First Supplement to Memorandum 93-45

**Subject: Study N-100 — Comments on Tentative Recommendation (Continued)**

This supplement to Memorandum 93-45 includes letters received since that memorandum was issued, concerning the administrative adjudication tentative recommendation. The Exhibit to this supplement is numbered sequentially beginning where the Exhibit to Memorandum 93-45 ends.

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| State Bar Litigation Section | 155-175 |
| Agricultural Labor Relations Board | 176-186 |
| Professor Michael Asimow | 187-191 |

GENERAL APPROVAL

The **State Bar Litigation Section** applauds "all the procedural changes in the Act which will increase the protection of the rights, duties, and privileges of all participants by clarifying and, in certain instances, broadening the procedural protections available under the Act." Exhibit p. 156. They do not specify what those changes are, and they have a substantial concern with the variance provisions, among others. See discussion below.

GENERAL CRITICISM

The **State Bar Litigation Section** is concerned that the proposed act actually makes state administrative procedure more, rather than less, uniform.

> Giving each agency discretion to adopt its own exceptions to otherwise uniform rules and eliminating most administrative proceedings from the Act is contrary to public interest. Each exception and each election by an agency to opt out of the Act will create both substantive and procedural traps for attorneys who appear before the agency and who do not specialize in practice before that particular agency. Exhibit p. 157.

SCOPE OF STATUTE

**Professor Asimow** suggests that the scope of the statute should be narrowed to limit it to constitutionally or statutorily required hearings and not "other adjudicative proceedings". He suggests Comment language to make clear that the statute applies only to statutory or constitutional formal on-the-record-hearings and not lesser hearings. Exhibit pp. 190-191.

EXEMPTIONS FROM ADMINISTRATIVE PROCEDURE ACT

The **Agricultural Labor Relations Board** requests an exemption from the proposed administrative procedure act. Exhibit pp. 176-186. They indicate that the proposed procedures vary so significantly from the scheme envisioned by the Agricultural Labor Relations Act as to amount to a rewriting of the statute. They would be forced to opt out of all the optional provisions, and the ones they could not opt out of would present serious problems for their operations. They indicate that they have by regulation already adapted most of the basic procedural reforms found in the proposed act for use in their proceedings.

**Professor Asimow** responds to the exemption request of the **Department of Corrections and related entities** at Exhibit pp. 187-189. He points out that the conference hearing provisions of the proposed statute enable the agency to conduct just the kind of informal hearing the agency seeks. He points out that although tailoring the statute through rulemaking may take time and money, it is worth it: there is a substantial public benefit to the process itself, as well as in the resulting accessibility of the rules. Adoption of the proposed act will provide a clear answer to the question of what procedure must be used if the constitution or statute requires a hearing. "One major advantage is that it will not be necessary to constantly litigate about what the state and federal constitutions require; the APA and accompanying regulations will set forth a constitutionally acceptable framework. The ground rules will then be readily available to anyone (lawyer or otherwise) who is engaged in dispute settlement with your Department."

The **State Water Resources Control Board** recommends that no provisions of the Porter-Cologne Water Quality Control Act or provisions of the Water Code relating to adjudication of water rights be amended or repealed. Exhibit pp. 81-82 (attached to Memorandum 93-45). "To the extent that there are conflicts between those statutes and the proposed APA, I feel that the specific rules in the Water Code better suit our needs."

The **State Personnel Board** notes that unless expressly repealed, Government Code Sections 18570-18577, 18650-18683, 19570-19593, 19630-1935, and 19700-19706 would prevail over contrary provisions in the proposed administrative procedure act. Exhibit p. 109 (attached to Memorandum 93-45).

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

THE STATE BAR OF CALIFORNIA

OFFICE OF RESEARCH

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September 14, 1993



Robert Murphy
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Additional Comments on Tentative Recommendation Concerning Administrative Adjudication by State Agencies

Dear Mr. Murphy:

Enclosed are the comments of the State Bar's Litigation Section concerning the Law Revision Commission's tentative recommendation on administrative adjudication by state agencies circulated for comment in June 1993.

These comments are only those of the Litigation Section. They have not been adopted or endorsed by the State Bar's Board of Governors and should not be considered the position of the State Bar of California.

We appreciate the opportunity to comment on this tentative recommendation. Please contact me if you have questions or need further information concerning these comments.

Sincerely,

David C. Long
Director of Research

DCL:ec
Enclosures

cc: Margaret Morrow
Mark Mazzarella
Jerome Sapiro
Janet Carver

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# LITIGATION SECTION
## THE STATE BAR OF CALIFORNIA



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August 20, 1993

David C. Long, Esq.
Director of Research
The State Bar of California
555 Franklin Street
San Francisco, CA 94102

re: California Law Revision Commission Tentative Recommendation on Administrative Adjudication by State Agencies

Dear Mr. Long:

This letter is submitted on behalf of the Litigation Section in response to the California Law Revision Commission proposal to revise the Administrative Procedure Act (the "Act").

### 1. PRELIMINARY OBSERVATIONS

We applaud all the procedural changes in the Act which will increase the protection of the rights, duties, and privileges of all participants by clarifying and, in certain instances, broadening the procedural protections available under the Act. Hearings under the Act affect important rights and privileges of individuals and other entities, such as the ability to practice an occupation, the right to drive, or the privilege of conducting a business. Clarity in the Act will enable agencies to enforce and to carry out statutory duties in a fair and appropriate manner.

Ostensibly, the Administrative Procedure Act regulates adjudicatory proceedings in approximately 65 state agencies. It is supposed to provide a single format for procedures resembling trials conducted by administrative law judges assigned by the Office of Administrative Hearings. However, the current Act applies only to approximately five percent of the adjudications that occur in agencies that would otherwise come under it. It

does not cover the Public Utilities Commission, the Workers' Compensation Appeals Board, the Unemployment Insurance Appeals Board, the State Board of Equalization, the Agricultural Labor Relations Board, the State Personnel Board, and others. The Law Revision Commission states that the agencies which do not come under the Act conduct at least 95% of the adjudications that occur each year within the state government.

