

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
AGENCY: CALIFORNIA)	DECISION REGARDING
APPRENTICESHIP COUNCIL)	DISAPPROVAL OF
)	A RULEMAKING ACTION
)	(Gov. Code Sec. 11349.3)
RULEMAKING ACTION: Adopt)	
sections 232.01, 232.02, 232.03, 232.04,)	
232.05, 232.06, 232.07, 232.08, 232.09,)	OAL File No. 03-0328-02s
232.10, 232.11, 232.12, 232.20, 232.21,)	
232.22, 232.23, 232.24, 232.25, 232.26,)	
232.27, 232.28, 232.29, 232.30, 232.31,)	
232.32, 232.33, 232.34, 232.35, 232.36,)	
232.37, 232.40, 232.41, 232.42, 232.43,)	
232.44, 232.45, 232.46, 232.47, 232.48,)	
232.49, 232.50, 232.51, 232.52, 232.53,)	
232.60, 232.61, 232.62, 232.63, 232.64,)	
232.70; repeal section 232 of title 8 of)	
the California Code of Regulations)	

SUMMARY OF RULEMAKING ACTION

This rulemaking action establishes hearing procedures for hearings under Labor Code section 1777.7, which concerns penalties for knowingly violating statutory requirements governing employment of apprentices in public works.

SUMMARY OF DECISION

On May 12, 2003, the Office of Administrative Law (OAL) disapproved the above-referenced rulemaking action. The reasons for the disapproval are summarized here and explained in detail below.

A. The Council has failed to cite the statutes which provide authority for the regulations and the statutes which are implemented, interpreted, or made specific by the regulations. To the extent that the regulations duplicate specific statutory provisions in Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, the regulations fail to satisfy the Nonduplication standard.

B. A number of provisions fail to satisfy the clarity standard.

- C. The STD Form 399 is not signed by the Agency Secretary, and these regulations do not have the concurrence of the Department of Finance.**
- D. Necessity has not been demonstrated for a part of regulation 232.11.**
- E. Miscellaneous problems.**

DISCUSSION

The adoption of regulations by the California Apprenticeship Council ("Council") must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency ("APA"). Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure is subject to the APA unless a statute *expressly* exempts the regulation from APA coverage.

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by the Office of Administrative Law ("OAL") for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code Section 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

The procedures for the above-referenced hearing regulations are governed by Labor Code section 1777.7 and by the mandatory¹ requirements of Government Code, Title 2, Division 3, Part 1, Chapter 4.5 (commencing at sec. 11400, hereinafter "Chapter 4.5"). Labor Code section 1777.5 establishes requirements for the employment and training of apprentices by contractors and subcontractors in the performance of public works projects. Labor Code section 1777.7 subjects a public works contractor or subcontractor to civil penalties for a knowing violation, and to debarment from the right to bid on, be awarded, or to perform work on any public works contract for a knowing, serious violation of any provision of Labor Code section 1777.5. Labor Code section 1777.7 also provides for administrative and judicial review of a determination imposing a debarment or civil penalty and specifies part of the administrative procedures for such a review.²

¹ Some of the provisions of Chapter 4.5 are optional and some are mandatory. 25 Cal.L.Rev.Comm. Reports 55 (1995).

² Labor Code Section 1777.5 provides, as relevant:

"(c) (1) An affected contractor, subcontractor, or responsible officer may obtain a review of the determination of the Chief imposing the debarment or civil penalty by transmitting a written request to the office of the Administrator within 30 days after service of the determination of debarment or civil penalty.

Chapter 4.5 applies to an adjudicative proceeding³ commenced on or after July 1, 1977 (Gov. Code, sec. 11400.10) by any state agency in the executive branch except as expressly provided by statute (Gov. Code sec. 11410.20) if a state statute requires an evidentiary hearing for determination of facts pursuant to which an agency issues a decision (Gov. Code sec. 11410.10). Thus, the procedure used by the Administrator of Apprenticeship to affirm, modify, or dismiss a determination of debarment or civil penalty pursuant to Labor Code section 1777.7 is subject to Chapter 4.5 as a matter of law.

