#N-105

ns89
10/07/91

Memorandum 91-69

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

Attached to this memorandum is a revised draft of the provisions relating to the effect of the administrative law judge's decision. The Commission has considered this material on serveral occasions in the past, but has never adopted any of the policy decisions embodied in the draft. The direction to the staff has been to prepare draft language along the lines discussed at the Commission meeting so the Commission could review the policy issues with precise statutory language before it.

There are a number of staff notes following the sections of the draft the Commission should review. When the Commission has approved the statutory language, the staff will write explanatory material to be added to the tentative recommendation we are assembling on administrative adjudication. We hope to complete a draft of the entire administrative adjudication statute during 1992 that can be circulated for comment among interested persons, organizations, and agencies.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

N-105 ns98

CHAPTER 2. FORMAL ADJUDICATIVE HEARING

Article 1. General Provisions

§ 642.010. Applicable hearing procedure 11/30/90

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 regulation 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 regulation 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.

Staff 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.

Although the current draft adopts the formal proceeding as the "default" administrative procedure, other approaches are possible. The Commission has directed its staff to consider making the least formal type of hearing procedure the basic procedure applicable in all cases unless a more formal hearing procedure is required by a court's due process finding, by statute, or by agency regulation. Or, an agency might be able to select any of the statutory hearing models without first adopting a regulation.

Article 2. Presiding Officer

§ 642.210. Designation of presiding officer by agency head 04/11/91

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

(a) The agency head.

(b) An agency member.

(c) An administrative law judge assigned by the director of the Office of Administrative Hearings.

(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 under subdivision (c) includes assignment pursuant to Section 642.230 (voluntary temporary assignment of hearing personnel) as well as pursuant to Section 640.250 (assignment of administrative law judges). See Section 640.250(f).

Discretion of the agency head to designate "another person" to serve as presiding officer under subdivision (d) is subject to Section 642.270 (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 decisions), if the agency head presides, the agency head shall issue a final decision; if any other presiding officer presides, a proposed decision must be issued. Section 642.810 (availability and scope of review) establishes the general appealability of proposed decisions 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).

§ 642.220. OAH administrative law judge as presiding officer 11/30/90

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 by the director of the Office of Administrative Hearings.

(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) The agency head shall issue a final decision as provided in Section 642.710. 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.

(4) Notwithstanding any other provision of this subdivision, 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 issue a proposed decision as provided in Section 642.710.

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 (Office of Administrative Hearings). See also Section 642.230 (voluntary temporary assignment of hearing personnel).

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 11517(a) with the addition of a sentence that makes clear the agency head may issue a final decision in the proceeding. Subdivision (d)(4) continues former Section 11512(e) without substantive change.

§ 642.230. Voluntary temporary assignment of hearing personnel 04/11/91

642.230. (a) In response to an agency request for assignment of an administrative law judge, the director of the Office of Administrative Hearings may:

(1) 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, the employing agency, and the requesting agency. The designee must possess the same qualifications required of an administrative law judge employed by the Office of Administrative Hearings.

(2) If there is no designee available under paragraph (1), appoint a pro tempore part-time administrative law judge.

(b) The Office of Administrative Hearings may adopt, and the director of the Office of Administrative Hearings may implement, regulations to establish the procedure for designation or appointment under this section.

Comment. Section 642.230 is new. It is drawn from 1981 Model State Act § 4-301(c). It supplements the authority of the director under Section 640.250 (assignment of administrative law judges). See Section 640.250(f).

Article 7. Decision

§ 642.710. Proposed and final decisions 04/11/91

642.710. (a) If the presiding officer is the agency head, the presiding officer shall issue a final decision within 100 days after the case is submitted or such other time as the agency by regulation requires.

(b) If the presiding officer is not the agency head, the presiding officer shall deliver a proposed decision to the agency head within 30 days after the case is submitted or such other time as the agency by regulation requires. Failure of the presiding officer to deliver a proposed decision within the time required does not prejudice the right of the agency in the case.

(c) A proposed decision becomes a final decision at the time provided in Section 642.760.