We are particularly concerned about the proposed new Act because it not only perpetuates the exceptions but makes the exceptions the rule. In addition to the present inconsistencies because adjudication in non-Administrative Procedure Act agencies is not uniform, the proposed new Act will allow each state agency to elect to exempt itself from most of the provisions which otherwise would protect the public and which are inherent if both the fact and the perception of fairness are to be afforded to people who appear before the agencies. Giving each agency discretion to adopt its own exceptions to otherwise uniform rules and eliminating most administrative proceedings from the Act is contrary to the public interest. Each exception and each election by an agency to opt out of the Act will create both substantive and procedural traps who appear before the agency and for attorneys who do not specialize in practice before that particular agency. In addition, because the adjudicators in most administrative proceedings are employed by the agency itself, rather than by the Office of Administrative Hearings, the existence of uniform procedural safeguards ought to be considered essential to a fair hearing.

In the spirit of trying to provide a more "user-friendly" set of regulations, the Litigation Section recommends the following:

**2. ARTICLE 2: DECLARATORY DECISION**

Proposed Article II (commencing with Section 641.210 of the new statute) creates and establishes the requirements for a new, special proceeding to be known as a "Declaratory Decision" proceeding. The Comment states that the purpose of the "Declaratory Decision" proceeding is to provide an inexpensive and generally available means by which a person may obtain "fully reliable information as to the applicability of agency administered law to the person's particular circumstances." The Summary refers to this as "administrative declaratory relief."

Proposed Section 641.210 provides that the Office of Administrative Hearings shall adopt and promulgate model regulations under this article "that are consistent with the public interest and with the general policy of this article to facilitate and encourage agency issuance of reliable advice." Section 641.210(a) also states that the model regulations shall provide for all of the following: (1) a description of the classes of circumstances in which an agency will not issue a declaratory decision; (2) the form, contents and filing of an application for a declaratory decision; (3) the procedural rights of a person in relation to an application; (4) the disposition of an application." We support the concept of administrative declaratory relief in principle. The public should be able to obtain reliable advice, and the procedures for doing so should be uniform.

However, the Act deviates from its own laudable goals two ways. First, proposed Section 641.210(b) gives the agency discretion to adopt its own regulations regarding declaratory decisions and to ignore the regulations adopted by the Office of Administrative Hearings under this article. Second, proposed Section 641.210(c) would also permit an agency to modify the provisions of this article or make the provisions of this article inapplicable to its own proceedings.

Giving discretion to all agencies to avoid or to modify the provisions of this article may make the article moot. Although the Comment to the proposed section provides the guidelines which the Office of Administrative Hearings or the specific agency should use in creating the regulations it expressly states that an agency may choose to preclude declaratory decisions together. It also states that the agency may include in its rules reasonable standing, ripeness and other requirements for obtaining a declaratory decision. Although the Comment states that "Agency regulations on this subject will be valid so long as the requirements they impose are reasonable and are within the scope of agency discretion," it invites non-uniformity of both practice and procedure as the rule, rather than the exception.

Proposed Section 641.220(a) provides: "In case of an actual controversy, a person may apply to an agency for a declaratory decision as to the applicability to specified circumstances of a statute, regulation, or decision within the primary jurisdiction of the agency." However, the Section also gives discretion to

each agency whether to issue a declaratory decision or not and does not define what an "actual controversy" is.

Section 641.220(a) provides that the agency shall not issue a declaratory decision if the agency determines, among other things, that the decision would substantially prejudice the rights of a person who would be a "necessary" party and who does not consent in writing to the determination of the matter in a declaratory decision proceeding. It does not define "necessary" but refers to a "necessary" party as "indispensable," without defining that word. The proposal should include standards by which the agency may determine who is a "necessary" or "indispensable" party and/or whether such a party exists. It also should state the consequences to the parties, the proceeding, and the agency, if the agency issues a declaratory decision that affects a party (whether "necessary" or not) about whom the agency does not know or who has not consented.

Indicative of the problem is Section 641.230, which provides: "Within 30 days after receipt of an application for a declaratory decision, an agency shall give notice of the application to all persons to whom notice of an adjudicative proceeding is otherwise required, and may give notice to any other person." The proposal should define how the agency would identify a person to whom notice of an adjudicative proceeding is "otherwise required."

The Commission might consider requiring the person who requests a declaratory decision to identify all persons who might be affected by it and limiting the effect of the declaratory decision to only such persons. The Act could give the agency discretion to refuse to render a declaratory decision if it believes that the person asking for the declaratory decision has not identified and given notice to all persons who would be affected by the requested declaratory decision.

Proposed Section 641.240 provides that, with qualifications, a person may move for leave to intervene in a declaratory decision proceeding. The Act should require all persons who may be affected by the proposed declaratory decision to receive actual, timely notice of the proceeding, and of their rights to intervene, so they may timely move to intervene.

Section 641.240(a) indirectly suggests that many features of a regular adjudicatory proceeding do not apply to a proceeding for a declaratory decision. The Comment to Section 641.240 explicitly states that other procedural requirements for adjudications do not apply to a declaratory decision proceeding. "For example, cross-examination is unnecessary since the application establishes the facts on which the agency should rule. Oral argument could also be dispensed with." The Comment says that there are no contested issues of fact in a declaratory decision proceeding,

> because its function is to declare the applicability of the law in question to unproven facts furnished by the appellant. The actual existence of facts on which the decision is based will usually become an issue only in a later proceeding in which a party to the declaratory decision proceeding seeks to use the decision as a justification of the party's conduct.

Ibid. It also states: "Note also that the party requesting a declaratory decision has the choice of refraining from filing such an application and awaiting the ordinary agency adjudicative process governed by this part."

Later sections and comments point out that a declaratory decision, like other decisions, only determines the legal rights of the particular parties to the proceeding in which it is issued. Although this would be consistent with due process, the declaratory decision procedure seems to be inconsistent with that aspiration. For example, the Comment to Section 641.240 and other sections and comments regarding the declaratory decision process also state that a declaratory decision has the same status and binding effect as any other decision issued in an agency adjudicative proceeding and that a declaratory decision issued by an agency is reviewable by a court. If, as discussed infra, a class action can be brought under the proposed Act [a concept we recommend be opposed], others will inherently be bound by the decision.

The provisions for intervention suggest that adversary proceedings should occur in declaratory decision proceedings. For example, if a third party disputes the statement of facts set forth by the person who requests the declaratory decision, he or she should be allowed to present evidence, cross-examine adversaries, and argue. Otherwise, intervention may be an idle

act. If the agency or the intervenor dispute the facts, shouldn't the petitioner be able to prove its case? If there is an "actual controversy," what is the value of deciding that "actual controversy" on the basis of a statement of facts which are simply "unproven facts furnished by the applicant?" What is the value of a court's judicial review of a declaratory decision based on an unproven statement of facts, which may be entirely fictional or self-serving? Wouldn't such judicial review waste judicial resources and violate the requirement that a court is to decide only actual controversies and not to issue advisory or hypothetical opinions?

