#N-103

ns90
05/18/90

Memorandum 90-72

Subject: Study N-103 - Administrative Adjudication (Central Panel--views of the agencies)

BACKGROUND

At the April meeting the Commission reviewed material collected from other states and heard from a number of administrative law judges concerning the concept of requiring state administrative hearings to be heard by an administrative law judge employed and assigned by the Office of Administrative Hearings. The Commission requested the staff to solicit the views of the affected state agencies on this matter.

The Office of Administrative Hearings currently employs 27 administrative law judges and conducts hearings for about 50 different agencies. That office expects to have 40 administrative law judges in September to help catch up with the existing backlog of hearings.

From material provided by Gary Gallery of the Public Employment Relations Board and John Sikora of the Association of California State Attorneys and Administrative Law Judges, we have ascertained that at least 16 other agencies employ administrative law judges or hearing officers to conduct hearings, and we have notified them:

Agency	Number of Judges or Officers
Agricultural Labor Relations Board	3
Board of Prison Terms	84
Unemployment Insurance Appeals Board	171
Department of Health Services	5
Department of Industrial Relations	180
Cal/OSHA Appeals Board	6
Cal/OSHA Standards Board	7
Workers Compensation Appeals Board	134
Department of Insurance	3
Department of Motor Vehicles	17
Public Employment Relations Board	12
Public Utilities Commission	34
Department of Social Services	61
State Energy Resources	4
State Personnel Board	7
New Motor Vehicle Board	Unknown

In addition to the agencies that employ their own administrative law judges or hearing officers, many agencies conduct their own hearings using attorneys, commissioners, or lay persons. We have no idea of the extent of this practice, but we have attempted to alert the major agencies that we know hold their own hearings but do not employ specialized personnel for that purpose. These include:

Agency
Department of Water Resources
California Waste Management Board
Department of Veterans Affairs
California State University
Department of Personnel Administration
Department of Developmental Services
Resources Agency
Department of Rehabilitation
State Oil and Gas Supervisor
California Maritime Academy
Commission on Judicial Performance
Fish and Game Commission
Department of Corporations
State Controller
Superintendent of Banks
California Coastal Commission
San Francisco Bay Conservation and Development Commission

There are of course many others, and we have in general notified all state agencies that the Commission is studying state administrative procedure.

We anticipate that a number of these agencies will send representatives to the Commission meeting to indicate the problems the requirement of a central panel hearing officer would cause for them. Other agencies are sending letters; we will supplement this memorandum from time to time as letters are received. A number of agencies will not be meeting until after the Commission meeting, so we will be unable to review their comments until later.

There is such a variety of functions and structures among state agencies that the staff believes the Commission should not attempt to generalize whether the central panel administrative law judge approach is appropriate for all. Each agency should be reviewed individually before any decision is made that could affect the operations of that agency. Analyzed below are the comments of agencies that have so far responded in writing to the Commission's request for comment on this matter.

AGRICULTURAL LABOR RELATIONS BOARD

We have received a telephone call from the Executive Secretary of the Agricultural Labor Relations Board. The board will not be meeting until after the Commission's May meeting and therefore will be unable to respond. They request that the Commission not act with respect to that agency until they have had an opportunity to respond. The staff believes it is important to have the input of an affected agency before making any tentative recommendations with respect to that agency and has assured the agency that the Commission will not do so. The staff therefore recommends that the Commission defer consideration of this matter with respect to the Agricultural Labor Relations Board.

INSURANCE, DEPARTMENT OF

Exhibit 1 is a letter from the Department of Insurance. The department's administrative law judges are the finders of fact in a wide spectrum of subject areas under the Insurance Code. They are specialists who are required to have a high level of technical knowledge. In a rate case, for example, "In addition to a thoroughgoing knowledge of the applicable insurance regulatory law, competent adjudication of such a case requires familiarity with actuarial science, including rate-making concepts and methods, statistical analysis, generally-accepted accounting principles, statutory accounting methodology, and general economic principles."

The department believes it should retain control of the appointment and training of its administrative law judges in order to ensure that its hearings are conducted by qualified specialists. The expertise of its administrative law judges also enables it to achieve efficiency in handling the high volume of cases it is confronted with and to remain responsive to the rapid changes in requirements brought about by the passage of Proposition 103.

The Commission's consultant notes that the Insurance Commissioner's decision to employ departmental administrative law judges is not surprising. "In light of the exceptional difficulty of regulating the price of almost all lines of insurance, on a company by company basis, the use of expert and specialized ALJs is clearly justified." He did not find the case persuasive for transferring them

to a central panel, although he felt that the Insurance Commissioner's power to issue a cease and desist order under Insurance Code Sections 1065.1 to 1065.7 might be appropriate for central panel treatment. The staff has heard nothing to indicate this position is unsound, and recommends that the Department of Insurance administrative law judges not be considered for transfer to a central panel.

