] shall issue a written determination as to whether the state agency rule is a regulation, along with the reasons supporting the determination."[Emphasis added.]

Title 1 CAC section 121 provides in part:

> "(a) 'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342(b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the Act."
>
> "(b) 'Request for determination' means a request made by any person to [OAL] . . . to issue a determination as provided by Government Code section 11347.5, as to whether a state agency rule is a regulation as defined in Government Code section 11342(b)." [Emphasis added.]

Second, DLSE contends that the Bulletin meets the standards of Government Code section 11349.1. In light of our disposition of DLSE's first contention, it is unnecessary to address this second contention other than to note that compliance with the substantive standards set forth in Government Code section 11349.1 is irrelevant to determinations made pursuant to Government Code section 11347.5.[18], [19]

III. DISCUSSION OF DISPOSITIVE ISSUES

There are two main issues before us:[20]

(1) WHETHER THE CHALLENGED RULE IS A REGULATION WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In pertinent part, Government Code section 11342(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, criteria, bulletin, manual, instruction [or] . . . standard of general application which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, . . . manual, instruction [or] . . . standard of application . . . 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(b) involves a two-part inquiry.

First, is the informal rule either

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

Second, does the informal rule either

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

The answer to both parts of this inquiry is "yes."

By way of background, we note that regulatory "bulletins" have been condemned by the California Supreme Court,[21] outlawed by the Legislature,[22,23] struck down by the California Court of Appeal,[24] and declared invalid in two earlier OAL determinations.[25]

In interpreting Labor Code section 351, the Bulletin lays down the following rules oriented toward future decisions:

1. waitresses may voluntarily share tips with other restaurant employees, such as busboys and chefs;

    a. [impliedly] these employees may work out sharing arrangements in which the employer is not involved in collecting or distributing tips;

    b. the agreed arrangement will be applicable only to those employees who willingly participate;

2. the employer may serve as "custodian or trustee" for a tip sharing arrangement, but only if the following conditions are met:

   a. the sharing arrangement is completely voluntary on the part of the participating employees;

   b. the arrangement did not originate with the employer;

   c. tips thus collected by the employer must be distributed at least as frequently as every payday;

   d. tips collected by the employer must be distributed according to the agreement made by the employees;

   e. the employer cannot request an employee to enter into a sharing agreement;

   f. any such agreement must be entirely free of any coercion or duress, express or implied, exerted by the employer on the employees involved;

   g. the employer cannot make a tip sharing arrangement a condition of employment or continued employment;

3. the employer may not require employees to take part in a tip sharing arrangement;

   a. the employer may not collect tips from, for instance, waitresses, for the purpose of distributing a portion thereof to, for instance, busboys or chefs.

   b. the employer may not deduct from wages an amount representing any portion of tips paid or given to one class of employee for the purpose of distributing tips to other employees.

Violation of Labor Code section 351 is a misdemeanor, punishable by a fine of $1000 or by 60 days in jail or both.[26] Clearly, it is the position of the Division of Labor Standards Enforcement (emphasis added) that employer conduct inconsistent with the above rules violates Labor Code section 351 and subjects the employer to criminal prosecution.[27]

How do the two prongs of the "regulation" test apply to the Bulletin?

First, DLSE Interpretive Bulletin No. 85-4 clearly is a standard of general application. In fact, there are approximately a dozen discrete standards of general

application articulated in the document under review. The Bulletin applies on a statewide basis to any employer subject to the provisions of Labor Code section 351. No specific employer is cited anywhere in the Bulletin; nor is any specific fact situation discussed.

Second, DLSE Interpretive Bulletin No. 85-4 implements, interprets, and makes specific the law enforced or administered by DLSE. The Bulletin quotes Labor Code section 351 verbatim. DLSE has requested the Los Angeles County district attorney to prosecute Fung Lum for violating section 351 by requiring tip sharing among employees.

The fundamental problem faced by the DLSE in interpreting Labor Code section 351 in the above Bulletin is that the statute in no way addresses the subject of tip sharing between employees. Thus, DLSE had to do more than to "fill in the gaps" in the statutory scheme, it had to analyze the problem from the ground up.