Such problems suggest that, if that the subject of a proposed declaratory decision affects not only the applicant, but also another person, the declaratory decision procedure may well be either a pointless exercise or a violation of that other person's right to due process and a fair hearing. The general concept seems to make sense only in the situation where the person applying for a declaratory decision has a question regarding interpretation of, or the application of, a regulation that affects only that applicant or which takes place in a non-adversarial context. For example, it would be quite helpful if a person who wants to license a particular method of doing business could ask the California Department of Corporations (which has jurisdiction over the administration of the California Franchise Investment Law) whether, in the Department's opinion, the proposed method of doing business is a franchise (which would require the applicant to register with the state and meet other expensive statutory and regulatory requirements) or merely a license (which does not require such registration or expensive regulatory compliance). The answer to the applicant's question may save the applicant money, if indeed the applicant is merely a licensor rather than a franchisor, but also prevent the applicant from violating the law.

The proposed "declaratory decision" procedure should be completely rethought. What might otherwise be quite helpful in a limited form is, as presently proposed, murky and a substantial danger to due process.

### 3. ARTICLE 3: ALTERNATIVE DISPUTE RESOLUTION

Proposed Article 2 of Chapter 7 of the Act addresses alternative dispute resolution ("ADR"). Once again, the proposal gives an administrative agency the power to eviscerate the Act by

regulation (see proposed Section 647.210(b)) and by the fact that the Office of Administrative Hearings will be required to adopt "model regulations" governing ADR subject -- again -- to modification by agency regulation (proposed Section 647.230). With those limitations in mind, we recommend:

(1) Although the Commission expresses the desire to encourage alternative dispute resolution, there is no mechanism by which parties to an administrative proceeding are encouraged or even channeled into the ADR process. As an example, proposed Section 646.130 (on prehearing conferences) does not expressly include ADR as one of the subjects which should be discussed at a prehearing conference. Thus, although alternative dispute resolution is codified in the proposed act, the ADR possibility is "buried."

(2) We are concerned about the language of proposed Section 647.220(a), which gives the agency discretion to refer a dispute to ADR, even over the opposition of all parties.

(3) Because the word "agency" is defined at proposed Section 610.190 to include not only the agency itself but also the agency head, agency employees, and other persons purporting to act under the authority of the agency head, the Act does not specify who may exercise the apparently absolute discretion conferred on the agency as to whether or not a matter will be sent to ADR.

(4) We are concerned about possible constitutional or statutory problems raised by the interplay of proposed Section 647.220(a) with the confidentiality provision of proposed Section 647.240(a). Read together, they provide that, if a matter is sent to mediation, any communication made in the course of the mediation would be subject to a complete confidentiality privilege. Aside from the fact that it is not clear whether all aspects of a mediation would be subject to the confidentiality privilege (including the decision of the mediator), the involvement by a state agency in a proceeding which is sealed from public scrutiny may be indefensible. Sunshine, rather than secrecy, should be the norm in government decision making.

(5) Proposed Section 647.220(b) provides that the parties may agree to refer a dispute to binding arbitration. We are concerned that, in binding arbitration, the State may be giving up to unspecified private decision makers, whose qualifications and objectivity are not specified, its constitutional or statutory powers and discretions. This, too, may be constitutionally indefensible.

(6) The proposed Act does not expressly provide for the allocation of costs of ADR, the right to discovery in ADR, or the enforcement or review of a decision rendered or settlement reached pursuant to ADR.

**4. ARTICLE 3: EMERGENCY DECISIONS**

As to emergency decisions, we have the following concerns:

a. **Uniformity among agencies.** The proposal ostensibly encourages a laudable goal of uniformity of procedures among agencies covered by the proposed Act (see, e.g., Tentative Recommendations at 5-6). Nevertheless, proposed Article 3 delegates to each agency the discretion to destroy uniformity by adopting regulations governing the issuance of emergency decisions. Section 641.310 provides that any agency wishing to issue emergency decisions must adopt regulations defining, "the circumstances in which an emergency decision may be issued," stating, "the nature of the temporary, interim relief" available, and prescribing "the procedures that will be available before and after issuance of an emergency decision." This plenary delegation of authority would encourage each agency to tailor specific regulations to meet its own peculiar needs and institutional requirements. It would promote diversity among the various agencies, rather than uniformity.

b. **Vagueness and Overbreadth.** Several critical terms in the proposed Act are vague or overbroad, and, accordingly, appear to delegate virtually unlimited power and authority to the individual agencies. For example, proposed Section 641.320 states that an agency may issue an emergency decision "in a situation involving an immediate danger to the public health, safety, or welfare . . . . The term "welfare" is vague in this context and could be used to support the unfettered exercise of agency discretion to

issue emergency decisions in circumstances that may not warrant emergency action.

The notice requirements in the Act are also vague. Proposed Section 641.330 provides that, before an emergency decision is issued, notice to the respondent shall be given, "if practicable." The meaning of the word "practicable" in that context is left to the imagination. This section would permit emergency decisions to be issued without notice at all. It would vest the individual agencies with unlimited discretion to determine the nature and timing of notice, if any, to be given to respondents in connection with emergency decisions. (Compare, for example, the specific notice requirements for court-issued injunctions set forth in Code of Civil Procedure section 527, including the requirement that an attorney certify to the court, under oath, the reasons why notice should not be given, if such is the case.)

c. **Burden of Proof.** The proposed statute does not specify the burden of proof required to obtain emergency relief. Usually, an applicant for extraordinary emergency or temporary relief pending the resolution of an issue on its merits is required to meet specific and substantial evidentiary burdens before such relief will be granted. See, e.g., Code of Civil Procedure section 527 (requiring a verified complaint or affidavits for the issuance of a temporary restraining order or preliminary injunction). The committee expressed concern that no such procedural protections are included in the proposed statute.

d. **Completeness of Record.** Section 641.360(b) provides that "the agency record need not constitute the exclusive basis for an emergency decision" or for review of that decision. An agency emergency decision based on information extraneous to the record may be unreviewable as a practical matter. Indeed, its effect may be to bar all review, particularly if the standard of review is the abuse of discretion. See, e.g., proposed Section 641.380(c). Moreover, the proposal would also permit an agency to issue emergency decisions without regard to the contents of the record. We see no reason to vest agencies with such apparently limitless discretion.

e. **Statutorily defined emergency proceedings.** The tentative recommendations point out that there are already statutes providing that certain agencies may take emergency action when necessary. See Commission recommendations at p. 24 and note 87. We consider the current statutory regulation of emergency proceedings to be appropriate and are not convinced that there are sufficient reasons to delegate this power and authority to all the individual administrative agencies.

