CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Marvin H. Philo concerning the State Personnel Board's AB 3001 Affirmative Action Order-of-Layoff Guidelines[1]	1987 OAL Determination No. 5 [Docket No. 86-011] April 30, 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

John D. Smith, Chief Deputy Director/
General Counsel

Herbert F. Bolz, Coordinating Attorney
Rulemaking and Regulatory
Determinations Unit

THE ISSUE PRESENTED [2]

The Office of Administrative Law (OAL) has been requested to determine whether or not ten specified State Personnel Board guidelines are "regulations" as defined in Government Code section 11342(b). These guidelines currently "govern" the procedures SPB uses to determine whether or not past discriminatory hiring practices occurred for purposes of establishing layoff and reemployment procedures.

THE DECISION [3,4,5,6]

I. The Office of Administrative Law finds that the following guidelines (1) are subject to the requirements of the APA, (2) are "regulations" as defined in the APA and (3) are therefore invalid and unenforceable unless adopted pursuant to the APA.

1. use of Labor Force Parity in the underutilization and past discrimination contexts;

2. use of the following categories in conducting AB 3001 analysis: class, series, job category, department and "professional and above."

3. use of a rule creating a presumption and indicating how to rebut it;

4. use of "Bottom Line Hiring Data";

5. use of the 80% rule; and,

6. use of the Rule of 1.

II. The Office of Administrative Law finds that the following guidelines (1) are not "regulations" as defined in the APA and (2) are not subject to the requirements of the APA:

1. three statements justifying or explaining AB 3001 or pertinent Board policies; and

2. use of data covering an eleven year period in reviewing a particular classification for past discrimination.

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The State Personnel Board, created by section 2, article 7 of the California Constitution, is responsible for administering various statutes pertaining to the state civil service system, including those concerning affirmative action.

Authority [7]

The Board has been granted general rulemaking authority by Government Code section 18701.

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."[8] Since the State Personnel Board is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Board.[9]

In addition, the Board is made subject to the APA by Government Code section 18701:

> "The Board shall prescribe . . . rules in accordance with law . . . . " [Emphasis added.]

We read the word "law" to refer to the statute pertaining to rulemaking, i.e., the APA.

Background

In 1980, the Legislature adopted section 19798 of the California Government Code (AB 3001/Harris), which mandates the State Personnel Board to modify the "last-hired-first-fired" principle otherwise governing layoffs and reemployment of state employees when the Board finds "past discriminatory hiring practices":

> "In establishing order and subdivisions of layoff and reemployment, the board, when it finds past discriminatory hiring practices, shall by rule, adopt a process that provides that the composition of the affected work force will be the same after the completion of a layoff, as it was before the layoff procedure was implemented."[Emphasis added.]

In a bill report dated July 17, 1980, the Department of Finance supported AB 3001, and warned of the potential

challenges the board would face if it failed to carry out the legislature's mandate to adopt regulations:

> ". . . as written the measure probably will be extremely difficult to administer and it will require promulgating precise definitions and criteria in order that there is a consistency to the implementation of the statute. Specifically, the bill is unclear as to what constitutes past discriminatory hiring practices or, for that matter, what is the time period referred to by the word 'past'." [Emphasis added.]

Nonetheless, to date the only regulatory action the Board has undertaken to carry out the author's intent is found in Title 1, California Administrative Code (CAC) sections 470--473. These regulations, read in conjunction with other applicable statutes and the challenged guidelines, set out the following four (4) step procedure for conducting layoffs:

1. First, employees in the affected agency are ranked according to specific criteria. Employees in each affected job classification are awarded one point for each month of state service. Professional, scientific, administrative, management, and executive classes are to be ranked according to efficiency as well as seniority.[10] Other classes are preliminarily ranked purely on a seniority basis.

2. Then, the Board analyzes the projected impact of the layoff within each classification on nine groups of employees which have been informally designated by guideline, as "protected groups". These groups are the disabled, women, Hispanics, Blacks, Pacific Islanders, Asians, American Indians, Filipinos, and "other".

3. If any protected group is thus determined to be "underutilized" (a term not defined in the CAC article dealing with "Layoff and Demotion,") in any classification in the affected department, the Board moves on to the next procedural step--a formal hearing before the Board. At this hearing the Board must determine:

* whether or not Board staff correctly determined that underutilization of any of the protected groups would result if the layoff were based solely on seniority.