Several facets of the Bulletin are clearly underground regulations--most notably item 2 (c), above. The statute makes no reference at all to this "every payday" requirement.[28]

A closer question is presented by the Bulletin's conclusion that section 351 "must be interpreted" to preclude employer administration of involuntary tip sharing arrangements. We assume arguendo that this DLSE interpretation is "reasonable". The question we must answer, however, is not whether or not the DLSE interpretation is reasonable or consistent with the statute. We must determine whether or not section 351 is self-executing, whether or not DLSE's "preclusion interpretation" is the only legally tenable interpretation of Labor Code section 351.[29]

If section 351 may only be read one way--as absolutely prohibiting involuntary tip sharing--then DLSE is correct in contending that it is simply applying a self-executing statute. If, however, section 351 may plausibly be read as either prohibiting or allowing involuntary tip sharing, then DLSE's narrowing "preclusion interpretation" is an attempt to informally define the elements of a criminal offense.

Section 351 prohibits employers from "collect[ing], tak[ing], or receiv[ing]" tips meant for employees.

Does section 351 permit employers to collect, take, or receive tips for the purpose of administering a mandatory employee tip sharing arrangement in which the employer does not share in the tips? Since the language of section 351 does not supply a definitive answer to this question, we turn to the statute's legislative history.

An earlier version of this statute had permitted employers to keep tips left for employees so long as a sign was posted to alert patrons to that fact. In a document drafted during legislative deliberations, the author of the bill that led to the current section 351 described the effect of his proposed amendment as follows:

> "Management has no business sharing employee tips. The bill would end this practice."[Emphasis added.][30]

We conclude, for the following reasons, that section 351 is not self-executing as applied to involuntary tip sharing, that DLSE's "preclusion interpretation" is not the only legally tenable interpretation of section 351.

1. The statute does not absolutely preclude management handling of tips for all purposes--only for the purpose of adding the tips to the day's gross receipts. DLSE recognizes this fact by sanctioning management handling of tips pursuant to a voluntary tip sharing arrangement.

2. The statute declares that a tip is "the sole property of the employee or employees to whom it was paid, given, or left for." [Emphasis added.] This declaration leave no doubt that vis a vis the employee, the employer has no claim to ownership of the tip. As the Bulletin itself recognizes, however, this declaration sheds no light at all on how to handle a situation in which, for instance, three employees provided significant personal service to a particular patron, who then left behind one sum of money in appreciation of the good service received. As Fung Lum points out, it would be arguably inconsistent with the statute for an employer faced with the above hypothetical situation to permit one particular employee to keep 100% of the tip.

3. In declining to amend the Bulletin under review, the DLSE stated in a letter dated July 16,1986:

> "However, I do believe there are other avenues that you might explore to resolve this problem. Under the circumstances legislative action or review by the Industrial Welfare Commission for possible regulatory revision might be appropriate." [Emphasis added.]

The emphasized language suggests that it would be possible to permit involuntary employee tip sharing if appropriate formal regulations interpreting section 351 were adopted.

> If the terms of the statute absolutely prohibited involuntary tip sharing (the position taken in the Bulletin and in DLSE's Response to the Request), adopting an authorizing regulation would not be an option.

The controversy over the validity of Interpretive Bulletin 85-4 is remarkably similar to the situation presented in the recent case of National Elevator Services, Inc. v. Department of Industrial Relations.[31] In this latter case, the Department sought to enforce a 1917 statute mandating annual inspections of building elevators by either a state inspector or "by any qualified elevator inspector employed by an insurance company."[Emphasis added.][32] In approximately 1970, the Department, evidently concerned that elevator inspectors working for insurance companies as independent contractors would do less reliable inspections than persons in an actual employer-employee relationship, adopted a narrow interpretation of the 1917 statute, concluding that the only legally tenable reading of the statute was that persons in the independent contractor category were not "employed by" an insurance company and thus could not be authorized to perform annual inspections. This interpretation "found expression only in an internal memorandum of staff counsel." It was not formally adopted pursuant to the APA.

