Second Supplement to Memorandum 91-4

Subject: Study N-105 - Administrative Adjudication (Effect of ALJ Decision--comments of agencies)

Attached to this memorandum are additional comments of agencies concerning the staff revised draft of the effect of the ALJ's decision. See Exhibits 1 (Workers' Compensation Appeals Board (WCAB)) and 2 (Department of Real Estate (DRE)). Their comments are summarized below.

General Comments

The Department of Real Estate notes a number of overriding concerns with the Commission's project to revise the administrative procedure statute:

(1) "Apart from anecdotal instances, the evidence of a need to extensively review the APA is somewhat lacking."

(2) Some of the remedies proposed are worse than the problems they address.

(3) Some of the proposals would increase the cost of administrative adjudication. This is particularly inadvisable during a budget crisis.

(4) Care should be taken not to destroy the purpose of the licensing structure--to protect the public from dishonest or incompetent licensees--by drafting procedures that hinder enforcement.

(5) The public is most concerned about lack of timely prosecution of disciplinary actions. It is DRE's general observation that many of the proposed changes under consideration would lengthen the time of administrative adjudications.

(6) Even where the redrafted provisions continue the substance of existing law, changes in terminology and wording "throws out the case law and commentary which has interpreted" the existing statute.

The staff hopes DRE will continue to call to the Commission's attention specific proposals that will cause problems of this nature.

Scope of Statute

The Workers' Compensation Appeals Board expresses concern about being included in any uniform administrative procedure act. It is unable to provide the Commission with details about its concern at present, but hopes in the near future to advise the Commission on how the proposals would impact the ability of WCAB to perform its judicial function.

The Department of Real Estate doubts whether the goal of a single statute applicable to all state administrative adjudications is achievable. They are concerned that in the effort to make one size fit all, we will draw an unnecessarily broad statute, and when agencies adopt their own regulations under the broad statute it will cause greater diversity and confusion than now exists. They also note that there could be existing administrative actions that are unknowingly and improperly swept into an all inclusive APA.

The Commission discussed this matter at the April meeting and decided to proceed with the goal of a uniform statute applicable to all state agencies. As the statute begins to develop, the need for exemptions may or may not become more apparent.

§ 610.310. "Decision" defined

DRE is concerned that the definition of "decision" is too broad, possibly encompassing preliminary motions, interlocutory orders, procedural orders, and rulings on evidence. They suggest it be limited to final agency actions.

The Commission discussed this issue at the April meeting and decided the Comment should make clear that the statute is not intended to expand the types of cases in which an adjudicatory proceeding, whether formal or informal, is required. See Section 640.010: "An agency shall conduct a proceeding under this part as the process for formulating and issuing a decision for which a hearing or other adjudicative proceeding is required by the federal or state constitution or by statute."

§ 610.460. "Party" defined

DRE is concerned that the definition of party--including any person named in the proceeding--is overbroad. DRE's accusations, for example, include the name of an alleged victim of wrongful conduct by a licensee. If this section makes the named victim a party, it is neither workable nor desirable.

The staff would tighten up the draft by referring to a "person named as a party or allowed to intervene in the proceeding."

§ 642.720. Form and contents of decision

Subdivision (a) requires a decision to include a statement explaining the factual and legal basis for the decision as to each of the principal controverted issues. DRE does not recall any previous study or draft finding fault with existing Government Code Section 11518, which requires a decision to contain "findings of fact" and "a determination of the issues presented".

Actually, the previous draft of this section, which was discussed at the Commission's November 30 meeting in Los Angeles and at which the signatory of the DRE letter was an active participant, merely retained the language of existing Section 11518. Concerns were expressed by agency representatives present at the meeting that the existing statutory requirement requires an overly detailed decision, and that it may not be suitable for the perfunctory type of denial of a tax claim or for default proceedings. In response to these agency concerns, the Commission at that meeting asked the staff to revise the section to adopt a concept analogous to a statement of decision in a civil action, as provided in Code of Civil Procedure Section 632. This approach is reflected in the current draft.

Subdivision (b) provides a means of identifying determinations based substantially on the credibility of a witness, in order that such determinations may be given great weight on review. DRE objects, noting that "such determinations are already given great weight under the existing APA. We see no reason to write that procedure into the statute."

But is there any reason not to? It appears to be existing law in many cases and existing practice in most. It could help avoid litigation over the matter by setting the rule out in black and white.