* whether or not "past hiring discrimination has occurred that impacts the affected workforce" (emphasis added). Answering this question involves both extensive review of available selection data

and application of a complex series of presumptions and allocations of burdens of proof.

4. If it is confirmed that underutilization would result if the layoff proceeded based on seniority alone, and if "past hiring discrimination" is found, the Board then orders adjustments to the order of layoff to ensure that the relative composition of the affected workforce will be, as nearly as possible, the same immediately after the completion of the layoff as it was immediately before the layoff.

The key document in this proceeding is a memo dated December 17, 1985, sent by Board staff to the Board. This memo, titled "Application of the Provisions of Government Code section 19798 (AB 3001) to the proposed layoff within the Department of Rehabilitation", will be referred to hereafter as the memo of 12-17-85.

The memo of 12-17-85 states in substance that the protected group composition within each affected classification has been compared to the percentage of each group's representation in the work force.[11]

The memo uses the term "Labor Force Parity" to describe this policy. Other standards that could have been utilized for comparison purposes include "actual applicant flow data", general population data, and qualified labor market data.

In the case before us, the Board's application of this "Labor Force Parity" standard and other associated policies to the recent layoff at the Department of Rehabilitation resulted in the layoff of three higher-seniority persons, in order to retain three members of protected groups with less seniority.

Mr. Marvin H. Philo, formerly employed by the Department of Rehabilitation, has filed a Request for Determination concerning ten specific parts of the 150-page memo of 12-17-85.[12]

III. DISCUSSION OF DISPOSITIVE ISSUES

There are two main issues before us:[13]

(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(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 . . . 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?

Mr. Philo has identified the following ten portions of the SPB staff memo of December 17, 1985 as alleged "underground regulations". As noted in an earlier determination[14], we are not limited by the arguments advanced by the requestor in assessing the validity of challenged rules. The issue of the constitutionality of the challenged rules, though raised by Mr. Philo, will not be addressed here.[15] We are obliged to analyze the rules identified, not the arguments employed against them.

IV. CHALLENGED RULES

Challenged Rule 1: Use of "Labor Force Parity" (LFP) as the standard of comparison in making both the "underutilization" and "past discriminatory hiring practices" determinations.

Mr. Philo challenged the following table, alleging that SPB uses LFP "as a standard definition without citing the source for determining the parity." [Emphasis added.][16]

The memo states at p. 23:

> "Labor Force Parity (LFP) percentages used throughout this report are as follows (emphasis added):

	1980 LFP			1970 LFP		
	Male	Female	Total	Male	Female	Total
White	40.0	29.8	69.8	47.3	29.0	76.3
Black	3.4	3.2	6.6	3.5	2.8	6.3
Hispanic	10.4	6.8	17.2	8.9	4.8	13.7
Asian	1.9	1.7	3.6	1.3	1.0	2.3
Fili.	0.8	0.8	1.6	0.4	0.3	0.7
Amer. Indian	0.4	0.3	0.7	0.2	0.2	0.4
Pacific Islander	0.2	0.1	0.3	n/a	n/a	n/a
Other	0.1	0.1	0.2	0.2	0.1	0.3
Total	57.2	42.8	100.00	61.9	38.1	100.00
Disabled	----		6.3			

We note that the "Labor Force Parity" concept has two components: (1) the specification of particular protected groups and (2) assignment of certain percentages for each group.

The remaining rules pertain to the manner in which the Board makes its Past Discriminatory Hiring Analysis

Challenged Rule 2

Use of the following categories: class, series, job category, department, and "professional and above" for this purpose.[17]

Challenged Rule 3

"As with most major employers, the State of California's hiring practices have involved many instances of systemic as well as more individually-based forms of discrimination. This has caused minorities, women and disabled persons to have been widely underrepresented in the State's work force for many years".[18]

Mr. Philo states that this statement itself "creates a fact", relying upon neither court cases nor proof.