**5. CENTRAL PANEL OF ADMINISTRATIVE LAW JUDGES**

California was the first jurisdiction to adopt a central panel of hearing officers who would hear administrative adjudications for different agencies. However, many agencies now employ their own administrative law judges and hearing officers. Only certain, enumerated agencies use the central panel now. Gov. Code §§ 11,500(a), 11,501. The Commission recommends that there not be a general removal of state agency personnel and functions to a central panel, but that any transfer of hearing functions to a central panel should be specific to the particular agency involved, based on a showing of the need for the particular transfer.

We recommend that the proposal be disapproved. Its rationales are incorrect. The recommendation of the Law Revision Commission should be that all state agency hearing personnel and functions are removed to, compensated by, and assigned by a central panel, unless the adjudicative functions of the agency are expressly excepted by the Legislature. The process of deciding which adjudicative functions should be excepted from the general rule may take longer and require more detailed study, but the protection of the public requires no loss.

The concepts of fairness and the "appearance of fairness" are not merely theories but present the only means an individual has to protect his or her rights vis-a-vis the State. When the Commission states that its investigation "did not reveal any evidence of unfairness or perception of unfairness in California" [p. 11] the Commission must not have spoken with many people who have appeared before or who represent respondents before administrative agencies.

When an administrative adjudicatory hearing is held before a hearing officer who is employed by the agency which has initiated the proceeding, has review authority over the decision, and may communicate ex parte with the hearing officer, both unfairness and the appearance of unfairness result. For example, the appearance and reality of unfairness often occur in Department of Motor Vehicle hearings, where the hearing officer is an employee of the administrative agency. Assume, for example, a citation for driving with a blood alcohol level in excess of .08%, where the driver refused to take a blood alcohol test. Assume, further, that a court found lack of probable cause, so the arrest was improper, and the criminal case was dismissed. The driver finds an attorney who represents her before the Department of Motor Vehicles for low or no fee. She appears with that attorney at the date set in a notice received from the Department of Motor Vehicles. The hearing is at the Department of Motor Vehicles office. The hearing officer is an employee of the Department of Motor Vehicles. The hearing officer is the accuser. At the beginning of the hearing, the hearing officer insults both the driver and the attorney and openly expresses his opinion that the attorney is simply there to obstruct justice because the record shows a "clear violation." The hearing officer receives in evidence a semi-legible copy of the police report, but no police officer is present. The hearing officer refuses to accept the testimony of the driver to refute the statements contained in the police report and accepts the contents of the police report as conclusive. The driver may be able to subpoena the arresting officer, if the driver can afford the fee charged by the agency for whom the arresting officer works. If the driver cannot afford that fee, the hearing officer refuses to subpoena the arresting officer to the hearing. Therefore, an impecunious driver, whose attorney is working for little or no fee, cannot defend herself. Even though the criminal case was dismissed, her license is revoked, and she cannot even drive her child to day care in order to remain employed. She has no money to seek judicial review.

In administrative proceedings, the hearing officer may be the accuser, judge, jury, and executioner. Even if, legally and factually, the same result would occur after a fair hearing, the process is demeaning, leaving the respondent frustrated, angry, and bitter. Because administrative agencies adjudicate a huge volume of proceedings in which rights and privileges may be denied that are critical to the lives of the respondents, perpetuating the appearance of unfairness creates an ever-growing

group of people whose hostility could have been ameliorated. Continuation of these problems cannot be tolerated.

Not assuring the appearance of fairness is not justified by the second reason cited by the Commission, namely that "the various agencies are generally satisfied with their present in-house hearing personnel." [P. 11.] A system which gives the agency advantages will inherently satisfy the agency. Due process, fairness, and the appearance of objectivity are more important.

Centralization need not increase costs. Not all hearing officers need to be lawyers, and their compensation can vary in accordance with their qualifications. Hearing officers who qualify to sit in cases for one agency need not be qualified to sit as hearing officers in all cases. The mere fact that they are independent of the administrative agency will at least allow the respondent to have a reasonable expectation that the hearing will fairly be conducted.

The Commission's statement that the agency charged with administering the area of state regulation needs to be able to control the enforcement process [p. 12] is a succinct expression of the very reason why hearing officers need to be independent of the administrative agency if respondents are to receive at least the appearance of a fair hearing. A respondent will not expect a hearing officer whose procedural and substantive decisions are controlled by the agency to be able to be objective in hearing accusations or ruling upon policies initiated by his or her employer.

**6. ROLE OF ADMINISTRATIVE LAW JUDGE**

Under the existing Administrative Procedure Act, fact finding is done by an administrative law judge employed by the Office of Administrative Hearings. The head of the administrative agency may either adopt the proposed decision of the administrative law judge or reject it and decide the case itself on the record. The new proposal could change the format:

(1) Each agency head will decide whether the hearing will be conducted by an administrative law judge or by the agency head, itself.

(2) If the agency head conducts the hearing, the agency head will issue a final decision within 100 days after the end of the hearing.

(3) If an administrative law judge conducts the hearing, the administrative law judge renders a proposed decision within thirty days after the end of the hearing. The agency head has 100 days within which to act on the proposed decision. If the decision is not acted upon within that time, it becomes final by operation of law.

(4) A proposed decision or a final decision is subject to administrative review only in the discretion of the agency.

The procedures will create additional flexibility in administrative practice. We recommend that they be supported.

However, a possible result of limiting administrative review may be increased judicial proceedings in comparison with current practice. Now, the general rule is that an appeal to the head of the agency is available as a matter of right. If the Law Revision Commission proposal is adopted, an appeal to the head of the agency would only lie in the discretion of the agency. The reviewing authority would then be limited to a review of the record, except for newly-discovered evidence or evidence that was unavailable at the time of the hearing.

A possible result of this change will be an increased frequency of administrative mandamus proceedings. To the extent that the agency elects not to allow the head of the agency to reconsider a decision, the parties will be left with no recourse other than judicial relief. The Law Revision Commission points out that an appeal to the agency head has "attendant expense." [P. 13.] However, the expense of appealing to the head of an administrative agency is substantially lower than the expense of filing or responding to a petition for administrative mandamus or other judicial proceedings. The Law Revision Commission does not discuss any reasons for its recommended change, nor does it analyze the fiscal impact on the judiciary. Since courts' budgets are being reduced, and their calendars are congested by criminal cases, the State Bar should oppose proposals which force more administrative cases into the courts without administrative review.