Comment. Subdivision (a) of Section 642.710 continues the substance of the second sentence of former Section 11517(d), with the addition of authority for an agency to provide a different decision period. See also 1981 Model State APA § 4-215(a).

The first sentence of subdivision (b) continues the substance of the first sentence of former Section 11517(b), with the addition of authority for an agency to provide a different decision period. The second sentence makes clear that the agency is not accountable for the presiding officer's failure to meet required deadlines.

For the form and contents of a decision, whether proposed or final, see Section 642.720.

Either a proposed or final decision may be subject to administrative review. Section 642.810 (availability and scope of review). See also Section 610.310 ("decision" defined). Errors in either a proposed decision or a final decision may be corrected under Section 642.780 (correction of mistakes in decision). A proposed decision becomes final unless it is subjected to administrative review under Article 8 (commencing with Section 642.810).

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

We have added language to the effect that the agency's rights are not prejudiced by a failure to meet the subdivision (b) time limits, pursuant to the discussion at the April 1991 meeting. However, it is not clear what this language means, for practical purposes.

Mr. Louis of DSS has agreed to provide the Commission with suggested language addressed to the problem of temporary suspension orders expiring before the agency has time to act on the presiding officer's proposed decision.

§ 642.720. Form and contents of decision 06/14/91

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

(1) A statement explaining the factual and legal basis for the decision as to each of the principal controverted issues.

(2) The remedy prescribed.

(b) The statement explaining the factual basis for the decision may be in the language of, or by reference to, the papers filed in the proceeding. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination.

(c) Nothing in this section limits the information that may be contained in a decision, including a summary of evidence relied upon.

Comment. Section 642.720 supersedes the first two sentences of former Section 11518. Under Section 642.720, the form and contents of a proposed decision and final decision 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 a mere repetition or paraphrase of the relevant statute or regulation be accompanied by a statement of the underlying facts is drawn from 1981 Model APA § 4-215(c).

The requirement in subdivision (b) that a determination based on credibility be identified is derived from Rev. Code of Wash. Ann. §§ 34.05.461(3) and 34.05.464(4). A determination of this type is entitled to great weight on judicial review to the extent the statement of decision identifies the observed demeanor, manner, or attitude of the witness that supports the determination. Code Civ. Proc. § 1094.5 (administrative mandamus).

Staff Note. This draft is not intended as a complete statute on the form and contents of the decision. There are a number of issues raised by 1981 Model State APA § 4-215 that will be reviewed at a later time, including the requirement that the decision state policy reasons

if it is an exercise of the agency's discretion. 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.

We have replaced the reference to "pleadings" with a reference to "the papers filed in the proceeding". This is subject to further revision as the terminology of the statute is developed.

§§ 642.730. [Not yet drafted]

§ 642.740. Filing of proposed decision NEW

642.740. (a) Within 30 days after delivery of a proposed decision to the agency head, or such other time as the agency by regulation requires, the agency head shall file a copy of the proposed decision as a public record, and serve a copy of the proposed decision on each party and the attorney for each party. The agency may not by regulation require another time if the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

(b) Filing and service under this section is not an adoption of a proposed decision by the agency head. Nothing in this section limits the time within which a proposed decision becomes a final decision under Section 642.760.

Comment. Subdivision (a) of Section 642.740 continues the substance of the second paragraph of former Section 11517(b) and extends it to hearings not required be conducted by an OAH administrative law judge, along with the authority of those agencies to vary the time allowed for filing.

Subdivision (b) makes clear the distinction between the filing requirement for a proposed decision (this section) and the time within which the agency must act before a proposed decision becomes final (Section 642.760). The time within which a proposed decision must be filed does not affect the time the agency has for acting on the proposed decision.

§ 642.750. Adoption of proposed decision 06/14/91

642.750. (a) Within 100 days after delivery of the proposed decision to the agency head, or such other time as the agency by regulation requires, the agency head may summarily do any of the following:

(1) Adopt the proposed decision in its entirety as a final decision.

(2) Make technical or other minor changes in the proposed decision and adopt it as a final decision. Action by the agency head under this paragraph is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.

(3) Reduce or otherwise mitigate a proposed penalty and adopt the balance of the proposed decision as a final decision.