Challenged Rule 4

AB 3001 was intended to "prevent the effects of past discrimination from causing an excessive layoff impact on members of various ethnic/sex/disability affirmative action protected groups." AB 3001 review is "a vital element of the State's overall commitment to achieving and maintaining a balanced work force since it would be counterproductive to allow one element of the personnel management system [i.e., seniority] to undo progress made under the many other provisions that have been implemented to meet this goal."[19]

Challenged Rule 5

"The basic objective of [AB 3001] is to prevent the seniority-based layoff and demotion process from excessively impacting individuals who have been recently hired through affirmative action efforts aimed at correcting the past underrepresentation of various ethnic, sex and disability groups in the State's work force. This is accomplished by adjusting layoff subdivisions and/or the basic seniority order of layoff or reemployment as needed to ensure that members of target groups do not suffer excessive adverse impact in the area of layoff."[20]

Challenged Rule 6

"Underrepresentation may be considered prima facie evidence of discrimination in past hiring procedures within the layoff area unless this assumption can be rebutted by: (1) selection process data indicating the absence of adversely impacted groups participating in the selection process in numbers consistent with their representation in the work force; or (2) a vigorous, well-documented affirmative action and recruitment effort to attract applicants from underrepresented groups." [Emphasis added.][21]

Challenged Rule 7

"Bottom-Line Hiring Data" (the percentage of target group applicants who were actually selected).[22]

Challenged Rule 8

The 80% rule (a selection rate for any target group that is less than 80% of the rate for the group with the highest rate shows that the target group was adversely effected).[23]

Challenged Rule 9

The "Rule of 1" (citing the federal Uniform Guidelines on Employee Selection Procedures[24], the Memo states "When the number of persons and the differences in success rates are so small that the placement of one person differently would result in a finding of no adverse impact for a previously impacted group, then the data is insufficient to perform a meaningful statistical analysis of adverse impact, and the 'Rule of 1' has been violated.")[25]

Challenged Rule 10

Mr. Philo objects to this sentence:

> "Data for the past 11-year period shows a clear pattern of underrepresentation for females in the class, series, and job category." [Emphasis added.][26]

Mr. Philo asks "How far back do they [SPB] go [in making 'past discrimination' determinations]?"[27]

We will discuss each of the 10 items in turn.

V. ANALYSIS OF THE CHALLENGED RULES

Challenged Rule 1 - Labor Force Parity

We will examine the use of Labor Force Parity as the standard of comparison in both the "underutilization" and the "past discrimination" contexts.

We will initially consider the "underutilization" context.

As Mr. Philo asks, "What does 'underutilization' mean?" Title 1 CAC section 472(b) uses, but does not define this word:

> "If the executive officer determines that the layoff . . . will significantly cause underutilization . . . of any [protected] group . . . , the executive officer shall immediately schedule a hearing to determine if past hiring discrimination has occurred." [Emphasis added.]

However, "underutilization" is defined in Government Code section 19791(c) as

> "having fewer persons of a particular group in an occupation or at a level in a department than would reasonably be expected by their availability." [Emphasis added.]

The same term appears in Government Code section 19792, which mandates the Board to (1) establish requirements for corrective action to elimination the "underutilization of minorities and women" and (2) develop data permitting analysis of the "underutilization of minorities and women", and data relating to the "utilization of minorities and women compared to their availability in the labor force." [Emphasis added.]

"Underutilization" is also defined in a CAC provision not directly applicable to AB 3001 procedures. Title 1 CAC section 547.31(f) (in the SPB article titled "Discriminatory Employment Practices") provides:

> "'Substantial underutilization' means having a substantially disproportionate level of minorities, women, or disabled persons in a civil service classification, occupation, department or program area than would reasonably be expected by their availability. In determining substantial underutilization, the board shall consider the availability of minorities, women, or disabled persons having the requisite skills in those areas of California where the appointing power or appointing powers can reasonably be expected to recruit." [Emphasis added.][28]

WE CONCLUDE that by requiring use of "Labor Force Parity" as the standard of comparison in making "underutilization" determinations, the Board has created a standard of general application and has held itself out as implementing, interpreting, and making specific the regulatory term "underutilization". SPB has also applied its unadopted definition of the statutory term "availability" by providing that persons are "available" for work if present in the labor force as a whole as opposed to being present in the "qualified labor force". By "qualified labor force", we mean, for instance, that only persons holding appropriate

professional licenses (e.g., physicians) would be deemed qualified to compete for selection to professional classifications.

The second component of the Labor Force Parity concept considered in the "underutilization" context is the specification of the particular protected groups listed in the table reproduced above. By specification, we mean the determination that, for instance, "Pacific Islanders" should be deemed a protected minority or ethnic group.

We have not located the above displayed listing in any SPB statute or regulation. SPB has not called any such provision to our attention. Creating such a listing clearly supplements the regulatory term "underutilization" by specifying precisely which groups will be protected.