INTEGRATED WASTE MANAGEMENT BOARD, CALIFORNIA

Exhibit 2 is a letter from the General Counsel for the California Integrated Waste Management Board, expressing the views of the author but not necessarily those of the Board. The Board makes determinations regarding city and county integrated waste management plans and solid waste facility design, operation, and closure, and also determinations on the disbursement of grant and loan monies and the designation of delegated enforcement powers to units of local government. The board itself consists of six full-time appointed members who are experts in the field. Although the board makes the decisions, the board's staff does investigative, administrative, and enforcement work and makes recommendations to the board sitting in public session.

The General Counsel is negative to the concept of requiring central panel administrative law judges to conduct hearings for a number of reasons. (1) The board's procedure does not fit the traditional administrative hearing mold. (2) Administrative law judge hearings would add an unnecessary layer of bureaucracy to the process. (3) The board members and staff are all experienced professionals who are far more capable than a central panel administrative law judge of dealing with the enormous complexities in this field. The board has found that "its own abilities and that of its staff constitute the premier body of knowledge in the state and perhaps the nation on solid waste land use, environmental, public health and safety matters." (4) The General Counsel's experience with central panel administrative law judges in the past indicates the judges are adequate but "not particularly sensitive to the complex relationships between the industry and local and state government, and the interactions among the diverse technologies and strategies necessary to accomplish successful integrated waste management." (5) Potential conflicts of interest with

solid waste decision makers have been carefully studied in the past, resulting in a strengthening of the board by authorizing full-time professional membership.

Based on the information provided by the General Counsel, the staff recommends against a requirement that hearings of the California Integrated Waste Management Board be conducted by central panel administrative law judges at this time. The primary reasons for this recommendation are the particular expertise required of fact finders in this area and the procedure followed by the board which involves determinations based on evidence taken at public meetings by a full-time board. The Commission has made an initial determination that it will draft a new administrative procedure act that can be made applicable to proceedings of all state agencies. If the Commission ultimately concludes that the Integrated Waste Management Board should not be exempted from this requirement, it may be appropriate to reexamine the central panel issue at that time.

JUDICIAL PERFORMANCE, COMMISSION ON

Exhibit 3 is a letter from the Commission on Judicial Performance. The commission conducts administrative hearings on two types of matters--(1) judicial misconduct and involuntary disability retirement, and (2) voluntary disability retirement.

The first function is authorized by the state constitution, which also states that "The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings." Cal. Const. Art. VI, § 18(h). The Judicial Council Rules of Court provide procedures that include hearing officers who are members of the Commission on Judicial Performance itself or judges of courts of record appointed by the Supreme Court. The commission believes that this matter is constitutionally beyond legislative control, and that in any case the existing scheme is superior to assignment of an administrative law judge from a central panel. "We have had no problem with the use of judges and retired judges as hearing officers. Some judges have served several times. They have been neutral and fair, both in appearance and in reality. Their career path is not controlled either by the commission or the Supreme Court. They have at least as much expertise in judicial ethics as ALJs."

The staff agrees with this analysis and recommends against legislative intrusion into this system.

The second function of the Commission on Judicial Performance--approval of voluntary disability retirement applications by judges--is statutory. The statute requires no hearing and the commission reports that in the past the commission's procedure has been informal, with the commission itself being the finder of fact. They are in the process now of making the procedure more formal, probably with a judge of a court of record appointed as the hearing officer in a case. The objective of the formalization is to create a procedure parallel to judicial misconduct hearings.

While the commission acknowledges that the legislature could require a hearing by a central panel administrative law judge, it prefers to have as much control over the process as possible. "So long as the commission is given wide discretion in the setting of its own disability procedures, it should be able to appoint masters in much the same manner as it is empowered to do in discipline cases. Having this more uniform approach should facilitate the commission in processing both types of claims."

Because a hearing in this case is required by neither the constitution nor a statute, the voluntary disability retirement function is beyond the scope of our proposed administrative procedure act, and the staff recommends against the requirement of a central panel administrative law judge here. This does raise the issue, however, of whether in the course of our study we should recommend imposition of hearing requirements where appropriate. The Commission on Judicial Performance appears to recognize that a hearing requirement is appropriate here, since it is in the process of voluntarily establishing a hearing procedure.

OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

Exhibit 4 is a letter from the Occupational Safety and Health Standards Board. The board adopts occupational safety and health regulations and grants interim and permanent variances from the regulations. It employs one hearing officer whose duties relate to variance activities and who also provides legal advice to the board and

its executive officer. Hearings are conducted by a three-member panel consisting of the hearing officer and two board members (who are part-time gubernatorial appointees).

The board is opposed to removal of its hearing officer to a central panel for a number of reasons. (1) Past experience with central panel administrative law judges was unfavorable due to lack of understanding of the technical aspects of occupational safety and health and unresponsiveness to the need for informal hearings and development of an adequate hearing record. (2) The board needs to retain control over the hearing process so that it can respond in a timely manner; this is particularly important since variance applications are often involved with citation and abatement proceedings. (3) It would be more costly since the board would have to obtain part-time legal counsel to replace the loss of the hearing officer, and also would have greater hearing costs as a result of being billed for central panel overhead and other costs such as travel to variance hearings that the board would be unable to control.

