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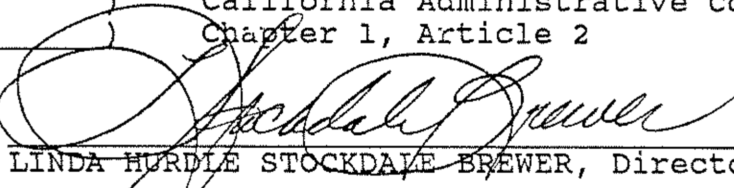
SECRETARY OF STATE
OF CALIFORNIA

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Mike Bujko, concerning the State Labor Commissioner's letter dated October 3, 1986, interpreting Title 8, California Administrative Code, section 11755.[1]	1987 OAL Determination No. 7 [Docket No. 86-013] May 27, 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
Debra M. Cornez, Staff Attorney
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law was whether the requirements for certification as entertainment studio teachers as set forth in regulation have been unlawfully supplemented by the Labor Commissioner.

The Office of Administrative Law has concluded that the Labor Commissioner has imposed requirements for certification as entertainment studio teachers which exceed the requirements as set forth in regulation.

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THE ISSUE PRESENTED [2]

The Office of Administrative Law (OAL) has been requested to determine whether or not the State Labor Commissioner's (Commissioner) letter dated October 3, 1986, requiring the Elementary and Secondary teaching credentials of an applicant for a studio teacher certificate to be multiple subject or general teaching credentials[3], is a "regulation" as defined in Government Code section 11342(b). Teachers may not teach minors employed in the entertainment industry unless they hold the proper teaching credentials and are certified by the Labor Commissioner.

THE DECISION [4,5,6,7]

The Office of Administrative Law finds that the State Labor Commissioner's above noted letter (1) is subject to the requirements of the Administrative Procedure Act (APA), (2) is a "regulation" as defined in the APA and (3) is therefore invalid and unenforceable unless adopted pursuant to the APA.[8]

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The Division of Labor Standards Enforcement (a division 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.[9]

The Division of Labor Standards Enforcement (hereinafter "DLSE") is responsible for enforcing various provisions of the California Labor Code, including those involving the employment of minors.[10]

Authority [11]

Labor Code section 55 provides the director of the Department of Industrial Relations (hereinafter "Department") with general rulemaking authority. Section 55 provides in part that:

> "Notwithstanding any provision in this code to the contrary, the director may require any division in the department to assist in the enforcement of any or all laws within the jurisdiction of the department. . . . [T]he director may, in accordance with the [APA], make such rules and regulations as are reasonably necessary to carry out the provisions of this chapter [sections 50-64] and to effectuate its purposes." [Emphasis added.]

Labor Code section 59 provides:

> "The department through its appropriate officers shall administer and enforce all laws imposing any duty, power, or function upon the offices or officers of the department." [Emphasis added.]

Labor Code section 1398 states:

> "The Division of Labor Standards Enforcement shall enforce the provisions of this article [article 2, chapter 3, part 4, sections 1390 - 1399, concerning the employment of minors]."

Under the above-noted code sections, the Labor Commissioner has implied rulemaking authority.[12]

<u>Applicability of the APA to Agency's Quasi-Legislature Enactments</u>

The APA applies to <u>all</u> state agencies, except those "in the judicial or legislative department."[13] Since DLSE is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to DLSE and the Labor Commissioner.[14]

<u>Background</u>

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

In 1919 the Legislature mandated that it was necessary to protect minors from employment or occupations dangerous or injurious to their health or morals.[15] In 1929, as part of its efforts to protect the health, safety and welfare of minors who were employed in the entertainment industry, the Department informally issued a publication known in the entertainment industry as the "Blue Book," a compilation of rules governing the employment of such minors.

After the recent "Twilight Zone" accident (in which minors were killed during the filming of this motion picture), attention was focused anew on the need to ensure the safety of children employed in the entertainment industry. Responding to these concerns, the Labor Commissioner reviewed the existing rules and moved to formally adopt as regulations certain rules hitherto appearing solely in the "Blue Book."