Labor Code section 1777.7 specifies how and when and to whom a request for review must be submitted, provides an opportunity to review evidence that may be offered at the hearing, provides for an exchange of evidence and disclosure of certain nonprivileged documents, specifies when a hearing must be commenced and who must conduct the hearing, provides that the contractor or subcontractor has the burden of proving evidence of compliance with Labor Code section 1777.5, specifies when a decision must be issued and the contents of the decision, specifies required service of the decision, and provides for reconsideration or modification of the decision to correct an error.⁴ Chapter 4.5 sets out the administrative adjudication bill of rights and other provisions which concern such matters as disqualification of a presiding officer, ex

A copy of this report shall also be served on the Chief. If the Administrator does not receive a timely request for review of the determination of debarment or civil penalty made by the Chief, the order shall become the final order of the Administrator.

"(2) Within 20 days of the timely receipt of a request for review, the Chief shall provide the contractor, subcontractor, or responsible officer the opportunity to review any evidence the Chief may offer at the hearing. The Chief shall also promptly disclose any nonprivileged documents obtained after the 20-day time limit at a time set forth for exchange of evidence by the Administrator.

"(3) Within 90 days of the timely receipt of a request for review, a hearing shall be commenced before the Administrator or an impartial hearing officer designated by the Administrator and possessing the qualifications of an administrative law judge pursuant to subdivision (b) of Section 11502 of the Government Code. The affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5.

"(4) Within 45 days of the conclusion of the hearing, the Administrator shall issue a written decision affirming, modifying, or dismissing the determination of debarment or civil penalty. The decision shall contain a statement of the factual and legal basis for the decision and an order. This decision shall be served on all parties and the awarding body pursuant to Section 1013 of the Code of Civil Procedure by first-class mail at the last known address of the party that the party has filed with the Administrator. Within 15 days of issuance of the decision, the Administrator may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time. "(5) An affected contractor, subcontractor, or responsible officer who has timely requested review and obtained a decision under paragraph (4) may obtain review of the decision of the Administrator by filing a petition for a writ of mandate to the appropriate superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the final decision. If no timely petition for a writ of mandate is filed, the decision shall become the final order of the Administrator. The decision of the Administrator shall be affirmed unless the petitioner shows that the Administrator abused his or her discretion. If the petitioner claims that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the entire record."

³ "'Adjudicative proceeding' means an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision." Gov. Code, sec. 11405.20.

⁴ See footnote 2, above.

parte communications, language assistance, service, electronic hearings, subpoenas, sanctions, and attorney fees.

Subdivision (g) of Labor Code section 1777.7 authorizes the Council to adopt regulations to give effect to the hearing procedures specified in Labor Code section 1777.7.⁵ Government Code section 11400.20 authorizes the Council to adopt regulations to implement, interpret, or make specific the provisions of Chapter 4.5.⁶

A.

The Council has failed to cite the statutes which provide authority for the regulations and the statutes which are implemented, interpreted, or made specific by the regulations. To the extent that the regulations duplicate specific statutory provisions in Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, the regulations fail to satisfy the Nonduplication standard.

The rulemaking action submitted by the Council to OAL for review adopts fifty separate, detailed regulation sections (25 typewritten pages) on all procedural aspects of the hearing required by subdivision (c)(3) of Labor Code section 1777.7. They cover scope and application, determinations and request for review, prehearing procedures, hearings, decision of the administrator, and statute of limitations.

The APA provides that the text of each regulation section must be accompanied by a note that cites to the Authority and the Reference for the section, at every stage of the rulemaking process. (Gov. Code secs. 11346.2(a)(2), 11344(d) ; Cal. Code Regs. tit 1, sec. 8; see also Gov. Code, sec. 11346.5(a)(2).) "'Authority' means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation." (Gov. Code, sec. 11349(b).) In reviewing a regulation for compliance with the Authority standard pursuant to California Code of Regulations, title 1, section 14, OAL presumes that the standard is satisfied only if an agency cites in the note proposed for printing in the California Code of Regulations the following:

"(1) a California constitutional or statutory provision which expressly permits or obligates the agency to adopt, amend, or repeal the regulation; or

"(2) a California constitutional or statutory provision that grants a power to the agency which impliedly permits or obligates the agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted."

⁵ Subdivision (g) of Labor Code section 1777.7 provides: "The interpretation of ... this section shall be in accordance with the regulations of the California Apprenticeship Council. The Administrator may adopt regulations to establish guidelines for the imposition of monetary penalties and periods of debarment and may designate precedential decisions under Section 11425.60 of the Government Code."

