

Memorandum 92-15

Subject: Study N-106 - Administrative Adjudication: Impartiality of
Decision Maker (Revised Draft)

Attached to this memorandum as Exhibit 1 is a redraft of the provisions relating to the impartiality of the decision maker, revised in accordance with the Commission's decisions at the January 1992 meeting.

One issue left unresolved at the meeting was the extent to which individual agencies should be permitted by regulation to adopt their own rules governing ex parte communications. Draft Section 642.810 (scope of chapter) recognizes the authority of an agency by regulation "to impose greater restrictions on ex parte communications" than are provided by statute.

Mr. Perlstein of the Public Utilities Commission indicated at the meeting that the PUC has developed its own extensive ex parte rules that are tailored to its needs, and that the PUC would prefer to be governed by rules appropriate for its own special types of proceedings. A copy of the PUC ex parte rules is attached as Exhibit 2.

Whether or not the PUC rules impose "greater" restrictions, they differ from the draft statute somewhat. For example, the draft statute would allow ex parte communications only in nonprosecutorial cases (provided they are disclosed to the parties) and would prohibit them in other cases, whereas the PUC would allow ex parte communications in all cases (with a three-day disclosure requirement) but would prohibit them in enforcement cases after the issue has been submitted to the Commission.

The staff's sense is the differences between these two schemes are more apparent than real; they both serve generally the same purpose of helping to ensure the fairness of an administrative adjudication by requiring that all communications to the decision maker be made part of the record and subject to review by all parties.

Our main objective here is try to achieve a uniform body of administrative law, and it should be perfectly achievable with respect to the ex parte communications rule. We are not prepared to say that the draft statute is superior to the PUC rule, however. There is merely a difference in emphasis--the draft statute disfavors communications to the decision maker outside regular channels, while the PUC accepts ex parte communications as routine and focuses on how to ensure they are disclosed and made part of the record.

For the staff it is a very close call whether we try to force a single uniform rule here, or to allow variants such as the PUC's to flourish. One approach would be to adopt a single uniform rule but bring it closer to PUC's version. Our instinct on this one, though, is to maintain the draft statute we now have--generally prohibiting ex parte communications--but to allow variants such as the PUC's, whether or not the variants are viewed as imposing "greater" restrictions. Thus we would revise the draft statute to read:

642.810. Nothing in this chapter limits the authority of an agency by regulation to impose ~~greater~~ different restrictions on ex parte communications than are provided in this chapter, so long as the restrictions ensure that an ex parte communication is disclosed on the record and all parties have an opportunity to address the communication.

Respectfully submitted,

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Executive Secretary

IMPARTIALITY OF DECISION MAKER¹

Fairness and due process are ensured in administrative adjudication by the basic requirement of impartiality of the decision maker. The Commission recommends codification of five fundamental elements of impartiality in the Administrative Procedure Act: (1) the decision should be based exclusively on the record in the proceeding, (2) ex parte communications to the decision maker should be prohibited, (3) the decision maker should be free of bias, (4) adversarial functions should be separated from decision making functions within the agency, and (5) decision making functions should be insulated from adversarial command influence within the agency. Each of these elements is elaborated below.

Exclusivity of Record

Existing California case law requires that the decision be based on the factual record produced at the hearing.² Both the federal³ administrative procedure and the model state⁴ administrative procedure statutes codify this aspect of due process, and the proposed legislation does the same for California.

However, some agencies rely on the special factual knowledge and expertise of the decision maker in the area, and in fact agency members may be appointed for just this purpose. The proposed law addresses this situation by permitting evidence of record to include factual knowledge of the decision maker and other supplemental evidence not produced at the hearing, provided that the evidence is made a part of the record and all parties are given an opportunity to comment on it.

1. This discussion is drawn largely from Asimow, *Impartial Adjudicators: Bias, Ex Parte Contacts and Separation of Powers* (January 1991), a background study prepared for use of the Law Revision Commission in its study of administrative adjudication.

2. See, e.g., *Vollstedt v. City of Stockton*, 220 Cal. App. 3d 265, 269 Cal. Rptr. 404 (1990). See also Asimow, *supra* note *, at 4-5.

