#N-105

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Memorandum 90-129

Subject: Study N-105 - Administrative Adjudication: Effect of ALJ Decision (Discussion Draft)

At the September meeting the Commission's consultant, Professor Asimow, presented the portion of his study relating to Appeals Within the Agency: The Relationship Between Agency Heads and ALJs. The Commission also heard comments from persons present at the meeting concerning the impact of Professor Asimow's recommendations on their agencies.

In order to better focus the discussion, the Commission requested the staff to prepare a draft statute that would implement Professor Asimow's recommendations, with one major exception. The procedure for reconsideration should be converted to a limited procedure for correction of mistakes.

Attached to this memorandum, for purposes of Commission review and discussion, is a staff draft to implement Professor Asimow's recommendations. A number of policy questions are noted in italics following some of the sections in the draft.

One aspect of the draft the staff would call to the Commission's attention is that we are attempting to prepare a statute that employs one basic procedure, usable for all agencies. Thus we are trying to design a hearing procedure that will work for agencies that use independent administrative law judges as well as for agencies that use their own agency ALJs, agencies where the agency head itself assumes the role of the finder of fact, and agencies where review authority is vested in an independent board.

One consequence of this omnibus type of statute is that some procedures turn out to be more complexly drafted than we would like them to be, simply because they must encompass a number of

alternatives. Also, one size may not turn out to fit all; we hope that the affected agencies will alert us when it appears that a particular procedure does not work well for hearings of an agency of that type.

Respectfully submitted,

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§ 610.250. Agency head

610.250. "Agency head" means a person or body in which the ultimate legal authority of an agency is vested, and includes a person or body to which the power to act is delegated pursuant to authority to delegate the agency's power to hear and decide.

Comment. The first portion of Section 610.250 is drawn from 1981 Model State APA § 1-102(3). The definition of agency head is included to differentiate for some purposes between the agency as an organic entity that includes all of its employees, and those particular persons in whom the final legal authority over its operations is vested.

The last portion is drawn from former Section 11500(a), relating to use of the term "agency itself" to refer to a nondelegable power to act. An agency may delegate the power of the agency head to review a proposed order in an administrative adjudication. Section 642.820 (limitation of review); see also Section 610.680 ("reviewing authority" defined).

§ 610.280. Agency member

610.280. "Agency member" means a member of the body that constitutes the agency head and includes a person who alone constitutes the agency head.

Comment. Section 610.280 continues the substance of former Section 11500(e) ("agency member" defined).

§ 610.400. Order

610.400. "Order" means an agency action of particular applicability that determines a legal right, duty, privilege, immunity, or other legal interest of a specific person.

Comment. Section 610.400 is drawn from 1981 Model State APA § 1-102(5). The definition of order makes clear that it includes only legal determinations made by an agency that are of particular applicability because they are addressed to named or specified persons. In other words, an order includes every agency action that determines any of the legal rights, duties, privileges, or immunities of a particular identified individual or individuals. This is to be compared to the Section 610.700 definition stating that a rule is an agency statement establishing law or policy of general applicability, that is, applicable to all members of a described class. The primary operative effect of the definition of order is in Part 4 (commencing with Section 640.010), governing adjudicative proceedings.

Consistent with the definition in this section, rate making and licensing determinations of particular applicability, addressed to named or specified parties such as a certain utility company or a certain licensee, are orders subject to the adjudication provisions of this statute. Cf. federal APA § 551(4), defining all rate making as

rulemaking. On the other hand, rate making and licensing actions of general applicability, addressed to all members of a described class of providers or licensees, are rules under this statute, subject to its rulemaking provisions. See the Comment to Section 610.700 ("rule" defined).

Note. This section has previously been approved by the Commission. The Commission intends to address issues involving proceedings that are adjudicative/rulemaking hybrids. Included in this matter are orders that have precedential or stare decisis effect and proceedings that result in both an order and a rule or determination of general application.

§ 610.460. Party

610.460. "Party", in an adjudicative proceeding, includes the agency that is taking action, the person to whom the agency action is directed, and any other person named or allowed to appear or participate in the proceeding.

Comment. Section 610.460 continues the substance of former Section 11500(b); see also 1981 Model State APA § 1-102(6). Under this definition, if an officer or employee of an agency appears in an official capacity, the agency and not the person is a party. This section is not intended to address the question whether a person is entitled to judicial review.

Note. The Commission has not yet reviewed the rules governing who may appear in a proceeding, and whether this is done by "intervention" or by another procedure.

§ 610.680. Reviewing authority

610.680. "Reviewing authority" means the agency head and includes the person or body to which the agency head has delegated its review authority under Section 642.820 (limitation of review).

Comment. Section 610.680 is new. It is intended for drafting convenience.

§ 610.700. Rule

610.700. "Rule" means an agency statement of general applicability that implements, interprets, or prescribes (i) law or policy, or (ii) the organization, procedure, or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule.

Comment. Section 610.700 is drawn from 1981 Model State APA § 1-102(10).

MISCELLANEOUS PROVISIONS

§ 613.010. Service

613.010. If this division requires that an order or other writing be served on a person, the writing shall be delivered personally to the person or sent by certified mail to the person at the person's last known address and, if the person has an attorney of record in the proceeding, to the person's attorney.

Comment. Section 613.010 is intended for drafting convenience. It generalizes provisions found in former Section 11517.

Note. It is premature to decide whether many of the general rules of civil procedure should be paralleled or incorporated in the administrative procedure act. The staff suggests that for now we deal with general procedural matters on an ad hoc basis.

PART 4. ADJUDICATIVE PROCEEDINGS

CHAPTER 1. GENERAL PROVISIONS

Article 1. Availability of Adjudicative Proceedings

§ 640.010. When adjudicative proceeding required

640.010. An agency shall conduct an adjudicative proceeding as the process for formulating and issuing an order for which a hearing or other proceeding is required by the federal or state constitution or by statute.

Comment. Section 640.010 states the general principle that an agency shall conduct an appropriate adjudicative proceeding before issuing an order. It thus provides the linkage between the definition of order in Section 610.400 and the various types of adjudicative proceedings described in Part 4. This section does not specify which type of adjudicative proceeding should be conducted at all. If an adjudicative proceeding is required by this section, the proceeding may be either the formal, conference, summary, or emergency adjudicative proceeding, in accordance with other provisions of this part.