We note that SPB has implicitly recognized the need to specify particular protected groups in formally adopted regulations by promulgating Title 1 CAC section 547.34, which defines "American Indian":

> "Any person shall be counted as American Indian for affirmative action and statistical purposes who . . . [i]s a member of an American Indian tribe or band which is under the jurisdiction of the Federal Government as shown on the list of recognized tribes and bands maintained by the Federal Bureau of Indian Affairs; or Has at least one-quarter American Indian blood quantum of tribes or bands indigenous to the United States or Canada." [Emphasis added.][29]

By contrast, what does the protected group designation "other" signify?

SPB regulations make an invalid effort to delegate to the Board the power to create a listing of protected groups without complying with APA procedures.

Title 1 CAC section 472 provides in part:

> "(b) If the executive officer determines that the layoff . . . will significantly cause underutilization . . . of any group identified, pursuant to Rule 471 as making up the composition of the affected workforce, the executive officer shall . . . schedule a . . . hearing . . . ." [Emphasis added.]

Title 1 CAC section 471[30] provides that:

> ". . . the composition of the affected workforce shall be determined in accordance with relative representation within the area of layoff of the various ethnic, sex,

> and disability groups identified in the most recent report published by the Board pursuant to Government Code sections 19237 and 19793." [Emphasis added.]

The Government Code sections cited in section 471 simply require reports to the Legislature; these statutes neither list the particular protected groups designated by SPB nor expressly exempt SPB from compliance with the APA in creating such a list.

As indicated in an earlier Determination,[31] an agency may not avoid the requirements of the APA by simply incorporating regulatory material in reports to the Legislature.

Arguably, SPB need not comply with APA requirements concerning designation of particular minority groups because section 471 permits reliance on legislative reports. We reject this argument on the authority of Hillery v. Rushen,[32] which held that a state agency may not delegate to itself by regulation the power to avoid APA procedures.[33] (It should be noted that section 471 was adopted before Government Code section 11347.5 became law and before current OAL requirements for incorporation by reference took effect.[34])

Government Code section 11347.5 clearly states that

> "no state agency shall issue . . . any . . . guideline . . . which is a regulation . . . unless the guideline . . . has been adopted as a regulation . . . . " [Emphasis added.]

HERE, THE "GUIDELINE" IS THE LIST OF SPECIFIC ETHNIC OR MINORITY GROUPS APPEARING SOLELY IN THE MEMO OF 12-17-85. THIS "GUIDELINE" HAS NOT BEEN FORMALLY ADOPTED AS A REGULATION AND THUS CANNOT WITHSTAND SCRUTINY UNDER SECTION 11347.5.

OAL regulations governing requests filed under Government Code section 11347.5 (i.e., Title 1 CAC section 121(a)) make clear that when confronted with an informally adopted regulatory enactment, OAL has only two alternatives: (1) to find the enactment "invalid and unenforceable" unless formally adopted as a regulation or (2) to find the enactment "has been exempted by statute from the requirements of the [APA]." [Emphasis added.][35,36]

The SECOND facet of the Labor Force Parity question relates to the use of that standard in making "past discrimination" analyses.

Specifically, the issue presented is whether the Board has unlawfully supplemented the AB 3001 regulations by using LFP in this context.

SPB denies that this is the case, contending that "'Labor Force Parity' is synonymous with 'general workforce composition', which is expressly provided in Rule 473."[37]

Section 473 provides in part:

> "A lack of evidence sufficient to demonstrate the job relatedness of such past practices may support a finding of past discrimination in instances where available data on specific examinations or general workforce composition indicate that such practices had an adverse effect on any group identified pursuant to Rule 472(b)." [Emphasis added.]

The Board further argues[38] that the "methods used in arriving at a finding of adverse impact are set forth in the [federal Uniform Guidelines on Employee Selection Procedures] and are obligatory upon the SPB in assuring that hiring and promotion practices conform to Title VII of the Civil Rights Act of 1964, as amended in 1972."

OAL has, accordingly, looked to this complex body of law. In federal employment discrimination law, we find that a typical approach to assessing the adverse impact of selection criteria is to compare the percentage of protected group members who are selected with the percentage of protected group members in the appropriate segment of the general population. According to a leading treatise,[39] for the population side of the comparison, the variations of data that can be used include:

> "(1) general population data
>
> (2) labor force data (civilian, nonfarm, or total)
>
> (3) qualified labor market
>
> (4) qualified and interested labor market data
>
> (5) actual applicant flow data
>
> (6) qualified applicant flow data
>
> (7) employer's own work force data composition
>
> (8) employer's own qualified and interested work force composition."

