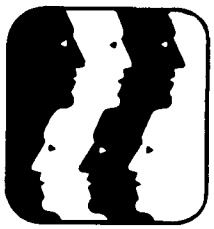
INTERNAL GOVERNMENT REVIEW OF AGENCIES



The Reporter summarizes below the activities of those entities within state government which regularly review, monitor, investigate, intervene or oversee the regulatory boards, commissions and departments of California.

OFFICE OF ADMINISTRATIVE LAW

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The Office of Administrative Law (OAL) was established on July 1, 1980, during major and unprecedented amendments to the Administrative Procedure Act (AB 1111, McCarthy, Chapter 567, Statutes of 1979). OAL is charged with the orderly and systematic review of all existing and proposed regulations against six statutory standards—necessity, authority, consistency, clarity, reference and nonduplication. The goal of OAL's review is to "reduce the number of administrative regulations and to improve the quality of those regulations which are adopted...." OAL has the authority to disapprove or repeal any regulation that, in its determination, does not meet all six standards.

OAL also has the authority to review all emergency regulations and disapprove those which are not necessary for the immediate preservation of the public peace, health and safety or general welfare.

Under Government Code section 11347.5, OAL is authorized to issue determinations as to whether state agency "underground" rules which have not been adopted in accordance with the Administrative Procedure Act (APA) are regulatory in nature and legally enforceable only if adopted pursuant to APA requirements. These non-binding OAL opinions are commonly known as "AB 1013 determinations," in reference to the legislation authorizing their issuance.

MAJOR PROJECTS:

AB 1013 Determinations. The following determinations were issued and published in the *California Regulatory Notice Register* in recent months:

-December 18, 1990, OAL Determination No. 16, Docket No. 89-023. OAL determined that the Department of Personnel Administration's (DPA) policy requiring state employees using sick leave to list the specific nature of their illnesses on a standard state form is a regulation required to be adopted in compliance with the APA.

OAL found that DPA had entered into Memoranda of Understanding (MOU) with its bargaining units regarding sick leave; a typical MOU provides in part that "the department head or designee shall approve sick leave only after having ascertained that the absence is for an authorized reason and may require the employee to submit substantiating evidence including, but not limited to, a physician's certificate." Further, Government Code section 19859 provides DPA with specific authority to adopt rules regarding sick leave substantiation. However, OAL determined that neither the MOU provisions nor pertinent statutory law contained the challenged policy.

OAL found that the challenged policy constitutes a rule or standard of general application, because it applies to all state employees. Further, OAL found that because existing legal requirements do not contain the challenged rule, the rule interprets, implements, or makes specific the laws administered by DPA. In so determining, OAL rejected DPA's assertion that requiring an employee to give a reason for his/her absence is not a regulation but simply an instruction relating to the use of a form, and concluded that the challenged policy required state employees to furnish information which clearly exceeded that required by existing law.

-December 29, 1990, OAL Determination No. 17, Docket No. 89-024. OAL determined that the Department of Corrections' (DOC) policy prohibiting inmates from corresponding with other inmates or certain former inmates (with specified exceptions) is a regulation required to be adopted in compliance with the APA. Further, OAL noted that the challenged rule restricting correspondence is essentially the same as a DOC-proposed regulation previously disapproved by OAL for failure to comply with the substantive and procedural standards of the APA.

Initially, OAL found that the correspondence restriction policy constituted a rule or standard of general application, since the provisions are intended to apply to all inmates seeking to correspond with other inmates or parolees.

Next, OAL determined that the challenged rule interprets, implements, or makes specific the laws administered by DOC. Penal Code section 2600 sets forth those rights, such as the right to correspond with others, of which a person sentenced to imprisonment in a state prison may be deprived; OAL found that section 2600 "is obviously a statute being implemented, interpreted and made specific by this rule."

Finally, OAL determined that the challenged rule does not fall within any established general exception to the APA requirement, such as the internal management exception, since the rule is a standard of general application which significantly affects the prison population in the custody of the Department.

-December 26, 1990, OAL Determination No. 18, Docket No. 90-001, OAL determined that the Board of Podiatric Medicine's (BPM) "policy decision" stating that a doctor of podiatric medicine may use the terms "podiatric physician," "podiatric surgeon," and "podiatric physician and surgeon" is a regulation and therefore without legal effect unless adopted in compliance with the APA. (*See infra* agency report on BPM for related discussion.)