The National Elevators court found that the Department's overly restrictive interpretation of the statute was supported by neither the language of the statute (as that language was ordinarily understood in case law) nor by the legislative history. Accordingly, the court rejected the interpretation, finding that it was an improper exercise of quasi-legislative power.

In Interpretive Bulletin 85-4, the Department has attempted to resolve a problem which developed in 1985 by informally adopting an overly restrictive interpretation of a 1973 statute. As in National Elevators, the Department's informally issued interpretation cannot withstand scrutiny when reviewed in light of statutory language and history.[33]

We conclude that DLSE Interpretive Bulletin 85-4 is a "regulation" within the meaning of the key provision of Government Code §11342.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS 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.[34],[35]We conclude that none of the recognized exceptions (set out in note 13) apply to the DLSE Interpretive Bulletin No. 85-4.

III. CONCLUSION

For the reasons set forth above, OAL finds that DLSE Interpretive Bulletin No. 85-4 is (1) subject to the requirements of the APA, (2) a regulation as defined in the APA and is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA.

DATE: March 25, 1987

HERBERT F. BOLZ
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Rulemaking and Regulatory
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for: LINDA HURDLE STOCKDALE BREWER
Director

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1 In this proceeding, Mr. Joric Pang, Fung Lum Restaurant, was represented by George Kasolas, Esq. Maurine Padden Stevens, Esq. represented State Labor Comissioner Lloyd W. Aubrey, Jr. (Division of Labor Standards Enforcement), who in turn represented Ronald T. Rinaldi, Director of Industrial Relations.

2 The legal background of the regulatory determination process --including a survey of governing case law--isdiscussed 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).

3 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, Chapters 4 and 5, also part of the APA, concern administrative adjudication rather than rulemaking.

4 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 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 published in the California Administrative Notice Register and be made available to . . . the courts." (Emphasis added.)

5 A timely Response to the Request for Determination was received from DLSE and considered in making this determination.

In general, in order to obtain full presentation of contrasting viewpoints, we encourage affected agencies to submit responses. If the affected agency concludes that part or all of the challenged rule is in fact an underground regulation, it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

In addition to the DLSE's Response, four timely comments were received and considered. The comments were from:

Edward F. Sloan, California Hotel and Motel Association;

Stanley R. Kyker, California Restaurant Association

Jan D. Smock, California Lodging Industry Association

George C. Kasolas, Fung Lum

All comments supported Fung Lum.

6 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.

7 Pursuant to Title 1 CAC § 127, this Determination shall become effective on the 30th day after filing with the Secretary of State.

8 Labor Code sections 79 & 82(b).

9 Contained in "Chapter 1 (commencing with Section 1171) Part 4 of Division 2 . . . ". Labor Code § 61.

10 We discuss the affected agency's rulemaking authority (see Gov. Code, §11349(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 Gov. Code, §11349.1(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 Gov. Code, §11349.1(a). At that point in 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 leadsus to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. Gov. Code, § 11349.1.

11 See, for instance, Labor Code section 53 on the complexity point.

12 Response page 4, citing Labor Code section 55.See also Labor Code section 355 and Title 1 CAC § 14(a)(2).

13 Government Code section 11342(a). See Government Code sections 11346; 11343. 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 Labor Code section 55 requires the Director ofIndustrial Relations to adopt specified rules pursuant to the APA.

16 Response, p. 1.

17 DLSE also objects to OAL consideration of a Fung Lum letter dated February 4, 1987 on the grounds that requestors may not pursuant to established OAL practice subsequently raise issues in addition to those issues raised in the original Request. We reject this argument: any person is free to submit within the public comment period additional grounds for finding that the challenged rule violates Government Code section 11347.5.