This part by its terms applies only to adjudicative proceedings required by constitution or statute. However, an agency may by rule require a hearing for a particular decision that is not constitutionally or statutorily required, and may elect to have the hearing governed by this part. See Section 612.040 (election to apply division).

Note. *This section has previously been approved by the Commission. Statutory hearings will need to be reviewed to determine whether this part will operate satisfactorily. See, e.g., Pub. Cont. Code § 4107 (Subletting and Subcontracting Fair Practices Act).*

The Commission has deferred decision on the issue of applying this part to all state agency actions that affect individual rights. When

the draft of this part is complete, the Commission will consider whether it should be so extended.

The 1981 Model State APA would apply to all orders of state agencies, unless the order is a decision:

(1) to issue or not to issue a complaint, summons, or similar accusation;

(2) to initiate or not to initiate an investigation, prosecution, or other proceeding before the agency, another agency, or a court; or

(3) under Section [4-103], not to conduct an adjudicative proceeding.

The 1981 Model State APA's commentary to this provision states that it does not preclude emergency action in circumstances where such action would be the appropriate adjudicative proceeding under Section [4-501]. The provision lists, as exceptions, the situations in which an agency may issue an order without first conducting an adjudicative proceeding. Paragraph (1) enables an agency, on the basis of its investigation and other non-adjudicative processes, to decide whether to issue or not to issue a complaint, etc., without first conducting an adjudicative proceeding. Paragraph (2) enables an agency to decide to initiate or not to initiate an investigation, prosecution, or other proceeding, either before the agency itself or before another agency or a court, without first conducting an adjudicative proceeding. For example, a law enforcement officer may, without first conducting an adjudicative proceeding, issue a "ticket" that will lead to a proceeding before any agency or court. Paragraph (3) enables an agency to decide to dismiss or not to dismiss a matter, in accordance with Section [4-103], without first conducting an adjudicative proceeding.

Article 2. Office of Administrative Hearings

§ 640.210. Definitions

640.210. As used in this article:

(a) "Director" means the executive officer of the Office of Administrative Hearings.

(b) "Office" means the Office of Administrative Hearings.

Comment. Subdivision (a) of Section 640.210 continues former Section 11370.1 without substantive change. Subdivision (b) is new.

§ 640.220. Office of Administrative Hearings

640.220. (a) There is in the Department of General Services the Office of Administrative Hearings which is under the direction and control of an executive officer who shall be known as the director.

(b) The director shall have the same qualifications as an administrative law judge, and shall be appointed by the Governor subject to confirmation of the Senate.

(c) A reference in a statute to the Office of Administrative Procedure means the Office of Administrative Hearings.

Comment. Section 640.220 continues subdivisions (a) and (b) of former Section 11370.2 without substantive change.

Note. We have retained subdivision (c) even though a computer search of the state codes shows only one section still containing an obsolete reference to the Office of Administrative Procedure. See Rev. & Tax. Code § 1636, to be corrected in the conforming revisions. However, there may be references in uncodified statutes that are not in the computer data base that should be converted, so we have carried over this provision.

§ 640.230. Administrative law judges

640.230. (a) The director shall appoint and maintain a staff of full-time, and may appoint pro tempore part-time, administrative law judges sufficient to fill the needs of the various state agencies.

(b) Each administrative law judge shall have been admitted to practice law in this state for at least five years immediately preceding the appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

Comment. Subdivision (a) of Section 640.230 continues the first sentence of former Section 11370.3 and the second sentence of former Section 11502 without substantive change.

Subdivision (b) continues the third sentence of former Section 11502 without substantive change.

§ 640.240. Hearing officers and other personnel

640.240. The director shall appoint hearing officers, shorthand reporters, and such other technical and clerical personnel as may be required to perform the duties of the office.

Comment. Section 640.240 continues the second sentence of former Section 11370.3 without substantive change.

§ 640.250. Assignment of administrative law judges and hearing officers

640.250. (a) The director shall assign an administrative law judge for an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the office.

(b) On request from an agency, the director may assign an administrative law judge or a hearing officer for an adjudicative proceeding not required by statute to be conducted by an administrative law judge employed by the office.

(c) The director shall assign a hearing reporter as required.

(d) An administrative law judge, hearing officer, or other employee assigned under this section shall be deemed an employee of the office and not of the agency to which the judge, officer, or other employee is assigned.

(e) When not engaged in conducting an adjudicative proceeding, an administrative law judge or hearing officer may be assigned by the director to perform other duties vested in or required of the office, including those provided in Section 640.280.

Comment. Subdivision (a) of Section 640.250 supersedes the first part of the third sentence of former Section 11370.3. Adjudicative proceedings required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings include:

[(1) A proceeding required to be conducted under the Administrative Procedure Act. Gov't Code § 11502.]

[(2) A proceeding arising under Chapter 20 (commencing with Section 22450) of Division 8 of the Business and Professions Code on request of a public prosecutor. Bus. & Prof. Code § 22460.5.]

Subdivision (b) continues the second part of the third sentence of former Section 11370.3 without substantive change.

Subdivision (c) continues the third part of the third sentence of former Section 11370.3 without substantive change.

Subdivision (d) continues the fifth sentence of former Section 11370.3 without substantive change.

Subdivision (e) continues the sixth sentence of former Section 11370.3 without substantive change.

Note. *The 1981 Model State APA precludes the agency from influencing the decision on assignment of a particular ALJ--"an agency may neither select nor reject any individual administrative law judge for any proceeding except in accordance with this Act." The Act provides a procedure for disqualification of an ALJ for bias, prejudice, interest, "or any other cause provided in this Act or for which a judge is or may be disqualified".*

§ 640.260. Voluntary temporary assignment of hearing personnel

640.260. (a) If the office cannot assign one of its administrative law judges in response to an agency request, the director may designate in writing a full-time employee of an agency other than the requesting agency to serve as administrative law judge for the proceeding, but only with the consent of the employee and the employing agency. The designee must possess the same qualifications required of an administrative law judge employed by the office.

(b) The office may adopt, and the director may implement, rules to establish the procedure for a designation under this section.

Comment. Section 640.260 is new. It is drawn from 1981 Model State Act § 4-301(c).

Note. The Commission decided not to pursue further the concept of a voluntary temporary transfer list for ALJs to help combat ALJ burnout, but felt that an appropriate agency could be authorized to implement such a system if there is interest among the agencies and ALJs to do this.