The nature of the administrative hearing being conducted--to grant variances from regulations adopted by the board--leads the staff to conclude that the hearing officer of the Occupational Safety and Health Standards Board should not be removed to a central panel. The variance process has got to be policy-oriented and is intimately bound with the board's primary function of adopting regulations; the familiarity with agency policy is critical here and variance hearings should not be separated from the board's other functions.

PUBLIC EMPLOYMENT RELATIONS BOARD

Exhibit 5 is a letter from the Public Employment Relations Board, which unanimously opposes reassignment of its administrative law judges to a central panel. The board resolves labor disputes between public school employers and their employees, the State of California and its employees and employee representatives, and the University and State University systems and their employees and employee representatives.

The board opposes use of central panel administrative law judges for the reasons that: (1) The board deals exclusively in the specialty area of public labor relations and requires trained specialist hearing

officers in that field. (2) The board is charged with responsibility for timely resolution of disputes and must have full control over case processing; "control and accountability would be lost if the ALJs were not subject to agency direction for case processing". (3) Public Employment Relations Board administrative law judges are exempt from the labor relations law applicable to other state-employed administrative law judges, so they can preside over labor disputes between the other administrative law judges and their state employer; independence and neutrality is necessary for this function.

The board points out that the reasons for having central panel administrative law judges do not apply to it--it is a neutral party that has no stake in the labor disputes it presides over and its administrative law judges are likewise independent. The staff agrees with this analysis and believes a case has not been made to alter the manner in which the Public Employment Relations Board performs its quasi-judicial functions.

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

We have received a telephone call and letter (Exhibit 6) from the Staff Counsel for the San Francisco Bay Conservation and Development Commission. That commission will not be meeting until after the Commission's May meeting and therefore will be unable to respond. They request that the Commission not act with respect to that agency until they have had an opportunity to respond. The staff believes it is important to have the input of an affected agency before making any tentative recommendations with respect to that agency and has assured the agency that the Commission will not do so. The staff therefore recommends that the Commission defer consideration of this matter with respect to the San Francisco Bay Conservation and Development Commission.

UNEMPLOYMENT INSURANCE APPEALS BOARD, CALIFORNIA

Exhibit 7 is a letter from the California Unemployment Insurance Appeals Board. The board is an independent and autonomous body whose functions are purely adjudicatory; it decides disputes between parties that are external to it. Administrative law judge personnel matters

are controlled by the board and are not subject to review by any of the parties whose cases the administrative law judges rule upon.

The board opposes removal of its administrative law judges to a central panel for a number of reasons, including: (1) There is no reason for such a relocation, since the integrity of the administrative hearing process is assured by the independence of the board. (2) Such a relocation would not be cost-effective since the board as currently constituted processes disputes efficiently and economically. (3) There is a large workload and tight time restrictions which the board must meet. (4) This is a joint federal-state program which is federally-funded; apportionment to central panel funding would be difficult. The board also mentions professionalization within the board's administrative law judge corps and the fact that a significant number of the judges themselves would be opposed to removal to a central panel. The board notes that the concern that has been expressed about administrative law judge burnout could be addressed by an exchange program among agencies that employ administrative law judges.

The Commission's consultant, Professor Asimow, has recommended to the Commission that the board's administrative law judges not be transferred to a central panel. He notes that the parties to disputes adjudicated by the board are external to it and thus it possesses no built-in conflict of interest; the Department of Labor might object to any change in board procedure that might cause a failure to meet the strict DOL time limits for disposal of cases; board judges are dispersed throughout the state so that new office space might have to be obtained; and the volume of cases is immense, so that administrative law judges from a central panel could have difficulty accommodating to the quite different work style required at the board. The staff agrees there does not appear to be a good reason to remove the administrative law judges from the California Unemployment Insurance Appeals Board.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

STATE OF CALIFORNIA
GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF INSURANCE
Administrative Law Bureau
100 Van Ness Avenue
San Francisco, CA 94102

May 16, 1990

Edwin K. Marzec, Chairperson
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94303-4739

Re: Proposal to Create Central Panel of Administrative Law Judges

Dear Mr. Marzec:

Thank you for the invitation to comment upon the proposal to be considered by the Law Revision Commission on May 31 concerning creation of a single administrative law judge corps under the jurisdiction of the Office of Administrative Hearings. The proposed consolidation would have certain advantages but, overall, I believe that the best interests of insurance consumers, the state and the insurance industry will be better served by retention of the present statutory scheme, under which Department of Insurance hearings are conducted by its own cadre of ALJ's.

Proposition 103, passed by the voters in November 1988, empowered the Insurance Commissioner to appoint ALJ's. Under the Insurance Code, the Department's judges are authorized to preside at hearings in specified types of cases required to be conducted in accordance with the Administrative Procedure Act. The judges also are authorized to conduct the Department's non-APA hearings, involving the wide spectrum of subject areas which are within the Department's quasi-judicial powers.