The challenged "policy decision," adopted by BPM on February 17, 1984, and entitled "Use of the Title Podiatric Physician and Surgeon," states in part: "it is the opinion of [BPM] that a doctor of podiatric medicine may use the broader terms of podiatric physician, podiatric surgeon or podiatric physician and surgeon....The BPM would not consider the broader usage in violation of the relevant statutes and would not investigate or prosecute a doctor of podiatric medicine who used the broader titles." The 1974 policy decision cautions that this opinion conflicts with the position held by the Division of Allied Health Professions of the Board of Medical Quality Assurance (now the Medical Board of California); the statement also notes that the Medical Board is empowered to enforce criminal sanctions pursuant to Business and Professions Code section 2054, which prohibits use of such terms by unlicensed persons.

OAL first found that because the challenged provision is intended to apply to all persons who practice podiatric medicine and who wish to use the terms in question, the policy establishes a rule or standard of general application.

OAL then reviewed whether the challenged rule interprets, implements, or

makes specific any provision of law which BPM is charged with enforcing, and determined that "[t]here can be little doubt that the challenged 'policy decision' is [BPM's] interpretation of Business and Professions Code section 2054 which prohibits the use of terms or letters falsely indicating the right to practice as a physician or surgeon without holding the proper certificate under the [Medical Practice Act]." OAL noted that the policy decision itself referenced section 2054.

OAL then reviewed whether the policy statement falls within the "internal management" exception to the APA requirements. BPM argued that "the policy decision quite clearly relates only to the internal management of the Board of Podiatric Medicine since it specifically concerns those situations where the Board will not pursue an enforcement action." OAL rejected this reasoning, stating that the dispositive question is not whether the challenged policy requires Board action or inaction, but whether it interprets, implements, or makes specific the law the agency is charged with enforcing.

As a result of its findings, OAL concluded that BPM's policy decision is a regulation and is without legal effect unless adopted in compliance with the APA.

-December 26, 1990, OAL Determination No. 19, Docket No. 90-002. OAL determined that the state Water Resources Control Board's (WRCB) "Model Well Standards Ordinance," dated November 1, 1989, is a regulation and therefore without legal effect unless adopted in compliance with the APA.

Water Code section 13801 requires WRCB to adopt a comprehensive model ordinance regarding water, cathodic protection, and monitoring wells; section 13801(d) specifies that if a local government fails to adopt an ordinance establishing such standards, WRCB's model ordinance shall take effect on February 15, 1990, as the actual local ordinance, and shall be enforced as such by the given local government. On or about November 1, 1989, without adhering to APA rulemaking standards, WRCB approved a resolution which adopted the "Model Well Standards Ordinance Adopted in Accordance with Water Code Section 13801." (See CRLR Vol. 10, No. 1 (Winter 1990) p. 142 for background information.)

OAL began its review of WRCB's action by noting that the Model Well Ordinance establishes a rule or standard of general application, as it is potentially applicable to each county, city, or water agency within California. OAL then determined that the Ordinance "clearly interprets, implements and makes specific the laws enforced or administered by [WRCB] and the regional boards," finding that many sections of the Ordinance exceed the scope of the authorizing statute, thus interpreting and making the statute more specific. Finally, OAL determined that the Ordinance does not fall within any recognized exception to the requirements of the APA. As a result of its findings, OAL determined that the Model Well Ordinance is invalid until adopted pursuant to APA procedures.

-January 9, 1991, OAL Determination No. 1, Docket No. 90-003. OAL determined that a memorandum issued by the State Personnel Board (Board) concerning stipulated agreements between parties in employee disciplinary actions contains regulations which are without legal effect until adopted in compliance with the APA. OAL also determined that other portions of the challenged memorandum are valid because they merely restate existing law.

On December 20, 1989, the Board issued a memorandum concerning "stipulations on adverse actions and rejections of probation"; the memorandum was addressed to "all state agencies and employee organizations." On January 23, 1990, the Alliance of Trades and Maintenance requested OAL to determine whether the document contains regulations required to be adopted pursuant to the APA. The stated purpose of the challenged memo is to "alert departments and employee organizations of the need to submit proposed Stipulated Agreements to the State Personnel Board" and to "advise [those parties] of certain stipulations which will not be approved."