In 1985, the Labor Commissioner sent proposed regulations to interested parties for public comments. The present Title 8, CAC, section 11755 was one of the proposed regulations. The reasons for these proposed regulations were stated in the Initial Statement of Reasons:

> "Experience has shown, and recent fatalities and injuries to minors, particularly those under 16 years of age, and in the entertainment industry, have confirmed, there to be an absolute need for stricter regulations in the field of child labor and a characterization of certain activities, occupations, and methods of doing things as being sufficiently dangerous.
>
> . . . .
>
> With reference to employment of minors in the entertainment industry, such employment has been the subject of recent interest and concern throughout the State of California. First, the recent 'Twilight Zone' incident had

> the effect of raising the general level of concern for the safety of minors in the entertainment industry. Secondly, restrictions upon minors' hours of employment and other conditions of employment in California have been identified as one of the major contributing factors in causing 'run away' productions, that is, causing producers to make films and commercial productions in other states because of less stringent regulations in such other states of the employment of minors."[16]

Initially, proposed section 11755 defined "studio teacher" as "a certified teacher who holds a valid and current California State teaching credential or life diploma and who has been certified by the Labor Commissioner."(Emphasis added.)[17] Public comments were received from the business agent of the studio teacher union, and a supervisor of the work permits office/studio teachers of the Los Angeles Unified School District[18], suggesting that section 11755 reflect the current credentialling requirements as indicated in the "Blue Book,"[19] i.e., "All regular Studio Teacher-Child Labor Representatives must have both the California Secondary and Elementary Credential . . . ."[20] (Emphasis added.) In response to these comments, the Labor Commissioner changed the language of section 11755 to "a certificated teacher who holds both a California Elementary and a California Secondary teaching credential which are valid and current. . . ." (Emphasis added.) This amended version of section 11755 became effective in April, 1986.

Currently, Title 8, CAC, section 11755 defines studio teacher as follows:

> "A studio teacher within the meaning of these regulations is a certificated teacher who holds both a California Elementary and a California Secondary teaching credential which are valid and current, and who has been certified by the Labor Commissioner. Certification by the Labor Commissioner shall be for a three (3) year period. A written examination will be required of the studio teacher by the Labor Commissioner at the time of certification or renewal. Such examination shall be designed to ascertain the studio teacher's knowledge of the labor laws and regulations of the State of California as they apply to the employment of minors in the entertainment industry." [Emphasis added.]

Facts

A studio teacher is hired by the producer of a motion picture, television production, radio broadcast or stage play to care and attend to the health, safety and morals of minors under sixteen (16) years of age while they are engaged or employed in the entertainment industry. In addition to teaching, the studio teacher is responsible for being aware of the working conditions, physical surroundings, signs of the minor's mental and physical fatigue, and the demands placed upon the minor in relation to the minor's age, agility, strength and stamina.[21]

Sometime after the effective date of existing section 11755, Mike Bujko, the requestor, and Linda Elster, another studio teacher, applied for studio teacher certificates. They each received the same form rejection letter from the Labor Commissioner.[22] These two letters are set out as Appendix A and Appendix B, respectively. The letter Mr. Bujko received, dated October 3, 1986, denied his application on the grounds that his Elementary and Secondary teaching credentials were not "multi-subject or general teaching credentials [emphasis added]." The Labor Commissioner pointed out that Mr. Bujko's "credentials appear to be single-subject credentials and are, therefore, not acceptable for the purpose of obtaining a studio teacher certificate from this office." The Labor Commissioner continues on in the letter, explaining his "one-time provision":

> "The Labor Commissioner has made a one-time provision for individuals who have performed services as studio teacher in the past but who do not currently possess multi-subject credentials. Individuals who meet the above criteria may obtain a [conditional] studio teacher certificate . . . if proof of enrollment in courses to obtain . . . multi-subject or general teaching credential(s) is submitted." [Emphasis added.]

