#N-103

ns43
06/27/90

Memorandum 90-89

Subject: Study N-103 - Administrative Adjudication (ALJ Central Panel--more information)

BACKGROUND

At the May 31 meeting the Commission had before it letters from various state agencies objecting to the concept of having their administrative law judges removed to a central panel or having their hearings conducted by central panel administrative law judges. The Commission also heard oral presentations to the same effect from representatives of a number of agencies.

Since that time we have received additional letters objecting to the concept. We have also received copies of material requested by the Commission from agency representatives who spoke at the meeting.

This memorandum summarizes the new information we have received, and gives staff recommendations for resolving the ALJ central panel issue. Information we receive from proponents of the central panel directed to specific state agencies will be presented in supplementary memoranda.

AGENCY OBJECTIONS

The additional letters we have received from agencies objecting to the ALJ central panel for their operations are attached as Exhibits to this memorandum and are summarized below.

Agricultural Labor Relations Board

The Agricultural Labor Relations Board (Exhibit 1) unanimously objects to the concept of removal of their three administrative law judges to a central panel. "This is based on the specialization of practice before this Board, the need for Administrative Law Judges with demonstrated expertise in this area of law, and the organizational

structure which guarantees the independence of the Administrative Law Judge unit, patterned after the National Labor Relations Board." The Board also points out that it has used administrative law judges provided by the Office of Administrative Hearings in the past and found the decisions to be overly general in nature. The staff notes that we have previously received a communication directly from the three administrative law judges in question objecting to their removal for these and other reasons. See Second Supplement to Memorandum 90-72.

Corrections, Department of

The Department of Corrections (Exhibit 2) objects to the required use of central panel judges for specific administrative determinations made by the Department that are identified in their letter. The staff agrees with the analysis in their letter, so far as it goes. But the letter fails to mention other hearings conducted by the Department of Corrections, specifically hearings to award, deny, or revoke good time and participation credits for prisoners. Penal Code §§ 2931-2932. The statute specifies procedures and requires a hearing by a person independent of the case.

Motor Vehicles, Department of

The Department of Motor Vehicles (Exhibit 3) notes that all of its occupational license hearings with respect to the automobile industry are conducted by administrative law judges of the Office of Administrative Hearings. However, with respect to drivers' license hearings, the department employs 250 Driver Improvement Analysts who perform, in part, hearing officer functions. These persons are not required to be attorneys, and the hearings they conduct include vision tests, written tests, driving tests, and medical evaluations, as well as more standard hearing procedures. This enables the department to conduct a high volume of hearings efficiently and at low cost. The department would not support removal of this function to a central panel.

In this connection, the staff notes that the Commission's consultant, Professor Asimow, in his report to the Commission, did not find the case persuasive for transferring judges from the department to a central panel:

> The arguments for placing DMV hearing officers into an independent agency seem weak. DMV hearing officers are usually not lawyers and are experts only in motor vehicle law. In the case of the DMV, they hear relatively simple cases in high volume that other ALJs might not be much interested in deciding. By the same token, DMV hearing officers are not qualified by training or experience to hear cases from other agencies. Thus the case for independence for DMV hearing officers is not compelling.
>
> Asimow, Administrative Adjudication: Structural Issues 45 (1989) (omitting the references to State Board of Equalization).

Personnel Administration, Department of

The Department of Personnel Administration (Exhibit 4) manages the nonmerit aspects of the state's personnel system. The department uses State Personnel Board hearing officers to hear employee appeals to the department. Also, the department itself, in its capacity as the party representing the interests of the state employer, appears before administrative law judges of the Public Employment Relations Board.

The department is opposed to the ALJ central panel concept either for its own functions or for those of the Public Employment Relations Board. The department makes the following points:

(1) The hearing officers are expert in the specialized area of public employment relations law and civil service law. Continuation of the expertise is ensured by hiring persons with the requisite background, which would be lost in a central panel setting.

(2) The quality of decisions will be degraded by the lack of specialization, which will result in additional appeals and further hearings on remand.

(3) Removal of public employment relations administrative law judges to a central panel will create a conflict of interest every time a central panel judge hears a collective bargaining or wage dispute involving other central panel administrative law judges. Right now independence is ensured by exclusion of the specialized judges employed by the Public Employment Relations Board from collective bargaining.

(4) There will be no real increased efficiency or cost savings from centralization, since one large central panel will lead to generally higher ALJ wages and to a bureaucracy of ALJ supervisors and managers that doesn't presently exist.

San Francisco Bay Conservation and Development Commission

The San Francisco Bay Conservation and Development Commission (Exhibit 5) holds hearings using commissioners and alternate commissioners. The commission is unanimously and strongly opposed to requiring use of a central panel hearing officer for its hearings because (1) its current procedures are fair, (2) it is efficient to use people familiar with the technical and highly specific planning matters at issue, and (3) it would involve substantial additional costs to the commission.

This position is supported by a letter from Sylvia K. Gregory (Exhibit 6), a Citizens Advisory Committee member who has attended and watched the commission since 1969. She believes use of an administrative law judge would make an undesirable change in the way the commission operates, and would cause many permits to be automatically granted as a result of administrative hearing delay.

SUPPLEMENTAL INFORMATION REQUESTED BY COMMISSION

At the May 31 Commission meeting, the Commission requested supplemental information from a number of agency representatives who appeared at the meeting. To date we have received the following information in response to these requests.