It makes sense to authorize OAH to supervise such a system, and there is a similar structure established for it in the 1981 Model State APA, which we have adapted here for our purposes. The OAH would be able to recover its costs of running such a system pursuant to Section 640.270 (cost of operation).

§ 640.270. Cost of operation

640.270. The total cost to the state of maintaining and operating the office shall be determined and collected by the Department of General Services in advance or upon such other basis as it may determine from the state or other public agencies for which services are provided by the office.

Comment. Section 640.270 continues former Section 11370.4 without substantive change.

§ 640.280. Study of administrative law and procedure

640.280. (a) The office is authorized and directed to:

(1) Study the subject of administrative law and procedure in all its aspects.

(2) Submit its suggestions to the various agencies in the interests of fairness, uniformity, and the expedition of business.

(3) Report its recommendations to the Governor and Legislature at the commencement of each general session.

(b) All agencies of the state shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge or control.

Comment. Section 640.280 continues former Section 11370.5 without substantive change. See also Section 610.190 ("agency" defined).

CHAPTER 2. FORMAL ADJUDICATIVE HEARING

Article 1. General Provisions

§ 642.010. Applicable hearing procedure

642.010. (a) Except as otherwise provided by statute, an adjudicative proceeding is governed by this chapter.

(b) This chapter does not govern an adjudicative proceeding if any of the following is applicable:

(1) A rule that adopts the procedures for the conference adjudicative hearing or summary adjudicative proceeding in accordance with the standards provided in this part for those proceedings.

(2) Section [to be drafted] (emergency adjudicative proceedings).

(3) Section [to be drafted] (declaratory proceedings).

Comment. Section 642.010 is drawn from 1981 Model State APA § 4-201. It declares the formal hearing to be required in all adjudicative proceedings except where otherwise provided by statute, agency rule pursuant to this part, the emergency provisions of this part, or Section [to be drafted] on declaratory proceedings. The formal hearing is analogous to the "adjudicatory hearing" under the former Administrative Procedure Act. Former Section 11500(f). The other procedures are new.

Note. This section is included merely to help show the intended structure of the new Administrative Procedure Act as it is assembled. The Commission has not yet considered, accepted or rejected, or modified any of the procedures referred to in this section.

The 1981 Model State APA establishes three procedural models for adjudication. The first, called "formal adjudicative hearing", is analogous to the standard procedures under the current California Administrative Procedure Act. The other two models are new. They are called "conference adjudicative hearing" and "summary adjudicative proceedings". In addition, emergency adjudication is authorized when necessary.

The notion of establishing more than one model adjudicative procedure is found in some of the more recent state acts, including Delaware, Florida, Montana, and Virginia. Bills have been introduced in Congress to amend the Federal APA by creating more than one type of adjudicative procedure. See also 31 Ad. L. Rev. 31, 47 (1979).

A justification for providing a variety of procedures is that, without them, many agencies will either attempt to obtain enactment of statutes to establish procedures specifically designed for such agencies, or proceed "informally" in a manner not spelled out by any

statute. As a consequence, wide variations in procedure will occur from one agency to another, and even within a single agency from one program to another, producing complexity for citizens, agency personnel and reviewing courts, as well as for lawyers. These results have already happened, to a considerable extent, at both the state and federal levels.

The number of available procedures in the administrative procedure act should not, however, be so large as to make the act too complicated or to create uncertainty as to which type of proceeding is applicable. The 1981 Model State APA establishes three basic types of adjudicative proceedings, as a proposed middle ground between a formal hearing only and other theoretical alternatives that could establish large numbers of models.

Article 2. Presiding Officer

§ 642.210. Designation of presiding officer by agency head

642.210. Except as otherwise provided by statute, any one or more of the following persons may be the presiding officer, in the discretion of the agency head:

(a) The agency head.

(b) An agency member.

(c) An administrative law judge or hearing officer assigned as provided in Section 640.250.

(d) Another person designated by the agency head.

Comment. Section 642.210 is drawn from 1981 Model State Act § 4-202(a). It uses the term "presiding officer" to refer to the one or more persons who preside over a hearing. If the presiding officer is more than one person, as for example when a multi-member agency sits en banc, one of the persons may serve as spokesperson, but all persons collectively are regarded as the presiding officer. See also Section 13 (singular includes plural).

Assignment of an administrative law judge or hearing officer under subdivision (c) is governed by subdivision (b) of Section 640.250 (Office of Administrative Hearings). Discretion of the agency head to designate "another person" to serve as presiding officer under Subdivision (d) is subject to Section [to be drafted], on separation of functions.

One consequence of determining who shall preside is provided in Sections 642.710 and 642.810. According to Section 642.710 (proposed and final orders), if the agency head presides, the agency head shall issue a final order; if any other presiding officer presides, a proposed order must be made. Section 642.810 (availability of review) establishes the general appealability of proposed orders to the agency head.

For a statutory exception to the right of the agency head to designate the presiding officer, see Section 642.220 (OAH administrative law judge as presiding officer).

Note. This section implements the recommendations of Professor Asimow that the law make clear that the agency head may, but need not, delegate the hearing function, in the judgment of the agency head.

§ 642.220. OAH administrative law judge as presiding officer

642.220. If an adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, the following provisions apply:

(a) The presiding officer shall be an administrative law judge assigned as provided in Section 640.250.

(b) In the discretion of the agency head, the administrative law judge may hear the case alone or the agency head may hear the case with the administrative law judge.

(c) If the administrative law judge hears the case alone, the administrative law judge shall exercise all powers relating to the conduct of the hearing.

(d) If the agency head hears the case with the administrative law judge:

(1) The administrative law judge shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency head on matters of law.

(2) The agency head shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the administrative law judge.

(3) If, after the hearing has commenced, a quorum no longer exists, the administrative law judge who is presiding shall complete the hearing as if sitting alone and shall make a proposed order in accordance with Section 642.710.

(4) The administrative law judge who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency head. No agency member who did not hear the evidence shall vote.

Comment. Section 642.220 continues the substance of the first sentence of former Section 11512(a). It recognizes that a number of statutes require an administrative law judge employed by the Office of Administrative Hearings. Subdivision (a) makes clear that assignment of an administrative law judge in such a case is governed by Section 640.250(a) (Office of Administrative Hearings).

Subdivision (b) continues the second sentence of former Section 11512(a) without substantive change.

Subdivision (c) continues the second sentence of former Section 11512(b) without substantive change.

