

First Supplement to Memorandum 91-6

Subject: Study N-106 - Administrative Adjudication: Fact Finder
Impartiality (Comments of OSHA Appeals Board)

Attached is a letter we have received from the Cal OSHA Appeals Board commenting on issues involved with the following matters:

Procedure on Administrative Adjudication Study (Memorandum 91-17)

Fact Finder Impartiality (Consultant's Background Study)

Effect of ALJ Decision (Memorandum 91-4)

We will raise the issues orally at the meeting as we reach the relevant place in the Commission's deliberations of these matters.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Another approach, which we believe would be closely analogous to these suggested alternatives, would be to establish a set of criteria which would comprise the essential prerequisites for due process in administrative adjudication. These might include, for example, Professor Asimow's recommendations with respect to ex-parte communications, exclusivity of the record, separation of functions, et al. This approach would allow individual agencies to adopt their own regulations and procedures consistent with their particular needs, but also provide assurance that the adjudicative process is a fair one.

Insofar as staff's suggestion with respect to specialization is correct -- that is, that general practitioners are not likely to appear before the Worker's Comp., PERB, ALRB, or OSHAB, not because of the numerous differences in the agency's particular rules, but because of economic factors, then the goal of a uniform APA is itself one of lesser significance. Variations, if any, among agencies with respect to evidentiary standards, formality of hearings, decision-making time requirements, etc., could then be left to determination by the individual agencies and the interested practitioners who are in the best position to understand the agency's program and the public expectation for that program. So long as all due process criteria are met in each set of regulations or procedures, then the critical problems addressed by Professor Asimow will have been resolved.

Our particular comments on the two studies are as follows:

1) N-106: Fact Finder Impartiality (Consultant's Background Study, Memorandum 91-6)

A. Exclusive Record

This due process imperative is reflected in OSHAB regulation (Title 8, Code of Regulations) Sections 385(a) and (b), 376.3 and 390.1(c). These regulations derive from Labor Code Sections 6608, 6621, and 6622.

B. Ex-parte Communications

The OSHAB Prohibition is defined in regulation Sections 352(a) and (b). We concur with Professor Asimow's recommendation that ALJs be permitted to communicate with agency heads since ALJs are neutral parties to any dispute, and they are the persons within the agency with expertise on OSHAB legal matters (in addition to chief counsel).

C. Bias

Labor Code Sections 6606 and 6607 as well as regulation 375.2 set forth the procedures for

objection to an OSHAB ALJ. CCP Sections 641 et seq. are incorporated.

D. Separation of Functions

As submitted earlier, OSHAB is a separate appointing authority, totally distinguishable from the Division of Occupational Safety and Health (the enforcement arm of the program). Actions by the Division are mere allegations until proven at hearing. Labor Code Sections 148, 148.6 and 148.8.

E. Command Influence

Insofar as the modified proposal in Professor Asimow's report (Section 4-214) merely relates to the separation of functions, it does not pose any particular problems for OSHAB operations. It may, however, impact upon some matters determined at the departmental level (for example, hearings on orders prohibiting use, Labor Code Sections 6325 and 6327). We are also concerned that this concept may resurrect the central panel idea which has been discussed extensively at earlier sessions. OSHAB is on record opposing the central panel.

2) **Study N-105: Effect of ALJ Decision (Revised Draft, Memorandum 91-4)**

A. Section 612.010 - Application of division to statute: If the set of criteria suggestion contained in this memorandum or staff's alternative recommendations were to be followed, language along the lines of former Government Code Section 11501 would be more appropriate.

B. Section 612.030 - Application of division notwithstanding exception: Labor Code Section 6303 directs the Appeals Board to adopt rules of practice and procedures consistent with Government Code Sections 11507, 11507.6, 11507.7, 11507.10, 11513, 11514, 11515, 11516, 11525. There is some question as to whether the revised draft language would make all other APA sections applicable to OSHAB

C. Section 640.220 - Office of Administrative Hearings: Insofar as this article is limited to agencies currently subsumed under OAH, it

would present no problems to current OSHAB practices and procedures.

D. Section 640.260 - Voluntary temporary assignment of hearing personnel: OSHAB feels that this concept can be beneficial for both ALJs and management -- affording personnel the opportunity to decide cases in different areas, as well as permit management to best utilize resources where there are fluctuations in work flow. It is not clear, however, that the program should be limited to OAH assignments. OSHAB is presently reviewing a proposal to loan ALJs on an interagency temporary basis along these lines.

E. Section 642.710 - Proposed and final decision: The Appeals Board does not believe that uniform time lines among various agencies is practical. The differences in the types of legal issues presented, as well as the scope of the facts litigated among agencies would seem to compel more discretion in this area.

F. Section 642.720 - Form and contents of decision: As submitted previously, Labor Code Section 6608 requires summaries of evidence relied upon, findings of facts, reasons for decision in OSHAB proceedings. ALRB proceedings, for example, also require much lengthier decisions and detailed statements of facts. Earlier experiences by both agencies - with hearing officers from OAH and the mere recitation of pleadings -- proved to be inadequate from the agencies' and parties' point of view.

G. Section 642.820 - Administrative review of decision and Section 642.830 Initiation of review: These determinations are best left for particular statutory and regulatory schemes. Some agencies provide transcripts for all proceedings. OSHAB, on the other hand, will not provide transcripts unless a Board decision after reconsideration (the agency decision following the administrative law judge's decision) is under review through superior court writ procedure. Depending upon the volume of cases, complexity of issues, budgetary concerns, etc., variations among agencies on these issues seem appropriate. Labor Code Sections 6627 and 6628.

H. CCP Section 1094.5.

OSHA has previously indicated its concerns about the necessity of codifying the Garza and Lamb precedent that it has historically followed. It should be noted that Labor Section 6630 provides that the findings and conclusions of the Appeals Board on questions of fact are conclusive and final and are not subject to review. Such questions of fact include ultimate facts of findings and conclusions of the Appeals Board.

Thank you for this opportunity to express our views on these matters. Our acting presiding administrative law judge, Stuart A. Wein, plans to attend the Sacramento meeting and would be pleased to answer any questions you might have concerning OSHA.

Yours Very Truly,



ELAINE W. DONALDSON
Chairman