The treatise continues:

> "Recent cases have made it clear that for other than unskilled entry level jobs, 'qualified labor market' data should be utilized for population/work force

comparisons. While the Supreme Court has permitted the use of population data for entry jobs in Teamsters, it also cautioned that 'evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants would also be relevant.' In Hazelwood, the Supreme Court was even more emphatic, stating that:

> 'When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.'

Clearly, when there is no dispute as to the qualifications for the job in question or where the qualifications are so manifestly job-related that they create a presumptively valid business necessity, qualified labor market data should be utilized . . . .'" [Citations omitted.][40], [41]

In its Response, the Board places special emphasis on the federal Uniform Guidelines for Employee Selection Procedures. Examining these guidelines, we find the following recommendations applying to employers' voluntary affirmative action plans (such as the AB 3001 program):

> "Voluntary affirmative action to ensure equal employment opportunity is appropriate at any stage of the employment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether percentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the percentages of those groups available in the relevant job market who possess the basic job-related qualifications." [Emphasis added.][42]

If analysis shows that remedial steps are needed, the Uniform Guidelines recommend that these steps include:

> "(a) The establishment of a long-term goal, and short-range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market . . . ." [Emphasis added.]

The precise nature of all SPB policies pertinent to AB 3001 have not been outlined in detail in the record before us. The record, however, appears to support the inference that SPB gauges adverse impact by individually comparing the composition of each state civil service classification against the composition of the California work force. It appears to be SPB policy that the Board considers no

statistical data drawn from general workforce sources except for the undifferentiated, statewide, general data reflected in the 12-17-85 memo's Labor Force Parity table (displayed above). That is, it appears that SPB does not make its AB 3001 determinations, where possible, based upon all "available [state and non-state] data" (emphasis added), as Title 2 CAC section 473 would appear to provide, but rather as a matter of policy limits itself to mechanically comparing classification composition against California work force composition.[43]

We assume for the purposes of this Determination that SPB policy is as stated in the preceding paragraph. This policy is not clearly articulated in section 473. Such a policy, we conclude, would constitute a standard of general application used to interpret section 473 and Government Code section 19798; this policy must be formally adopted as a regulation in order to be enforceable.

Given the way section 473 is drafted, we recognize that the above conclusion is not wholly free from doubt. But in any event, in light of the apparent need to re-draft the AB 3001 regulations to fully reflect other actual Board policies, we would suggest that SPB carefully consider how to articulate its data consideration policies and procedures in regulation.

Challenged Rule 2 - Various Categories

Mr. Philo alleges that SPB's use of five categories (class, series, job category, department, and "professional and above") in analyzing the Department of Rehabilitation workforce violates Government Code section 11347.5 because these categories appear in neither AB 3001 nor the implementing regulations.

In response, SPB states:

> "Rule 473 allows the use of general workforce composition data. The above-quoted designations are the 'available data' for the department's workforce composition."

We conclude that the five categories are standards of general application interpreting not only the statutory term "the affected work force" but also the regulatory term "available data" (used in Title 1 CAC section 473). The ways in which the affected work force is broken up for purposes of statistical analysis is crucial to structuring a layoff. Use of one category in lieu of another or in addition to another might result in different people being laid off.

Challenged Rules 3, 4, 5 - Statements

Mr. Philo alleges that these three excerpts from the memo (quoted above) are regulatory. In reply, SPB asserts that they do not meet the definition of "regulation". We agree with SPB. As stated, and read in context, these excerpts are not regulatory. The excerpts are more in the nature of justifications for AB 3001 and the Board's policies in implementing it.

Challenged Rule 6 - Presumption

Mr. Philo alleges that this rule is regulatory. SPB denies this, stating:

> "This statement is part of the general background information referring to the law applied by SPB in its discrimination review process under Rule 473 and the [Uniform Guidelines on Employee Selection Procedures]. Underrepresentation data is indicative of past discriminatory practices unless the practices are justified by business necessity. (See Rule 473.) The requestor's contention once again relates to the legality of the use of general workforce data as a basis for showing past discrimination."[44]

In its reply, SPB asserts that the above noted federal guidelines are binding federal regulatory requirements which SPB has no choice but to follow pursuant to both federal law and state statute (Government Code section 19702.1).