DRE argues that the administrative procedure act should not require a higher standard than the one used in the civil and criminal courts. But findings of fact in civil and criminal courts, whether based on credibility or anything else, are given more than great weight on appeal. Trial court findings of fact will be upset on appeal only where there is no substantial evidence to support them.

§ 642.750. Adoption of proposed decision

DRE notes that the non-adoption procedure of existing Government Code Section 11517(c) would be replaced by "Administrative Review of Decision." DRE's objections to this change are discussed under Article 8 (commencing with Section 642.810) (administrative review of decision).

DRE also wonders why there is no provision stating when a proposed decision adopted by the agency becomes final and why there are no provisions for a stay of the effective date, citing existing Government Code Section 11519. The answer is that we are building the statute piece by piece; the current draft simply sets out in statutory form policy issues raised in Professor Asimow's study in order to focus review by the Commission and interested persons. It does not purport to be a complete statute. When we have made policy decisions that will shape the direction of the draft, we will fill in the holes, and we will be certain to cover these points.

§ 642.770. Service of decision on parties

DRE remarks that this section is "somewhat confusing". The staff agrees, although we think it does work. Maybe as we refine and clarify the procedures we can simplify this section.

DRE also remarks that 30 days may be more time than necessary for service of a copy of a final decision, since that is simply a ministerial act. The 30 day period responds to agency input at an earlier Commission meeting that the existing provision requiring

"immediate" delivery is unrealistic since the decision may require some additional physical work. DRE may be right that 30 days is too long; perhaps 15 days would be a better period.

DRE notes conflicting Business and Professions Code provisions requiring different time periods for different types of hearings. We presume that we will make conforming changes to standardize these provisions in the course of this project, absent a showing of need for a special provision to govern the particular matter.

§ 642.780. Correction of mistakes in decision

DRE likes the purpose of this section, but believes there are mechanical difficulties with it:

(1) If the agency head on its own motion corrects an error, what recourse is there for another party who disagrees? The answer is that there is no recourse, other than to appeal the final decision, as issued, if the party disagrees with the final decision. The staff sees no problem in this.

(2) There is only a 15-day period for a party to apply for a correction. The staff agrees it is not much time. But it is better than nothing.

(3) How will it work where the decision is scheduled to take effect during or immediately after the correction period? Then the correction procedure may not work as well as we would like.

Specific suggestions from agency representatives for improvements in the correction procedure would be welcome.

Article 8 (commencing with Section 642.810). Administrative Review of Decision

DRE notes that the administrative review procedure appears intended to replace the reconsideration and non-adoption provisions of the current APA. They question the need for such a sweeping revision, being unaware of demonstrated abuses or a need to revise practices that have been in place for almost 50 years.

This is a position the Commission needs to hear in evaluating whether to adopt Professor Asimow's recommendation to revise the existing reconsideration procedure. Defects in the existing statute

pointed out by Professor Asimow in his backgroumd study for the Commission include:

(1) Existing law ties reconsideration to the effective date of the order, thereby making reconsideration impossible for orders with immediate effective dates.

(2) Existing rigid procedures may not work well for all agencies under an expanded administrative procedure act; the agencies need to be able to vary the reconsideration process by regulation.

(3) Existing law is limited to reconsideration of final agency decisions and fails to provide for reconsideration of initial decisions.

(4) Existing law fails to provide for a statement of findings and reasons when an agency grants a reconsideration petition.

§ 642.810. Availability of review

DRE is concerned about the time and cost of requiring mandatory review on petition of a party. But an agency by regulation may limit review of decisions, under the current draft. See Section 642.820 (limitation of review).

§ 642.820. Limitation of review

DRE sees potential problems where an agency elects to review only a portion of a proposed decision. "We suspect that most respondents would not be too happy with such a procedure. For example, suppose a licensing agency chose to review only the discipline imposed in a proposed decision."

The staff hopes our practitioner consultants will advise the Commission on this provision from their perspectives.

§ 642.840. Review procedure

DRE thinks that review of a partial transcript by the agency could cause concerns among parties. Again, we invite our consultants to address this issue.

DRE questions the need to limit the agency from taking new evidence on review. The need is outlined in Professor Asimow's background study for the Commission, which this draft simplify codifies for purposes of focusing discussion:

(1) It would be cumbersome and time consuming for busy agency heads to rehear cases en banc (and it is unlikely they would often find time to do so).

(2) It would confront a reviewing court with conflicting credibility determinations and make the statute difficult to apply.

