

Third Supplement to Memorandum 90-89

Subject: Study N-103 - Administrative Adjudication: ALJ Central Panel
(Comments of National Conference of Administrative Law
Judges)

At the May 31 meeting the Commission requested Donald B. Jarvis (representing the National Conference of Administrative Law Judges and the Association of California State Attorneys and Administrative Law Judges) to identify the specific agencies, or the specific functions within an agency, for which they believe administrative law judges should be removed to a central panel.

Attached is Mr. Jarvis' response, indicating time does not permit him to identify all of the groups that should be included in the central panel. However, his letter does indicate the criteria he would use in making the identification.

The staff believes Mr. Jarvis should be allowed the time necessary to make specific suggestions to the Commission. Meanwhile, the staff reiterates its belief that the Commission should adopt the general position that an agency's administrative law judges or functions will not be recommended for transfer to a central panel unless the agency or function has first been specifically identified as one appropriate for transfer, a convincing case has been made of the need for the transfer, and the agency has been given an opportunity to respond to the specifics.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

JUL 23 1990

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RE: Study on Administrative Adjudication (Central Panel)

Dear Mr. Sterling:

This is a response to the question of Judge Marshall at the meeting on June 1, 1990, in which he asked that the groups of administrative law judges or hearing officers which should be included in a central panel be identified. All of the groups which I believe fit in this category call their adjudicators administrative law judge or workers compensation judge. The term administrative law judge will be used for brevity.

Without extensive research, which time does not permit, it is not possible to identify all of the groups which should be included in the central panel. It is possible to set forth the criteria which should be applied in determining whether a group should be included in the central panel. These criteria are those which follow.

I. Independent Adjudicator

All of the administrative law judges in a group to be included in a central panel must have statutory power to make an independent initial, proposed or final decision in the matter which is heard.

For example, the Hearing Advisors of the California Energy Resources Commission are sometimes involved with significant, complex matters of great magnitude. But, they do not have the power to make an independent

decision in these matters. They are employed as staff members pursuant to Section 25217 of the Public Resources Code. Section 25211 of that Code provides that hearings of the commission may be held before a committee of not less than two members of the commission. The Section states that,

"Upon agreement of all parties to a proceeding who are present at the hearing or proceeding, the committee may authorize a hearing officer to continue to take evidence in the temporary absence of a commission member."

The statute makes no provision for decisions to be issued by Hearing Advisors. In fact, Section 25211 provides that:

"Every order made by the committee pursuant to the inquiry, investigation or hearing, when approved or confirmed by the commission and ordered filed in its office, shall be the order of the commission."

Clearly, these Hearing Advisors are not independent adjudicators. (Compare, Government Code Sections 11502, 11517, Administrative Law Judges, Office of Administrative Hearings; Public Utilities Code Sections 309, 311 (b)(c)(d)(e), Administrative Law Judges, Public Utilities Commission; Welfare and Institutions Code Section 10958, Administrative Law Judges, Department of Social Services; Unemployment Insurance Code Sections 404, 412, 413, Administrative Law Judges, Unemployment Insurance Appeals Board and Labor Code Sections 5310, 5313, Workers Compensation Judges, Workers Compensation Appeals Board.)

Another facet of an independent adjudicator is that he or she must be a permanent civil service employee who can only be removed for cause or have a fixed term. A person who serves at the pleasure of the appointing power is not an independent adjudicator.

Persons in a group to be included in the central panel should only have adjudication as their duty and responsibility. For example, a staff counsel who may be detailed on occasion to hold a hearing but performs other legal duties for an agency is not an independent adjudicator.

II. Preside at an Impartial Hearing Which Affords Due Process to All Parties

All of the administrative law judges in a group to be included in the central panel must preside at impartial hearings which afford due process to all parties. Some of the attributes of such a hearing are:

- a. There are statutory or published agency rules which set forth the procedure to be followed at the hearing.
- b. Parties to the proceeding have the right to compel the attendance of witnesses. The administrative law judge and/or the agency should have the power to issue subpoenas.
- c. Testimony should be given under oath.
- d. There is a verbatim record of the proceeding which may be certified for the purpose of appeal.
- e. Parties have the right to cross-examine witnesses.
- f. The hearing should provide procedural and substantive due process to the parties.
- g. The hearing should be a public one.
- h. If one of the parties or a material witness is not competent in the English language an interpreter should be provided.

III. Preparation of a Decision Based on the Record

All of the administrative law judges to be included in the central panel should prepare independent initial, proposed or final decisions based solely on the record presented at the hearing and applying applicable statutes, agency rules, court decisions and previous decisions of the agency.

As I indicated in my presentation before the Commission, not all events called "hearings" which occur before California agencies require the formal type of Administrative

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Procedure Act or equivalent type of hearing. These types of hearings occur when: 1.) A court determines it is required by due process; 2.) The Legislature enacts a statute requiring such a hearing; 3.) An agency adopts rules providing for this type of hearing.

The proposed central panel should only include groups which have administrative law judges who preside at Administrative Procedure Act, or equivalent types of hearings and have statutory power to issue independent initial, proposed or final decisions in the matters heard.

I also note that on the federal level S.594 sponsored by Senator Heflin was reported favorably out of the Senate Judiciary Committee and is before the full Senate. I enclose a copy of the amended version reported out of the Committee.

Yours Truly,



Donald B. Jarvis
Secretary, National
Conference of Administrative
Law Judges

cc: Michael Asimow, Esq.

DBJ:jb