We reject this theory on two grounds. First, as a matter of federal law, the guidelines are not binding. In a 1985 published opinion, the United States Court of Appeals for the Ninth Circuit stated:

> "The Uniform Guidelines are not legally binding. They have not been promulgated as regulations and do not have the force of law." [Citations omitted; emphasis added.][45]

Second, even if they were legally binding as a matter of federal law or per Government Code 19702.1, the pertinent parts of the guidelines do not purport to apply to voluntary affirmative action plans developed by public employers. Also, if the federal guidelines were binding in toto, there would appear to be a problem harmonizing the Board's AB 3001 guidelines with the provisions of the federal guidelines that do directly apply to voluntary affirmative action plans.

We conclude that the rule under discussion violates Government Code section 11347.5 by supplementing Title 1 CAC section 473, which states in part:

> "In determining whether past discrimination has occurred that impacts the affected workforce, the board's considerations shall include, but shall not necessarily be limited to past practices and results relating to employee recruitment, selection, promotion, and affirmative action . . . . A lack of evidence sufficient to demonstrate the job relatedness of such past practices may support a finding of past discrimination in instances where available data, including but not limited to data on specific examinations or general workforce composition, indicate that such practices had an adverse effect on any group identified pursuant to Rule 472(b)."

The challenged supplemental rule specifically provides that the presumption of discrimination arising from a showing of "underrepresentation" may be rebutted by "selection process data indicating the absence of adversely impacted groups participating in the selection process in numbers consistent with their representation in the work force"--language not appearing in section 473. Further, it is significant (1) that the supplemental rule appears in a portion of the memo of 12-17-85 headed "The Law and Related Procedures" (emphasis added) and (2) that section 473 is not quoted in the memo. The inference thus may be drawn that the Board relied upon the supplemental rule rather than the formal regulation in purporting to implement AB 3001.

The supplemental rule appears to be generally perceived as controlling and authoritative. We note, for instance, the fact that a very similar rule appears on p. 28 of "The California State Civil Service Layoff Process; A Manual for Department Personnel Offices", issued by the Department of Personnel Administration.

As noted in an earlier determination, "allocating burdens of proof and creating presumptions are critically important methods of structuring legal proceedings." [46] It is difficult to imagine a situation in which an informal rule that explicitly creates a presumption and then indicates how to rebut it could be characterized as non-regulatory.

Challenged Rule 7 - Bottom Line Hiring Data

Mr. Philo alleges that use of this particular technique for analyzing employee selection data is regulatory. SPB states in reply:

> "Rule 473 authorizes the consideration of 'data on particular examinations' in determining past discrimination. 'Bottom line hiring data' is the data obtained on each examination administered by the State and is used to assess adverse effect in the selection process . . . . SPB is not making new law in

> establishing bottom line hiring data . . . , but rather is applying existing regulations to the available data in this particular layoff situation."

According to the treatise previously cited and 29 CFR section 1607.4C, hiring practices may be analyzed for adverse impact either by focusing on each individual component in turn or by simply turning to the "bottom line"--who was selected. By electing the "bottom line" approach, SPB has adopted a standard of general application purporting to implement AB 3001 and section 473. The fact that this election may be perceived as a sensible choice does not alter the fact that it is a regulatory procedure that must be formally adopted as a regulation in order to be enforceable.

Challenged Rule 8 - The 80% Rule

This rule states that a selection rate for any target group that is less than 80% of the rate for the group with the highest rate shows that the target group was adversely effected. SPB argues that it is "obligated to use the 80% rule promulgated in the federal [Uniform Guidelines for Employee Selection Procedures]. (44 Fed. Reg. 11998; 28 C.F.R. 50.14, sec. 4D.)"

For reasons stated above, we reject the argument that the federal Guidelines are mandatory.

Further, according to a 1985 published opinion of the U.S. Court of Appeals for the Ninth Circuit:

> " . . . the 80% rule has been sharply criticized by courts and commentators. See E. Shoben, Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII, 91 Harv.L.Rev. 793, 805 (1978) (ill-conceived rule capable of producing anomalous results because it fails to take account of differences in sampling size)."[47]

According to the above opinion, courts have employed various other statistical methods of checking for adverse impact.