For purposes of this Determination this form rejection letter is divided into three parts:

1. The interpretation of section 11755 as requiring the Elementary and Secondary teaching credentials of an applicant for a studio teacher certificate to be multiple subject or general teaching credentials before a studio teacher certificate will be granted.

2. The Labor Commissioner's waiver of these purported requirements for those applicants who have past experience as a studio teacher, but do not possess multisubject or general credentials.

3. The Labor Commissioner's one-time provision for applicants who have past experience as a studio teacher,

> but do not possess multisubject or general credentials, to obtain a "conditional" studio teacher certificate upon proof of enrollment in courses to obtain the lacking credential(s).

On November 11, 1986, Mike Bujko filed a Request for Determination with OAL concerning the Labor Commissioner's letter of October 3, 1986.

A lawsuit was filed on behalf of Motion Picture Studio Teachers and Welfare Workers, Local 884, International Alliance of Theatrical Stage Employees (IATSE) (hereinafter Union), to enjoin the Labor Commissioner from enforcing any interpretation of Title 8, CAC, section 11755, which requires as a condition of a certificate as a studio teacher that the holder have a teaching credential other than a current and valid Elementary and Secondary teaching credential. On January 29, 1987, a preliminary injunction was issued in Los Angeles Superior Court. This preliminary injunction reads in part:

> "[T]he Court concludes that the Labor Commissioner's <u>interpretation</u> of 8 [California] Administrative Code [section] 11755 <u>amounts to the issuance of a new regulation</u> without having first complied with the requirements of the California Administrative Procedure Act, therefore,
>
> > IT IS HEREBY ORDERED that respondents ... State of California Labor Commissioner, and the Department of Industrial Relations, . . . and all persons acting in concert with them, or with any of them, are enjoined from directly or indirectly engaging in any of the following acts:
> >
> > > Enforcing any interpretation of 8 California Administrative Code [section] 11755 which requires as a condition of a certificate as a studio teacher that the person have a teaching credential other than a California Elementary and a California Secondary teaching credential, both of which are valid and current."[23] [Emphasis added.]

On or about February 11, 1987, Mr. Bujko received a studio teacher certificate with the word "CONDITIONAL" boldly stamped across the front of it.

II. DISCUSSION OF DISPOSITIVE ISSUES

There are two main issues before us:[24]

(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 <u>rule</u>, <u>regulation</u>, order or <u>standard of general application or</u> the amendment, <u>supplement or revision of any such rule, regulation</u>, order, <u>or standard adopted</u> by any state agency <u>to implement, interpret, or make specific the law enforced or administered by it</u>, 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:

> "<u>No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion</u>, <u>bulletin</u>, <u>manual, instruction</u> [or] . . . <u>standard of general application</u> . . . 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

- 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?

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

First, other applicants received the same form rejection letter that Mr. Bujko received from the Labor Commissioner.[25] In this letter, the Labor Commissioner ruled:

> "Section 11755 of the California Administrative Code requires a teacher to possess both an elementary and a secondary teaching credential. Because studio teachers are expected to teach all subjects at all grade levels, both credentials must be multi-subject or general teaching credentials." [Emphasis added.]

This additional "multi-subject or general teaching credentials" requirement applied not only in Mr. Bujko's case, but was articulated as a standard of general application; i.e., "Because studio teachers are expected to teach all subjects at all grade levels . . . .[emphasis added]" The rule stated in this letter applies generally to all teachers who initially apply for a studio teacher certificate or who renew a current certificate. There is no doubt that this additional credential requirement is a standard of general application. The fact that the form rejection letters were addressed to specific applicants does not lessen the statewide impact these additional credential requirements will have on all studio teacher certificate holders or applicants; i.e., expenditure of large sums of money, large amounts of time receiving classroom instruction, and lost work opportunities resulting from the necessity to attend classes.[26]

Second, in the Labor Commissioner's Response to the Request for Determination, he argues that he is merely interpreting

> "a properly adopted regulation (Title 8, CAC, section 11755) concerning studio teachers to require proof of a multisubject teaching credential or enrollment in classes for the credential in the application for recertification."[27]

The Labor Commissioner cites Skyline Homes v. Department of Industrial Relations[28] as his authority in contending that his "interpretation" need not first comply with the procedural requirements of the APA.