Subdivisions (d)(1) and (2) continue the first sentence of former Section 11512(b) without substantive change. Subdivision (d)(3) continues former Section 11512(e) without substantive change. Subdivision (d)(4) continues former Section 11517(a) without substantive change.

Note. We are informed that the sort of joint hearing procedure described in this section is not used much under the Administrative Procedure Act, but occasionally an agency will want to sit on a case. A similar procedure--hearings conducted jointly by a hearing officer and one or more agency members--is also used by a few non-APA agencies, including the Board of Prison Terms and the Public Utilities Commission.

The purpose of this procedure, according to the Judicial Council's 1944 report, is the assurance that all hearings will provide due process of law and will be conducted in an orderly manner. This purpose is served by the provision that all hearings must be conducted by a qualified hearing officer:

"The agency may either delegate the duty of conducting a hearing to a hearing officer who will sit alone, or the agency itself may sit at the hearing with the hearing officer presiding. The first alternative permits the agencies to delegate the duty of holding a hearing, and will enable the agencies more fully to meet the exigencies of business. The latter alternative is novel, but it was approved by nearly all of the multi-member agencies which desire to hear cases themselves, and the Council believes that it will remove the cause of much adverse criticism of administrative proceedings. The practice of most of these agencies is to delegate to the president the duty of conducting the hearing, passing on motions, and ruling on the admissibility of evidence. The presiding members of most professional boards are not familiar enough with the rules of trial procedure to resolve legal questions of any complexity. Desiring to reach a correct result the presiding member of the board is forced to seek legal advice and the natural person to whom he turns is the prosecutor or agency attorney. The prosecutor thus seems to share in the fact-finding process. This is extremely undesirable both because of the potential danger to the respondent, and because of the appearance of unfairness even though there be no actual unfairness. By requiring the board to sit with a hearing officer the evils of lack of procedural knowledge and undue reliance on the prosecutor can be overcome, and at the same time the benefits of having the decision on technical matters made by experts in the field can be retained.

"This section is specially adapted to the requirements of the agencies in this State. None of the proposed Federal acts contain a similar provision, but the situation in the Federal system is distinguishable. The volume of Federal business is such that few agencies try cases before the members of the agency, most cases being heard by trial examiners. Where the agency members do conduct hearings, they usually give their full time to agency affairs and, therefore, have some opportunity to become proficient in the process.

"When the hearing officer sits with the agency it is provided that he preside at the hearing, rule on the admissibility of evidence and act as legal adviser. The agency may reserve to itself any other powers in connection with the hearing. Since the presence of the

hearing officer is designed to improve procedure, not to deprive the agency of its authority, the agency should have the power to rule on continuances and other matters which may be as much questions of agency convenience as of fair procedure. When the hearing officer sits alone he is, in effect, a deputy of the agency and is authorized to exercise all of the agency's powers in conducting the hearing."

In other words, this section is the result of a political compromise made in 1944. It is not of major importance in 1990, although there are a few agencies that want to retain as much control over the proceedings as possible. The staff believes that this provision, and others that implement it, complicate administrative procedure beyond their value. We would delete these provisions in reliance on other review protections given the agency, in the interest of uniformity and simplicity of administrative procedure.

Article 7. Orders

§ 642.710. Proposed and final orders

642.710. (a) If the presiding officer is the agency head, the presiding officer shall make a final order within 100 days after the case is submitted.

(b) If the presiding officer is not the agency head, the presiding officer shall make a proposed order within 30 days after the case is submitted. A proposed order becomes a final order at the time provided in Section 642.780.

Comment. Subdivision (a) of Section 642.710 continues the substance of the second sentence of former Section 11517(d). See also 1981 Model State APA § 4-215(a).

Subdivision (b) continues the substance of the first sentence of former Section 11517(b). For the form and contents of an order, whether proposed or final, see Section 642.720.

A proposed order may be subject to administrative review; a final order is not. Section 642.810 (availability of review). See also Section 610.400 ("order" defined). Errors in either a proposed order or a final order may be corrected under Section 642.760 (correction of mistakes in order). A proposed order becomes final unless it is subjected to administrative review under Article 8 (commencing with Section 642.810).

Note. The existing administrative procedure act refers to a proposed "decision" rather than a proposed "order". The terminology of orders, rather than decisions, makes more sense to the staff, since an order is the end product of an agency administrative adjudication.

We have not yet examined the concept of when a case is "submitted" for purposes of this section.

§ 642.720. Form and contents of order

642.720. (a) A proposed order or final order shall be in writing and shall include all of the following:

(1) Findings of fact.

(2) A determination of the issues presented.

(3) The penalty, if any.

(b) The findings of fact may be stated in the language of, or by reference to, the pleadings and shall include an identification of any findings based substantially on credibility of evidence or demeanor of witnesses.

Comment. Section 642.720 is drawn from the first two sentences of former Section 11518. Under Section 642.720, the form and contents of a proposed order and final order are the same. Cf. former Section 11517(b) (proposed decision in form that it may be adopted as decision in case).

The requirement in subdivision (b) that findings based on credibility and demeanor be identified is derived from Rev. Code of Wash. Ann §§ 34.05.461(3) and 34.05.464(4). Findings of this type are entitled to great weight on judicial review. Code Civ. Proc. § 1094.5 (administrative mandamus).

Note. This implements Professor Asimow's recommendation that the presiding officer identify findings that will be given "great weight" on judicial review. However, the presiding officer's identification does not bind the agency or the courts, which may make their own determinations whether a particular finding is based substantially on credibility or demeanor observation. Given this situation, the staff wonders whether this provision may not do more harm than good, leading to battles over the weight to be given the presiding officer's identification, in addition to the inevitable battles over the weight to be given the findings themselves.

This draft is not intended as a complete statute on the form and contents of the order. There are a number of issues raised by 1981 Model State APA § 4-215 that will be reviewed at a later time. The draft of this section is complete only in the sense that it represents a tentative disposition of the relevant portion of Government Code Section 11518.

§ 642.750. Delivery of order to parties

642.750. The presiding officer immediately shall cause a copy of a proposed order or final order to be served on each party. The agency shall file a copy as a public record.

Comment. Section 642.750 supersedes the third sentence of former Section 11517(b) and continues the substance of former Section 11517(e) and the third sentence of former Section 11518. See also 1981 Model State APA § 4-215(h). For the manner of service, see Section 613.010.

Note. This implements Professor Asimow's recommendation that the parties should always receive a copy of the presiding officer's decision, even if it is only a proposed order that will be vacated by the agency. Existing law gives the agency 30 days to review a proposed order before it must serve copies on the other parties and their attorneys.