Banking Department, State

The State Banking Department may use either its own personnel or administrative law judges from the Office of Administrative Hearings to conduct the department's hearings. The Commission asked Brian Walkup, Legislative Counsel for the department, for more information about how the determination is made whether to use in-house or OAH hearing officers. Mr. Walkup's letter (Exhibit 7) indicates that the department uses administrative law judges from OAH for license application denial hearings and other hearings on less urgent matters. In matters of urgency (and to a lesser extent, in matters which are either very minor or exceedingly complex), the services of OAH have been either unavailable or deemed to be unsuited to the subject matter, and in-house personnel have been used.

Equalization, State Board of

The Commission asked Gary Jugum, Assistant Chief Counsel for the State Board of Equalization, for a statement of the qualifications required of board hearing officers. Mr. Jugum's letter (Exhibit 8) states that the board does not use the administrative law judge classification, since their hearing officers do not issue subpoenas or take sworn testimony nor is a record made of the preliminary hearings. The board uses the general civil service staff counsel classifications. Specifications for those qualifications are attached to his letter.

Unemployment Insurance Appeals Board, California

The Commission asked Tim McArdle, Chief Counsel for the California Unemployment Insurance Appeals Board, for copies of the board's procedural rules, decision-writing manual, and compilation of precedential decisions. Exhibit 9 is Mr. McArdle's transmittal letter. Attached to it were copies of the requested materials, which are far too voluminous to reproduce here. However, they are available for review by the staff and for inspection, on request, by Commissioners.

STAFF'S RECOMMENDATIONS FOR RESOLVING ISSUE

The issue of centralization of administrative law judges is one of the major issues to be resolved by the Commission in the administrative law study; it is one of the reasons for the study. We have now reviewed quite a bit of information on the issue, including a report from the Commission's consultant, information from other central panel jurisdictions, oral presentations by proponents of a broader central panel in California, and written and oral presentations by individual agencies opposed to removal of their hearing officers or hearing functions to a central panel.

The main argument in favor of broader use of the central panel is that central panel administrative law judges are independent of the agency and therefore are able to give hearings that are fair both in

appearance and in fact. Other benefits of centralization are felt to be economy, efficiency, and improved working conditions for administrative law judges.

The arguments presented by the agencies against use of central panel ALJs include:

(1) The area dealt with by the agency is a specialized area for which special knowledge and expertise is necessary, which would not be possible to maintain in a central panel setting.

(2) The agency is a high volume operation that must deal with cases in a way far different from the typical central panel ALJ hearing.

(3) The cases dealt with by the agency take months or even years to complete, so they would not be appropriate for central panel treatment.

(4) The cases dealt with by the agency are time-sensitive, and the agency must be able to control the administrative law judges in order to control processing of the cases.

(5) The agency manages federal funds, which are subject to regulations requiring that the agency itself resolve the issues.

(6) The agency's board is charged with responsibility for deciding issues and the board itself hears the cases; the board does not wish to delegate this responsibility to a hearing officer, and removal of this function to the central panel is inappropriate.

(7) The agency's hearing procedure is constitutionally exempt from legislative control.

(8) The whole purpose of the agency is to be a neutral appeals board; removing the hearing officers to a central panel will serve no useful purpose.

(9) The agency's hearing officers are also part-time legal advisers; removal of the hearing officers will cause increased expense for legal advice.

(10) The agency has used central panel officers occasionally in the past, but the experience was not wholly satisfactory.

(11) The agency conducts informal hearings; it would be inappropriate to formalize the hearings and a waste of money to have a highly-paid administrative law judge conduct the informal hearings.

The single most significant conclusion to be drawn from all of this, in the staff's opinion, is that generalizations cannot be made. Every agency is unique and has its own particular needs that must be taken into account in making decisions that could affect the operations of the agency. That having been said, the staff will now proceed to make a number of generalizations about this matter and suggest a method for Commission resolution of the issue.

First, the staff does not believe the proponents of an enlarged central panel have made a compelling case for a general removal of hearing officers to the central panel. The concept of fairness and the appearance of fairness is fine in theory, but we have yet to see any evidence of unfairness or a perception of unfairness in a state agency. This was also the finding of the Commission's consultant. However, we have asked the proponents of an expanded central panel to give us specifics, and they may be forthcoming.

Second, the overall impression the agencies convey is that their systems are geared to their particular needs and are functioning well now. Why disrupt a process that works in exchange for one that may not work as well, absent a compelling reason to do so?

Third, it is unlikely there would be savings to the state, and there could be increased costs for some agencies. The Department of Finance in 1977 conducted a fiscal study of the concept of statewide centralization of administrative law judges at the request of the then director of the Office of Administrative Hearings. The department's study concluded it was not clear any savings would result. There is also no concrete evidence from other central panel states of any significant savings. One reason for this, besides the greater bureaucracy involved in centralization, is the likelihood that centralization would lead to a leveling upward of minimum qualifications and salary ranges among the wide range of lay and professional hearing officers and administrative law judges that exists today. This is recognized in the Department of Finance study and is a basis of opposition from the Department of Personnel Administration, which comments, "We believe that the union representing the ALJs views centralization as a mechanism to leverage the State into raising the salaries of lower-paid ALJs as the result of consolidating several

different ALJ classifications into one or a few." There are also likely to be increased costs for some agencies in which administrative law judges serve several functions, acting as legal advisors as well as hearing officers; loss of these persons to a central panel would cause the agencies to incur additional expense for legal costs.