**7. IMPARTIALITY OF DECISION MAKER**

The Law Revision Commission has recommended five excellent additions to the Administrative Procedure Act to assure fairness and due process. But for extensive exceptions, the proposal would require that:

(1) The decision be based exclusively on the record in the proceeding.

(2) Ex parte communications with the decision maker be prohibited.

(3) The decision maker be free of bias.

(4) Adversarial functions be separated from decision making functions within the administrative agency.

(5) Decision making functions be insulated from command influence within the agency.

However, the proposed Act is written so that most requirements which would assure fairness are offset by exceptions which take away such assurances.

Proposed Section 649.120(c) would codify the requirement that the decision be based exclusively on the record of the proceeding. The evidence of record may include the knowledge of the decision maker and other supplemental evidence not produced at the hearing, if that evidence is made a part of the record and all parties are given an opportunity to comment on it. This change is laudable.

Another welcome change is the prohibition against ex parte communications with the decision maker. Under present law, factual information must be given to the decision maker on the record, but the law is not clear whether ex parte contacts concerning law or policy are permissible. The principle which ought to govern administrative proceedings is nicely stated by the Commission: "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."

However, the proposed Act would permit the decision maker to obtain advice and assistance from agency personnel. See

Section 648.520, pp. 94-95. This will destroy the fundamental fairness which would have been created by the proposal. In addition, the decision maker would be permitted to discuss "non-controversial matters of practice or procedure" [p. 15]. The proposal does not define this phrase. One person's "non-controversial" matter of "procedure or practice" is another person's controversial matter of substance. To illustrate, the guidelines for disciplinary sanctions of attorneys are contained in the Transitional Rules of Practice and Procedure of the State Bar Court.*/

Thus, after articulating well the reasons for the prohibition against ex parte communications with the adjudicator proposed Act includes expansive exceptions which will swallow the rule. The State Bar should oppose the exceptions. Instead, all communications with the decision maker should be with notice to the other side and opportunity to be heard.

Proposed Section 643.210 contains a succinct statement disqualifying the decision maker for "bias, prejudice, interest, or any other cause provided in this part." The exceptions appear appropriate. Proposed Section 643.130 goes beyond existing law to provide that, if disqualification of the decision maker would prevent the agency from acting, the decision maker is nevertheless disqualified, and another person may be substituted for the decision maker by the appointing authority. These sections are sound and should be approved.

Proposed Section 643.230 codifies procedures for the disqualification of the presiding officer are spelled out. The proposal should be approved, with one exception.

Proposed Section 643.230(d) would prohibit administrative or judicial review of a ruling on a request for disqualification, except on review of the final decision of the adjudicator. If the hearing officer should not have heard the matter in the first place, the decision will have to be vacated, and the matter will have to be reheard. This would be a waste of the resources of the agency and of the respondent. If the adjudicator has a personal interest, bias, or prejudice, it will also usually be impossible for the respondent to prove that the result of the

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*/ Note that the State Bar Court is not subject to the Administrative Procedure Act.

hearing would have differed before a nonpartisan adjudicator. Thus, limiting the right of review to post-decision review would defeat any right of review of the decision or disqualification. The adjudicator will have no incentive to comply with the new rules on disqualification if there is no possibility of being overturned. The right of review should be restored.

Existing statutory and decisional law on the separation of administrative and adjudicatory functions is not clear. See Commission's discussion at p. 16. The proposal attempts to clarify the law as follows:

1. Agency personnel may confer in making preliminary determinations, such as probable cause for issuing the initial pleading. However, proposed Section 643.330(a)(1) destroys the separation of functions by permitting a person who participated in determining that there was probable cause to serve as the presiding officer in the proceeding which results from that person's decision. Thus, the person who decides to prosecute an administrative proceeding may ultimately adjudicate the result of that proceeding. The appearance and likelihood of bias are inherent. This exception should be disapproved.

2. If the adjudicatory proceeding is non-prosecutorial, and a person has been an investigator or advocate more than one year before the time he or she sits as an adjudicator in the case, there is no disqualification. Again, the appearance and likelihood of bias are inherent. To analogize for illustration, if this exception were applied to the judicial branch of government, an assistant attorney general who represented the agency in the hearing was later appointed to the Supreme Court, he or she could decide the appeal from the case on which he or she worked. This exception should be opposed.

Proposed Section 643.330 would also permit an investigator or advocate to give advice to the adjudicator concerning a "technical issue," if the proceeding is non-prosecutorial in character and the advice is necessary for, and not otherwise reasonably available to, the adjudicator, provided that the content of the advice is disclosed on the record, and all parties have an opportunity to comment on the advice. Although this may be necessary in administrative cases that involve specialized, technical issues, an additional element should be required. The

State Bar should recommend that, before seeking or receiving the advice, the adjudicator be required to give notice to the non-agency parties and an opportunity for them at least to be present, so they can hear firsthand what is communicated to the adjudicator.

Proposed Section 643.330(a)(3) would also permit an investigator, prosecutor, or advocate to advise the adjudicator concerning a settlement proposal advocated by that person. Again, the exception should be disapproved. An easy way to bias a judge or a hearing officer is to disclose the contents of settlement negotiations at psychologically important times. The other side could not safely participate in settlement negotiations if the agency's advocate can use settlement proposals or the agency's position regarding them as a means of creating bias by the hearing officer against the respondent. The Law Revision Commission states no rationale for this proposed exception and merely states that prosecutorial personnel "must be able to advise the decision maker" concerning the prosecution's settlement proposals. An unfair proceeding would be the result.

The existence of a driver's license is essential to many people for economic, medical, and other reasons. Under the rationale that driver's licensing cases are so voluminous that separating the prosecution and hearing functions by the Department of Motor Vehicles would "gridlock the system," the Law Revision Commission proposes a blanket exception for the Department of Motor Vehicles when the matter at issue applies to issuance, denial, revocation, or suspension of a driver's license. See Proposed Section 643.320(b). For the reasons stated throughout this report, the exception should not be disapproved.

Proposed Section 643.320(a)(2) prohibits the adjudicator from being a subordinate of an investigator, prosecutor, or advocate in the case. This prohibition is appropriate and should be supported. Anything which promotes the fairness of the proceeding should be built into the act.