WE CONCLUDE that SPB has adopted a standard of general application purportedly implementing AB 3001 and section 473; the 80% rule must be formally adopted as a regulation in order to be enforceable.

Challenged Rule 9 - The Rule of 1

SPB argues that using the Rule of 1 is required by the federal Guidelines.

WE REJECT THAT argument for reasons set forth above and CONCLUDE that SPB has adopted a standard of general

application purportedly implementing AB 3001 and section 473.

Challenged Rule 10 - Meaning of "past"

Mr. Philo's Request raises the issue of how far back SPB should go in determining whether "past discrimination" occurred; he suggests that choosing an 11-year period in one case was "selective reaching for females". In reply, SPB argues that the 11-year period cited in the memo is simply the period of time for which data was available concerning female representation in a particular classification.

According to the treatise previously cited[48], the Hazelwood[49] case held that the relevant statistical period in that proceeding excluded any employment decisions that occurred prior to the date that Title VII was amended (1972) to cover public employers. However, other cases have found statistical proof relating to a prior time period as admissible as circumstantial evidence of violations occurring within the relevant time period.

The reference to the 11-year period appears to reflect a non-standardized case-by-case approach to the problem. We conclude, therefore, that the reference to an 11-year period does not constitute a standard of general application and thus is not violative of Government Code section 11347.5.

We conclude that six of the ten above noted guidelines are "regulations" within the meaning of the key provision of Government Code section 11342.

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.[50] We conclude that none of the recognized exceptions (set out in note 50) apply to the subject regulatory guidelines.

VI. CONCLUSION

For the reasons set forth above, OAL finds that six of the ten guidelines are (1) subject to the requirements of the APA, (2) regulations as defined in the APA, and (3) invalid and unenforceable unless adopted pursuant to the APA.

DATE: April 27, 1987

HERBERT F. BOLZ
Coordinating Attorney
Rulemaking and Regulatory
Determinations Unit

HFB:twm\87.5C

1 In this proceeding, Mr. Philo represented himself. The State Personnel Board was represented by Deputy Attorney General Faith J. Geoghegan. We appreciate the Attorney General's efforts in illuminating the legal context in which this Request arose.

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.

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 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.)

4 A timely Response to the Request for Determination was received from SPB 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.

No public comments were received.

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 § 127, this Determination shall become effective on the 30th day after filing with the Secretary of State.

7 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 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, § 11349.1.

8 Government Code section 11342(a). See Government Code sections 11346; 11343. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).

9 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.

10 Government Code section 19997.3.

11 Memo of 12-17-85, pp. 15-18, n. 1.

12 The memo appears to reflect provisions contained in an informally adopted "AB 3001 Operations Manual".

13 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 the six above-noted guidelines are "quasi-legislative" in nature because they are rules formulating general policies 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)).

In its Response to the Request, SPB argues that all of the challenged rules are exempt from APA rulemaking requirements

because the Board was acting in a quasi-judicial capacity in carrying out the AB 3001 process. No authorities are cited in support of this proposition.

We reject this argument for the following reasons:

1. It has not been shown that AB 3001 proceedings qualify as quasi-judicial in nature.

2. Assuming that the proceedings are quasi-judicial, it is nonetheless the case that the six problematic challenged rules supplement governing statutory and regulatory provisions. Government Code § 11347.5 prohibits all such supplementing enactments; it contains no "quasi-judicial" exception. Rules governing quasi-judicial proceedings should be placed in regulation, see, e.g., SPB's Title 2 CAC §§ 68 & 547.30--547.33. See City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (see n. 2 for summary).

3. The record before us and our legal research indicate that the challenged rules are longstanding SPB policies.

a. Challenged rule 6 appears in substance in "guidelines" attached to an SPB bulletin dated January 2, 1981, as well as in the DPA manual referred to in the text of this determination.

b. Challenged rule 6 is stated as a fundamental principle in the memo of 12-17-85, not as the ad hoc resolution of a problem that has been considered on a case-by-case basis.

c. Challenged rule 1 (i.e., "assignment of percentages" component of the Labor Force Parity) appears to reflect an informal adoption of the 1970 and 1980 census data concerning the California labor force as the sole appropriate standard for underutilization and past discrimination determinations. SPB's bulletin dated Aug. 5, 1985 (p. 1) makes clear that SPB's longstanding policy is to compare protected group representation in the "state civil service labor force" with the group representation in the "California labor force", using U.S. census data.