Fourth, the agency charged with administering an area of state regulation needs to be able to control the enforcement process. This includes not only the timing of hearings but also the use of a hearing officer familiar with the technicalities of the area and the policies of the agency. Agency control must of course be tempered with basic fairness in the hearing process, since the administrative process may as a practical matter be the only opportunity a person has to challenge an agency action--judicial review will be prohibitively expensive in the ordinary case. Our task should be to devise hearing procedures that ensure basic fairness in hearings conducted by agency hearing officers while preserving the concept of agency control of enforcement.

Fifth, each agency, its mission and needs, is unique. An inordinate amount of Commission resources would be consumed by studies of the impact of shifting away the hearing functions of innumerable state agencies. The Commission simply does not have the ability to conduct such massive in-depth studies nor does it appear to the staff in light of the information we have collected so far that such studies would be a worthwhile expenditure of resources even if the resources were available.

Sixth, whether an agency loses its hearing officers is a highly political matter within state government. Historically, Law Revision Commission recommendations on political matters have not carried the same weight in the Legislature as its recommendations on more purely substantive and procedural issues. Our review of experience in other central panel jurisdictions confirms the conclusion that this issue is the one of greatest concern to state agencies and that whether an agency is successful in obtaining an exemption from central panel treatment is largely a matter of state politics. The Commission could better devote its time to ensuring sound administrative hearing procedures in a decentralized system.

For the foregoing reasons, the staff recommends the Commission make a decision that, as a general principle, it will not propose removal of agency administrative law judges to a central panel or a requirement that agency hearings be conducted by a central panel administrative law judge. However, the Commission should receive and consider suggestions for specific functions of specific agencies that could be subject to central panel treatment, if a clear and convincing case is made that sound decision-making can be achieved in no other way; the participation of the affected agency in the discussions should be invited in such a case. Likewise, if the Commission, staff, or consultant in the course of this study comes across specific instances where centralization appears warranted, the Commission should review those areas.

To some extent the Commission is already embarked on this approach, since it has requested the proponents of the ALJ central panel to give it specifics as to the proposed application of the central panel to individual agencies or agency functions. The staff believes the Commission needs to make a public decision that it will not as a general matter propose expansion of the central panel, thereby excusing the bulk of the concerned agencies from having to follow this matter. If an issue comes up as to a particular agency, the agency would be informed of this and be given an opportunity to respond to specifics.

In supplementary memoranda the staff will present any specifics brought before the Commission by proponents of the ALJ central panel.

ALTERNATIVE SOLUTIONS

A number of alternative solutions have been suggested to deal with the possible concern that an administrative law judge employed by an agency may be subject to undue pressure from the agency. These alternatives are reviewed briefly below.

Internal Structural Devices

The Commission's consultant has suggested that administrative law judge independence can be achieved, without the radical surgery of removal from the agency, by use of internal structural devices:

--The administrative hearing unit within an agency could be separate from the enforcement unit and responsible to a different supervisor than the enforcement unit. Such a system is already in place in a number of state agencies.

--Whether or not separate units are created within an agency, clear rules on ex parte contacts between the administrative law judge and agency enforcement personnel could help achieve desirable separation of functions.

--Some assurance of fairness could be achieved by strengthening the administrative law judge's findings of fact. This could be done by making the findings conclusive, or by making review by the agency head subject to a substantial evidence standard.

The staff believes these are all promising approaches. Our consultant should be encouraged to investigate them, along with others that might be helpful, as part of the administrative adjudication study.

External Control of Pay Raises and Promotions

At the May 31 Commission meeting, Commissioner Marshall raised the possibility of having administrative law judge pay raises and promotions controlled not by the employing agency but by the State Personnel Board. The concept here is that administrative law judge independence should not be compromised by the judge's career path being controlled by the agency against which the judge may be required to rule.

The staff does not know what sorts of procedural problems could be caused by such a system--whether the State Personnel Board wants the extra work, what sorts of information it would need to make such decisions, what weight it would give to the agency's recommendation, etc. However, it is a possible solution to some concerns about administrative law judge independence. If the Commission is interested in pursuing this approach, the staff will devote resources to developing it.

Voluntary Temporary ALJ Transfers

One of the benefits of a central panel is the opportunity for variety in the types of cases heard by the administrative law judges. The chief counsel for the California Unemployment Insurance Appeals Board has suggested that the same benefits could be achieved by facilitating temporary transfer of administrative law judges among agencies, as work loads permit. The same suggestion was made by the Commission's consultant at the Commission's May 31 meeting.

A voluntary transfer policy could be attractive if the administrative law judge were interested, the agency could spare the administrative law judge temporarily, and another agency is interested in using the administrative law judge. This could work out particularly well in cases where administrative law judges from the Office of Administrative Hearings are unavailable immediately due to workload.

The staff sees administrative problems in the whole scheme, however. First, there would need to be some determination of the cost of the judge's services, presumably derived from a proration of the judge's cost to the home agency. Second, the borrowing agency would need to pay the home agency for use of the judge. Whether the payment would go into the home agency's funds or into general funds, and how the accounting would be done, is not clear. Also, we would likely find the home agency reluctant to allow administrative law judges out on temporary assignment for fear that this would result in a reduction of the agency's authorized number of administrative law judges since the agency would not appear to need the full number of judges allotted to it. Third, centralized administration would be required. What judges are interested in temporary assignments, what the needs of the borrowing agency are, whether the home agency can spare the judge, etc. It would make sense for the Office of Administrative Hearings to handle this function, but it would not be free. Thus the cost of administration could cause the ALJ temporary transfer program to be marginally more expensive than regular administrative law judges. But it could result in lower costs overall if it saves the need to employ additional regular judges.