3. 5 U.S.C. § 556(e) (19**).

4. 1981 Model State APA § 4-215(d).

Ex Parte Communications

While existing California law is clear that factual inputs to the decision maker must be on the record, it is not clear whether ex parte contacts concerning law or policy are permissible.⁵ Existing Government Code Section 11513.5 prohibits ex parte contacts with an administrative law judge employed by the Office of Administrative Hearings, but is silent as to the majority of administrative adjudications in California that do not fall under it. In many state agencies ex parte contacts are tolerated or encouraged.⁶

Fundamental fairness in decision making demands that any arguments to the decision maker on law and policy be made openly and be subject to argument by all parties. The proposed legislation prohibits ex parte communications with the decision maker, subject to several qualifications necessary to facilitate the decision-making process:

(1) The ban on ex parte communications would not apply to a nonprosecutorial proceeding, such as an individualized ratemaking or initial licensing decision. Although these are trial-type proceedings, they involve a substantial element of policy determination where it may be important that the decision maker consult more broadly than the immediate parties to the proceeding.

(2) The decision maker should be allowed the advice and assistance of agency personnel. This may be critical in a technical area where the only expertise realistically available to the decision maker is from personnel within the agency that is a party to the proceeding. However, the decision maker would not be allowed to consult with personnel who are actively involved in prosecution of the administrative proceeding.⁷

5. See Asimow, supra note *, at 8-9.

6. See Asimow, supra note *, at 10-11. Some, such as the California Public Utilities Commission, have developed elaborate ex parte prohibitions tailored to their specific needs.

7. See discussion of "Separation of Functions", infra.

Where an improper ex parte contact has been made, the proposed legislation provides several curative devices. A decision maker who receives an improper ex parte communication must place it on the record of the proceeding and advise the parties of it, and the parties are allowed an opportunity to respond. To rectify cases where the ex parte communication would unduly prejudice the decision maker, the ex parte communication could be grounds for disqualification of the decision maker. In such a case, the record of the communication would be sealed by protective order of the disqualified decisionmaker.

Bias

The existing California Administrative Procedure Act makes clear that a decision maker may be disqualified if unable to "accord a fair and impartial hearing or consideration".⁸ The proposed law would recodify this standard in the more concrete traditional terms of "bias, prejudice, interest".⁹

Case law apart from the Administrative Procedure Act makes clear that an appearance of bias is not a sufficient ground for disqualification; there must be a showing of actual bias.¹⁰ This requirement makes bias difficult to prove, even though in a particular case it may seem apparent. To address this problem, the proposed law would add as grounds for disqualification, that "a person aware of the facts might reasonably entertain a doubt that the decision maker would be able to be impartial". This is the standard applicable to judges in civil proceedings in California¹¹, and it has proved workable in

8. Gov't Code § 11512(c).

9. The proposed law would also permit an agency to provide by regulation for peremptory challenge of the decision maker regardless of bias. The Workers Compensation Appeals Board provides for a peremptory challenge. 8 Cal. Code Reg. § 10453.

10. Andrews v. ALRB, 28 Cal. 3d 781, _____, 171 Cal. Rptr. 590 (1981).

11. Code Civ. Proc. § 170.1(a)(6)(C).

practice.¹² It fosters the concept that administrative adjudication should be fair in appearance as well as in fact.

Notwithstanding actual bias, existing law adopts a "rule of necessity" that if disqualification of the decision maker would prevent the agency from acting (e.g., causing lack of a quorum), the decision maker may nonetheless participate. The proposed law addresses this problem with a provision drawn from the Model State Administrative Procedure Act that disqualifies the decision maker and provides for substitution of another person by the appointing authority.¹³

Separation of Functions

Existing California statute and case law on separation of functions is unclear.¹⁴ To avoid prejudgment, the decision maker should not have served previously in the capacity of an investigator, prosecutor, or advocate in the case. Nor should a person assisting or advising the decisionmaker have served in that capacity. The proposed law codifies these principles.