⁶ Subdivision (a) of Government Code section 11400.20 provides as relevant: "[A]fter July 1, 1997, an agency may adopt . . . permanent regulations to govern an adjudicative proceeding under this chapter" "Permanent regulations are subject to all the provisions of Chapter 3.5 (commencing with Section 11340),"

This requirement has not been satisfied for any of the regulations submitted by the Council. The authority cited for 49 of the regulations submitted for review is the following: "Labor Code sections 3071 and 1777.7(f)." No authority is cited for regulation section 232.70.⁷

Neither of the statutory provisions cited by the Council expressly or impliedly grant the Council the rulemaking power to adopt these regulations. Section 3071 does authorize the Council to adopt certain rules and regulations, but it does not expressly or impliedly cover rules and regulations on Labor Code section 1777.7 and Chapter 4.5 of the Government Code.⁸ Labor Code section 1777.7(f), the only other Authority citation provided in the entire package, delegates no rulemaking authority to the Council for these procedural regulations.⁹ (See discussion above regarding correct authority citations.) Moreover, none of the authority notes for those regulation sections that implement, interpret, make specific, or otherwise give effect to specific statutory provisions in Chapter 4.5 include a citation to Government Code section 11400.20.¹⁰

⁷ The adoption of this section cannot be approved without adequate authority and reference citations. It is questionable whether the Council has rulemaking authority to establish a "statute of limitations." Of course, if there is an "statute of limitation" established in statute which is applicable to the determination that is the subject of this regulation, then that statute applies as a matter of law, notwithstanding regulation section 232.70. No such statute, however, has been identified. The only explanation of the basis for regulation section 232.70 in the rulemaking record is the following: "The purpose of section 232.70 is to provide a statute of limitations for violations of Labor Code section 1777.5." Rulemaking record, tab 7, Initial Statement of Reasons, p. 10.

⁸ Labor Code sec. 3071 provides:

"The California Apprenticeship Council shall meet at the call of the Director of Industrial Relations and shall aid him or her in formulating policies for the effective administration of this chapter.

"Thereafter, the California Apprenticeship Council shall meet quarterly at a designated date and special meetings may be held at the call of the chairman. The California Apprenticeship Council shall issue rules and regulations which establish standards for minimum wages, maximum hours, and working conditions for apprentice agreements, hereinafter in this chapter referred to as apprenticeship standards, which in no case shall be lower than those prescribed by this chapter; and shall issue rules and regulations governing equal opportunities in apprenticeship, affirmative action programs which include women and minorities in apprenticeship, and other on-the-job training, and criteria for selection procedures with a view particularly toward eliminating criteria not relevant to qualification for training employment or more stringent than is reasonably necessary."

⁹ Subsection (f) of Labor Code section 1777.7 provides:

"The Chief shall consider, in setting the amount of a monetary penalty, in determining whether a violation is serious, and in determining whether and for how long a party should be debarred for violating this section, all of the following circumstances:

"(1) Whether the violation was intentional.

"(2) Whether the party has committed other violations of Section 1777.5.

"(3) Whether, upon notice of the violation, the party took steps to voluntarily remedy the violation.

"(4) Whether, and to what extent, the violation resulted in lost training opportunities for apprentices.

"(5) Whether, and to what extent, the violation otherwise harmed apprentices or apprenticeship programs. If a party seeks review of a decision by the Chief to impose a monetary penalty or period of debarment, the Administrator shall decide de novo the appropriate penalty, by considering the same factors set forth above."

¹⁰ See, footnote 6, above.

"Reference' means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation." (Gov. Code, sec. 11349(e).) In reviewing a regulation for compliance with the Reference standard pursuant to California Code of Regulations, title 1, section 14, OAL presumes that the standard is satisfied if an agency cites in the note proposed for printing in the California Code of Regulations the following:

"(b) Sources of 'Reference.' 'Reference' shall be presumed to exist if an agency is empowered to implement, interpret or make specific a:

"(1) California constitutional provision; or

"(2) California statute; or

"(3) federal statute or regulation; or

"(4) court decision or order, cited in its 'reference' note proposed for printing in the California Code of Regulations."