We reject this argument--as we have done in two prior OAL Determinations, one concerning the California Coastal Commission, the other concerning the Labor Commissioner.[29]

In the Coastal Commission Determination, we rejected this same interpretation of, and reliance on, Skyline and found noteworthy, in reading Skyline, the absence of any reference to the statutory definition of "regulation" contained in Government Code section 11342(b), which provides in part:

> "Regulation" means every rule . . . or the amendment, supplement, or revision of any such rule, . . . adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it. [Emphasis added.]

In this same Determination we stated:

> "In rulemaking , an agency is often free to interpret a statute or another regulation in such a way as to impose [through proper APA rulemaking procedures] an additional requirement on the regulated public. By contrast, in applying a statute or regulation, an agency has much less latitude. In the interest of clarity, it would have been preferable had the Skyline Court avoided the term 'interpretation' when the term 'application' would have more closely reflected the intended meaning.
>
> The Commission's interpretation of Skyline is clearly inconsistent with governing California statutory and decisional law.
>
> In Government Code section 11342(b), the Legislature expressly states that the term 'regulation' includes 'every rule . . . adopted by any state agency to . . . interpret . . . the law . . . administered by it.' In Armistead v. State Personnel Board [30], the California Supreme Court, citing section 11342(b), in substance rejected the argument (based on the Federal Administrative Procedure Act) that 'interpretive rules' and 'policy statements' were not exercises of quasi-legislative power.[]" [Original emphasis, except first emphasis added; footnote deleted.]

In addition to rejecting the Skyline argument, we note that in order to "interpret" a statute or regulation, one must look to the intent or purpose behind the statute or regulation. Neither the Initial Statement of Reasons, the public comments, nor the final language of section 11755, evidence an intent to impose the condition that an applicant for a studio teacher certificate, or a current studio teacher certificate holder, possess multiple subject or general credentials before obtaining a studio teacher certificate or getting recertified.

In the previous Determination concerning the Department and DLSE, the Department attempted to resolve a problem which

developed in 1985 by informally adopting an overly restrictive interpretation of a 1973 statute. We concluded, "As in National Elevators[31], the Department's informally issued interpretation cannot withstand scrutiny when reviewed in light of statutory language and history."[32]

Both in the prior Determination and in the proceeding before us, the facts are similar to the National Elevator case. In the National Elevator case, the court found the Department's overly restrictive interpretation of the statute was supported by neither the language of the statute nor by the legislative history; and therefore rejected the interpretation, finding that it was an improper exercise of quasi-legislative power.[33] In the matter before us, the Labor Commissioner's Response admits:

> "After the adoption of this regulation [section 11755], the Labor Commissioner became aware of a problem concerning studio teachers certified by DLSE to teach minors in the entertainment industry who possessed single subject credentials. The problem arose where teachers with single subject credentials, such as a credential in physical education, were hired to teach child actors in multiple technical subjects, including Algebra, Science and English. Upon discovery of the problem, the Labor Commissioner, exercised his discretion by notifying individual studio teachers that each teacher must possess a multisubject credential or submit evidence of enrollment in classes for a multisubject credential with their applications for recertification."[34] [Emphasis added.]

Again, we conclude that the Labor Commissioner's interpretation in the challenged letter "cannot withstand scrutiny when reviewed in light of statutory [here, regulatory] language and history."