Delivery of the proposed order directly to the parties immediately by the presiding officer rather than later through the agency helps to achieve fairness and the appearance of fairness in the proceedings--the proposed order is delivered by a neutral party rather than the agency, and both the agency and the respondent have an equal opportunity to review it. The present draft is thus more consistent with the concept of the independence of the presiding officer.

There was discussion at the last Commission meeting whether providing the parties a copy of the proposed order before it is reviewed by the agency head would encourage lobbying of the agency head before it has a chance to do a careful review of the order. Also, concerns have been expressed that the parties may feel obligated to seek reconsideration. This is addressed under the reconsideration statute, immediately below ("correction of mistakes in order").

We have added an "immediate" delivery requirement for a proposed order. This will enable correction and appeal times to run from a fixed date--the making of the order--rather than from a variable delivery date that may differ for different parties.

§ 642.760. Correction of mistakes in order

642.760. (a) Within 15 days after the making of a proposed order or a final order, a party may move for correction of mistakes and clerical errors in the order, stating the specific grounds on which the motion is made. The motion is not a prerequisite for seeking administrative or judicial review, and administrative or judicial review may be granted notwithstanding the pendency of a motion for correction of mistakes and clerical errors in the order.

(b) The motion shall be disposed of by the presiding officer who made the proposed order or final order, if available.

(c) The presiding officer shall make a ruling denying the motion, granting the motion and modifying the proposed or final order, or granting the motion and setting the matter for further proceedings. The motion may be granted, in whole or in part, only if the presiding officer states, in the ruling, findings of fact and conclusions of law to justify the ruling. The motion is deemed to have been denied if the presiding officer does not rule on it within 15 days after the motion is made.

Comment. Section 642.760 supersedes former Section 11521 (reconsideration). It is analogous to Code of Civil Procedure Section 473 and is drawn from 1981 Model State APA § 4-218. "Party" includes the agency that is a party to the proceedings. Section 610.460 ("party" defined).

The section is intended to provide parties a limited right to remedy mistakes in the proposed or final order without the need for administrative or judicial review. Instances where this procedure is intended to apply include correction of factual or legal errors in the proposed or final order.

Note. We have drafted this procedure for "reconsideration" on request of a party, as opposed to remand at the direction of the agency, in a manner designed to limit its use to correction of mistakes rather than a review on policy grounds. The Commission had requested that this limitation be incorporated. The concept is that we already have provisions for a full review on policy grounds, and we don't need to encumber administrative proceedings with additional procedures. Correction of mistakes can be done simply without hindering the regular process of the administrative proceeding.

Since this provision is narrower in scope than the existing procedure for reconsideration, we have not included any provisions allowing the agency to by rule limit the procedure for correction of mistakes, nor do we require the presiding officer's ruling to be written. We are calling this a "motion" for now, but this terminology may be changed as we elaborate the mechanics of hearings generally.

§ 642.770. Adoption of proposed order

642.770. (a) Within 30 days after a proposed order is made, the agency head may summarily adopt the proposed order in its entirety as a final order or reduce a proposed penalty and adopt the balance of the proposed order as a final order.

(b) In proceedings under this section the agency head shall consider the proposed order and any briefs filed by the parties, but need not review the record in the case.

Comment. Section 642.770 is drawn from the second sentence of former Section 11517(b). Unlike the former provision, subdivision (b) requires the reviewing authority to consider any review briefs filed by the parties. It should be noted that the adoption procedure provided in this section is available to an agency independent of any review procedures under Article 8 (commencing with Section 642.810) (administrative review of proposed order).

Note. This draft changes the existing law by requiring the agency head to consider review briefs filed by the parties, as per Professor Asimow's recommendation. This change, combined with early delivery of the proposed order to the parties, would tend to fuel concerns that it will add complexity. It would make it almost mandatory for the parties to file a brief with the agency head in every case, thus further complicating and increasing the cost of administrative proceedings.

§ 642.780. Time proposed order becomes final

642.780. Unless adopted as a final order under Section 642.770 or reviewed under Article 8 (commencing with Section 642.810), a proposed order becomes a final order at the earliest of the following times:

(a) If the agency by rule precludes administrative review, at the time the proposed order is made.

(b) If the agency by rule limits administrative review, at the time limited in the rule.

(c) If the agency head by rule has discretion whether to grant administrative review, at the time administrative review is denied.

(d) One hundred days after the proposed order is made.

Comment. Section 642.780 supersedes the first sentence of subdivision (d) of former Section 11517. See also 1981 Model State APA § 4-220(b).

Note. One hundred days in limbo seems like an unduly long time.

Article 8. Administrative Review of Proposed Order

§ 642.810. Availability of review

642.810. Except as otherwise provided in this article, an agency on its own motion may, and on petition by a party shall, review a proposed order.

Comment. Section 642.810 is drawn from the introductory portion of 1981 Model State APA § 4-216(a). The reviewability of proposed orders may be limited or eliminated by agency rule. Section 642.820 (limitation of administrative review).

Note. The statutory scheme provides for automatic agency review on request of a party, unless the agency has decided to limit review. We do not know how many agencies have limited review. If we find that most agencies have limited the right of automatic review, it may make more sense to reverse the statutory scheme and limit review unless authorized by the agency. This will make the statute conform more with reality and will avoid the burden on agencies of adopting a rule in order to overturn the automatic feature of the statute.

§ 642.820. Limitation of review

642.820. Except to the extent expressly limited by statute:

(a) An agency, by rule, may preclude or limit administrative review of a proposed order.

(b) An agency head, in the exercise of discretion conferred by rule, may do any of the following with respect to administrative review of a proposed order:

(1) Determine to review some but not all issues, or not to exercise any review.

(2) Delegate its review authority to one or more persons.

(3) Authorize review by one or more persons, subject to further review by the agency head.

(c) An agency may grant administrative review notwithstanding a rule precluding or limiting review if, in advance of the hearing, a party has requested that the matter be made reviewable and the agency has consented. The decision of the agency on the request is not subject to judicial review.

Comment. Section 642.770 is drawn from 1981 Model State APA § 4-216(a)(1)-(2). The introductory clause recognizes that a statute may require the agency head itself to hear and decide a specific issue. See, e.g., Greer v. Board of Education, 47 Cal. App. 3d 98, 121 Cal. Rptr. 542 (1975) (school board, rather than hearing officer, formerly required to determine issues under Education Code § 13443).