As a practical matter, the separation of functions requirement could cripple an agency in a number of situations, due to staffing limitations. The proposed law addresses these situations specifically:

(1) A lengthy nonprosecutorial case such as individualized ratemaking or power plant siting may continue for years while agency personnel transfer from one type of function to another within the agency. The proposed law allows violation of the separation of functions principle in nonprosecutorial cases where the contrary function occurred more than one year before the decision making.

12. The "appearance of bias standard" is circumscribed by a specification of characteristics that do not constitute bias, including cultural factors affecting the judge, prior expressions of the judge on legal and factual issues that arise in the proceeding, and involvement in formulation of the laws being applied in the proceeding. Code Civ. Proc. § 170.2. The proposed law applies these standards to bias determinations in administrative adjudication as well.

13. 1981 Model State APA § 4-202(e)-(f).

14. See discussion in Asimow, supra note *, at 22-23.

(2) A nonprosecutorial case may involve specialized technical issues for which the decision maker needs advice that is available only from an agency employee who has also been involved in other aspects of the case. The proposed law would allow such technical advice to be given, provided it is summarized in the record and provided to all parties.

(3) Prosecutorial personnel must be able to advise the decision maker concerning aspects of a settlement proposed by the prosecution. The proposed law recognizes this situation.

(4) Drivers' licensing cases are so voluminous that to require separation of prosecution and hearing functions by the Department of Motor Vehicles would cripple the system. The proposed law exempts drivers' licensing cases from the separation of functions requirements. The exemption is limited in scope and would not extend to other types of operators' certificates, such as schoolbus driver certificates.

Command Influence

A corollary of the separation of functions concept is the requirement that the decisionmaker should not be the subordinate of an investigator, prosecutor, or advocate in the case, for fear that their relative positions within the agency will allow the adversary to dictate the result to the decision maker. The proposed law codifies the command influence prohibition.

The command influence prohibition may pose difficulties for a small agency that has insufficient personnel to avoid using a subordinate as a hearing officer. The proposed law makes clear that in such a case the agency head may go outside the agency, for example to the Office of Administrative Hearings, for an alternate hearing officer.

IMPARTIALITY OF DECISION MAKER

DEFINITIONS AND GENERAL PROVISIONS§ 610.320. Decision maker 10/7/91

610.320. "Decision maker", in an adjudicative proceeding, means presiding officer or reviewing authority that makes a proposed or final decision.

Comment. Section 610.320 is intended for drafting convenience. See also Section 610.680 ("reviewing authority" defined).

§ 613.040. Attorney or other representative of party NEW

613.040. Unless the provision or context requires otherwise, any act required or permitted by this division to be performed by, and any notice required or permitted by this division to be given to, a party may be performed by, or given to, the attorney or other authorized representative of the party.

Comment. Section 613.040 is intended for drafting convenience. Cf. Code Civ. Proc. §§ 283, 446, 465, 1010, 1014 (authority of party or attorney in civil actions and proceedings). The section recognizes that an administrative proceeding may involve a non-attorney authorized representative of a party.

Staff Note. Other provisions of the draft statute will be checked to make sure this section works properly. It may be possible simply to define "party" to include attorney or other representative.

BIAS

§ 642.240. Grounds for disqualification of decision maker 1/24/92

642.240. (a) The decision maker is subject to disqualification for bias, prejudice, interest, or any other cause provided in this part, or if a person aware of the facts might reasonably entertain a doubt that the decision maker would be able to be impartial.

(b) It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the decision maker:

(1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group.

(2) Has in any capacity expressed a view on a legal, factual, or policy issue presented in the proceeding.

(3) Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding.

(c) An agency by regulation may provide for peremptory challenge of the decision maker.

Comment. Section 642.240 supersedes former Section 11512(c). Section 642.240 applies whether the decision maker serves alone or with others. Other causes of disqualification provided in this part include receipt of ex parte communications. Section 642.850 (disqualification of decision maker). For separation of functions requirements, see Section 642.270.

Subdivision (a) specifies grounds for disqualification drawn from 1981 Model State APA § 4-202(b). It adds as a ground for disqualification that a person might reasonably doubt the ability of the decision maker to be impartial. This standard is drawn from Code of Civil Procedure Section 170.1(a)(6)(C) (disqualification of judges).