The fact-finding task of the ALJ in a majority of the hearings conducted by the Department of Insurance requires a high level of technical knowledge, one of the principal reasons for not removing the Commissioner's authority to appoint a bureau of specialist ALJ's. As an example, under the provisions of the Insurance Code added by Proposition 103, all rate changes by insurers must be approved in advance by the Commissioner. An APA hearing concerning

the proposed rate may be held by the Department at the instance of the insurer, a consumer or the Department. In addition to a thoroughgoing knowledge of the applicable insurance regulatory law, competent adjudication of such a case requires familiarity with actuarial science, including rate-making concepts and methods, statistical analysis, generally accepted accounting principles, statutory accounting methodology, and general economic principles. Each of these areas is in itself a specialized body of knowledge.

I believe that control of ALJ appointment and training by the Department of Insurance is required to guarantee that its hearings are conducted by qualified specialists. The Department's personnel, technical resources, library and in-house training are available to its ALJ's and the Department encourages and assists them to enroll in outside educational courses. This level of specialized training would not be feasible were the Department's judges to be transferred to another agency.

An additional reason why it is in the public interest for the Department to retain its panel of judges is the efficiency with which the present system has enabled the Department to manage a high volume of cases. Proposition 103 has added hundreds of cases each year to the Department's administrative hearing calendar and court rulings on the new law also have affected the volume of hearings. It is of utmost importance to the public and the regulated industry that the Department have the capability immediately to respond to the rapid changes in hearing requirements.

If you have any questions concerning the foregoing comments, please do not hesitate to call.

Very truly yours,

Fermin J. Ramos

FERMIN J. RAMOS
Assistant Commissioner

FJR:gg

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD
1020 NINTH STREET, SUITE 300
SACRAMENTO, CALIFORNIA 95814

May 14, 1990

Edwin K. Marzec, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Attn: Nat Sterling

Re: Conduct of Administrative Hearings

Dear Chairperson Marzec:

Chairman John E. Gallagher asked me to reply to your letter on your pending investigation of administrative hearings. As the General Counsel (staff) for over ten years to the Board, I would like to share my views with you as you begin your work in this area. Should it become necessary for the appointed Board to consider a position on your recommendations or legislation stemming from them, the Board would be able to do so, as it normally follows legislation affecting its mission.

The California Integrated Waste Management Board (CIWMB) is authorized as an appointed board of six full-time members whose responsibility and authority involve conducting its business in public by holding noticed meetings at least monthly. It performs both legislative and quasi-adjudicatory functions during these meetings, by considering and voting on policies and regulations, as well as statutorily required determinations regarding city and county integrated waste management plans and solid waste facility design operation and closure. The Board will also consider determinations on the disbursement of grant and loan monies and the designation of delegated enforcement powers to units of local government.

During the history of solid waste management law, neither this Board nor its predecessor organizations have ever been subject to the hearing requirements of the California Administrative Procedures Act (CalAPA). Particularly in its quasi-adjudicatory functions, the Board has always taken testimony and made its determination on the preponderance of the evidence, with its decisions reviewed nominally under the substantial evidence rule.

The California Integrated Waste Management Board and its predecessor organizations have been enabled because of and constituted with membership possessing the particular expertise needed in this esoteric environmental and public health and safety regulatory field. It has generally found that its own abilities and that of its staff constitute the premier body of knowledge in the state and perhaps the nation on solid waste land use, environmental, public health and safety matters.

Your letter does not indicate how the proposal you are considering might differ from the current use of the existing Administrative Law Judge (ALJ) corps of the Office of Administrative Hearings (OAH). It has been my experience that where matters involving the Board required CalAPA hearings, the specific knowledge of the OAH ALJs was adequate, but not particularly sensitive to the complex relationships between the industry and local and state government, and the interactions among the diverse technologies and strategies necessary to accomplish successful integrated waste management.

In my over twenty years of study and practice in the administrative law field I have always strongly supported the use of Chancellors or Special Masters, primarily as a substitute for the general civil court process or where an administrative agency is a bureaucratic department and does not have the ability to have hearings conducted using Fact Finders who are separate from staff. In the case of the California Integrated Waste Management Board, the Board has been reconstituted as a **full-time** body of experts in the field who possess the decision making powers apart from the staff who does investigative, administrative and enforcement work and makes recommendations to the Board sitting in public session.

It would appear that, in the case of the California Integrated Waste Management Board, the overlaying of an administrative hearing process would unnecessarily duplicate the functions of either the Board or the staff. Furthermore, with the imminent implementation of new, complex legislation in integrated waste management, no centralized hearing officer corps could amass the knowledge necessary to handle the matters which come before the Board. Because a "body of experts" has already been authorized under the new California Integrated Waste Management Act of 1989, no economies in decision-making would be realized, if the duplicate efforts of the ALJ corps were applied to the Board's required hearing and decision-making process. The issue of potential conflicts of interest with solid waste decision makers has been thoroughly studied for many years, resulting in the strengthening of the California Integrated Waste Management Board, by authorizing a full-time professional membership.