Note. Subdivision (c) implements one of Professor Asimow's suggestions. It is intended to be used in situations where, although administrative review is not the norm, the issues in a particular case warrant an exception.

The staff wonders whether this procedure is worth it. If an agency wants to be able to review an occasional case for policy reasons, it can write that exception into its rules.

§ 642.830. Initiation of review

642.830. Within 100 days after a proposed order is made:

(a) A party may file with the agency head a petition for administrative review of the proposed order. The petition shall state its basis.

(b) The agency head on its own motion may give written notice of administrative review of the proposed order. The notice shall be served on each party and shall identify the issues for review.

Comment. Section 642.830 supersedes a portion of the first sentence of former Section 11517(d). See also 1981 Model State APA § 4-216(b)-(c). For the manner of service, see Section 613.010.

Note. The 100-day period to initiate review of a proposed order is taken from the existing California administrative procedure act. This seems somewhat long. On the other hand, the 10 days allowed by the 1981 Model State APA seems unduly short. In a statute designed for all state agencies, a middle ground may be preferable.

§ 642.840. Review procedure

642.840. (a) The reviewing authority shall decide the case on the record, including a transcript, prepared at the agency's expense, of such portions of the proceeding under review as the reviewing authority considers necessary. By stipulation of the parties, the reviewing authority may decide the case on the record without including the transcript.

(b) The reviewing authority shall not take additional evidence, but may remand the matter to the presiding officer who made the proposed order for further proceedings.

(c) The reviewing authority shall allow each party an opportunity to present a brief and an oral argument.

Comment. Section 642.840 continues the first, second, and fifth sentences of former Section 11517(c) except that the reviewing authority is precluded from taking additional evidence and is required to receive both briefs and oral arguments. See also 1981 Model State APA § 4-216(d)-(f). The reviewing authority is the agency head or person to whom the authority to review is delegated. Section 610.680 ("reviewing authority" defined).

If further proceedings are required, they may be obtained on remand under Section 642.850.

Note. This section implements Professor Asimow's recommendation that the agency on review not be permitted to hear the case de novo but must restrict itself to the record. The only procedure for obtaining additional evidence is on remand to the presiding officer. Existing law requires that "If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence."

This section also implements Professor Asimow's suggestion that a party be entitled to present both a brief and an oral argument on review, instead of one or the other as existing law provides.

This section as reconstituted is not much different in character from the 30-day-adoption-of-the-proposed-order procedure under Section 642.770. Perhaps the two procedures should be combined into one.

§ 642.850. Final order or remand

642.850. (a) Within 100 days after receipt of briefs and oral argument, the reviewing authority shall make a final order disposing of the proceeding or remand the matter to the presiding officer who made the proposed order for further proceedings. The 100-day period begins on delivery of the transcript in a case where the reviewing authority has ordered a transcript of the proceedings. The 100-day period may be waived or extended with the written consent of all parties or for good cause. If the reviewing authority finds that a further delay is required by special circumstances, it shall issue a ruling delaying the final order or remand no more than 30 days and specifying the reasons therefor. The ruling is subject to judicial review pursuant to Section [11523].

(b) A final order or a remand for further proceedings shall be made in writing and shall include, or incorporate by express reference to the proposed order, all the matters required by Section 642.720 (form and contents of order). The final order or remand shall identify any difference between the proposed order and the final order or remand. A remand shall specify the ground for remand and include instructions to the presiding officer.

(c) The reviewing authority shall cause a copy of the final order or remand for further proceedings to be served on each party.

Comment. Section 642.850 supersedes Government Code § 11517(c)-(d). It is drawn in part from 1981 Model State APA § 4-216(g)-(j). Specification of the ground for remand may include such matters as the need for additional proceedings resulting from newly discovered evidence. The reviewing authority is the agency head or person to whom the authority to review is delegated. Section 610.680 ("reviewing authority" defined). For the manner of service, see Section 613.010.

Note. The concept of subjecting to judicial review an agency-ordered delay of 30 days in issuing its decision seems crazy, but that's what the existing statute seems to say. The staff would delete this.

§ 642.860. Procedure on remand

642.860. On remand:

(a) The reviewing authority may order such temporary relief as is authorized and appropriate.

(b) The presiding officer shall prepare a proposed order based on the additional evidence and the transcript and other papers that are part of the record of the prior hearing.

(c) The proposed order shall be served on each party and is subject to correction and review to the same extent and in the same manner as an original proposed order.

Comment. Subdivision (a) of Section 642.860 is drawn from 1981 Model State APA § 4-216(g). Subdivisions (b) and (c) continue the substance of the third and fourth sentences of former Section 11517(c). For the manner of service, see Section 613.010.

ADMINISTRATIVE MANDAMUS

Code Civ. Proc. § 1094.5 (amended). Administrative mandamus

1094.5. ...

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record. In making a determination under this subdivision, the court shall give great weight to any findings of the presiding officer in the adjudicative proceeding based substantially on credibility of evidence or demeanor of witnesses.

...

Comment. Subdivision (c) of Section 1094.5 is amended to adopt the rule of Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951), requiring that the reviewing court weigh more heavily findings by the trier of fact--the presiding officer in an administrative adjudication--based on observation of witnesses than findings based on other evidence. This generalizes the standard of review used by a number of California agencies. See, e.g., Lamb v. W.C.B.A., 11 Cal. 3d 274, 281, 113 Cal. Rptr. 162, 520 P.2d 978 (1974) (Workers' Compensation Appeals Board); Millen v. Swoap, 58 Cal. App. 3d 943, 947, 130 Cal. Rptr. 387 (1976) (Department of Social Services); Apte v. Regents of Univ. of Calif., 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr.

312 (1988) (University of California); [citation] (Public Employment Relations Board). It reverses the existing practice under the administrative procedure act and other California administrative procedures that gives no weight to the findings of the presiding officer at the hearing. See Asimow, Appeals Within the Agency: The Relationship Between Agency Heads and ALJs 22-25 (August 1990).

Findings based substantially on credibility of evidence or the demeanor of witnesses must be identified by the presiding officer in the order made in the adjudicative proceeding. Gov't Code § 642.720(b) (form and contents of order). However, the presiding officer's identification of such findings is not binding on the agency or the courts, which may make their own determinations whether a particular finding is based substantially on credibility or demeanor of witnesses.