OAL found that the Board intended its memorandum to have general application, as it applies to all state employees. Although OAL determined that portions of the memorandum merely restate existing law, it also found that other provisions interpret, implement, or make specific the law enforced by the Board. For example, one of the memorandum's provisions states that "proposed stipulated agreements in which an appeal has not been filed and which were not negotiated during either the Skelly Hearing or prior to the expiration of the appellant's appeal period will not be approved by the Board after January 31, 1990." OAL conceded that insofar as this rule provides that stipulated agreements submitted after the expiration of the appeal period shall not be approved, the rule only reflects existing law and does not constitute a regulation. However, OAL found that because the converse to this rule—that is, that proposed stipulated agreements which were negotiated during either the Skelly Hearing or prior to the expiration of the appeal period will be approved prior to January 31, 1990—"undeniably interprets, implements or makes specific the law," the rule is a regulation which must be adopted pursuant to the APA.

.OAL concluded that those provisions of the memorandum which constitute regulations do not fall within any of the established general exceptions to the APA requirements, and are therefore without legal effect until such time as they are adopted in compliance with the APA.

Governor Upholds OAL's Third Disapproval of Board of Pharmacy's Proposed Regulations. On January 2, then-Governor George Deukmejian denied the Board of Pharmacy's (BOP) appeal from OAL's decision disapproving BOP's proposed regulatory action to amend section 1717, Title 16 of the California Code of Regulations (CCR). BOP's proposed amendment would authorize unlicensed persons to perform specified clerical and packaging tasks under the supervision of licensed pharmacists. (*See infra* agency report on BOP; *see also* CRLR Vol. 11, No. 1 (Winter 1991) p. 83 for background information.) BOP submitted its proposed regulatory action to OAL for review on November 3, 1989 and January 30, 1990; both times, OAL disapproved the action because it failed to comply with the consistency standard in Government Code section 11349.1. In August 1990, BOP filed a request for review of OAL's disapproval with the Governor's office. Upon review, the Governor's office directed OAL to review the rulemaking file again in light of additional information submitted by BOP. On November 19, 1990, OAL disapproved the action for the third time for failure to comply with the consistency standard. BOP again appealed to the Governor's Office, which held that existing law prohibits unlicensed persons from being present in the area where controlled substances or dangerous drugs are stored, compounded, or repackaged, and thus affirmed OAL's disapproval.

CCR Now On-Line on State's Computer Service. In January, OAL announced that the entire CCR may now be accessed by state agencies which subscribe to the TS3 VM Timesharing System furnished to the state by the Teale Data Center. OAL staff will maintain the CCR textbase on a weekly basis. The CCR is already on-line and available to

the public via privately-run computer services such as Legitech and LEXIS.

LEGISLATION:

AB 1736 (Campbell). Existing law requires OAL to provide for the official compilation, printing, and publication of the CCR and updates thereto. As introduced March 8, this bill would specify that any action taken by OAL to have the CCR or its updates compiled, printed, or published by anyone other than a state agency shall be in compliance with the State Contract Act. This bill is pending in the Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development.

AB 2060 (Polanco), as introduced March 8, would require every state and local agency that is authorized to adopt rules, regulations, or ordinances to adopt rules and regulations to grant variances and to adopt a variance process, whereby an individual or private entity may apply for full or partial relief from regulations adopted by that governmental agency. This bill would also require every such agency to adopt a procedure for an appeal of any decision that leads to orders, sanctions, or fines being given to private individuals or entities, including the denial of a variance. This bill is pending in the Assembly Consumer Protection Committee.

AB 2061 (Polanco). Existing law requires every state agency to transmit to OAL, for filing with the Secretary of State, a certified copy of each regulation adopted or amended, with specified exceptions. As introduced March 8, this bill would include regional agencies that are not created by local government and that do not have an elected board of governors as agencies whose regulations are subject to OAL approval.

This bill would also require state and regional agencies proposing to adopt or amend any regulation to actively consider the potential for adverse economic impact on California small business enterprises and individuals. This bill is pending in the Assembly Consumer Protection Committee.