Subdivision (b) is drawn from Code of Civil Procedure Section 170.2 (disqualification of judges). Although subdivision (b)(2) provides that expression of a view on a legal, factual, or policy issue in the proceeding does not in itself disqualify the decision maker under Section 642.240, disqualification in such a situation might occur under Section 642.270 (separation of functions).

Subdivision (c) codifies existing practice. The Workers Compensation Appeals Board provides for a peremptory challenge. 8 Cal. Code Reg. § 10453.

§ 642.250. Self disqualification

1/24/92

642.250. (a) The decision maker shall disqualify himself or herself and withdraw from a proceeding in which there are grounds for disqualification.

(b) The parties may waive disqualification under subdivision (a) by a writing that recites the basis for disqualification. The waiver is effective only when signed by all parties, accepted by the decision maker, and included in the record.

Comment. Section 642.250 is drawn from the first sentence of former Section 11512(c) and from Code of Civil Procedure Section 170.3(b)(1).

A waiver of disqualification under subdivision (b) is a voluntary relinquishment of rights by the parties. It should be noted that the waiver may be signed by the attorney or other authorized representative of a party. Section 613.040 (attorney or other representative of party). The decision maker need not accept a waiver; the waiver is effective only if accepted by the decision maker.

§ 642.260. Procedure for disqualification of decision maker 1/24/92

642.260. (a) A party may request disqualification of the decision maker by filing an affidavit within 10 days after receipt of notice of the decision maker's identity or within 10 days after discovering facts establishing grounds for disqualification, whichever is later. The affidavit shall state with particularity the grounds of the request for disqualification of the decision maker.

(b) The decision maker whose disqualification is requested shall determine whether to grant the request. If the decision maker is more than one person, the person whose disqualification is requested shall not participate in the determination. The agency by regulation may provide for determination of a disqualification request by a person other than the decision maker whose disqualification is requested.

(c) The determination of the disqualification request shall state facts and reasons for the determination. Unless the agency by regulation provides for administrative review at an earlier time, the determination is subject to administrative and judicial review at the same time, in the same manner, and to the same extent as other determinations of the decision maker in the proceeding.

Comment. Section 642.260 supersedes former Section 11512(c). It is drawn from 1981 Model State APA § 4-202(c)-(d).

SEPARATION OF FUNCTIONS

§ 642.270. Separation of functions 1/24/92

642.270. (a) Except to the extent provided in subdivision (b):

(1) A person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as decision maker or assist or advise the decision maker in the same proceeding.

(2) A person who is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as decision maker in the same proceeding.

(b) Unless a party demonstrates other statutory grounds for disqualification:

(1) A person who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as decision maker or assist or advise the decision maker in the same proceeding.

(2) A person may serve as decision maker at successive stages of the same adjudicative proceeding.

(3) A person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding may advise the decision maker concerning a settlement proposal advocated by the person in the same proceeding.

(4) A person who has served as investigator or advocate in an adjudicative proceeding may serve as decision maker or assist or advise the decision maker in the same proceeding if the proceeding is nonprosecutorial in character and the service, assistance, or advice occurs more than one year after the time the person served as investigator or advocate.

(5) A person who has served as investigator or advocate in an adjudicative proceeding may give advice to the decision maker concerning a technical issue involved in the same proceeding if the proceeding is nonprosecutorial in character and the advice concerning the technical issue is necessary for, and is not otherwise reasonably available to, the decision maker, provided the advice is disclosed on the record and all parties have an opportunity to address the advice.

(c) Nothing in this section limits the authority of an agency by regulation to adopt limitations in addition to or greater than the limitations in this section.

(d) Nothing in this section authorizes a communication between the decision maker and another person to the extent the communication is otherwise prohibited by Section 642.820.

(e) This section does not apply to issuance, denial, revocation, or suspension of a driver's license.

Comment. Section 642.270 is drawn from 1981 Model State APA § 4-214.

In subdivision (a), the term "a person who has served" in any of the capacities mentioned is intended to mean a person who has personally carried out the function, and not one who has merely supervised or been organizationally connected with a person who has personally carried out the function. The separation of functions requirements are intended to apply to substantial involvement in a case by a person, and not merely marginal or trivial participation. The sort of participation intended to be disqualifying is meaningful participation that is likely to affect an individual with a commitment to a particular result in the case. For this reason also, a staff member who plays a meaningful but neutral role without becoming an adversary would not be barred by the limitations of subdivision (a).

