

Second Supplement to Memorandum 91-6

Subject: Study N-106 - Administrative Adjudication (Fact Finder
Impartiality--comments of Public Employment Relations Board)

Attached to this memorandum is a letter from the Public Employment Relations Board commenting on issues raised in Professor Asimow's study of factfinder impartiality. We will note their comments at the relevant place in the Commission's review of the background study.

The general tenor of the letter is that PERB's administrative procedures are such that it does not encounter impartiality problems of the type raised by Professor Asimow. PERB's Division of Administrative Law conducts formal hearings and renders proposed decisions in disputes between unions and employers; no one on the PERB staff is a party to the litigation before the PERB administrative law judge.

"Accordingly, as we have suggested before, the concerns giving rise to the Commission's recommendations for a uniform APA do not apply to PERB's practices. We believe our processes conform to current notions of due process and fair play. We further see no reason to require PERB to alter its processes in response to perceived needed changes not applicable to this agency."

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

PUBLIC EMPLOYMENT RELATIONS BOARD



Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3088

CA LAW REV. COMM'n

JUL 10 1991



July 9, 1991

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

Re: Impartial Adjudicators: Bias, Ex Parte Contacts
and Separation of Functions

Dear Chairperson Arnebergh:

This missive responds to Professor Michael Asimow's background paper on the above-referenced topics, which we understand will be considered at the Commission's July meeting.

We believe the Public Employment Relations Board's (PERB) existing practices and organizational alignment immunizes it from most of the concerns the Professor has with respect to existing agency practices. PERB has a Division of Administrative Law, which conducts formal hearings and renders proposed decisions of disputes between the parties (usually unions and employers) subject to our jurisdiction. No one on the PERB staff is a party to or part of the litigation before the PERB Administrative Law Judge (ALJ).

Accordingly, as we have suggested before, the concerns giving rise to the Commission's recommendations for a uniform APA do not apply to PERB's practices. We believe our processes conform to current notions of due process and fair play. We further see no reason to require PERB to alter its processes in response to perceived needed changes not applicable to this agency.

Record Exclusivity: We agree that determinations should be based upon the record. Indeed, our regulations contemplate just such a process. Section 32170 charges the ALJ to develop a record upon which a decision can be made.

Ex Parte Contacts: We agree that ex parte contacts can disrupt the appearance of impartiality and the notion of decisions on the record evidence only. However, PERB, though not subject to the APA, has its own regulation barring ex parte evidence. Such contacts must be placed onto the record and the other side given an opportunity to respond.

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While the Professor finds great discomfort in PC practices, no such criticism is made to other state agencies such as PERB.

We believe, if PERB is not exempted from the application of the revised APA, that the prohibited communications be limited to the "merits of the contested matter." This is consistent with PERB regulations and, as the Professor notes, this is the current law. No reason has been advanced to change it.

A further concern is the commencement of the ban. As we understand it, the Professor's recommendation would commence the ban when the matter is "pending." We commence the matter with the complaint. As a part of our proceedings, one ALJ will meet with the parties in an informal conference setting. This conference is confidential (see section 32650), in part to encourage the parties to be open and receptive to settlement. Our regulations expressly preclude any record being made of such discussions. If the case does not settle, then the matter is assigned to another ALJ for formal hearing. A rule that would make such discussions part of the record, as advocated in the Professor's report, would bar any success in our settlement efforts. Thus, we would prefer the ban to commence at the time of the formal proceedings.

Bias: Our belief in this concept is reflected in the regulations already in place in our proceedings. Section 32155 addresses both voluntary disqualifications and party-initiated proceedings in an effort to test the status of the trier of fact.

Our regulations allow any party to request a disqualification ". . . whenever it appears that it is probable that a fair and impartial hearing or investigation cannot be held . . ." Section 35155.

Although we are uncertain of the difference between this standard and that recommended by Professor Asimow, we have experienced no problems with this standard and, in the absence of demonstrated flaw, see no reason to change it.

PERB regulations further provide that the challenged ALJ shall make the determination in response to the request for disqualification. The issue can be raised upon appeal of the proposed decision, where the request is denied.

Peremptory Challenges: PERB is a small agency with only 10 ALJs and would prefer not to have such an option available.

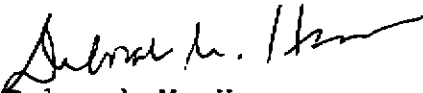
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Separation of Functions: PERB's organizational structure, as well as its mission, preclude the issues of concern described by the Professor. PERB's mission is to resolve unfair practice disputes between the parties, either individuals or the employee organization and the employer. PERB staff is not a party to the dispute and are involved only in the process of investigating the charge to determine if a complaint should issue. If so, the matter is then placed into the Division of Administrative Law, where ALJs will serve as a neutral between the parties, who are the adversaries. The Board itself serves as an appellate body over proposed decisions that are appealed to the Board. Thus, the concerns articulated by Professor Asimow regarding non-record reliance and advocates judging the judges do not pertain to the PERB setting.

Command Influence: As noted, PERB serves as a neutral in the field of labor law. The parties, one on each side, are the advocates and no PERB staff member serves in the proceedings as an advocate. In addition, the agency has a major subunit, the Division of Administrative Law, which devotes all of its energies to the adjudication of labor disputes. Thus, no issues of ALJs being subordinate to staff adversaries exist.

We thank you for the opportunity to comment on the Commission's review.

Sincerely,



Deborah M. Hesse
Chairperson

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