(3) It would provide an agency a simple way to avoid credibility determinations it dislikes.

To which the staff would add:

(4) The burden on the public is undue. Administrative procedure is supposed to simplify and expedite. This is lost and even becomes worse if findings of the professional hearer of evidence are ignored and the same evidence taken a second time by other agency personnel.

DRE also questions the need for oral argument on review. This matter is addressed at some length in the staff notes to Section 642.840.

§ 642.850. Decision or remand

DRE objects to the requirement that the final decision or remand identify any differences from the proposed decision. This position is consistent with those of other agencies mentioned in the staff note to Section 642.850.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

STATE OF CALIFORNIA PETE WILSON, *Governor*
DEPARTMENT OF INDUSTRIAL RELATIONS
Workers' Compensation Appeals Board
455 Golden Gate Avenue
San Francisco, CA 94102
Chairman's Office (415) 557-3229

April 26, 1991

EDWIN MARZEK, Chairman
CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto CA 94303-4739

Dear Mr. Marzek:

We are in receipt of the tentative agenda for meeting of the California Law Revision Commission on May 9 and 10, 1991. As you know, the Workers' Compensation Appeals Board has presented oral testimony and written response more particularly to the issue of whether a central panel should be used for administrative hearings by state agencies.

Mr. Younkin, Secretary of our Board, has attended several of your sessions and was at the April 12, 1991 session in Sacramento. At that time, you indicated you would proceed with the preparation of a model administrative procedures act which would cover all state agencies. I wish to express the concern of the Workers' Compensation Appeals Board regarding its inclusion into any uniform administrative procedures act. Due to the current press of other matters, including implementation of a Workers' Compensation Reform Act, the Board has been unable to respond to the issue of whether or not it should be included in such an act. Please be advised that we are currently studying the proposed procedures and hope in the near future to advise the California Law Revision Commission of the Board's thoughts on the new proposals and how these proposals impact the ability of the Workers' Compensation Appeals Board to perform its judicial function.

Unfortunately, we will not be able to attend the meeting on May 10, 1991. As indicated above, we will, however, be sending you written materials reflecting both the concerns and thoughts of the Workers' Compensation Appeals Board. We certainly appreciate the worthwhile nature of your task and the Commission's openness to receive constructive suggestions regarding its proposals.

Very truly yours,

Arthur J. Costamagna

ARTHUR J. COSTAMAGNA, Chairman
Workers' Compensation Appeals Board

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STATE OF CALIFORNIA PETE WILSON, *Governor*

DEPARTMENT OF REAL ESTATE
P. O. Box 187000
Sacramento, CA 95818-7000
(916) 739-3607

May 1, 1991

Roger Arnebergh, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite 2-D
Palo Alto, California 94303-4739

Re: Study N-105 Administrative Adjudication

Dear Mr. Arnebergh:

Thank you for the opportunity to comment upon the Commission's study of administrative adjudication. As you may have seen from your recent meetings on this subject, such a project will indeed be a formidable task.

The Department of Real Estate administers the Subdivided Lands Law and the Real Estate Law (Business and Professions Code Sections 10000 et seq). It is in connection with the latter that the Department most frequently comes into contact with the Administrative Procedure Act (APA). The Department prosecutes approximately 900 disciplinary actions against real estate licensees yearly. Those matters are handled under the APA and the Department's legal staff represents the Department at these APA hearings.

We believe that any proposed revision of the APA should recognize the reason why our Department and other professional licensing structures exist: The protection of the public from dishonest or incompetent licensees. When lawyers get together to thrash out new procedural rules, we often tend to overlook the goal those procedures are intend to affect. We would hope that the Commission in proposing revisions to the APA does not lose sight of the purpose behind licensing structures and the need for an efficient, cost-effective system which protects the rights of all parties and their respective interest.

If there is one recurring theme we have noticed in our contacts with both industry groups and the public, it is a general dissatisfaction with the lack of timely prosecution of disciplinary actions. We recognize that disciplinary actions are made up of various independent components, such as the investigation phase, the administrative hearing phase and the judicial review phase. We also recognize that we have a responsibility to timely investigate complaints and that we bear part of the responsibility for part of the public's negative perception of the length of time it takes to complete disciplinary cases. Nevertheless, it is our general observation that many of the proposed changes to the APA under consideration would extend

the time frame of the administrative hearing component beyond what exists under current law. This is of concern to us at the Department because we know of no case law which suggests that the present APA denies "respondents" due process of law.