The separation of functions requirements of subdivision (a) are not limited to agency personnel, but include participants in the proceeding not employed by the agency. A deputy attorney general who prosecuted the case at the administrative trial level, for example, would be precluded from advising the reviewing authority at the administrative review level, except with respect to settlement matters. Subdivision (b)(4).

While subdivision (a) precludes adversaries from assisting or advising decision makers, it does not preclude decision makers from assisting or advising adversaries. Thus it would not prohibit an agency head from communicating to an adversary that a particular case should be settled or dismissed.

Subdivision (a)(2), unlike 1981 Model State APA § 4-214(b), does not preclude a subordinate of an adversary from assisting or advising the decision maker. However, an agency by regulation may adopt a more stringent separation of functions requirement. Subdivision (c).

Subdivisions (b)(1) and (2), dealing with the extent to which a person may serve as decision maker at different stages of the same proceeding, should be distinguished from Section 642.820, which prohibits certain ex parte communications. The policy issues in Section 642.820, regarding ex parte communication between two persons differ from the policy issues in subdivisions (b)(1) and (2) regarding the participation by one individual in two stages of the same proceeding. There may be other grounds for disqualification, however, in the event of improper ex parte communications. Subdivision (d); Section 642.850. See also Section 642.240 (grounds for disqualification of decision maker).

Subdivisions (b)(4) and (5) apply to nonprosecutorial types of administrative adjudications, such as individual ratemaking and power plant siting decisions. The subdivisions recognize that the length and complexity of many cases of this type may as a practical matter make it impossible for an agency to adhere to the separation of functions requirements, given limited staffing and personnel. Subdivision (b)(4) excuses compliance with the separation of functions requirements in such a case if more than one year has elapsed between the contrary functions. Subdivision (b)(5) recognizes such an adjudication may

require advice from a person with special technical knowledge whose advice would not otherwise be available to the decision maker under standard separation of functions doctrine.

Subdivision (e) recognizes the personnel problem faced by the Department of Motor Vehicles due to the large volume of drivers' licensing cases. Although subdivision (d) makes separation of powers requirements inapplicable in drivers' licensing cases, the separation of functions requirements remain applicable in other Department of Motor Vehicle hearings, including schoolbus operation certificate hearings.

§ 642.280. Substitution of decision maker

1/24/92

642.280. (a) If a substitute is required for a decision maker who is disqualified or is unavailable for any other reason, the substitute shall be appointed by the appointing authority.

(b) An action taken by a substitute appointed under this section is as effective as if taken by an original decision maker.

Comment. Section 642.280 is drawn from 1981 Model State APA § 4-202(e)-(f). The section only applies where a substitute is "required", i.e., is necessary because the decision maker is otherwise unable to act, for example because of lack of a quorum.

In cases where there is no appointing authority, e.g., the decision maker is an elected official, this section provides for no appointment of a substitute, and the "rule of necessity" applies. Cf. former Section 11512(c) (no agency member subject to disqualification if disqualification would prevent existence of quorum qualified to act).

EXCLUSIVE RECORD

§ 642.720. Form and contents of decision

02/14/92

642.720. (a)(1) ... The statement explaining the factual basis for the proposed or final decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. Evidence of record may include factual knowledge of the decision maker and supplements to the record that are made after the hearing, provided the evidence is made a part of the record and that all parties are given an opportunity to comment on it.

Comment. The first sentence codifies existing California case law. See, e.g., *Vollstedt v. City of Stockton*, 220 Cal. App. 3d 265, 269 Cal. Rptr. 404 (1990). It is drawn from the first sentence of 1981 Model State APA § 4-215(d). The second sentence codifies existing practice in some agencies.

CHAPTER 8. EX PARTE COMMUNICATIONS

§ 642.810. Scope of chapter

10/7/91

642.810. Nothing in this chapter limits the authority of an agency by regulation to impose greater restrictions on ex parte communications than are provided in this chapter.