14 See 1987 OAL Determination No. 4 (Department of Industrial Relations, Division of Labor Standards Enforcement, March 25, 1987, Docket No. 86-010), California Administrative Notice Register 87, No. 15-Z, April 10, 1987, p. B-38, n. 17.;

typewritten version p. 15.

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, pp. B-76--B-81, typewritten version pp. 3-9.

15 As indicated in note 7, above, if SPB subsequently submits further AB 3001 regulations to OAL, we will review those proposed regulations for consistency with "existing statutes, court decisions, [and] other provisions of law." Gov. Code, section 11349(d). Pertinent statutes might include the Federal Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. See Johnson v. Transportation Agency, Santa Clara County (no. 85-1129) 87 Daily Journal D.A.R. 1105, April 3, 1987. Pertinent court decisions might include Wygant v. Jackson Board of Education (1986) 106 S.Ct. 1842 (construing Federal Equal Protection Clause).

16 Request letter of May 30, 1986, p.2.

17 Memo of 12-17-85, pp. 26-27.

18 Memo of 12-17-85, p. 20.

19 Memo of 12-17-85, p. 21.

20 Memo of 12-17-85, p. 21.

21 Memo of 12-17-85, p. 22.

22 Memo of 12-17-85, p. 31.

23 Memo of 12-17-85, p. 31.

24 29 CFR part 1607.

25 Memo of 12-17-85, p. 32 & n. 3.

26 Memo of 12-17-85, p. 32.5.

27 Annotation on p. 32-5 of memo copy submitted with requestor's letter of June 17, 1986.

28 See also California Fair Employment and Housing Commission's 2 CAC § 8104(a)(4)(c)(similarly defining "underutilize").

29 As part of its program concerning nondiscrimination by state contractors, the Fair Employment and Housing Commission has adopted a formal list and definitions of "minority" groups in Title 2 CAC § 8102(n).

30 Cf. Title 1 CAC § 174.6 (also fails to list specific "ethnic groups").

31 See 1986 OAL Determination No. 8 (Department of Food and Agriculture, October 15, 1986, Docket No. 86-004), California Administrative Notice Register, No. 44-Z, October 31, 1986, p. B-29; B-31--B-35; typewritten version p. 12; pp. 14-19.

32 (9th Cir. 1983) 720 F.2d 1132, 1135-1136.

33 Faunce v. Denton (1985) 167 Cal.App.3d 191, 197, 213 Cal.Rptr. 122, 125, followed Hillery.

34 Title 1 CAC § 20 (requirements for incorporation by reference).

35 Title 1 § 121(a) provides:

> "'Determination' means a finding by the office 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." [Emphasis added.]

As explained in OAL's Final Statement of Reasons for section 121(a):

> "Although a specific [challenged] rule may in fact be a regulation as defined in Government Code section 11342(b), it may be statutorily exempt . . . . Such

> [statutorily exempt] rules are not made invalid and unenforceable by Government Code section 11347.5.
>
> . . . .
>
> . . . OAL must determine both whether the rule is a regulation as defined in the Government Code and whether [(1)] the rule must be adopted pursuant to the [APA], or [(2)] [that] the rule is statutorily exempt from these provisions." [Emphasis added.]

36 See Government Code section 11346.

37 Response, p. 5.

38 Response, p. 6.

39 Schlei & Grossman, Employment Discrimination Law, 2d Ed., p. 1347.

40 Id., p. 1356.

41 See also Johnson v. Transportation Agency, Santa Clara County (No. 85-1129) 87 Daily Journal D.A.R. 1105, 1106, April 3, 1987 (endorsing use of qualified labor market data).

42 29 CFR § 1607.17.

43 On the other hand, the Board could have decided, as a matter of policy in implementing section 473, to look first for qualified work force data where appropriate and available, relying on "general workforce data" only where appropriate or where more reliable data was unavailable.

44 Reply, p. 5.

45 Clady v. County of Los Angeles (9th Cir. 1985) 770 F.2d 1421, 1428.

46 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, p. B-37; p. B-42,

n. 29; typewritten version p. 13 and p. 24, n. 29.

47 Clady v. County of Los Angeles (9th Cir. 1985) 770 F.2d 1421, 1428.

48 Schlei & Grossman, p. 1366.

49 Hazelwood School Dist. v. U.S. (1977) 97 S.Ct. 2736.

50 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 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); 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.