Thank you for allowing me to share my views as the General Counsel of the Board with you. If you desire further information about the Board or the views expressed above, please contact me directly.

Sincerely,

Robert F. Conheim
General Counsel

cc: John E. Gallagher, Chairman

State of California
Commission on Judicial Performance
1390 Market Street, Suite 304
San Francisco, CA 94102
(415) 557-2503
Fax (415) 557-3901

May 14, 1990

Edwin K. Marzec, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Conduct of administrative hearings

Dear Mr. Marzec:

Thank you for your letter of May 3, 1990, concerning the proposed use of a central staff of ALJs when "an administrative hearing of a state agency is required by statute."

The Commission on Judicial Performance has two quite separate functions:

+ First, it hears complaints about judicial misconduct and imposes or recommends discipline. It may also recommend involuntary disability retirement. The commission's authority in this area derives from the Constitution, Article VI, sections 8 and 18 -- not from statute.

+ Second, the commission receives and rules upon judges' applications for disability retirement -- a responsibility it shares with the Chief Justice. The commission's role in voluntary disability retirement was imposed by the legislature in the Government Code, sections 75060 - 75064.

We enclose a copy of our latest annual report, which discusses our activities and reprints the relevant constitutional provisions, statutes, court rules, and other laws. In this letter we will discuss your proposal as it applies to these two separate areas.

Judicial Discipline & Involuntary Disability Retirement

Article VI, section 18, of the Constitution assumes that the commission will hold "formal hearings" in at least some disciplinary matters, including involuntary removal for disability, but does not specify what those hearings consist of. Power to define commission procedure was given to the Judicial Council in section 18(h), which states:

> **The Judicial Council shall make rules implementing this section.**

It appears the legislature has little or no authority in the area, although there are a few statutes which deal with the commission (Government Code, sections 68701 - 68755). These statutes are supplementary to the rules made by the Judicial Council. The statutes deal with such matters as commission expenses, the duty of other governmental agencies to cooperate, witness fees, oaths, subpoenas, and so on.

The rules made by the Judicial Council are Rules of Court, rules 901 - 922. The most significant rule for your inquiry is Rule 907:

> **On filing or on expiration of the time for filing an answer [to the Notice of Formal Proceedings], the commission shall order a hearing to be held before it concerning the censure, removal, retirement or private admonishment of the judge. In place of or in addition to a hearing before the commission, the commission may request the Supreme Court to appoint three special masters to hear and take evidence in the matter, and to report to the commission. On a vote of two-thirds of the members of the commission and with the consent of the judge involved, the commission may request the Supreme Court to appoint one special master in place of three special masters. . .**
>
> **Special masters shall be judges of courts of record. When there are three special masters, not more than two of them may be retired from courts of record. The commission shall set a time and place for hearing before itself or before the masters. . .**

Rule 907 completely defines the type of hearing officer in judicial disciplinary proceedings: hearing officers must be the commission itself or judges of courts of record appointed by the Supreme Court. In the commission's view, the Judicial Council has sole constitutional authority in this area. It seems the plan proposed in your letter could not be applied to our disciplinary hearings.

Even if the legislature had authority here, the commission believes Rule 907 is sound. Fortunately, judicial disciplinary hearings are rare, running about two a year. We have had no problem with the use of judges and retired judges as hearing officers. Some judges have served several times. They have been neutral and fair, both in appearance and in reality. Their career path is not controlled either by the commission or the Supreme Court. They have at least as much expertise in judicial ethics as ALJs.

In short, the commission believes the legislature should not attempt to change a system that is working well in this area.

Voluntary Judicial Disability Retirement

Government Code section 75060(a) provides:

> **Any judge who is unable to discharge efficiently the duties of his or her office by reason of mental or physical disability that is or is likely to become permanent may, with his or her consent and with the approval of the Chief Justice or Acting Chief Justice and the Commission on Judicial Performance, be retired from office. The consent of the judge shall be made on a written application to the Commission. . .**

Although the Government Code goes on to mention various limitations and presumptions affecting the application, it does not lay out an over-all procedure for handling disability applications. In particular, no statute expressly requires an administrative hearing before a hearing officer.

For many years the commission has been ruling upon applications by considering all evidence submitted by the applicant, sometimes referring the applicant to independent experts, sharing the experts' reports with the applicant, and receiving any further evidence which the applicant may care to submit. In other words, the commission itself has been the fact-finder, and the process has been entirely or almost entirely on paper. There have been no hearing officers.

Very recently, however, the commission decided to make the application process more "formal." The commission will soon set forth a step-by-step procedure. The process will probably include reference to a special master. The master will have the power to take evidence and to make a report to the commission with proposed findings. As of now, it is the commission's intention to appoint a judge of a court of record as special master in each contested case.