Comment. Section 642.810 makes clear that ex parte communications restrictions provided in this chapter are a minimum, and an agency may adopt more stringent requirements if appropriate to its hearings.

§ 642.820. Ex parte communications prohibited

1/24/92

642.820. (a) Except as provided in subdivision (b), while the proceeding is pending there shall be no communication, direct or indirect, on the merits of a contested matter between the following persons without notice and opportunity for all parties to participate in the communication:

(1) Between the decision maker and a party or the attorney or other authorized representative of a party, including an employee of the agency that is a party.

(2) Between the decision maker and an interested person outside the agency.

(b) A communication otherwise prohibited by this section is permissible in any of the following circumstances:

(1) The communication is for the purpose of assistance and advice to the decision maker by an employee of the agency that is a party or the attorney or other authorized representative of the agency, provided the assistance or advice does not violate Section 642.270 (separation of functions).

(2) The proceeding is nonprosecutorial in character, provided the communication is made a part of the record and all parties are given an opportunity to comment on it.

(3) The communication is required for the disposition of an ex parte matter specifically authorized by statute.

Comment. Subdivision (a) of Section 642.820 is drawn from subdivisions (a) and (b) of former Section 11513.5. See also 1981 Model State APA § 4-213(a), (c). Subdivision (a) applies to communications initiated by the decision maker as well as communications initiated by others.

Subdivision (a) is not intended to apply to communications made to or by a decision maker or staff assistant regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, or manner of service; such topics are not part of the merits of the matter, provided they appear to be noncontroversial in context of the specific case.

Subdivision (a) does not preclude ex parte contacts between the agency head making a decision and any person who presided at a previous stage of the proceeding. This reverses a provision of former Section 11513.5(a).

The reference in subdivision (a)(1) to the attorney or representative of a party is consistent with Section 613.040 (attorney or other representative of party).

The reference in subdivision (a)(2) to an "interested person outside the agency" replaces the former reference to a "person who has a direct or indirect interest in the outcome of the proceeding", and is drawn from federal law. See Federal APA § 557(d)(1)(A); see also PATCO v. Federal Labor Relations Authority, 685 F. 2d 547 (D.C. Cir. 1982) (construing the federal standard to include person with an interest beyond that of a member of the general public).

Subdivision (b)(1) qualifies the provision of this section that otherwise would preclude a decision maker from obtaining advice from expert agency personnel even though not involved in the matter under adjudication.

Staff Note. We do not know whether there are any statutory ex parte proceedings. If we do not find any in the course of this project, we will delete subdivision (b)(3).

§ 642.830. Prior ex parte communication

1/24/92

642.830. If, while the proceeding is pending but before serving as decision maker, a person receives a communication of a type that would be in violation of this chapter if received while serving as decision maker, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in Section 642.840.

Comment. Section 642.830 is drawn from former Section 11513.5(c), but is limited to communications received during pendency of the proceeding. See also 1981 Model State APA § 4-213(d).

Staff Note. "Pendency" of a proceeding is yet to be defined.

§ 642.840. Disclosure of ex parte communication received

1/24/92

642.840. (a) A decision maker who receives a communication in violation of this chapter shall make a part of the record of the proceeding all of the following:

(1) If the communication is written, the writing and any written response to the communication.

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made, and the identity of each person from which the decision maker received the communication.

(b) The decision maker shall notify all parties that a communication described in subdivision (a) has been made a part of the record. A party that requests an opportunity to comment on the communication within ten (10) days after notice of the communication shall be allowed to comment.

Comment. Section 642.840 is drawn from former Section 11513.5(d). See also 1981 Model State APA § 4-213(e). Section 642.840 does not preclude ex parte communications with assistants if disclosed on the record, subject to separation of functions limitations. See Section 642.270. Agency rules may go further and prohibit the participation of a staff adviser who has received ex parte contacts. Section 642.810 (scope of chapter).

§ 642.850. Disqualification of decision maker

10/7/91

642.850. Receipt by the decision maker of a communication in violation of this section may provide the basis for disqualification of the decision maker. If the decision maker is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order of the disqualified decision maker.