This requirement has not been satisfied for any of the regulations submitted by the Council. The references cited for forty nine of the regulations submitted for review is the following: "Labor Code sections 1777.5 and 1777.7." The citation to Labor Code section 1777.5 is incorrect. All of these regulations appear to implement, interpret, make specific, or otherwise give effect to the hearing procedures specified in Labor Code section 1777.7 and the hearing procedures specified Chapter 4.5. To satisfy the Reference standard, each regulation section must include each statutory provision it implements, interprets, or makes specific in the reference citation(s) included in the note proposed for printing in the California Code of Regulations. For example, the reference citation for regulation 232.02 must include, at least, sections 11405.40, 11405.60, 11405.70, and 11405.80 of the Government Code.

For one regulation, section 232.70, no reference is cited at all.¹¹ This provision needs appropriate reference citations. In addition, the final statement of reasons must identify the statutory provision(s) that specifically establish a limit on judicial review of the issuance of a determination for violation of Labor Code section 1777.5, if such a statute applies.

In addition, many provisions scattered throughout these regulations duplicate statutory provisions set out in Chapter 4.5. None of these duplications are identified by including a citation to the duplicated statutory provision in the reference note proposed for printing in the California Code of Regulations. See California Code of Regulations, title 1, section 12(b)(1).¹²

¹¹ See, footnote 7, above.

¹² Cal. Code of Regs., tit. 1, sec. 12 provides:

"(a) A regulation shall 'serve the same purpose,' as that term is used in Government Code Section 11349(f), where it either repeats or rephrases in whole or in part a state or federal statute or regulation.

"(b) A regulation which duplicates a state or federal statute or regulation shall, nonetheless, meet the 'nonduplication' standard of Government Code Section 11349.1 if any one of the following conditions is met:

The failure to specifically identify duplicated statutory provisions and to demonstrate the duplication is necessary for purposes of clarity is a violation of the Nonduplication standard of Government Code section 11349, which provides:

"'Nonduplication' means that a regulation does not serve the same purpose as a state or federal statute or another regulation. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication. This standard is not intended to prohibit state agencies from printing relevant portions of enabling legislation in regulations when the duplication is necessary to satisfy the clarity standard in paragraph (3) of subdivision (a) of Section 11349.1. This standard is intended to prevent the indiscriminate incorporation of statutory language in a regulation."

Consequently every duplication of statute in these regulations violates the Nonduplication standard.

Note: OAL reserves its jurisdiction to review the regulations for compliance with the standards of Government Code section 11349 after appropriate authority and reference citations have been provided for each regulation section, e.g., consistency of regulation 232.02(m) with Government Code section 11405.60 and the consistency of regulation 232.10(a)(3) with Government Code section 11440.20.

B.

A number of provisions fail to satisfy the clarity standard.

"(1) The proposed regulation duplicates or overlaps a state or federal statute or regulation which is cited as 'authority' or 'reference' for the proposed regulation and the duplication or overlap is necessary to satisfy the 'clarity' standard of Government Code Section 11349.1(a)(3). Justification for such duplication shall be provided by inclusion of facts, explanations, expert opinions or other information in the rulemaking record which establish that the overlap or duplication is necessary in order for the regulation to satisfy the requirements of Government Code Section 11349.1(a)(3); or

"(2) The agency meets the requirement of Government Code Section 11346.9(c) when adopting or amending federally mandated regulations; or

"(3) The duplication is mandated or authorized by a specified statute or other provision of law. The agency shall include a statement in its rulemaking record which:

"(A) identifies the state or federal statute(s) or regulation(s) which the regulation under review overlaps or duplicates, and

"(B) identifies the provision of law which mandates or permits the overlap or duplication.

"This statement shall set forth the applicable provision of law in a citation style which clearly identifies the statute or regulation and provides information necessary to locate the full text of the statute or regulation."

Each regulation must satisfy the Clarity standard. (Gov. Code, sec. 11349.1.) "'Clarity' means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." (Gov. Code, sec. 11349.)

1. The overarching clarity problem with these regulations is that they do not make it easy to understand that the hearings conducted pursuant to subdivision (c) of Labor Code section 1777.7 are, as a matter of law, governed by the mandatory provisions of Chapter 4.5.¹³ The problem is illustrated by subsection (a) of regulation 232.01, which provides:

"These Rules govern proceedings for review of Determinations of civil penalty or debarment under sections 1777.5 and 1777.7 of the Labor Code. The provisions of Labor Code section 1777.7 and these Rules apply to all such Determinations served on a contractor, subcontractor, or responsible officer on or after the effective date of these Rules and provide the exclusive method for an Affected Contractor, Subcontractor, or Responsible Officer to obtain review of any such Determination."