In another vein, we recognize the Commission's goal of having a single APA to cover all forms of administrative adjudication. However, we doubt whether such a goal can be accomplished. As a department already subject to the existing APA, the concept of a universal APA as opposed to a more specialized APA has little direct impact upon our operations. However, we are interested in seeing that both administrative law and the APA function as well as is humanly possible. We have read with great interest the comments made by other departments and agencies and cannot help but wonder if an all inclusive APA is a realizable goal. In addition, there could well be existing administrative actions which could be unknowingly and improperly swept into the all inclusive APA.

We do not believe that forcing round pegs into square holes will promote the cause of administrative reform. We also believe that an attempt to make "one size fit all" will result in an unnecessarily broad APA. We second the observations made by other departments that there will be little, if any, attempts on the part of the private bar to appear in a broad spectrum of administrative forums once a universal APA has been enacted. We also agree that when agencies adopt their own regulations under the universal APA there will be a more confusing and greater diversity than that which exists under the current APA. This end result seems to us to be directly contradictory to the stated purpose of the APA revisions, to wit, uniformity.

In addition to these general observations, we have the following specific comments concerning the Draft Administrative Procedure Act dated March 1, 1991: Some of these comments revisit issues previously discussed at Commission meetings. We feel that it is necessary to once again point out where we have particular concerns.

1. Section 610.310 Decision.

While the definition of a "Decision" must be necessarily broad, this section is perhaps too broad. There are a number of preliminary motions, interlocutory orders, procedural orders and we suppose, rulings on evidence which could "determine(s) a legal right, duty, privilege, immunity or other legal interest ...". The definition should be limited to final agency actions.

2. Section 610.460 Party.

The definition of a "party" as including "any other person named or allowed to intervene in the proceeding" could lead to unwanted and unwarranted results. For example, the Department's accusations, under the requirements of notice pleading, will include the name of an alleged victim of wrongful conduct by a licensee. In this respect, the Department's pleadings are similar to criminal proceedings since the State of California is the true complainant. This section could make the victim a "party" to the proceeding. We do not believe this is either workable or desirable.

3. Section 642.720 Form and Contents of Decision.

This section differs substantially from Government Code Section 11518. We do not recall any previous study or draft which found fault with Government Code Section 11518. We believe it would not be sound policy to diverge from prior accepted law and terminology without a good reason for doing so. The immediate effect of such a divergence is to throw out all case law and commentary which has interpreted Government Code Section 11518.

We object to proposed subdivision (b) concerning determinations "based substantially on the credibility of a witness." Based upon our experience, such determinations are already given great weight under the existing APA. We see no reason to write that procedure into the statute. Further, we are aware of no similar statutory provisions relating to credibility determinations made in trials in superior court. It seems somewhat anomalous to us that the draft APA would propose a higher standard than the one used in the civil and criminal courts.

4. Section 642.750 Adoption of Proposed Decision.

This draft deletes the non-adoption provisions of Government Code Section 11517(c) and replaces those provisions with a concept known as "Administrative Review of Decision". We have yet to see any evidence that existing Government Code Section 11517(c) is an area rampant with abuse. The "Administrative Review" seems somewhat cumbersome and once again throws out the case law and commentary which has interpreted Government Code Section 11517.

5. There does not appear to be any provision in the draft regarding when proposed decision adopted by the agency becomes effective (see for example Government Code Section 11519). Section 642.760 appears to deal with proposed decisions not adopted. For a licensee whose license is about to be suspended or revoked, this date is a major importance. In addition, there does not appear to be a provision allowing (or requiring) for a stay

of the effective date (see Government Code Sections 11519 and 11521).

6. Section 642.770 - Service of Decision on Parties.

This section is somewhat confusing. Read in conjunction with Section 647.750, it would apear that an agency has 30 days to act upon a proposed decision. After rendering a decision adopting the proposed decision, the agency would have another 30 days to serve a copy of the final decision upon the other party. Service of the decision is a ministerial function and may not require a full 30 days in order to effect that service.

This section also conflicts with existing provisions of law such as Business and Professions Code Section 11019 which requires the Real Estate Commissioner to render (adopt or non-adopt) a decision within 30 days after completion of a hearing under that section and Business and Professions Code Section 10086 which requires the Commissioner to render a decision within 15 days after receipt of a proposed decision following a hearing under that section.