Comment. Section 642.850 is drawn from former Section 11513.5(e). See also 1981 Model State APA § 4-213(f). It permits the disqualification of a decision maker if necessary to eliminate the effect of an ex parte communication. In addition, this section permits the pertinent portions of the record to be sealed by protective order. The intent of this provision is to remove the improper communication from the view of the successor decision maker, while preserving it as a sealed part of the record, for purposes of subsequent administrative or judicial review.

Issuance of a protective order under this section is permissive, not mandatory, and is therefore within the discretion of a decision maker who has knowledge of the improper communication.

REPEALS

§ 11512. Presiding officer

11512. ... (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.

...

Comment. The first sentence of subdivision (c) of former Section 11512 is superseded by Section 642.250 (self disqualification). The second, third, and fourth sentences are superseded by Section 642.260 (procedure for disqualification of decision maker). The fifth sentence is not continued: If disqualification would prevent the existence of a quorum qualified to act, a substitute decision maker may be appointed under Section 642.280.

§ 11513.5. Ex parte communications

11513.5. (a) Except as required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any party, including employees of the agency that filed the complaint, with any person who has a direct or indirect interest in the outcome of the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.

(b) Unless required for the disposition of ex parte matters specifically authorized by statute, no party to an adjudicative proceeding, including employees of the agency that filed the complaint, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, may communicate directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any person serving as administrative law judge, without notice and opportunity for all parties to participate in the communication.

(c) If, before serving as administrative law judge in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subdivision (d).

(d) An administrative law judge who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication, and shall advise all parties that these matters have been placed on the record. Any person desiring to rebut the ex parte communication shall be allowed to do so, upon requesting the opportunity for rebuttal within 10 days after notice of the communication.

(e) The receipt by an administrative law judge of an ex parte communication in violation of this section may provide the basis for disqualification of that administrative law judge pursuant to subdivision (c) of Section 11512. If the administrative law judge is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order by the disqualified administrative law judge.

Comment. Subdivisions (a) and (b) of former Section 11513.5 are continued in Section 642.820 (ex parte communications prohibited), omitting the limitation on communications with a person who presided at a previous stage of the proceeding. Subdivision (c) is continued in Section 642.830 (prior ex parte communication) but is limited to communications received during the pendency of the proceeding.

Subdivision (d) is continued in Section 642.840 (disclosure of ex parte communication received). Subdivision (e) is continued in Section 642.850 (disqualification of decision maker).

R.84-12-028 ALJ/LTC/gab

APPENDIX A**Page 1****Article 1.5 Ex Parte Communications
In Commission Proceedings****1.1 Definitions**

For purpose of this Article, the following definitions apply:

- (a) "Commencement of a proceeding" is the tender to the Commission of a notice of intention, the filing with the Commission of an application or complaint, or the adoption by the Commission of an order instituting investigation (OII).
- (b) "Commission Staff of Record" means (i) all members of the staff organization or division created pursuant to Public Utilities Code § 309.5, except those temporarily assigned to other staff organizations or divisions; and (ii) members of other staff organizations or divisions not specifically covered under § 309.5, who are appearing as advocates or as witnesses for a particular party in covered proceedings, but excluding other members of such staff organizations or divisions. The Executive Director, General Counsel, and Division Directors (except the director of the staff division created pursuant to § 309.5) are not Commission Staff of Record.
- (c) "Covered Proceeding" is any formal proceeding other than a rulemaking, or an OII consolidated with a rulemaking to the extent that the OII raises the identical issues raised in the rulemaking. An OII is otherwise a covered proceeding. Except for OIIs, if no timely answer or protest or request for hearing is filed in response to a pleading initiating a covered proceeding, the proceeding ceases to be covered. If an answer or protest is withdrawn, the proceeding ceases to be a covered proceeding. However, if there has been a request for hearing, the proceeding remains covered until the request has been denied.