(b) The agency may not by regulation require another time if the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

(c) In proceedings under this section the agency head shall consider the proposed decision but need not review the record in the case.

Comment. Section 642.750 is drawn from the second paragraph of former Section 11517(b). The authority in subdivision (a)(2) to adopt with changes supplements the general authority of the agency head under Section 642.780 (correction of mistakes and clerical errors in decision).

Mitigation of a proposed penalty under subdivision (a)(3) includes adoption of a different sanction, as well as reduction in amount, so long as the sanction adopted is not of increased severity.

It should be noted that the adoption procedure is available to an agency as an alternative to review procedures under Article 8 (commencing with Section 642.810) (administrative review of proposed decision).

Staff Note. The second sentence of subdivision (a)(2) elaborates the first. The Commission had directed this be in the statute, but the staff believes the Comment is a more appropriate location for it.

§ 642.760. Time proposed decision becomes final 06/14/91

642.760. Unless adopted as a final decision under Section 642.750 or reviewed under Article 8 (commencing with Section 642.810), a proposed decision becomes a final decision at the earliest of the following times:

(a) If by regulation pursuant to Section 642.810 the agency precludes administrative review, at the time the proposed decision is filed by the agency head.

(b) If by regulation pursuant to Section 642.810 the agency limits administrative review, at the time limited in the regulation.

(c) If the agency head in the exercise of discretion denies administrative review, at the time administrative review is denied.

(d) One hundred days after delivery of the proposed decision to the agency head, or such longer time as the agency by regulation provides.

Comment. Section 642.760 supersedes the first sentence of subdivision (d) of former Section 11517. See also 1981 Model State APA § 4-220(b). The time within which a proposed decision becomes final is not affected by the time within which a copy of the proposed decision must be filed by the agency as a public record. See Section 642.740 and Comment (filing of proposed decision).

Staff Note. Some agencies' administrative procedure statutes contemplate that the agency head will take an affirmative act to issue a final decision rather than allowing the proposed decision to become final by default. E.g., Pub. Util. Code § 311. We anticipate this statute will be conformed to the general scheme. If the agency wishes to review proposed decisions and 100 days is insufficient time to initiate review, the agency may adopt a regulation under this section giving itself more time.

§ 642.770. Service of final decision on parties 06/14/91

642.770. (a) The agency shall serve a copy of the final decision in the proceeding on each party within 10 days after the decision is issued.

(b) If a proposed decision is filed and served on the parties in the proceeding and the agency head adopts the proposed decision as a final decision under Section 642.750 or the proposed decision becomes a final decision by operation of law under Section 642.760, the agency may satisfy subdivision (a) by service of a notice that the proposed decision is the final decision or, if the final decision makes technical or other minor changes in the proposed decision, that the proposed decision is the final decision, with specified changes. A notice under this subdivision may be served simultaneously with service of a copy of the proposed decision under Section 642.740.

(c) The final decision shall be filed immediately by the agency as a public record.

Comment. Section 642.770 supersedes the third sentence of former Section 11517(b), former Section 11517(e), and the third sentence of former Section 11518. For the manner of service (including service on a party's attorney of record instead of the party), see Section 613.010.

The California Public Records Act governs the accessibility of a decision to the public, including exclusions from coverage, confidentiality, and agency regulations affecting access. Gov't Code §§ 6250-6268.

Staff Note. The Commission requested research concerning when a decision becomes a matter of public record under the public records act. The staff could find nothing addressing this point. The existing law requires a decision to be "filed" as a public record, but the concept of filing is not well-defined. Presumably an agency files a decision when it "issues" it, i.e. when it is signed by the agency head or becomes a final decision by operation of law.

§ 642.780. Correction of mistakes and clerical errors in decision 06/14/91

642.780. (a) Within 15 days after service of a copy of a decision on a party, the party may apply to the agency head for correction of a mistake or clerical error in the decision, stating the specific ground on which the application is made. Notice of the application shall be given to the other parties to the proceeding. The application is not a prerequisite for seeking administrative or judicial review.

(b) The agency head may refer the application to the presiding officer who formulated the decision or may delegate its authority under this section to one or more persons.