**8. CONSOLIDATION AND SEVERANCE**

The present Administrative Procedure Act contains no provisions for consolidation or severance. Proposed Section 648.120(a) would permit consolidation of proceedings that involve common questions or law or fact. Proposed Section 648.120(b) would permit the agency or the presiding officer to order a separate

hearing of any issue in furtherance of convenience or to avoid prejudice or when separate hearings would be conducive to expectation and economy. These provisions are copied from Code of Civil Procedure section 1048 and should be approved.

Proposed Section 648.120(c) would provide that, if the agency and the presiding officer make conflicting orders for consolidation or severance, the agency's order controls. Given the nature of administrative proceedings, this is reasonable and should be approved.

However, the Comment to proposed Section 648.120 goes far beyond any reasonable interpretation of either Code of Civil Procedure section 1048 or proposed Government Code section 648.120. It states that proposed subsection (a) is sufficiently broad "to enable an agency to employ class action procedures in the agency's discretion." Any suggestion that the provisions for consolidation may permit class action procedures in administrative proceedings under state law should vigorously be opposed by the State Bar. Class actions include difficult technical issues broader than the claim itself. Adequacy of representation, risk of substantial prejudice from separate actions, presence or absence of common questions, adequacy of notice, and many other issues are very difficult to adjudicate, even where rules of evidence apply and due process concerns can be satisfied. In administrative proceedings, the Evidence Code does not apply, even under the proposed new legislation. See proposed Section 648.410(a). Even if an administrative law judge concludes that the preponderance of the evidence supports one side or the other, the administrative agency can overrule that decision. The substantial body of law related to individual rights and duties of represented but non-appearing members of the class and the substance and procedure of class actions could be ignored by the administrative agency.

The proposal is legally incorrect. Class actions are not legitimized by Code of Civil Procedure section 1048. Where class actions are intended, the law says so. For example, Code of Civil Procedure section 382 allows class actions when the question is of common or general interest of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. Civil Code sections 1750 and 1781 create a statutory scheme for class actions in the Consumer Legal Remedies Act. Forum shopping between administrative agencies and

the judiciary will be encouraged by the Comment to proposed Section 648.120.

Regardless of whether one represents plaintiffs or defendants in class action cases, merely suggesting in a comment that class action cases may be prosecuted in administrative agencies is extremely dangerous. The proposed Act should not include such provisions without extensive study. Even if such a study leads to the conclusion that they may be prosecuted in administrative agencies, the procedures must carefully be spelled out in the Act itself, to assure due process in all cases.

**9. PROPOSED SECTION 648.150. HEARING BY ELECTRONIC MEANS**

This section would incorporate new and different technologies which potentially could save both the agencies and individual participants significant time and expense. We recommend additional procedural safeguards to protect the rights of parties utilizing an electronic hearing. For example, an adequate time period in advance of the hearing should be specified for the exchange of exhibits, so a party will have time to prepare for the hearing and to object to the use of an electronic hearing once they have had an opportunity to review the exhibits. For instance, there may be a challenge to the authenticity of a document, so that only an inspection of the original will solve that issue. In a telephone conference call, the objecting party will not even see the original document. Secondly, particularly in instances where an individual will represent himself or herself without benefit of an attorney, a hearing by telephonic and/or certain other electronic means should be used with caution. A hearing by telephone may favor the educated and/or articulate, whereas if an individual is intimidated by a proceeding or simply inarticulate, a hearing officer who cannot view the demeanor of a participant may wrongfully interpret the timidity as uncooperativeness or dishonesty.

Finally, we would recommend that the method of implementing proposed Section 648.150(b) be given careful consideration. It permits the type of procedural safeguards that we recommend, but any potential savings in time and expense by having an electronic hearing would be lost if a party has to incur the same time or expense to make a preliminary appearance to support or oppose the use of electronics.

If you have any questions regarding these recommendations, please do not hesitate to telephone me.

Very truly yours,

Jerome Sapiro, Jr.

JS:vy

cc: Mark Mazzarella, Esq.
Ms. Janet Carver

(1:9930.03:29)

STATE OF CALIFORNIA

PETE WILSON, Governor

**AGRICULTURAL LABOR RELATIONS BOARD**
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September 14, 1993



NATHANIEL STERLING
Executive Secretary
CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94202-4739

Subject: **Comments on Tentative Recommendation: Administrative Adjudication by State Agencies**

Dear Mr. Sterling:

The Agricultural Labor Relations Board (ALRB) respectfully requests that it continue to be exempt from the provisions of the proposed Administrative Procedures Act (APA) in its proposed form. The ALRB has operated under a very formal and highly regulated hearing process for 18 years. What the APA reform purports to accomplish already exists for the most part under our process. Many of the procedural improvements in hearing and prehearing processes proposed by the APA that are workable under the ALRA, such as early disclosure of non-employee witnesses, have been substantially incorporated into the ALRB's procedures through its 1991 rulemaking package.

More importantly, the provisions of the proposed APA would either seriously impair the operation of the Agricultural Labor Relations Act (ALRA or Act) or so modify the basic statutory scheme of the ALRA as to amount to a substantial rewriting of the Act.

Finally, the opting out process is costly, time-consuming and would not alleviate serious derogations to the comprehensive labor relations scheme enacted in the ALRA.

Background

The ALRB is one of the agencies that has been exempted heretofore not only from the obligation to use Administrative Law Judges from the Office of Administrative Hearings, but from the existing Administrative Procedures Act in its entirety, except for rulemaking procedures. (Gov. Code sec. 11501.) The National Labor Relations Board (NLRB), whose statutory scheme and operations were consciously adopted by the Legislature when the ALRA was enacted, has been exempt from the federal Administrative Procedures Act, except that it is authorized to conduct

rulemaking proceedings. For the reasons set forth below, the proposed Administrative Procedures Act (APA) is, if anything, even more inappropriate for application to the ALRA than the existing Administrative Procedures Act.

To retain its present specialized and expert character, one consciously adopted by the Legislature from the National Labor Relations Act (NLRA), the ALRB would have to opt out of most of the provisions of the APA. However, even if the ALRB opted out of all the optional terms of the APA in order to retain the statutory scheme adopted by the Legislature, the APA provisions that do not allow opting out (herein called mandatory provisions) would either seriously disrupt the operations of the ALRB or modify the legislatively adopted statutory scheme in such fundamental ways that, we are confident, the drafters of the APA could not have intended from their proposals.