LITIGATION:

In *Fair Political Practices Commission (FPPC) v. Office of Administrative Law, et al.,* No. 512795, a tentative decision in favor of the FPPC handed down by the Sacramento County Superior Court on January 23 was implemented into a final and binding judgment issued on March 5. The court held that FPPC regulatory actions are subject to review under the APA only as it existed at the time of the electorate's 1974 approval of the Political Reform Act (PRA), which, *inter alia,* created the FPPC. OAL, its authority to review agency regulations, and the six criteria upon which its review is based were not created until 1980. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 38; Vol. 10, No. 4 (Fall 1990) p. 39; and Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 47 for background information.)

In particular, the court held that Government Code section 83112, which specifies that FPPC regulations "shall be adopted in accordance with the Administrative Procedure Act (Government Code, Title 2, Division 3, Part 1, Chapter 4.5, Sections 11371 *et seq.*)," is a "specific reference statute" as opposed to a "general reference statute." "When a reference is specific, the referencing statute takes the law as it existed at the time that the reference was made." Thus, the court ruled that the APA as it existed in 1974 is applicable to the FPPC, and enjoined OAL from applying to the FPPC any provisions of the APA that are inconsistent with the version of that law existing in 1974. According to FPPC staff counsel Jonathan Rothman, the court's rationale is that the FPPC was intended to be somewhat independent, and subjecting it to external standards and modifications would intrude on that independence.

Another issue in the matter focuses on a 1983 FPPC regulation which OAL originally approved and then disapproved two years later. Section 18312 of the FPPC's regulations in Title 2 of the CCR, implementing Government Code section 83112, instructs OAL to inspect only procedural and not substantive aspects of FPPC rulemaking. In its March 5 order, the court held that section 18312 is overbroad, and ordered FPPC to redraft the regulation.

According to OAL Director John D. Smith, the decision forces OAL to review the FPPC's regulations according to 1974 APA standards which predate the creation of OAL, and may encourage other agencies with unique enabling statutes to attempt to gain exemption from OAL review contained in the current APA based on this precedent. At this writing, OAL is considering an appeal of the decision.

OAL prevailed in a December 4, 1990 decision in *State Water Resources Control Board (WRCB) and the Regional Quality Control Board, San Francisco Region v. Office of Administrative Law,* No. 906452 (San Francisco County Superior Court). The court upheld OAL's invalidation of certain WRCB amendments to the San Francisco Bay Plan which defined the term "wetlands" and set forth certain criteria for permit discharges to wetlands, upon its finding that the amendments constituted regulations which must be adopted in compliance with the APA. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 39; Vol. 10, No. 4 (Fall 1990) p. 164; and Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) pp. 196-97 for background information.)

The outcome of this case may be significant, because it bears upon the administrative rulemaking procedures and powers of several state boards and agencies which conduct activities and enforcement procedures via local arms or local enforcement agencies and regional policy boards. For example, in *Simpson Paper Co. v. State Water Resources Control Board,* No. 364-016 (Sacramento County Superior Court), the central issue is similar to the matter addressed in *WRCB v. OAL.* Here, plaintiffs challenge the validity of certain provisions of the California Ocean Plan which were implemented by WRCB but not adopted pursuant to the APA.

Further settlements were recently reached in *California Chapter of the American Physical Therapy Ass'n et al. v. California State Board of Chiropractic Examiners, et al.,* Nos. 35-44-85 and 35-24-14 (Sacramento County Superior Court). The parties are litigating the validity of the Board of Chiropractic Examiners' (BCE) adoption and OAL's approval of section 302 of BCE's regulations, which defines the scope of chiropractic practice. A significant step towards final settlement occurred recently when the California Medical Association reached a settlement with BCE and other parties by agreeing to language of a proposed regulation on the scope of practice designed to replace the challenged section. This new scope of practice regulation was submitted by BCE to OAL as an emergency regulation, and is currently pending OAL approval. (*See infra* agency report on BCE; *see also* CRLR Vol. 11, No. 1 (Winter 1991) pp. 38-39; Vol. 10, No. 4 (Fall 1990) p. 39; and Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 47 for background information.)

OFFICE OF THE AUDITOR GENERAL

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The Office of the Auditor General (OAG) is the nonpartisan auditing and investigating arm of the California legislature. OAG is under the direction of the Joint Legislative Audit Committee (JLAC), which is comprised of fourteen members, seven each from the Assembly and Senate. JLAC has the authority to