Notably missing from this subsection, and consequently misleading, is an indication that the mandatory provisions of Chapter 4.5 of Title 2, Division 3, Part 1 (commencing with section 11400) apply to these proceedings. The applicability of all the mandatory provisions of Chapter 4.5 should also be clearly indicated in regulation 232.12, which refers only to the provisions in Article 6:

"The provisions of the Administrative Adjudication Bill of Rights found in Article 6 of Chapter 4.5 of Title 2, Division 3, Part 1 (commencing with section 11425.10) of the Government Code shall apply to these review proceedings to the extent not inconsistent with a state or federal statute, a federal regulation, or a court decision which applies specifically to the Department. The enumeration of certain rights in these Rules may expand but shall not be construed as limiting the same or similar provision of the Administrative Adjudication Bill of Rights; nor shall the enumeration of certain rights in these Rules be construed as negating other statutory rights not stated.^[14]"

In addition, the regulations present other clarity problems.

¹³ See discussion above.

¹⁴ This provision also appears to duplicate Gov. Code, secs. 11425.10(b) and 11415.20 without satisfying the Nonduplication standard. (See discussion of Nonduplication in A., above.)

Gov. Code, sec. 11425.10(b) provides:

"The requirements of this section apply to the governing procedure by which an agency conducts an adjudicative proceeding without further action by the agency, and prevail over a conflicting or inconsistent provision of the governing procedure, subject to Section 11415.20. The governing procedure by which an agency conducts an adjudicative proceeding may include provisions equivalent to, or more protective of the rights of the person to which the agency action is directed than, the requirements of this section."

Gov. Code sec. 11415.20 provides:

"A state statute or a federal statute or regulation applicable to a particular agency or decision prevails over a conflicting or inconsistent provision of this chapter."

2. Regulation 232.09(a) provides: "A Party may appear in person or through an authorized Representative, who need not be an attorney at law; however, a Party shall use the form Authorization for Representation by Non-Attorney [8 CCR 232.09(b) to authorize representation by any non-attorney who is not an owner, officer, or managing agent of that Party." Although this regulation refers to a form, there is no form either included or incorporated by reference into the regulation. Consequently, it is not clear what, if any, information the form requires. Note minor punctuation problem with bracket. There is a beginning bracket, but no end.
3. Regulation 232.24(d) requires the Chief DAS to make evidence available for review within 20 days of receipt of a request for review. It is not clear from the section, however, that the Chief DAS must also "promptly disclose any nonprivileged documents obtained after the 20-day time limit at a time set forth for exchange of evidence by the administrator" as required by Labor Code, section.1777.7(c)(2).
4. In regulation 232.11(b) the word "be" is missing.
5. In the last sentence of regulation 232.08(b) "apprenticeship program" needs to be added to the list of those whose later request to intervene shall be treated as a motion for permissive participation to conform it to the coverage of the first sentence of the subsection.
6. Regulation 232.12(b) provides: "Ex parte communications shall be permitted between the appointed Hearing Officer and the Administrator in accordance with Government Code section 11430.80(b)." This doesn't make sense. Government Code section 11340.80 provides:

"(a) There shall be no communication, direct or indirect, while a proceeding is pending regarding the merits of any issue in the proceeding, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

"(b) This section does not apply where the agency head or other person or body to which the power to hear or decide in the proceeding is delegated serves as both presiding officer and agency head, or where the presiding officer does not issue a decision in the proceeding."
7. In regulation 232.01(d) "this Section 17201" needs to be "this Section 232.01" to make sense. Similarly in regulation 232.02(q) "this Section 17208" needs to be "this Section 232.08" to make sense.
8. Regulation 232.20(c)(3) provides that a determination shall include "notice of the Opportunity to Request a Settlement Meeting under Rule 21" It is not clear why these words are capitalized. Is this an attempt to require the use of a specific form? No form is included.
9. The punctuation in regulation 232.4(b) is incorrect. Each of the following need to be made possessive: "Affected Contractor, Subcontractor, or Responsible Officer."

10. In regulation 232.02(h) eliminate one quotation mark before "Determination."
11. In regulation 232.31, the first sentence is incomplete. Also, there is no (a) or (b), but there is a (c).

C.

The STD Form 399 is not signed by the Agency Secretary, and these regulations do not have the concurrence of the Department of Finance.