To the extent that mandatory provisions were ultimately deemed contrary to the ALRA's express statutory language and therefore inapplicable to the ALRA, as discussed below, there would be no point in imposing them on the ALRB. To the extent that particular procedural improvements in the APA may be desirable, APA section 612.140 would allow the ALRB to adopt those provisions even if it were exempted. In our view, whatever residual benefits to the ALRB that may reside in the APA can be incorporated by the ALRB under APA section 612.140.

Most of the procedural improvements in hearing and prehearing processes proposed by the APA that are workable under the ALRA, such as early disclosure of non-employee witnesses, have been substantially incorporated into the ALRB's procedures through its 1991 rulemaking package.

Most importantly for our request for exemption, if the ALRB were subject to the terms of the APA and therefore were bound by its mandatory terms, particularly Chapter 9, Decisions, it is foreseeable that the most important function of the ALRB, elections to choose collective bargaining representatives, would either become impossible to conduct as originally authorized by the Legislature, or, at best, would be rendered essentially inoperative for a period of several years.

This disruption or inadvertent amendment would not advance the stated goals of the APA, because most of the objectives of the APA are already in place at the ALRB:

* Substantially all of our procedures are embodied in regulations formulated in rulemaking proceedings.

* The ALRB has adopted most of the hearing and prehearing procedures, insofar as they are appropriate for the context in which the ALRA operates, by its 1991 rulemaking proceeding.

* The ALRB's decisions, numbering about 1,000 at this time, are all published and precedentially binding.

* The decisional law interpreting our regulations, to the extent they are not already embodied in our own regulations and published decisions, are generally available in county law libraries and larger libraries, as well as practitioners' offices. They include approximately 50,000 published decisions of the National Labor Relations Board (NLRB), and approximately 5,000 published federal circuit decisions and 500 United States Supreme Court decisions, under a substantially identical statute dealing with the same subject matter. This NLRA material is available not only through the official reports of the courts and the NLRB, but also through major publishing services including Bureau of National Affairs and Commerce Clearing House.

* Labor matters in virtually all other forums, most of them substantially greater in the volume of cases generated (NLRB, federal district and superior court, arbitration), are handled by a specialized labor bar. Making our proceedings more accessible to non-specialists would probably not divert any substantial amount of business away from this specialized bar to other practitioners.

The substance of the reforms, while perhaps beneficial in many other areas of administrative procedure, conflicts with the basic scheme of the ALRA. Unless the ALRB is exempted from both the mandatory and optional terms of the APA, for the reasons explained below, the APA could constitute a rewriting of the ALRA and would impair the operations of major terms of the ALRA either permanently or until the full cycle of our administrative proceedings and judicial review is completed. In many cases, this process could last four to five years.

Mandatory APA Provisions and Their Impact on the ALRA

Agencies are not permitted to opt out of the following provisions of the APA: Part 1, all chapters, Part 4, Chapter 3, Chapter 4, Chapter 8, Article 2, Chapter 9 and Chapter 10. Several of these mandatory terms may be in conflict with the statutory scheme of the ALRA, or could cause significant harm to the operation of the ALRB without countervailing benefit.

The Impact of the APA on the Board's Election Procedures

An example of the APA's impact on the ALRB relates to the ALRB's election process.

One of the ALRB's two principal functions is to investigate and certify the collective bargaining status of bargaining units consisting of agricultural employees. If a labor organization is certified, the employer is required to recognize and bargain with it. The fostering of such relationships, if chosen by the employees in a Board conducted election, is the most important objective of the ALRA, and is the central means of accomplishing the declared statutory objective of promoting peace in the agricultural fields through the statutory scheme laid out by the ALRA. The second principal function of the ALRB, adjudication of unfair labor practices, exists primarily to foster and protect the rights of farmworkers to the free choice of a collective bargaining representative through ALRB elections, and to effective and fair representation should they exercise their right to be represented.

Because of the seasonal character of agricultural work, the Legislature departed from the NLRA by requiring that elections be conducted within seven days of the filing of a petition, or within 48 hours if a majority of employees are engaged in a strike.[1] Full compliance with the APA, even with regulations

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[1] The California Legislature departed from the NLRA model as to the timing of elections. The NLRA provides that virtually all elections conducted pursuant to its terms take place following a hearing. In cases where a hearing is not waived, the median time from filing of petition to preelection decision is 45 days. (NLRB Annual Report, 1989, Table 23, p. 249, (most recent available).) The NLRB's procedures provide that the election shall take place 25 to 30 days following the regional director's decision. (NLRB Representation Case Handling Manual, section 11302.1.) While most NLRB elections are run without a hearing pursuant to stipulation of the parties, the stipulations are arrived at with the only alternative being the direction of election following a hearing. This median lag of 70 days from petition to election would mean that elections could rarely be conducted until after the work force was less than half its annual peak, since few peak seasons in agriculture last 60 days. Both NLRB case law and the ALRA recognize the potential unfairness in conducting an election in an electorate that is not at least half the annual peak level of employment.

providing modified time frames, would make an election within seven days, much less two, impossible. Labor Code section 1153(f) prohibits a union from acting as bargaining agent without having a valid certification from the ALRB. Therefore, the only avenue into or out of collective bargaining rights for farmworkers under the ALRA is through the ALRB's election process. If that avenue is denied or obstructed, the right of farmworkers to effectively select or reject a collective bargaining representative is denied.

To preserve the existing election procedure, the courts would have to hold that the implication of informal election procedures raised by the ALRA's provision for seven-day elections constitutes an express provision of the ALRA contrary to the APA. Even if the courts ultimately conclude that the implication constitutes an expressly contrary provision of the ALRA, the ALRB's election procedure could foreseeably be nullified until all APA issues had been settled, probably by the California Supreme Court, a period that could last from three to four years.

Part 1, Chapter 1 of APA defines "license" in a way that appears to include certifications of unions as collective bargaining representatives of agricultural employees working in bargaining units covered by the ALRA. The APA appears to contemplate that its due process requirements will be met before a "license" is suspended. Under the ALRA, the ALRB must revoke the only significant form of license it issues, a union's certification to act as collective bargaining representative, upon the ALRB's decision on post-election objections or challenged ballots, or upon a vote of the majority of agricultural employees employed by the employer in an election conducted by the ALRB. Even the "granting" of the "license" (certification of representative) would constitute a decision under APA section 610.310(a). Section 610.310(a) defines a decision as "an agency action that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." The duty imposed on the employer to recognize and bargain with a union as the exclusive collective bargaining representative of the employer's agricultural employees clearly imposes "a legal right, duty, [or] privilege."