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- (d) "Date of Issuance of a Final Order" is (i) the date when the Commission mails the decision after rehearing or denying rehearing; or (ii) where the period to apply for rehearing has expired and no application for rehearing has been filed, the last date for filing an application for rehearing under PU Code Section 1731. However, where a decision does not close a docket, there has been no issuance of a final order with respect to any issues that remain pending in the proceeding.
- (e) "Decisionmaker" means any Commissioner, Commissioner's Personal Advisor(s), the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, and any Administrative Law Judge assigned to the proceeding.
- (f) Enforcement-related proceedings are those OIIs and complaint proceedings where (i) the order instituting investigation or (ii) the complaint raises the alleged violation of any provision of law, or of any order or rule of the Commission. Complaints solely challenging the "reasonableness of any rates or charges" pursuant to Public Utilities Code § 1702 are not enforcement-related proceedings.
- (g) "Ex parte communication" means a written or oral communication on any substantive issue in a covered proceeding, between a party and a decisionmaker, off the record and without opportunity for all parties to participate in the communication.
- (h) "Party" means any applicant, protestant, respondent, petitioner, complainant, defendant, interested party who has made a formal appearance in the proceeding, or Commission staff of record in covered proceedings, and their agent(s) or employee(s). A member of the public who is not acting as the agent or employee of a party is not a party.

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- (i) "Submission of a proceeding" is as described in Rule 77 of the Commission's Rules of Practice and Procedure.

1.2 The Record

The Commission shall render its decision based on the evidence of record. Any notice filed pursuant to Rule 1.4 is not a part of the record of the proceeding. The record is closed for the receipt of evidence after the proceeding is submitted under Rule 77, unless it is reopened under Rule 84.

1.3 Applicable Proceedings

- (a) In any enforcement-related proceeding, no decisionmaker shall have any oral or written ex parte communication with any party to the proceeding concerning any substantive issue involved in the proceeding, unless the communication is reported within three working days in accordance with the reporting requirements set forth in Rule 1.4. Communications limited to the hearing schedule, location, and format, filing dates and identity of parties are procedural inquiries which need not be reported. This rule shall apply from the commencement of such proceeding to its submission to the Commission. After such proceeding has been submitted to the Commission, and until the date of issuance of a final order in such proceeding, ex parte communications between parties and decisionmakers concerning any substantive issue involved in the proceeding are prohibited.
- (b) In all other covered proceedings, any oral or written ex parte communication between a decisionmaker and any party to the proceeding concerning any substantive issue involved in the proceeding, shall be reported within three working days, in accordance with the reporting requirements set forth in Rule 1.4. These reporting requirements shall apply from the commencement of the proceeding to the date of issuance of a final order in that proceeding.

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- (c) Where proceedings covered by subsections (a) and (b) above are consolidated, the ALJ shall by ruling prior to the date of submission determine the extent to which the prohibition provisions of subsection (a) shall apply.

1.4 Reporting Ex Parte Communications

- (a) Reportable communications shall be reported by the party, whether the communication was initiated by the party or the decisionmaker. They shall be reported within three working days of the communication by filing (but not serving) the original and 12 copies of a "Notice of Ex Parte Communication" (Notice) with the Commission's San Francisco Docket Office. Such Notice shall be provided simultaneously to the assigned ALJ. The Notice shall include the following information:
 - (1) the date, time and location of the communication, and whether it was oral, written or a combination;
 - (2) the identity of the recipient(s) and the person(s) initiating the communication, as well as the identity of any persons present during such communication;
 - (3) a description of the party's, but not the decisionmaker's, communication and its content, to which shall be attached a copy of any written material or text used during the communication.
- b) The filing of a Notice will be reported promptly thereafter in the Commission's Daily Calendar.
- c) Parties may obtain a copy of the Notice and any attachments from the Commission's Central File room or from the filing party, who must provide it to the requesting party without delay.

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1.5 Sanctions

The Commission may impose such penalties and sanctions, or make any other order, as it deems appropriate to ensure the integrity of the formal record and to protect the public interest.

1.6 Specific Proceedings

In augmentation of the provisions of this Article, the Commission, or the assigned Administrative Law Judge with the approval of the assigned Commissioner, may issue an ex parte communications ruling tailored to the needs of any specific proceeding.

1.7 Applicability

This article applies to all covered proceedings (as set forth in Rule 1.3) pending on the date it is effective, and to all covered proceedings commenced on or after the date it is effective.

(END OF APPENDIX A)