If the Commission is interested in pursuing this option, the staff will consult with the Office of Administrative Hearings concerning its feasibility and attempt to develop the details.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

AGRICULTURAL LABOR RELATIONS BOARD
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June 13, 1990

Mr. Edwin K. Marzec, Chairman
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Re: Proposal to Create Central Panel of Administrative Law Judges

Dear Mr. Marzec:

We appreciate the courtesy you have extended to us to provide comments concerning your proposal of a central panel of Administrative Law Judges. The following comments were unanimously adopted at our June 6, 1990, meeting.

The Agricultural Labor Relations Board (ALRB) believes its present configuration, which includes a unit of three Administrative Law Judges, to be preferable to a central panel concept, as suggested by the Law Revision Commission. This is based on the specialization of practice before this Board, the need for Administrative Law Judges with demonstrated expertise in this area of law, and the organizational structure which guarantees the independence of the Administrative Law Judge unit, patterned after the National Labor Relations Board.

Most of the attorneys who practice before our agency are labor specialists who also practice before the National Labor Relations Board. The Agricultural Labor Relations Board is patterned after the National Labor Relations Board, and follows applicable decisions of the national board. (California Labor Code section 1148.) Our Administrative Law Judges are required to apply the California Evidence Code insofar as practicable. (Labor Code section 1160.2.) Many of our hearings require the aid of interpreters.

In the past, our Board has tried using Administrative Law Judges provided by the Office of Administrative Hearings and found the decisions to be overly general in nature.

The structure of the Agricultural Labor Relations Board assumes the independence of our Administrative Law Judge unit. Unlike some other agencies, the Board has an independent prosecutorial unit under the General Counsel, which is a separate appointing power with a separate budget. The Administrative Law Judges are administered through the Executive Secretary, which is independent of the General Counsel. Decisions of our Administrative Law Judges are final unless appealed to the Board for revision. Ex parte communications are prohibited.

Based on the foregoing, the conclusion reached by this Board is to maintain our existing organizational structure, which we find consistent with the law and policy contained in the Agricultural Labor Relations Act. We therefore do not concur with your proposal as stated.

Please feel free to contact me at any time if you desire further elaboration on any of the foregoing points. Thank you.

Sincerely,

Bruce J. Janigian
Chairman

STATE OF CALIFORNIA—YOUTH AND ADULT CORRECTIONAL AGENCY GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF CORRECTIONS
P.O. Box 942883
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May 29, 1990

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

Dear Mr. Marzec:

Thank you for your letter of May 3, 1990, which provides us the opportunity to comment on the California Law Revision Commission consideration of recommending to the Legislature that if an administrative hearing of a state agency is required by statute, the hearing must be conducted for the agency by an administrative law judge employed and assigned by the Office of Administrative Hearings in the Department of General Services.

We note that California Government Code, Section 11500, defines certain state agencies which are governed by administrative adjudication. Section 11501 (Government Code), including the 1990 supplement, does not enumerate the Department of Corrections as being within the purview of administrative adjudication.

The Department conducts hearings to receive public comments on proposed regulations filed with the Office of Administrative Law pursuant to the Administrative Procedures Act. This hearing is nonadjudicatory; consideration of public comments, presented in person or in writing, are reviewed by executive staff in finalizing the decision on the proposed regulation. In the past three years, approximately eighteen such public comment hearings were conducted. On two occasions persons appeared at the hearings to present verbal comments. The regulatory process is extremely time consuming; approximately six to nine months are required to conclude a change to regulations. We would oppose any process that could elongate the window period for public comment/review that lacks a compelling due process rationale.

Appeals from personnel actions are eventually handled by the State Personnel Board who uses Administrative Law Judges for this type of hearing. Any authorized hearing prior to staff appeal to the State Personnel Board is a portion of the Department's adverse personnel action process and does not appear to fall under the purview of an administrative hearing.

There are essentially two types of hearings conducted relative to contract issues; Subcontractors Substitution Hearing - no more than six each year; and Responsibility Hearing - two since the Department's massive building program began. We are able to conduct these hearings in a timely, cost-saving manner. We would oppose any proposal to limit or restrict our ability to successfully conclude these hearings or that would prolong decisions which might result in substantial costs to the Department.

We would oppose any attempt to place the Department of Corrections into Government Code Section 11501 for mandatory use of Administrative Law Judges for any of the issues discussed above. In general, we have not had difficulty with our existing hearing procedures and wish to retain the option of hiring an Administrative Law Judge when the occasion or situation so warrants.

Sincerely,

JAMES ROWLAND
Director of Corrections

cc: Legal Affairs

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY GEORGE DEUKMEJIAN, Governor

OFFICE OF THE DIRECTOR
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June 4, 1990

Edwin K. Marzec, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Dear Mr. Marzec:

The Department of Motor Vehicles supports the concept of a centralized agency, such as the Office of Administrative Hearings, to provide hearings for the various state agencies. At the present time, all of our occupational license hearings with respect to the automobile industry (dealer, salesperson, manufacturer, dismantler, etc.) are conducted by Administrative Law Judges employed by the Office of Administrative Hearings and pursuant to the Administrative Procedure Act.

Within our own department, we also employ approximately 250 Driver Improvement Analysts who perform, in part, hearing officer functions. The hearings conducted by these staff include driver competency evaluations consisting of a vision test, a written test, on the road drive test and a medical evaluation in addition to the traditional due process proceedings. In the fiscal year 1988/89, these staff conducted 131,967 hearings. The specifications for this classification do not require the person (hearing officer) be an attorney. While there are some attorneys employed as Driver Improvement Analysts, this is an exception. As a result, we are able to provide this volume of hearings much more efficiently from a cost standpoint than an independent agency. There is caselaw supporting this concept of the hearing officer for the Department of Motor Vehicles presenting the case and deciding the case. Holding the hearing within the agency is also the common practice in almost all of the states at the first administrative level. For all of these reasons, we would not support moving our Driver Improvement Analysts to another agency.