(c) The agency head may deny the application, grant the application and modify the decision, or grant the application and set the matter for further proceedings. The application is deemed denied if the agency head does not dispose of it within 15 days after it is made.

(d) Nothing in this section precludes the agency head, on its own motion or on motion of the presiding officer, from modifying a decision to correct a mistake or clerical error. A modification under this subdivision shall be made within 15 days after issuance of the decision.

(e) The agency head shall, within 15 days after correction of a mistake or clerical error in a decision, serve a copy of the correction on each party on whom a copy of the decision was previously served.

Comment. Section 642.780 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 final decision 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 decision. This supplements the authority in Section 642.750(a)(2) of the agency head to adopt a proposed decision with technical or other minor changes.

For general provisions on notices to parties, see Sections 613.010 (service) and 613.020 (mail).

Staff Note. The Commission has directed the staff to investigate the possibility of extending the time for exercise of the correction of mistakes procedure to allow for time consumed in mailing. This brings to the fore the issue of incorporation of civil practice rules in the Administrative Procedure Act. The civil practice rules have long ago worked out issues such as allowing extra time due to mailing. Code of Civil Procedure Section 1013, for example, provides that service by mail is complete at the time of deposit in the mail, "but any prescribed period of notice and any right or duty to do any act or make any response within any prescribed period or on a date certain after the service of such document served by mail shall be extended five days if the place of address is within the State of California, 10 days if the address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States."

The staff sees three options--(1) replicate relevant provisions in the Administrative Procedure Act, (2) incorporate by reference relevant provisions of the Code of Civil Procedure, or (3) in this particular instance lengthen the times directly to reflect the possibility of mail service. Each of the options has attractions and problems. (1) Duplication of Code of Civil Procedure provisions has the advantage of making administrative procedure self-contained and not sending people into the bowels of civil procedure--many parties to administrative hearings will act in pro per. On the other hand, this proliferates statutory material and just about ensures that procedural provisions starting out parallel will diverge as changes are made in one statute without awareness that comparable changes should be made in the other. (2) This problem could be solved by incorporation by reference, but incorporation by reference is often awkward and picks up unintended provisions of the incorporated statute. It should be noted that many special proceedings incorporate all rules of civil practice insofar as applicable, leaving it to the parties and courts to determine which ones are applicable and which not. The staff is not certain we want to do that in administrative procedure. (3) The simplest solution is probably just to allow longer times on the assumption that most service in administrative proceedings will be by mail. But this doesn't pick up collateral provisions, such as service is complete when deposited in the mail, and doesn't address other civil procedure problems.

The staff recommends that for now we continue to deal with civil procedure problems on an ad hoc basis. The staff would simply add 5 days to each of the times in this and similar short-fuse situations to allow for the likelihood of mail service.

Article 8. Administrative Review of Decision

§ 642.810. Availability and scope of review 06/14/91

642.810. (a) Subject to subdivision (b), an agency may, on its own motion or on petition of a party, review a proposed or final decision. In the exercise of discretion under this subdivision, the agency head may do any of the following with respect to administrative review of the proposed or final decision:

(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.

(b) An agency, by regulation, may mandate administrative review, or may preclude or limit administrative review, of a proposed or final decision.

Comment. Section 642.810 is new. Subdivisions (b) and (c) are drawn from 1981 Model State APA § 4-216(a)(1)-(2). This section is subject to a contrary statute that may, for example, 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).

Staff Note. We plan to add at the beginning of the statute that contrary special statutes prevail over this general statute. This will put a premium on ferreting out and eliminating contrary statutes intended to be overruled by the general statute.

§ 642.820. Initiation of review 06/14/91

642.820. On service of a copy of a proposed or final decision, but not later than 30 days after service or such other time as the agency by regulation provides:

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

(b) The agency head on its own motion may give written notice of administrative review of the decision. The notice shall be served on each party and, if review is limited to specified issues, shall identify the issues for review.

Comment. Section 642.820 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.

Staff Note. If there is a consensus among agencies that the 30-day period for initiation in general is too long, the default provision should be shortened.