The legislature, having created the commission's authority over voluntary disability retirement applications, apparently can specify whatever procedure it wishes the commission to follow. The legislature could specify, for instance, in what circumstances the commission should hold a hearing. The legislature could also specify what sort of hearing officer should hear the case, and what the officer's powers are. If the legislature wants an ALJ from a central staff to hear disability applications, it could pass a statute to that effect. (However, such legislation should be drafted clearly, specifying the Commission on Judicial Performance by name.)

Does the commission want these applications to be heard by ALJs as you propose? If the commission is to handle these applications at all, it prefers to have as much control over the process as possible. So long as the commission is given wide discretion in the setting of its own disability procedures, it should be able to appoint masters in much the same manner as it is empowered to do in discipline cases. Having this more uniform approach should facilitate the commission in processing both types of claims.

In summary, the commission is opposed to the use of ALJs in disciplinary matters on both constitutional and policy grounds. As to voluntary disability matters, the commission would prefer to retain control over the appointment of special masters.

I hope this gives you the information you need. If I can be of further help, please let me know.

Sincerely,

Jack E. Frankel

JACK E. FRANKEL

JEF:JP:pmh

Attachment

cc: Honorable Arleigh Woods, Chairperson

STATE OF CALIFORNIA—DEPARTMENT OF INDUSTRIAL RELATIONS GEORGE DEUKMEJIAN, Governor

OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD
1006 FOURTH STREET
SACRAMENTO, CA 95814-3372
(916) 322-3640

May 15, 1990

Mr. Edwin K. Marzec
Chairperson, California Law
Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Conduct of Administrative Hearings

Dear Mr. Marzec:

This is to respond to your May 3, 1990 letter addressed to Chairwoman Mary-Lou Smith which provides an opportunity to comment on the concept of a central panel of administrative law judges and hearing officers to conduct hearings for state agencies.

The Occupational Safety and Health Standards Board is the standards setting agency within the Cal/OSHA program. In addition to maintaining a large body of occupational safety and health regulations, the Standards Board can grant interim and permanent variances from occupational safety and health regulations and is the review or appeals body regarding the granting or denial of a temporary variance by the Department of Industrial Relations.

The Standards Board consists of seven part-time board members appointed by the Governor and a small staff of 17 authorized positions including one hearing officer. Most of the hearing officer's duties relate to variance activities and workload generally allows the hearing officer to also provide legal advice to the Standards Board and its Executive Officer.

The Standards Board's variance hearings are fairly unique to the typical adjudicatory administrative hearings. Any employer may apply to the Standards Board for an interim or permanent variance from any regulation or portion thereof upon showing of an alternate program, means, method, device or process that will provide equal or superior safety for employees. Variance hearings are conducted by the hearing officer and two board members are generally assigned to a hearing panel depending upon the complexity of the issues involved.

Variance hearings are generally informal and designed to be accessible to all parties since most variance applicants are small employers whose employees are not represented. Thus, applicants for variances and employees having party status generally represent themselves and do not hire attorneys. However, a proper record must be established and it is up to the hearing officer to ensure that all parties' positions are accurately reflected in the record.

Following the hearing, the hearing officer, as instructed by the panel, drafts a proposed decision. The Board, by majority vote, may adopt the proposed decision or decide the case itself. The decision contains both a summary of evidence and the reasons for the decision.

The Standards Board is opposed to losing its own hearing officer who becomes familiar with the technical aspects of occupational safety and health, for the following reasons:

1. Past experience with variance hearings conducted by the Office of Administrative Hearings has been unfavorable because its administrative law judges did not understand the program, respond to the Board's desire for informal hearings or the need to aid the parties in developing the record.

2. The experience of variance hearings conducted by hearing officers of the Occupational Safety and Health Appeals Board was an improvement over hearings conducted by the Office of Administrative Hearings but still less favorable to those conducted by the Standards Board's own hearing officer. (The Occupational Safety and Health Appeals Board hears appeals from Cal/OSHA enforcement actions i.e., citations, civil penalties and abatement requirements).

3. By controlling its own hearings, the Standards Board can respond in a more timely manner recognizing that the safety and health of workers is generally affected. This is especially so since applications for a variance are often prompted by a citation for violating a regulation, which if appealed, stay the abatement requirements.

4. The Standards Board would need to obtain a part-time attorney to provide legal services to the Board and its Executive Officer, thus increasing the Board's costs.

5. The Standards Board would undoubtedly be billed for a prorated portion for supervision and the administrative/overhead costs of a central hearing panel agency, thus increasing the Board's costs.

6. The Standards Board would not be able to control some of the expenditures related to variance hearings such as travel costs, which may increase the Board's costs.

Thank you for the opportunity to express our views. Should you have any questions regarding these comments or the operations of the Standards Board, please let me know.