Thank you for the opportunity to present the Department of Motor Vehicles' position on this matter.

A. A. PIERCE
Director

STATE OF CALIFORNIA
GEORGE DEUKMEJIAN, Governor

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May 30, 1990

Edwin Marzec
Chairman
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Dear Mr. Marzec:

Thank you very much for your May 3, 1990, letter informing me of the Law Revision Commission's consideration of a Administrative Law Judge (ALJ) corps or central panel to hear all types of administrative cases. The Department of Personnel Administration (DPA) is opposed to this proposal for the following reasons.

Civil service statutes provide employees with a right to appeal nonmerit personnel matters to DPA under certain circumstances. Typically, we use State Personnel Board (SPB) hearing officers to hear these appeals and they prepare a proposed decision. This procedure is economical and logical, since the SPB for many years had jurisdiction over areas now within the jurisdiction of DPA. Thus, SPB ALJs are familiar with the issues in these types of hearings.

In addition, in our capacity as the party representing the interests of the State employer, DPA appears before the Public Employment Relations Board (PERB) ALJs in unfair practice and unit modification hearings. The PERB's decisions are generally more detailed both in the factual findings and conclusions of law than most other administrative decisions. In fact, they are rather like court of appeal decisions in style.

Centralizing the ALJs in one organization will have two adverse impacts upon the above proceedings. First, it will result in less ALJ expertise in the matters of interest to the DPA. While the proposal makes reference to specialization within the central panel, this is not as effective as the current system. The PERB and SPB ALJs have substantial expertise in the nuances of public employer-employee relations law and civil service law. This kind of expertise is unlikely to be fully developed or maintained solely by being regularly assigned to these types of cases. Expertise is now ensured in the hiring

process itself. In order to be hired as a PERB or SPB ALJ, it is necessary to have the requisite background in either labor relations or the civil service system. With a centralized ALJ corps, it is hard to imagine how the user agency can insure ALJs have the specialized knowledge that is needed.

Both the SPB and the PERB ALJs issue proposed decisions. The SPB hearing officers acting under contract with DPA will draft a proposed decision. That decision is automatically reviewed by the DPA before it is issued as a decision of the DPA. Proposed decisions from hearing officers of the PERB are appealable to the PERB; if not appealed, they become the decision of the case. We believe that the quality of decisions by a centralized panel of ALJs will be adversely affected by the lack of specialization. This will, in turn, make rejections by DPA of the proposed decisions more likely, and will necessitate another hearing on remand. We also believe that hearing officer decisions under PERB are more likely to be appealed to the PERB Board, as there will be less confidence by advocates in the initial decision of the ALJs. Or, put another way, since the PERB would have lost control over the hiring and screening of its ALJs, there is a greater likelihood of reversal of ALJ decisions since that would be the only means for PERB to effect quality control over its decisions. This would stimulate the losing party's interest in appealing. Should these events happen, there would not be any economies realized by centralizing ALJs.

DPA also acts as the State employer in collective bargaining with various State unions and sets wages for nonrepresented employees. Elimination of specialized ALJs employed by individual State departments will create two problems from a labor relations prospective. First, PERB ALJs are excluded from collective bargaining by virtue of their employment at PERB. Should PERB loss its own staff of ALJs, a conflict of interest will arise every time a unionized ALJ from the central panel is called upon to adjudicate a dispute for PERB.

Second, at present, State ALJs are in several different classifications which are compensated differently depending upon the specific experience and qualifications required for a given ALJ classification as well as the complexity and volume of the caseload for which the ALJ will be responsible. We believe that the union representing ALJs views centralization as a mechanism to leverage the State into raising the salaries of lower-paid ALJs as the result of consolidating several different ALJ classifications into one or a few.

Finally, we doubt that this proposal would lead to a real increased efficiency or cost savings, in that the creation of one large central panel of ALJs will inevitably lead to the need for a bureaucracy of ALJ supervisors and managers that does not exist at present.

For all of the above-stated reasons, we do not believe that the proposal for a centralized panel of ALJs is in the best interests of the State of California. Thank you for the opportunity to respond to this issue.

Sincerely,

DAVID J. TIRAPELLE
Director

DJT/jaa

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

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June 8, 1990

Mr. Edwin K. Marzec, Chairperson
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SUBJECT: Use of Administrative Law Judge to Conduct State Administrative Hearings

Dear Mr. Marzec:

I am writing to respond on behalf of the San Francisco Bay Conservation and Development Commission to your May 3, 1990 letter. In that letter, you asked for our comments on a Law Revision Commission proposal that state law be modified to require that all state administrative hearings be conducted by a state administrative law judge. We believe that this proposal is inappropriate and urge the Law Revision Commission to drop this proposal or expressly exclude the Bay Commission from its application.

Before I explain the Commission's position in detail, let me provide some background. The State Legislature established the Commission on a temporary basis in 1965 to study all aspects of San Francisco Bay and to develop a comprehensive plan to protect the Bay and provide for the orderly development of the Bay shoreline. The Commission prepared numerous reports pertaining to all aspects of the Bay and the Bay shoreline and held numerous public hearings on the reports and various drafts that led to the adoption of The San Francisco Bay Plan. In 1969, the Legislature adopted the Bay Plan and made the Commission permanent. Subsequently, the Legislature has expanded the Commission's jurisdiction and authority to include the Suisun Marsh.