The fact that the Labor Commissioner notified these studio teachers by merely sending them a form rejection letter upon their application for recertification does not lessen the effect of the letter's contents. The appellate court in Goleta Valley Community Hospital v. State Department of Health Services[35] found the agency's issuance of a letter "interpreting" its regulations was itself a "regulation," which was required to comply with the APA before it could be adopted.[36] The court also ruled that "a written interpretation of a rule or regulation which concerns a matter of import generally to those dealing with the interpreting agency cannot escape scrutiny on the ground it does no more than govern the agency's internal affairs. (Citation omitted, emphasis added.)" It was also pointed out

by the Goleta court

> "As noted in Weiss v. State Board of Equalization [37]: 'Like courts, agencies may overrule prior decision or practices and may initiate new policy or law []. . . [D]eliberate change in or deviation from established administrative policy should be permitted so long as the action is not arbitrary or unreasonable.' However, the power to overrule an earlier interpretation of an agency's regulations does not necessarily render the act of the reinterpretation procedurally valid." [Original omission except first brackets; original emphasis.]

In a similar vein, the Labor Commissioner argues that his exercise of discretion was lawful as an action to remedy a recognized problem after full discovery of the facts. He cites San Francisco Mining Exchange v. Securities and Exchange Commission[38] as his authority to take such action. The Labor Commissioner, however, overlooks two significant considerations: (1) this rationale cannot be reconciled with binding California case law such as Goleta and (2) the power exercised in San Francisco Mining Exchange was quasi-judicial (ordering withdrawal of the Exchange's registration due to repeated violations of statutes and regulations), and not quasi-legislative as in the proceeding before us.

Following the principle of stare decisis, and as further support of our finding, we offer the preliminary injunction mentioned above as persuasive authority. In this order, the court concluded that "the Labor Commissioner's interpretation of . . . [section] 11755 amounts to the issuance of a new regulation without having first complied with the requirements of the California Administrative Procedure Act." (Emphasis added.)

WE CONCLUDE THAT THE LABOR COMMISSIONER'S LETTER IMPOSING THE ADDITIONAL CONDITION OF HAVING MULTISUBJECT OR GENERAL CREDENTIALS IN ORDER TO OBTAIN A STUDIO CERTIFICATE, THE WAIVER OF THIS CONDITION, AND THE ONE-TIME PROVISION OF OBTAINING A "CONDITIONAL" CERTIFICATE, IS A STANDARD OF GENERAL APPLICATION AND INFORMALLY INTERPRETS TITLE 8, CAC, SECTION 11755, AND THEREFORE, IS A "REGULATION" AS DEFINED BY GOVERNMENT CODE SECTION 11342(B).[39]

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.[40]

In this proceeding, the Labor Commissioner argues that even if his actions are regulatory, such actions are exempt under Government Code section 11343(a)(3). Section 11343(a)(3) provides in part:

> "Every state agency shall:
>
> (a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted by it except one which:
>
> (3) Is directed to a specifically named person or to a group of persons and does not apply generally throughout the state."

The two prongs of section 11343(a)(3) must be met before this exemption would apply. The two prongs are:

1. Whether there is a specifically named person or group of persons, and

2. Whether the challenged rule applies generally throughout the state?

The challenged action by the Labor Commissioner affects, at a minimum, <u>all teachers statewide</u> who contemplate applying for a studio teacher certificate or who wish to be recertified. The fact that the Labor Commissioner's letter has only been sent to a limited number of persons does not make them "specifically named person[s] or a group of persons." Though individual members of this group may have been identified, the group is nonetheless an "open class"[41] whose individual members are affected by the challenged rule.

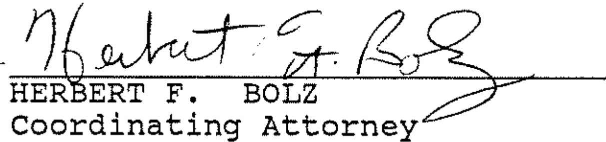
In our analysis, <u>supra</u>, we have already concluded that the challenged rule applies generally statewide; hence, we find that the Labor Commissioner's challenged rule does not meet either of the two prongs as set out above.