Pursuant to the AB 1013 procedural regulations, requestors may not add additional challenged rules to their request once that request has been accepted by OAL. Title 1 CAC §§ 122(a)(3);121(b); 123. For instance, once OAL has accepted a request concerning agency A's Widget Management Manual, the requestor may not a month later add to the earlier-filed request a second challenged rule, such as agency A's Blackacre Policy Manual. If the requestor wishes to challenge the second manual, he or she should file a new request pursuant to Title 1 CAC section 122. In a Determination cited by DLSE, OAL declined to consider a belatedly-raised challenge to a second agency rule.

18 See note 10, supra.

19 An informal enactment which violates Government Code section 11347.5 may also be found to be inconsistent with a statute. See National Elevator Services, Inc. and Association of Retarded Citizens, cited in note 2, supra.

20 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 3); 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.

We also conclude that DLSE Interpretive Bulletin 85-4 is "quasi-legislative" in nature because it is a rule formulating a general policy oriented toward future decisions. Gov. Code, §11346. See Pacific Legal Foundation v. California Coastal Commission (1982) 33 Cal.3d 158, 168, 188 Cal.Rptr. 104, 111 (quasi-legislative acts are reviewable by ordinary mandamus (Code Civ. Pro., sec. 1085) or action for declaratory relief (Code Civ. Pro., sec. 1060); whereas, quasi-judicial or adjudicatory acts are reviewable by administrative mandamus (Code Civ. Pro., sec. 1094.5).)

21 Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1.

22 Government Code Section 11347.5.

23 In a 1981 analysis of AB 1013 (Gov. Code § 11347.5), the Department of Industrial Relations itself acknowledged that if AB 1013 were enacted into law, it would require "bulletins" implementing "regulations" to be adopted "in the manner currently used to adopt regulations."

24 Ligon v. California State Personnel Board (1981) 123 Cal.App.3d 583, 176 Cal.Rptr. 717.

25 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, pp.B-18--B-34; and 1986 OAL Determination No.4 (Board of Equalization, June 25,1986, Docket No. 85-005), California Administrative Notice Register 86, No. 28-Z, July 11, 1986, pp. B-7--B-26.

26 Labor Code section 354.

27 When a criminal statute is susceptible of two reasonable interpretations, it is construed as favorably to the defendant as its language and the circumstances of its application may reasonably permit. People v. Overstreet (1986) 42 Cal.3d 891 ___,231 Cal.Rptr.213, 215.

28 Had any other provision of law (other than section 351) supported inclusion of this requirement in the Bulletin, DLSE would have pointed this fact out in its Response to the

Request.

29 See 1987 OAL Determination No. 4 (Board of Equalization, June 25, 1986, Docket No. 85-005), California Administrative Notice Register 86, No. 28-Z, July 11, 1986, pp. B-12--B-13, B-17---B-19; typewritten version, pp. 8-9, 14-17.

30 Memo dated April 9, 1973 from Assemblyman Leroy F. Greene to Senate Committee on Industrial Relations concerning AB 10.

31 (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165.

32 Labor Code section 7309.

33 In defense of Bulletin 85-4, the DLSE relies heavily on Skyline Homes v. Department of Industrial Relations (1985) 165 Cal.App.3d 239, 211 Cal.Rptr. 792. We have previously rejected the proposition that Skyline gives state agencies carte blanche to avoid compliance with the APA. 1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No.20-Z, May 16, 1986, pp. B-34--B-36; typewritten version, pp. 6--10.

34 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. Government Code section 11342(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. Government Code section 11342(b).

c. Rules that "establish[ ] or fix[ ] rates, prices or tariffs." Government Code section 11343(a)(1).

d. Rules directed to a specifically named person or group of persons and which do not apply generally or throughout the state. Government Code section 11343(a)(3).

e. Legal rulings of counsel issued by the Franchise

Tax Board or the State Board of Equalization. Government Code section 11342(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 protect); 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); 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 a exhaustive list of possible APA exceptions.

35 DLSE's argument to the contrary notwithstanding, Gov. Code § 11347.5 contains no exception for bulletins to agency staff to aid in statutory enforcement efforts. An enforcement "policy" that can lead to a 6-month jail term for a member of the affected public is certainly not a matter of merely internal agency interest. See 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-99, n.39.