Sincerely,

STEVEN A. JABLONSKY
Executive Officer

cc: Chairwoman Mary-Lou Smith
and Board Members
Ron Rinaldi, Director, Department of Industrial Relations
John Rea, Chief Counsel, Department of Industrial Relations

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3088

May 15, 1990

Edwin K. Marzec
Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Marzec:

This is in response to your invitation for the views of this agency to the concept of a central administrative law judge corps or central panel presently being considered by the California Law Revision Commission.

The Public Employment Relations Board is unanimously opposed to the reassignment of administrative law judges (ALJ) employed by the agency to a central panel.

The California Legislature has delegated to the Public Employment Relations Board exclusive jurisdiction over employer-employee relations in the public schools, state government and higher education institutions. This delegation of authority was predicated upon the highly specialized nature of labor law governing such relations and the need for specialists to adjudicate disputes in the public sector arena. The nuances of the specialty would be lost in the use of a panel of ALJs who are without the training and acclimation required for labor law adjudication.

The agency is charged with full responsibility for case processing of unfair practice charges and representation matters. This responsibility includes accountable processing of cases to insure timely resolution of disputes. Full control over case processing is imperative to meet this accountability. That control and accountability would be lost if the ALJs were not subject to agency direction for case processing.

An additional reason for opposing such a reassignment is that PERB ALJs preside over disputes involving all other state-employed ALJs in their labor relations with the State of California as their employer. Accordingly, PERB ALJs are exempt from the labor relations law applicable to state employees. PERB's absolute neutrality would be lost if its ALJs were part of a group of employees over whom PERB exercises jurisdiction.

The basic justification offered in support of the central panel is to prevent unfairness, or the appearance of unfairness, by

having ALJs employed by an agency who is also a party to disputes addressed by the ALJ. In support of this contention is the notion that the ALJ's career path should not be controlled by the agency against which the ALJ may make an adverse decision. The rationale does not apply to PERB.

PERB resolves disputes between public school employers and their employees, or employee representatives, the State of California and its employees and employee representatives, and the University and the State University systems and their respective employees and employee representatives. Thus, PERB is a neutral and has no stake in the outcome of any litigation over which the PERB ALJs preside.

Nor does the agency have influence on the decision of an ALJ presiding over an unfair practice dispute. While the ALJ is bound to follow PERB precedent, he or she issues the proposed decision based upon his or her own conclusions, and without prior review by the Board. Upon issuance of a proposed decision to the parties, they or either of them may appeal the decision to the Board itself. In the absence of such an appeal, the proposed decision is final and binding on the parties.

The suggestion has been made that agency concerns about specializations could be resolved by making "divisions" within the panel of ALJs, reflecting the specializations. That approach would not resolve our concerns over accountability for case processing, or the conflict in collective bargaining rights of non-PERB ALJs and PERB ALJs presiding over such disputes. Finally, because PERB is not a party to the proceedings, we see no need for altering the manner in which this agency performs its quasi-judicial functions.

Thank you in advance for considering our views on the question. We appreciate the opportunity to comment and wish to be kept informed of the Commission's recommendations.

Sincerely,

Deborah M. Hesse
Chairperson

DMH:em

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION
THIRTY VAN NESS AVENUE, SUITE 2011
SAN FRANCISCO, CA 94102-6080
PHONE: (415) 557-3686

May 10, 1990

CA LAW REV. COMM'N
MAY 15 1990
RECEIVED

Mr. Nat Sterling
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

SUBJECT: Conduct of Administrative Hearings

Dear Mr. Sterling:

Thank you for discussing with me the May 3, 1990 letter from Edwin Marzec to Robert Tufts. As I stated, Mr. Tufts believes that the proposal contained in that letter is so important to the Bay Commission that the Bay Commission should discuss this proposal before it submits any comments. The Commission will not meet again until June 7, 1990 so that it cannot offer its comments until after that time. Mr. Marzec's letter states that comments should be received prior to May 31, at which time the Law Revision Commission will consider this proposal. Therefore, we greatly appreciate your statement that the Law Revision Commission will accept the Bay Commission's comments before the Law Revision Commission takes any action on the proposal.

Very truly yours,

JONATHAN T. SMITH
Staff Counsel

State of California - Health and Welfare Agency

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
714 P Street, Room 1750
P. O. Box 944275
Sacramento 94244-2750 **(916) 445-5678**

May 14, 1990

Edwin K. Marzec, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Administrative Law Judge Central Panel

Dear Mr. Marzec:

I am writing in response to your letter of May 5, 1990, and to provide you with this Board's position on the concept of removing all administrative law judges to a central panel.

Initially, we note that the central panel that exists in the Office of Administrative Hearings has proven quite effective in its current application. Doubtless, the panel could be expanded to include the adjudicatory functions of other agencies, where it can be established that the independence of the ALJs and the integrity of the decision-making process is compromised by the existing structure. We do not believe that such an argument can be made in the case of California Unemployment Insurance Appeals Board (CUIAB) ALJs and this Board would oppose the removal of its ALJs to a central panel.