Note. This provision would implement the recommendation of Professor Asimow. It would change the rule applicable to most, but not all, California administrative hearings. Professor Asimow indicates that the general rule is that an agency is free to ignore all findings of the hearing officer, including findings based on observation of witnesses. By requiring these findings to be given greater weight on judicial review, agencies will be encouraged to honor the findings in agency review. This would facilitate the basic concept applicable in administrative procedure that "The one who decides must hear." Morgan v. United States, 298 U.S. 468, 481 (1936).

It should be noted that under this draft, it is not just the findings of the administrative law judge that are given great weight on judicial review. If the agency head presides, the agency head's findings based on demeanor evidence would also be given great weight.

Also, this draft does not discriminate between "independent judgment" review and "substantial evidence" review. In either case the court is required to give great weight to the credibility determinations of the trier of fact. With respect to independent judgment review, Professor Asimow would take a different approach--"My suggestion would be that in such cases, the court should consider the ALJ proposed decision along with the agency final decision, giving whatever weight to either decision it finds appropriate. Naturally, the court is likely to be more impressed by credibility findings of an ALJ who heard the witnesses rather than those made by agency heads who did not hear them."

CONFORMING REVISIONS AND REPEALS

[Government Code]

Gov't Code §§ 11370-11370.5 (repealed). Office of Administrative Hearings

CHAPTER 4. OFFICE OF ADMINISTRATIVE HEARINGS

§ 11370. Administrative Procedure Act

11370. Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act.

Comment. Former Section 11370 is restated in Section 600 (short title).

§ 11370.1. "Director"

11370.1. As used in the Administrative Procedure Act "director" means the executive officer of the Office of Administrative Hearings.

Comment. Former Section 11370.1 is continued in subdivision (a) of Section 640.210 ("director" defined) without substantive change.

§ 11370.2. Office of Administrative Hearings

11370.2. (a) There is in the Department of General Services the Office of Administrative Hearings which is under the direction and control of an executive officer who shall be known as the director.

(b) The director shall have the same qualifications as administrative law judges, and shall be appointed by the Governor subject to confirmation of the Senate.

(c) Any and all references in any law to the Office of Administrative Procedure shall be deemed to be the Office of Administrative Hearings.

Comment. Former Section 11370.2 is continued in Section 640.220 (Office of Administrative Hearings) without substantive change.

§ 11370.3. Personnel

11370.3. The director shall appoint and maintain a staff of full-time, and may appoint pro tempore part-time, administrative law judges qualified under Section 11502 which is sufficient to fill the

needs of the various state agencies. The director shall also appoint hearing officers, shorthand reporters, and such other technical and clerical personnel as may be required to perform the duties of the office. The director shall assign an administrative law judge for any proceeding arising under Chapter 5 (commencing with Section 11500) and, upon request from any agency, may assign an administrative law judge or a hearing officer to conduct other administrative proceedings not arising under that chapter and shall assign hearing reporters as required. The director shall assign an administrative law judge for any proceeding arising pursuant to Chapter 20 (commencing with Section 22450) of Division 8 of the Business and Professions Code upon the request of a public prosecutor. Any administrative law judge, hearing officer, or other employee so assigned shall be deemed an employee of the office and not of the agency to which he or she is assigned. When not engaged in hearing cases, administrative law judges and hearing officers may be assigned by the director to perform other duties vested in or required of the office, including those provided for in Section 11370.5.

Comment. The first sentence of former Section 11370.3 is continued in subdivision (a) of Section 640.230 (administrative law judges) without substantive change. The second sentence is continued in Section 640.240 (hearing officers and other personnel) without substantive change.

The first part of the third sentence is superseded by subdivision (a) of Section 640.250 (assignment of administrative law judges and hearing officers). The second part is continued in subdivision (b) of Section 640.250 without substantive change. The third part is continued in subdivision (c) of Section 640.250 without substantive change.

The fourth sentence is omitted as unnecessary. See Section 640.250(a) (assignment of administrative law judges) and Bus. & Prof. Code § 22460.5.

The fifth sentence is continued in subdivision (d) of Section 640.250 (assignment of administrative law judges and hearing officers) without substantive change.

Subdivision (e) continues the sixth sentence of former Section 11370.3 (assignment of administrative law judges and hearing officers) without substantive change.

§ 11370.4. Costs

11370.4. The total cost to the state of maintaining and operating the Office of Administrative Hearings shall be determined by, and collected by the Department of General Services in advance or upon such

other basis as it may determine from the state or other public agencies for which services are provided by the office.

Comment. Former Section 11370.4 is continued in Section 640.270 without substantive change.

§ 11370.5. Administrative law and procedure

11370.5. The office is authorized and directed to study the subject of administrative law and procedure in all its aspects; to submit its suggestions to the various agencies in the interests of fairness, uniformity and the expedition of business; and to report its recommendations to the Governor and Legislature at the commencement of each general session. All departments, agencies, officers and employees of the State shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge of control.

Comment. Former Section 11370.5 is continued in Sections 610.190 ("agency" defined) and 640.280 (study of administrative law and procedure) without substantive change.

Gov't Code §§ 11500-11528 (repealed). Administrative adjudication

CHAPTER 5. ADMINISTRATIVE ADJUDICATION

§ 11500. Definitions

11500. In this chapter unless the context or subject matter otherwise requires:

(a) "Agency" includes the state boards, commissions, and officers enumerated in Section 11501 and those to which this chapter is made applicable by law, except that wherever the word "agency" alone is used the power to act may be delegated by the agency, and wherever the words "agency itself" are used the power to act shall not be delegated unless the statutes relating to the particular agency authorize the delegation of the agency's power to hear and decide.

(b) "Party" includes the agency, the respondent, and any person, other than an officer or an employee of the agency in his or her official capacity, who has been allowed to appear or participate in the proceeding.

...

(e) "Agency member" means any person who is a member of any agency to which this chapter is applicable and includes any person who himself or herself constitutes an agency.

Comment. The introductory portion of former Section 11500 is restated in Section 610.010 (application of definitions).

Subdivision (a) is superseded by Section 612.010 (application of division to state).

The substance of subdivision (b) is continued in Section 610.460 ("party" defined).

The substance of subdivision (e) is continued in Section 610.280 ("agency member" defined).