7. Section 642.780 - Correction of Mistakes in Decision.

The purpose behind this section is a good one: the correction of clerical or typographical errors or mistakes. Currently, the only means for correcting such errors is to grant reconsideration under Government Code Section 11521. However, there are a number of potential problems with this section. First, where the agency on its own motion corrects what it believes to be a mistake or clerical error, the respondent may disagree with that determination. Second, the section allows only 15 days to make an application to modify. That time period is extremely short especially where the application is referred to a presiding officer. Finally, the section is silent on the issue of the effective date of the decision. Assume, for example that a decision is adopted with an effective date 30 days from adoption. Assume also that on the 14th day following adoption a motion to modify is received. Finally, assume that the agency takes 15 days to effect the modification, but the modification does not satisfy the respondent. Under this sequence, the respondent has only one day before the effective date to take further action.

8. Article 8 - Administrative Review of Decision.

This article appears intended to replace the reconsideration and non-adoption provisions of the current APA. Once again, we would question the need for such a sweeping revision. We are unaware of any demonstrated abuses in this area or a need to revise practices which have been in place for almost 50 years.

As we have pointed out previously, wholesale changes in terminology will have the effect of nullifying years of cases and commentary relating to this subject.

9. Section 642.810 Availability of Review.

This section would create a mandatory right of review. We question the need for a mandatory review right in view of the potential costs to the agency (transcript, etc.) and the amount of time which would be consumed. Even if we were to assume that administrative agencies regularly and consistently make incorrect decisions, there is little reason to believe that a review would change such decisions.

10. Section 642.820 - Limitation of Review.

We see no problem with the power to limit review to some (but not all) issues after a decision has been adopted. This authority would be roughly comparable to that in existing Government Code Section 11521 on reconsideration. However, we foresee some difficulties when an agency attempts to review only a portion of a proposed decision in what would be comparable to a non-adoption under existing Government Code Section 11517(c). We suspect that most respondents would not be too happy with such a procedure. For example, suppose a licensing agency chose to review only the discipline imposed in a proposed decision.

11. Section 642.840 - Review Procedure.

While the idea of using a partial transcript is appealing from a cost saving point of view, we are concerned with such a practice for the same reasons expressed in the previous comment.

We question the need for the provision which allows the taking of additional evidence "that in the exercise of reasonable dilligence [sic] could not have been produced at the hearing." Both existing Government Code Sections 11517(c) and 11521(b) allow for the taking of additional evidence without a showing of "reasonable dilligence [sic]". If there is some reason for that limitation, we are not aware of what that reason might be.

The current APA allows for oral argument, but does not require that an opportunity for oral argument be available. Once again, we have seen no reason articulated for such a change. Further, where the head of the agency conducts the review, it is extremely difficult to accommodate the schedules of the parties and the agency head for that argument. Finally, we note that the trend, at least in the appellate courts, seems to be away from oral argument.

12. Section 642.850 - Decision or Remand.

We object to the requirement that a final decision or remand "shall identify any difference between the original decision and the final decision or remand." First of all, it is unclear how a remand order will contain any identifiable difference from the decision. Second, this activity strikes us as a piece of busy work which serves no useful purpose. It appears to us that any respondent's counsel with minimal qualifications should be able to identify those differences if they are relevant. Since the decision after review is the decision for all purposes (including judicial review) of the agency, the proposed decision has no relevance whatsoever, except possibly on credibility issues (proposed amendment to CCP 1094.5).

Finally, at a time when the State of California is facing a severe budget crisis, a major overhaul of the Administrative Procedure Act seems singularly inappropriate. We recognize that APA revision is still at a preliminary stage, but we cannot overlook the potential costs involved in the proposed changes. We have attempted to point out some of the increased costs in our previous comments, but undoubtedly, there are additional new costs we have not considered. As an administrative agency, every time our Department proposes new ideas, one of the first questions we are asked is what is the potential cost impact. At sometime before revision of the APA progresses much further, you will have to address that question also.

Thank you again for the opportunity to comment on your proposal. While we believe that the existing Administrative Procedure Act is far from perfect, we also believe that some of the remedies that have been proposed are worse than the problems those remedies seek to redress. We also believe that, apart from anecdotal instances, the evidence of a need to extensively review the APA is somewhat lacking.

If you have any questions, please feel free to contact either Larry Alamao, staff counsel or myself at (916) 739-3607.

Sincerely,

ROBIN T. WILSON
Chief Counsel

RTW/lz