§ 642.830. Review procedure 06/14/91

642.830. (a) The reviewing authority shall decide the case on the record, including a transcript or a summary of evidence, a recording of proceedings, or another record used by the agency, of such portions of the proceeding under review as the reviewing authority considers necessary. A copy of the record shall be made available to the parties. The reviewing authority may take additional evidence that, in the exercise of reasonable diligence, could not have been produced at the hearing.

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

(c) The reviewing authority may remand the matter for further proceedings. The remand shall be to the presiding officer who formulated the proposed decision, if reasonably available.

Comment. Section 642.830 continues the first, second, and fifth sentences of former Section 11517(c) except that the reviewing authority is precluded from taking additional evidence (except evidence unavailable at the hearing before the presiding officer). Cf. Code Civ. Proc. § 1094.5(e); 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).

Subdivision (a) requires only that the record be made available to the parties. The cost of providing a copy of the record is a matter left to the discretion of each agency as appropriate for its situation.

If further proceedings are required, they may be obtained on remand under Section 642.840.

Staff Note. The Commission has deferred decision on this provision for further consideration in connection with the mechanics of the hearing procedure.

§ 642.840. Decision or remand 06/14/91

642.840. (a) Within 100 days after presentation of briefs and arguments, or if a transcript is ordered, after receipt of the transcript, or such other time as the agency by regulation requires, the reviewing authority shall issue a decision disposing of the proceeding or remand the matter for further proceedings. The remand shall be to the presiding officer who formulated the original decision, if reasonably available. The agency may not by regulation require another time if the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings. The time may be waived or extended with the written consent of all parties or for good cause.

(b) A final decision or a remand for further proceedings shall be in writing and shall include, or incorporate by express reference to the original decision, all the matters required by Section 642.720 (form and contents of decision). A remand shall specify the ground for remand and shall include precise instructions to the presiding officer of the action required.

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

Comment. Section 642.840 supersedes Government Code § 11517(c)-(d). It is drawn in part from 1981 Model State APA § 4-216(g)-(j).

Remand is required to the presiding officer who issued the proposed decision only if "reasonably" available. Thus if workloads make remand to the same presiding officer impractical, the officer would not be reasonably available, and remand need not be made to that particular person.

Specification of the ground for remand must be precise, but need not include the same details of explanation as a final decision would contain. The specification 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.

Staff Note. The staff is considering whether it is useful to include in the Comment illustrative instructions to the presiding officer on remand. The staff would welcome examples used by different agencies that could be offered as models.

§ 642.850. Procedure on remand 06/14/91

642.850. On remand:

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

(b) The presiding officer shall prepare a revised decision based on the additional evidence and the record of the prior hearing.

(c) The decision on remand 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 decision.

Comment. Subdivision (a) of Section 642.850 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 record in the proceeding, see Section 642.830 (review procedure). For the manner of service, see Section 613.010.

Code Civ. Proc. § 1094.5 (amended). Administrative mandamus 06/14/91

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 in a review of a decision under Division 3.3 (commencing with Section 600) of Title 1 of the Government Code, the court shall give great weight to a determination of the presiding officer in the adjudicative proceeding based substantially on credibility of a witness to the extent the determination of the presiding officer identifies the observed demeanor, manner, or attitude of the witness that supports the determination.

...

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), for proceedings under the Administrative Procedure Act, 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.A.B., 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); Precedent Decisions P-B-10, P-T-13, P-B-57 (Unemployment Insurance Appeals Board); Labor Code § 1148 (Agricultural Labor Relations Board); [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 a witness must be identified by the presiding officer in the decision made in the adjudicative proceeding. Gov't Code § 642.720(b) (form and contents of decision). 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 of a witness.

Under subdivision (c), even though the presiding officer's determination is based substantially on credibility of a witness, the determination is entitled to great weight only to the extent the determination derives from the presiding officer's observation of the demeanor, manner, or attitude of the witness. Nothing in subdivision (c) precludes the agency head or court from overturning a credibility determination of the presiding officer, after giving the observational elements of the credibility determination great weight, whether on the basis of nonobservational elements of credibility or otherwise. See Evid. Code § 780. Nor does it preclude the agency head from overturning a factual finding based on the presiding officer's assessment of expert witness testimony.