§ 11502. Administrative law judges

11502. All hearings of state agencies required to be conducted under this chapter shall be conducted by administrative law judges on the staff of the Office of Administrative Hearings. The Director of the Office of Administrative Hearings has power to appoint a staff of administrative law judges for the office as provided in Section 11370.3 of the Government Code. Each administrative law judge shall have been admitted to practice law in this state for at least five years immediately preceding his or her appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

Comment. The first sentence of former Section 11502 is superseded by Section 642.210 (designation of presiding officer by agency head). The second sentence is continued in subdivision (a) of Section 640.230 (administrative law judges) without substantive change. The third sentence is continued in subdivision (b) of Section 640.230 without substantive change.

§ 11502.1. Health planning unit

11502.1. There is hereby established in the Office of Administrative Hearings a unit of administrative law judges who shall preside over hearings conducted pursuant to Part 1.5 (commencing with Section 437) of Division 1 of the Health and Safety Code. In addition to meeting the qualifications of administrative law judges as prescribed in Section 11502, the administrative law judges in this unit shall have a demonstrated knowledge of health planning and certificate-of-need matters. As many administrative law judges as are necessary to handle the caseload shall be permanently assigned to this unit. In the event there are no pending certificate of need of health

planning matters, administrative law judges in this unit may be assigned to other matters pending before the Office of Administrative Hearings. Health planning matters shall be given priority on the calendar of administrative law judges assigned to this unit.

Comment. Section 11502.1 is not continued. The requirement that health facilities and specialty clinics apply for and obtain certificates of need or certificates of exemption is indefinitely suspended. Health & Saf. Code § 439.7 (1984 Cal. Stats. ch. 1745, § 14).

§ 11512. Presiding officer

11512. (a) Every hearing in a contested case shall be presided over by an administrative law judge. The agency itself shall determine whether the administrative law judge is to hear the case alone or whether the agency itself is to hear the case with the administrative law judge.

(b) When the agency itself hears the case, the administrative law judge shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law; the agency itself shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the administrative law judge. When the administrative law judge alone hears a case, he or she shall exercise all powers relating to the conduct of the hearing.

(c) An administrative law judge or agency member shall voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of any administrative law judge or agency member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. Where the request concerns an agency member, the issue shall be determined by the other members of the agency. Where the request concerns the administrative law judge, the issue shall be determined by the agency itself if the agency itself hears the case with the administrative law judge, otherwise the issue shall be determined by the administrative law judge. No agency member shall withdraw

voluntarily or be subject to disqualification if his or her disqualification would prevent the existence of a quorum qualified to act in the particular case.

(d) The proceedings at the hearing shall be reported by a phonographic reporter. However, upon the consent of all the parties, the proceedings may be reported electronically.

(e) Whenever, after the agency itself has commenced to hear the case with an administrative law judge presiding, a quorum no longer exists, the administrative law judge who is presiding shall complete the hearing as if sitting alone and shall render a proposed decision in accordance with subdivision (b) of Section 11517 of the Government Code.

Comment. The substance of the first sentence of subdivision (a) of former Section 11512 is continued in Section 642.220(a) (where administrative law judge required). The second sentence is continued in Section 642.220(b) without substantive change.

The first sentence of subdivision (b) is continued in Section 642.220(d)(1) and (2). The second sentence is continued in Section 642.220(c).

Subdivision (e) is continued in Section 642.220(d)(4) without substantive change.

§ 11517. Decision in contested cases

11517. (a) If a contested case is heard before an agency itself, the administrative law judge who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency. Where a contested case is heard before an agency itself, no member thereof who did not hear the evidence shall vote on the decision.

(b) If a contested case is heard by an administrative law judge alone, he or she shall prepare within 30 days after the case is submitted a proposed decision in such form that it may be adopted as the decision in the case. The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision. Thirty days after receipt of the

proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

(c) If the proposed decision is not adopted as provided in subdivision (b), the agency itself may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same administrative law judge to take additional evidence. By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the case is assigned to an administrative law judge he or she shall prepare a proposed decision as provided in subdivision (b) upon the additional evidence and the transcript and other papers which are part of the record of the prior hearing. A copy of the proposed decision shall be furnished to each party and his or her attorney as prescribed in subdivision (b). The agency itself shall decide no case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence.

(d) The proposed decision shall be deemed adopted by the agency 100 days after delivery to the agency by the Office of Administrative Hearings, unless within that time the agency commences proceedings to decide the case upon the record, including the transcript, or without the transcript where the parties have so stipulated, or the agency refers the case to the administrative law judge to take additional evidence. In a case where the agency itself hears the case, the agency shall issue its decision within 100 days of submission of the case. In a case where the agency has ordered a transcript of the proceedings, the 100-day period shall begin upon delivery of the transcript. If the agency finds that a further delay is required by special circumstances, it shall issue an order delaying the decision no more than 30 days and specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section 11523.

(e) The decision of the agency shall be filed immediately by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

Comment. Subdivision (a) of former Section 11517 is continued in Section 642.220(d)(4) without substantive change.

The substance of the first sentence of subdivision (b) is continued in Sections 642.710(b) (proposed and final orders) and 642.720 (form and contents of order). The substance of the second sentence is continued in Section 642.770 (adoption of proposed order). The third sentence is superseded by Section 642.750 (delivery of order to parties).

The substance of the first and second sentences of subdivision (c) is continued in Section 642.840 (review procedure), except that the agency is precluded from taking additional evidence. The substance of the third and fourth sentences is continued in Section 642.860 (procedure on remand). The fifth and sixth sentences are superseded by Section 642.840 (review procedure).

The first sentence of subdivision (d) is superseded by Sections 642.780 (time proposed order becomes final) and 642.830 (initiation of review). The substance of the second sentence is continued in Section 642.710(a) (proposed and final orders). The substance of the third, fourth, and fifth sentences is continued in Section 642.830 (initiation of review).

The substance of subdivision (e) is continued in Section 642.750 (delivery of order to parties).

§ 11518. Decision

11518. The decision shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference thereto. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail.

Comment. The substance of the first two sentences of former Section 11518 is continued in Section 642.720 (contents of order). The substance of the third sentence is continued in Section 642.750 (delivery of order to parties).

§ 11521. Reconsideration

11521. (a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of any of the applicable periods, an agency may grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

(b) The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to an administrative law judge. A reconsideration assigned to an administrative law judge shall be subject to the procedure provided in Section 11517. If oral evidence is introduced before the agency itself, no agency member may vote unless he or she heard the evidence.

Comment. Former Section 11521 is not continued. It is superseded by Section 642.760 (correction of mistakes in order).