A regulation that will result in state costs must have the approval of the Department of Finance. In this regard, section 6680 of the State Administrative Manual provides:

"The STD. 399 form must be approved and signed by the Agency Secretary. The form must also be signed by the appropriate Program Budget Manager in the DOF if there are fiscal impact disclosures required by SAM Section 6600-6670, in which case the Fiscal Impact Statement (FIS) portion of STD. 399 is to be completed."

Section 6660 of the State Administrative Manual provides in part:

"A state agency is not required in all instances to obtain the concurrence of DOF in its estimate of the fiscal effect of its proposed regulation on governmental entities. However, such concurrence is required for those estimates which contain any of the following elements, as depicted on STD. 399:

A.1–Reimbursable Local Costs
A.2–Non-Reimbursable Local Costs
A.3–Local Savings"

B.1–State Costs
B.2–State Savings

The rulemaking record submitted by the Council includes a STD 399 form. The form, however, is not signed by the Agency Secretary as required by State Administrative Manual section 6680.

The STD 399 included in the rulemaking record indicates that there will be "minor" absorbable costs resulting from these regulations. No supporting documentation is included to support this estimate. The STD 399 does not bear the signature of the Council's Department of Finance Program Budget Manager. Consequently, the requirements of State Administrative Manual 6680 have not been satisfied.

D.

Necessity has not been demonstrated for a part of regulation 232.11.

Regulation 232.11(a) provides in part: "A document transmitted by facsimile or other electronic means shall not be considered received until the next Working Day following transmission unless . . . the entire transmission is completed no later than 4:00 p.m. Pacific Time."

Every regulation must satisfy the Necessity standard. (Government Code Section 11349.1(a).) "Necessity' means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to facts, studies, and expert opinion." (Government Code Section 11349.) We turn to the rulemaking record to determine whether the need has been demonstrated for requiring a document to be completed one hour before the end of the normal work day. The record fails to explain the need for this requirement. The initial statement of reasons (rulemaking record, tab7) says nothing about the need for this provision.

E.

Miscellaneous problems.

1. Government Code section 11346.9(a)(3) requires a rulemaking agency to summarize each comment submitted on a proposed rulemaking and to respond "with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change." The purpose for this requirement is to demonstrate that the agency considered the comment or objection. Government Code section 11346.8(a) requires a rulemaking agency to consider all relevant matter presented to it before adopting a regulation.

In the final statement of reasons, in response to specific comments about specific provisions in these regulations, the Council repeatedly states the following:

"The Council believes that these changes should not be made because it is desirable to maintain as much uniformity as possible between these regulations and DIR's prevailing wage regulations (CCR, title 8, sections 187.01-187.70. [sic]"

These citations are erroneous. There are no regulations at CCR, title 8, sections 187.01-187.70.

2. In response to a comment, the final statement of reasons says that regulation 232.02(f) will be changed to add "contractor." This has not been done.

3. The Form 400 face sheet for filing regulations indicates that this rulemaking action repeals existing section 232 of title 8. The text submitted for filing with the Secretary of State, however, fails to include a strikeout text of existing section 232. (Gov. Code, sec. 11343, Cal. Code Regs., tit. 1, sec. 8.)

4. All the authority and reference citations that accompany the regulation text need to be underlined. Also in regulation 232.24(c) the last line needs to be underlined. (Cal. Code Regs., tit. 1, sec. 8.)

5. The regulations as submitted for publication have six subheadings, each of which needs to be designated as a sub-article of Article 10.

6. In regulation 232.26 delete the stricken "an" each time it appears.

7. The table of contents to the rulemaking record is confusing. It lists a number of notices, but does not clearly indicate which of them is the operative notice for this rulemaking action. The operative notice is the one which satisfies the content and publication requirements of the APA.

8. The statement included in the rulemaking record at tab 5 does not satisfy the requirements of California Code of Regulations, title 1, section 86 in that it fails to specify which of the numerous notices included in the record was mailed, and fails to state that the notice was mailed at least 45 days prior to the close of the public comment period.

For these reasons OAL disapproved the above-referenced rulemaking action.

Date: May 19, 2003

MICHAEL McNAMER
Senior Counsel

for: Sheila R. Mohan
Acting Director/Chief Counsel

Original: Henry P. Nunn, III, Chief, DAS
cc: Julian Standen, Deputy Attorney General