You state in your letter that the central panel is a matter that has received strong support from a number of ALJs. Certainly, there are a number of individuals who favor the concept. Although CUIAB ALJs have not been polled on the subject, a significant number are known to oppose being removed to a central panel. Moreover, we note that Professor Asimow polled ALJs at two agencies (WCAB and PUC) where ALJs might have been considered likely to support a central panel and found that they actually opposed the idea by a margin of 47 to 37. Thus, while individual ALJ support provides, at most, a collateral reason for a central panel, it appears that even this marginal justification does not exist.

You state in your letter that a key argument for a central panel is that a neutral hearing officer can help achieve both fairness and the appearance of fairness. You note the particular significance of a situation where a hearing officer's career path may be controlled by the agency against which the officer may make an adverse decision.

We agree with these sentiments. We wish to draw your attention to the fact that the CUIAB is an independent and autonomous body. Its functions are purely adjudicatory. It enjoys the status of a department of state government. All parties to cases heard and decided by the CUIAB and its ALJs are external to it. All personnel matters such as hiring, promotions, assignmesnts, etc., are performed within the CUIAB and are not subject to review, criticism, or any other type of input from any other entity, including the Employment Development Department. To underscore this point, in its status as a party, the EDD may file mandamus actions against the CUIAB in superior court. We are currently litigating four such cases, including two that have reached the court of appeals. Further, in an appropriate case, the CUIAB has and exercises the authority to declare EDD regulations invalid. The CUIAB also issues certain of its decisions as precedents which are binding on EDD for the legal principles set forth in those decisions.

You also state that centralization would result in greater economy. We seriously doubt that a central panel could adjudicate unemployment insurance and related disputes more economically than is currently being done by CUIAB. At the May 31 meeting, I will present figures citing a cost per disposition at CUIAB's lower authority and higher authority. These figures will be by the year for a multivear period and will represent all costs associated with a disposition. I anticipate that the Commission's staff will have presented it with comparable figures from OAH so that the validity of this point can be examined in the light of hard data.

You note the success of the current central panel in OAH and state that professionalism of the ALJ corps might be enhanced by centralization. We do not doubt the success of OAH as presently constituted. We do not believe, however, that centralization would have any particular effect on professionalism. There are several factors which affect professionalism, not the least of which is an enlightened management. Most critical is the attitude of the ALJs themselves. For many years, CUIAB ALJs have had their own organization, the Administrative Law Judges Association. This group, which enjoys the full support of the Appeals Board itself, has

worked diligently to enhance the stature of ALJs and to provide for education and training, including scholarships to the National Judicial College. It sponsors an annual Forum, open to the public and aimed at the main CUIAB constituent groups, including organized labor, legal aid groups, employer management, and EDD staff. It is difficult to see how removal of CUIAB ALJs to a central panel would in any positive way affect ALJ professionalism.

You mention loss of expertise as a potential problem area. Specialization is a necessary factor in most areas of administrative adjudication, but it takes on an added dimension in the case of unemployment insurance and related law.

Currently, CUIAB's ALJs at the lower authority are calendared to hear 28 cases per week. Approximately 70% of all appeals are heard and decisions issued within 30 days of the appeal being filed. The time limit is a regulatory requirement of the federal Department of Labor. These time limits must be kept while providing full due process of law to the parties at every stage of the proceedings, including statutorily required statements of fact and reasons for decision in every decision. Thus, it is not simply a question of specialization but also one of what Professor Asimow termed an immense workload coupled with rigid time requirements.

The unemployment insurance program is a joint federal-state effort. The essential parameters of the program are set forth in federal law (26 USC 3301 et seq., 42 USC 501 et seq.). The administration for the program, including appeals, is federally funded. Only a fractional portion of CUIAB's funding comes from state funds, and then from dedicated monies. It would be difficult at best to provide funding to what would have to be a dedicated portion of the central panel devoted to CUIAB cases. A cumbersome bureaucratic apparatus would have to be constructed to sort out the funding morass that would result from centralization.

One of the opportunities presented by a central panel that makes the concept attractive is the variety of cases that its ALJs hear. Because of this, central panel ALJs presumably are less prone to job burnout than are ALJs who hear the same type of cases year in and year out. Currently, there is movement of ALJs among various agencies but the transfer procedure is slow and cumbersome. Perhaps an apparatus could be established to facilitate the movement of those ALJs who want to hear different cases to other agencies for a specified term. In this way, ALJs could get the variety and stimulation and avoid the burnout without the necessity of being removed to a central panel.

The complications noted above raise a larger question of the desirability for CUIAB ALJ centralization in the first place. The CUIAB is an organization that is now operating at a high level of efficiency, effectiveness, and economy. Centralization does not appear to offer any opportunities to improve an organization that is working well now. The ills that a central panel has proven to cure so well are not present in CUIAB.

Thank you for the opportunity to comment on the ALJ central panel concept. We look forward to meeting with you on May 31.

Very truly yours,

TIM McARDLE, CHIEF COUNSEL