We therefore conclude that none of the recognized exceptions (set out in note 40) apply to the Labor Commissioner's challenged letter.

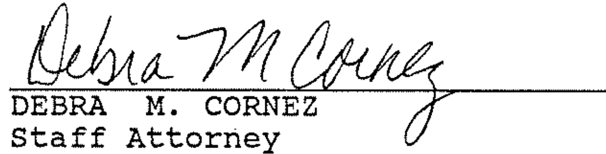
III. CONCLUSION

For the reasons set forth above, OAL finds that the Labor Commissioner's interpretation of Title 8, CAC, section 11755, imposing the condition that the Elementary and Secondary teaching credentials of an applicant for a studio teacher certificate be both multiple subject or general credentials; the waiver of that condition if the applicant has past experience as a studio teacher; and the granting of a "conditional" certificate upon proof of enrollment in classes to obtain the lacking credentials (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.

DATE: May 27, 1987



HERBERT F. BOLZ
Coordinating Attorney



DEBRA M. CORNEZ
Staff Attorney

Rulemaking and Regulatory
Determinations Unit

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[1] In this proceeding, Mike Bujko, owner of Affordable Studio Teacher's Association, represented himself. The State Labor Commissioner was represented by staff attorney Maurine Padden Stevens.

[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] The following definitions are found in the Education Code:

1. Section 44002 defines "credential" as "a document issued by the State Board of Education or the Commission for Teacher Preparation and Licensing, authorizing a person to engage in the service specified in the credential."

2. Section 44256 defines the four basic kinds of authorization as:

   (a) "Single subject instruction" means the practice of assignment of teachers and students to specified subject matter courses, as is commonly practiced in California high schools and most California junior high schools.

   (b) "Multiple subject instruction" means the practice of assignment of teachers and students for multiple

subject matter instruction, as is commonly practiced in California elementary schools and as is commonly practiced in early childhood education.

(c) "Specialist instruction" . . . .

(d) "Designated subjects" . . . .

3. Section 44258 explains "permissible teaching assignments" as:

"A teacher who is authorized for <u>single subject instruction</u> may be assigned, with his consent, to teach any subject in his authorized fields at any grade level; ... and grades 1 to 12, inclusive; . . . and similarly, a teacher authorized for <u>multiple subject instruction</u> may be assiged, with his consent, to teach . . . grades 1 to 12, inclusive . . . ." [Emphasis added.]

A "general credential" authorizes teaching multiple subjects, including English, social science, fine arts, general science, and mathematics.

There are other regulatory features of the challenged letter that are at issue here:

1. The Labor Commissioner's waiver of these two additional requirements for those applicants who have past experience as a studio teacher, but do not possess multisubject or general credentials.

2. The Labor Commissioner's one-time provision for applicants who have past experience as a studio teacher, but do not possess multisubject or general credentials, to obtain a "conditional" studio teacher certificate upon proof of enrollment in courses to obtain the lacking credential(s).

See also note 39, <u>infra</u>.

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; <u>Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization</u> (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 One public comment was received from Julius Reich, from the law firm of Reich, Adell & Crost, on behalf of Motion Picture Studio Teachers and Welfare Workers, Local 884, International Alliance of Theatrical Stage Employees (IATSE) (hereinafter Union). This comment, which supports Mr. Bujko, was considered in making this Determination.

A timely Response to the Request for Determination was received from the Labor Commissioner, by staff attorney Maurine Padden Stevens, and was 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.

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

8 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.

9 Labor Code sections 21, 79 and 82(b).

10 Labor Code section 1398.

11 We discuss the affected agency's rulemaking authority (see

Gov. Code, sec. 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 Government Code section 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 Government Code section 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. Government Code section 11349.1.