The Commission's activities can be divided into three major areas: planning, permits, and enforcement. The McAteer-Petris Act and the Suisun Marsh Preservation Act require the Commission to review and modify the Commission's various planning documents as necessary to keep them current.

The McAteer-Petris Act also requires that anyone who wants to place fill, extract materials worth more than $20, or make a substantial change in use in any land, water, or structure located within the Commission's jurisdiction must obtain a Commission permit before the person can begin the activity. The Commission's McAteer-Petris Act jurisdiction includes: (1) San Francisco Bay; (2) a 100-foot-wide strip of land that extends inland from the edge of the Bay, which is popularly known as "the shoreline band"; (3) salt ponds; (4) managed wetlands; and (5) parts of certain named rivers and streams that empty into San Francisco Bay. The Suisun Marsh Preservation Act requires

that anyone who wants to conduct a marsh development activity within the Marsh must first obtain a marsh development permit. The Commission can issue a permit only if it determines that the proposed activity is either necessary to the health, safety, or welfare of the entire Bay Area or is consistent with policies established in the applicable statute and planning documents.

Finally, the Commission is involved in enforcing state law by issuing cease and desist orders, imposing penalties administratively, and initiating litigation for failing to obtain a Commission permit as required or for failing to comply fully and completely with all terms and conditions imposed in Commission permits.

The Commission holds administrative hearings as part of all of the Commission's activities. The Commission must hold at least one public hearing before it can amend the Bay Plan. The Commission must hold a public hearing for all permit applications except those that qualify under Commission regulations as "minor repairs or improvements." Finally, the Commission must hold a public hearing before it can issue a cease and desist order or impose civil penalties administratively.

The Commission believes that its current hearing procedures work very well. The Commission holds all of the hearings itself, although enforcement hearings are first held before a standing enforcement committee that is composed of five members and one alternate, all of whom are either a Commissioner or an Alternate Commissioner. None of the Commission's hearings are conducted by a hearing officer. The hearings are presided over by the Commission Chair or, in the case of the enforcement committee, one member of the committee who acts as Chair for a six-month period. All persons who want to speak are allowed to do so, and Commission members may ask questions at any time. Extensive minutes of all such hearings are maintained.

The Commission believes that none of the reasons given by the Law Revision Commission for its proposal apply to the Bay Commission. The Bay Commission's hearing process is extremely fair. The Commission does not use hearing officers whose independence or integrity might be compromised because they are employed by the Commission. Attempting to allow someone who has no or limited experience with the Commission would result in a more inefficient hearing process because Commission hearings often involve technical matters or matters very specific to the laws and planning documents that the Commission enforces.

The Commission also believes that the proposal is inappropriate because it will involve substantial additional costs to the Commission. As I am sure you know, the State is currently subject to extremely tight fiscal constraints. New programs that impose substantial new costs on any agency should not be undertaken unless the need is clearly demonstrated and the funding source secure. Neither is true in the case of this proposal.

For all these reasons, the Commission urges that you drop your proposal or expressly exempt the Bay Commission from the proposal's application. I should also add that the Commission considered this matter at its June 7, 1990 meeting and unanimously directed me to send this letter. Many Commissioners felt very strongly about this matter.

Thank you for this opportunity to comment.

Very truly yours,

Robert R. Tufts

ROBERT R. TUFTS
Chairman

June 11, 1990

Edwin K. Marzec, Chair
Calif. Law Revision Comm.
4000 Middlefield Rd Suite D2
Palo Alto, Calif. 94303

Re: Law Judges for B.C.D.C.

Dear Mr. Marzec:

I have attended and watched the B.C.D.C. since 1969 and I feel that the use of a law judge for hearings in front of the B.C.D.C. would be absolute folly.

The letter you recieved from Robert R Buffo, Chairman of the Commission explains very carefully how the Commission proceeds with its business There is seldom a meeting passed that the Commission doesn't hold a public hearing. This is the nature of the business of the Commission. To change this to an administrative law judge type of hearing would make a drastic change in the way the Commission carries out its mission The hearing and judgement must be carried out in a limited

time that has been set by the legislature. If a decision has not been made in this time — the permit is automatically granted.

I have not had any experience with a Judge where he could render a decision in under 6 mos. By that time every permit he heard would have been granted due to time constraints of the law.

The Law Revision Commission should exempt B.C.D.C. from your recommendations for use of Law Judges. I feel that any inclusion of this commission would destroy an invaluable environmental bulwark for the Bay.

Sylvia M. Gregory
Citizens Advisory Committee Member.

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY GEORGE DEUKMEJIAN, Governor

STATE BANKING DEPARTMENT
1107 NINTH STREET, SUITE 360
SACRAMENTO, CA 95814
(916) 322-5966

June 11, 1990

JUN 12 1990
RECEIVED

Mr. Edwin K. Marzec
Chair
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 in response to your request, made at the meeting of the California Law Revision Commission ("Commission") on May 31, 1990, for additional information concerning administrative hearings conducted by the State Banking Department. In particular, you requested additional information on how the Department determines whether a hearing shall be conducted by an Administrative Law Judge ("ALJ") from the Office of Administrative Hearings ("OAH") or by a hearing officer appointed from within the Department.

Time is the most important factor in the Department's choice of hearing officer. As described in my letter to you, dated May 31, 1990, we use OAH's services for virtually all license application denial hearings, as well as for other hearings on less urgent matters. In matters of urgency, such as hearings resulting from the issuance of cease and desist orders, the Department typically checks with OAH first to see if any ALJ's and hearing dates are available. Our experience has been that ALJ's and hearing dates are rarely, if ever, available within 30 days (the current average is 60 to 90 days), so the Department usually turns in-house for a hearing officer.

The nature of the hearing is also a factor, albeit a lesser one, in the Department's choice of hearing officer. The nature of the hearing has been historically significant where (1) the scheduled hearing concerns a very minor and recurrent subject or (2) the subject matter of the hearing is very complex and involves relatively esoteric points of the Banking Law. An example of the former situation is the scheduling of required hearings for financial institutions who protest fines imposed by the Department for late submission of required reports. An example of the latter would be a hearing held to determine the existence of an unauthorized acquisition of control of a licensee, where familiarity with fine points of relevant sections of the Banking Law and the securities law, and with the general procedures utilized by licensees and the Department, is necessary. In both situations, the Department has almost always used Department personnel as hearing officers.

In an average year, the Department generally schedules approximately 20 to 25 hearings, but anywhere from a third to a half of those scheduled are never held (usually because some type of consent agreement is negotiated). The Department's practices with respect to administrative hearings are, therefore, based upon somewhat limited experience. That experience has nevertheless shown that in matters of urgency (and, to a lesser extent, in matters which

are either very minor or exceedingly complex), the services of OAH had been either unavailable or deemed to be unsuited to the subject matter.

I hope that the foregoing is responsive to your inquiry. If the Department can provide any additional information that would be of assistance to the Commission, please feel free to contact me.

Very truly yours,

JAMES E. GILLERAN
Superintendent of Banks

By 

BRIAN L. WALKUP
Legislative Counsel

BW:elw

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 445-3723

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Controller, Sacramento
CINDY RAMBO
Executive Director

June 5, 1990

Mr. Edwin K. Marzec
Chairperson
California Law Review Commission
4000 Middlefield Road, Suite D02
Palo Alto, CA 94303-4739

Re: Centralization of Administrative Law Judges

Dear Mr. Marzec:

On May 31, 1990, the Commission held a meeting in Sacramento at which I testified on behalf of the State Board of Equalization.

At the meeting, you requested that I furnish you with the statement of the qualifications required of persons serving as hearing officers at the State Board of Equalization.

As I stated at the hearing, the Board does not utilize the administrative law judge classification. Our hearing officers do not issue subpoenas; they do not take sworn testimony. A record is not made of the preliminary hearing. We use the Staff Counsel and Senior Staff Counsel civil service classifications. Enclosed are specifications for those qualifications.

Very truly yours,

Gary J. Jugum
Assistant Chief Counsel

GJJ:sr

Enc.

CALIFORNIA STATE PERSONNEL BOARD

specification

Schematic Code: 0A72
Class Code: 5778
Established: 12/17/85
Revised: --
Title Changed: --

STAFF COUNSEL

Definition:

This is a recruitment and developmental class for persons qualified to practice law in the State of California. Incumbents assigned to Range A perform the least difficult professional legal work of their department. Based upon the appropriate alternate range criteria, incumbents advance to Ranges B, C and D and are assigned progressively more difficult professional legal work as their competence increases. Incumbents assigned to Range D independently perform professional legal work of average difficulty.

Typical Tasks:

Studies, interprets and applies laws, court decisions and other legal authorities; prepares or assists in preparing cases, opinions, briefs, and other legal documents such as memoranda, digests, summaries and reports; assists in the preparation of or responsible for preparing cases which may result in litigation before boards, commissions, hearing officers, administrative law judges, trial or appellate courts; assembles and evaluates evidence; secures and interviews witnesses; assists in and holds hearings; conducts special investigations involved in the enforcement of State laws and departmental rules and regulations; does a wide variety of legal research; provides advice or opinions to departmental management or members of the public on legal issues arising out of the programs of the department in which the incumbent is employed and of the legal effect of rules, regulations, proposed legislation, statutory law, court decisions and administrative actions; develops proposed legislation; testifies before legislative committees; and conducts negotiations.

Minimum Qualifications:

Membership in The State Bar of California. (Applicants must have active membership in The State Bar before they will be eligible for appointment. Applicants who are not members of The State

Bar of California but who are eligible to take The California State Bar examination will be admitted to the examination but will not be considered eligible for appointment until they are admitted to The State Bar.)

and

Knowledges and abilities:

Knowledge of: legal research methods and performing research; legal principles and their application; scope and character of California statutory law and of the provisions of the California Constitution; principles of administrative and constitutional law; trial and hearing procedure and rules of evidence.

Ability to: perform research; analyze, appraise, and apply legal principles, facts, and precedents to legal problems; present statements of fact, law, and argument clearly and logically; draft statutes; prepare correspondence involving the explanation of legal matters; analyze situations accurately situations accurately and adopt an effective course of action.

CALIFORNIA STATE PERSONNEL BOARD

specification

Schematic Code: OA82
Class Code: 5795
Established: 12/17/85
Revised: 11/18/86
Title Changed: --

SENIOR STAFF COUNSEL (SPECIALIST)

Definition:

Under general direction, to effectively perform the most sensitive and complex legal work of the department in which employed, consistently with favorable results.

Distinguishing Characteristics:

This class is distinguished from the lower level Staff Counsel class by the level of difficulty of assignments given to incumbents and the expertise which the incumbent brings to these assignments. Senior Staff Counsels (Specialist) work with broad discretion and independence with a minimum of supervision and are expected to be expert in a broad or exceedingly complex area of the law.