12 See also Title 1, California Administrative Code, section 14.

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 See Stats.1919, c. 259, p. 416, section 4.

16 Initial Statement of Reasons, pp. 2-3, as provided by the Union.

17 Id., p. 12.

18 See Union's Exhibits C and D.

19 "Rules and Regulations Governing the Employment of Minors in the Entertainment Industry," adopted April 1, 1929, revision dates 1933, 1936, 1952, 1963, 1971, and 1981; a compilation of Rules and Regulations Enforced by The California State Division of Labor Standards Enforcement, The Los Angeles Unified School District. All subsequent references to the "Blue Book" will be to the 1981 revised edition of this publication.

20 Id., p. 3.

21 See Title 8, California Administrative Code, section 11755.2.

22 See Union's comment, Declaration of Linda Elster, p. 4.

23 Preliminary Injunction, Order No. C 630 515, pp. 1-2, as provided by the Union.

Informally, OAL has been informed by the requestor, the Labor Commissioner, and the Union that a permanent injunction has been issued, enjoining the Labor Commissioner from interpreting section 11755 and imposing multiple subject or general credentials as a condition to becoming certified as a studio teacher.

Because this late development has not been properly made part of the record, and because the record before us does not indicate whether the time period to appeal this order has lapsed or whether the Labor Commissioner has filed an appeal, we conclude that the issue in this Determination is not moot. Also, the Labor Commissioner has not alleged that this matter is moot.

24 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.

25 The Union specifically named three other applicants and made reference to "other members of the Union," who had also received the same form rejection letter from the Labor Commissioner as Mr. Bujko. See Declaration of Linda Elster, p. 4.

26 See Union's Petition for Writ of Mandate and Request for Injunctive Relief, p. 5.

27 Labor Commissioner's Response to Request for Regulatory Determination, p. 5.

28 (1985) 165 Cal.App.3d 239, 211 Cal.Rptr. 792.

29 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-35; typewritten version, pp. 8-10.

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, pp. B-33--B-34; typewritten version, pp. 8-9.

We note that the Labor Commissioner did not in his response filed in 1987 OAL Determination No. 4 attempt to refute the OAL analysis of Skyline as contained in 1986 OAL Determination No. 2. Again, in the matter at hand, the Labor Commissioner has not attempted to refute our earlier analysis of Skyline.

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

31 National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165.

32 See note 29, supra, 1987 OAL Determination No. 4, California Administrative Notice Register 87, No. 15-Z, April 10, 1987, p. B-35; typewritten version, p. 10.

33 Id.

34 Labor Commissioner's Response to the Request for Determination, pp. 2-3.

35 (1983) 149 Cal.App.3d 1124, 197 Cal.Rptr. 294.

36 Id., p. 1129. See also the Union's Points and Authorities in Support of Application for Writ of Mandate and Injunctive Relief, p. 8.

37 (1953) 40 Cal.2d 772, 776 - 777, 256 P.2d 1.

38 (9th Cir. 1967) 378 Fed.2d 162.

39 It is worth noting that in 1986 the Commission on Teacher Credentialing, which is responsible for establishing standards and procedures for teaching credentials, adopted as regulations additional credential requirements for teaching Adapted Physical Education.

The Commission provided for continuous employment with the condition that the individual's prior teaching experience and previously completed professional growth activities have been assessed by a college as meeting some or all of the components of an Adapted Physical Education credential program and either apply for the credential or enroll in a college's approved Adapted Physical Education credential program to complete the requirements. This "conditional" employment will be allowed until July, 1988, when all individuals assigned to teach Adapted Physical Education will be required to hold these additional credentials. (See Title 5, CAC, sections 80046 - 80046.1.)

40 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 an exhaustive list of possible APA exceptions.

41 See Faulkner v. California Toll Bridge Authority, supra, note 23, pp. 323 - 324.