A Senior Staff Counsel (Specialist) does not supervise lower level attorney staff, but may act in a lead capacity when the staff size is so large or the work so complex as to require both a first line supervisor and a lead attorney.

Typical Tasks:

Performs the most difficult and complex litigation, negotiation, legislative liaison, hearings, legal research, and opinion drafting; develops strategy and tact in the most complex disputes or litigation; and may act in a lead capacity over lower level attorney staff when the staff size is so large or the work so complex as to require both a first line supervisor and lead attorney.

Minimum Qualifications:

Either I

Two years of experience in the California state service performing legal duties* at a level of responsibility equivalent to Staff Counsel, Range D. (Applicants who have completed 18 months of the required experience will be admitted to the examination, but must complete two years of such experience before they will be eligible for appointment.)

Or II

Broad and extensive experience (more than six years) in the practice of law*.

and

Experience applicable to one of the above patterns may be combined on a proportional basis with experience applicable to the other to meet the total experience requirement. Experience in California state service applied toward "Pattern II" must include the same number of years of qualifying experience as required in "Pattern I" performing the duties at a level of responsibility equivalent to that described in "Pattern I".

In addition, all candidates must have membership in The State Bar of California. (Applicants must have active membership in The State Bar before they will be eligible for appointment.)

and

Knowledges and abilities:

Knowledge of: legal principles and their application; legal research methods; court procedures; rules of evidence and procedure; administrative law and the conduct of proceedings before administrative bodies; legal terms and forms in common use; statutory and case law literature and authorities; provisions of laws and Government Code sections administered or enforced.

Ability to: analyze complex and difficult legal principles and precedents and apply them to exceedingly difficult and complex legal and administrative problems; perform exceptionally difficult and complex legal research; present statements of fact, law and argument clearly and logically; draft exceedingly complex and difficult opinions, pleadings, rulings, regulations and legislation; negotiate effectively and conduct crucial litigation.

*Experience in the "practice of law" or "performing legal duties" is defined as only that legal experience acquired after admission to The Bar.

CALIFORNIA STATE PERSONNEL BOARD

specification

Schematic Code: 0A84
Class Code: 5815
Established: 12/17/85
Revised: 11/18/86
Title Changed: --

SENIOR STAFF COUNSEL (SUPERVISOR)

Definition:

Under general direction, to supervise the work of lower level attorneys and, in addition, may personally perform the most difficult, complex and sensitive legal work.

Distinguishing Characteristics:

This is the working supervisor level over a small attorney staff. It is distinguished from the Senior Staff Counsel (Specialist) class by its supervisory responsibility. The Senior Staff Counsel (Specialist) and (Supervisor) classes have the same level but different type of responsibility.

The Senior Staff Counsel (Supervisor) is distinguished from the next higher level class of Assistant Chief Counsel by the size and impact of the legal program, level and number of staff supervised, degree of general policy involvement, extent to which positions influence legal policy and complexity of legal work for which responsible.

Typical Tasks:

Plans, organizes and directs the work of a small staff of attorneys; evaluates the performance of subordinate staff and takes or effectively recommends appropriate action; interviews and selects or actively participates in the interview and selection process for subordinate staff; develops strategy and tact in the most complex disputes or litigation; and may personally perform the most difficult and complex litigation, negociation, legislative liaison, hearings, legal research, and opinion drafting.

Minimum Qualifications:

Either I

Two years of experience in the California state service performing legal duties* at a level of responsibility equivalent to Staff Counsel, Range D. (Applicants who have completed 18 months of the required experience will be admitted to the examination, but must complete two years of such experience before they will be eligible for appointment.)

Or II

Broad and extensive experience (more than six years) in the practice of law*.

Experience applicable to one of the above patterns may be combined on a proportional basis with experience applicable to the other to meet the total experience requirement. Experience in California state service applied toward "Pattern II" must include the same number of years of qualifying experience as required in "Pattern I" performing the duties at a level of responsibility equivalent to that described in "Pattern I".

In addition, all candidates must have membership in The State Bar of California. (Applicants must have active membership in The State Bar before they will be eligible for appointment.)

and

Knowledges and abilities:

Knowledge of: legal principles and their application; legal research methods; court procedures; rules of evidence and procedure; administrative law and the conduct of proceedings before administrative bodies; legal terms and forms in common use; statutory and case law literature and authorities; provisions of laws and Government Code sections administered or enforced; the department's affirmative action program and principles of supervision.

Ability to: analyze legal principles and precedents and apply them to complex legal and administrative problems; perform and direct legal research; present statements of fact, law and argument clearly and logically; draft and direct the drafting of opinions, pleadings, rulings, regulations and legislation; negotiate effectively; conduct and direct the conduct of civil litigation; effectively supervise the work of subordinate personnel; and effectively contribute to the department's affirmative action goals.

*Experience in the "practice of law" or "performing legal duties" is defined as only that legal experience acquired after admission to The Bar.

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**

June 18, 1990

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

Re: Administrative Law Study - Central Panel Concept

Dear Mr. Marzec:

Please find attached the volumes you requested at your May 31 meeting in Sacramento.

These volumes are the Index Digest of Precedent Decisions, the Standard Paragraphs/Points of Inquiry, and the Appeals Board's regulations (Title 22, CCR, beginning with section 5000).

If there is anything else I can provide, please let me know.

Very truly yours,

TIM McARDLE, CHIEF COUNSEL

TM:pm

Enclosures