Section 641.110 could be read to excuse the agency from conducting a hearing where it is not "required by statute" (if referring to statutes other than the APA), but the comment to Section 641.110 begins by stating "an agency must conduct an appropriate adjudicative proceeding before issuing a decision[.]"

Decades of litigation under the NLRA and the ALRA have shown a strong motivation to challenge elections, even with a legal theory much less plausible than that raised by the APA amendments. It is foreseeable that almost every election conducted by the ALRB would be challenged based upon the failure of the election process to comply with the APA. While some judicial decisions have characterized the election process as an investigation of employee desire for representation, these cases arose at a time when the ALRB was not under the APA. It is difficult to see how the preelection process can be made to comply with the APA with the existing statutory time frames. Only if the implication raised in the existing seven-day requirements were held to be an "express contrary statutory provision", would the Board's election process be upheld.[2]

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[2] The employer can only obtain judicial review of an ALRB or NLRB election determination by refusing to bargain if the union wins the election. During the pendency of the judicial review, the bargaining obligation is in effect suspended.

The courts have recognized that in many cases the judicial review process had been abused by the raising of frivolous or insubstantial issues to avoid the potential costs of bargaining and to discredit and thereby eliminate the certified union. To cure the perceived deficiency in the NLRA, which provides no monetary remedy for an unfounded refusal to bargain, the Legislature adopted the "makewhole" remedy, requiring the employer to pay the employees in the certified unit whatever gains they would have received had bargaining proceeded without the test of certification. The California Supreme Court held that where the employer has shown a good faith reasonable basis for its contention that the election was invalid, makewhole will not be imposed, even though the contention is ultimately rejected. (J.R. Norton (1980) 26 Cal.3d 1 [160 Cal.Rptr. 710].)

Since at least one court decision has held that good faith can still be shown even where one court of appeal has adversely decided the issue upon which review of the ALRB's certification is based, it is possible that the procedural issues raised by the APA would be viable grounds for asserting a good faith basis for refusing to bargain until the California Supreme Court resolved all APA issues that could arise in ALRB election proceedings.

The effect of the generalized availability of these theories could be to deny substantially all agricultural laborers in California (in excess of one million persons per year) effective access to the Board's election process, and to render that

Unless the ALRB, or at least its election process, is expressly exempted from the APA, it is reasonable to expect that it would be subject to challenge. The inclination of many employers under both the NLRA and the ALRA to postpone and defeat a collective bargaining obligation imposed by the certification was recognized by the remedial provisions of the ALRA, and by the California Supreme Court in J.R. Norton v. ALRB (1980) 26 Cal.3d 1 [165 Cal.Rptr. 710]. Similarly, incumbent unions could be motivated to resist decertification efforts by litigating the applicability of the APA, since under established law they remain the bargaining agent until they are finally decertified.

Other Mandatory Provisions of APA Conflict With the ALRA's Statutory Scheme

Mandatory Sections 642.210-.230 appear to require the agency to issue decisions upon the application of private parties for decisions. Under section 1149 of the ALRA, the General Counsel has the exclusive and substantially unreviewable discretion to initiate any unfair labor practice cases. This statutory arrangement is copied from section 3(d) of the NLRA, which has been interpreted similarly. While parties can file charges under the ALRA, charges are not pleadings but mere requests for investigations.

The General Counsel's authority over the complaint until opening of hearing has for decades been interpreted to include the ability to withdraw or modify it without leave at least until the opening of hearing. APA section 648.120, another mandatory APA section, provides that the presiding officer may consolidate and sever matters from the proceeding without reference to the stage of the proceedings.

These sections would seriously alter the ALRA's statutory scheme unless read to be inapplicable to the ALRA because of their inconsistency with ALRA section 1149's express statutory grant of authority to the ALRB General Counsel.

Summary of Comment as to Mandatory APA Terms

The ALRB believes, as stated previously, that it should be exempt from the proposed APA in its entirety. The ALRB has already adopted many of the procedural improvements required by the APA,

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process substantially inoperative until the APA issues had been settled by appellate court litigation, a time period that could last four to five years.

and would opt out of most of the nonmandatory APA provisions not already in place. The ALRB would be able to incorporate any other terms of the APA that appeared helpful under APA section 630.140, as it has already done in its 1991 rulemaking package.

Optional APA Provisions

The negative impact of application of the APA's optional terms on the ALRA would appear to fall into the following areas:

* The provision for declaratory decisions would substantially modify the statutory scheme created by the ALRA, which is to encourage employers, unions and employees to adjust their differences with a minimum of governmental supervision.

* The whole process of collective bargaining, arbitration and grievance processing sanctioned by the ALRA is a form of alternative dispute resolution, and therefore, APA provisions for additional alternative dispute resolution are at best, surplusage.

* Existing United States Supreme Court precedent suggests that discovery provisions, like those in the APA, would deny the ALRA's investigative and adjudicative process evidence from employees, upon which these processes are almost completely dependent.

Declaratory Decisions

The availability of declaratory decisions, while potentially useful in some cases, contradicts the statutory scheme of the ALRA. The underlying scheme of both the ALRA and NLRA is to create a system of private negotiations operating with a minimum of governmental supervision. Declaratory judgments could be requested to bring the agency in to give approval at every step of the process. Requests for resolution of disputes over preelection access by unions, plans for preelection speeches by consultants, and bargaining proposals could be submitted to the Board for advance clearance.

The process created and regulated by the ALRA and the NLRA was clearly intended to create private dispute resolving mechanisms free of governmental supervision, except on an after-the-fact basis. The NLRB has throughout its history, or at least since 1948, refused to give advisory opinions, except as to narrow jurisdictional issues. To do so would make the agency the supervisor of labor relations on an ongoing basis as the process

proceeded. While such an experiment may be desirable, it would be such a departure from the underlying private dispute resolution assumed by the legislation as to amount to a substantial amendment of the statutory scheme.

While the Board would have discretion to decline any such requests, there could be substantial pressure or criticism if the Board exercised the declaratory opinion power in any case, but refused it in others. The ALRB would therefore have to exclude itself from the declaratory decision process.

Alternative Dispute Resolution

As to the sections on Alternate Dispute Resolution, the whole framework of collective bargaining and concerted activity is a form of alternative dispute resolution. While most of the disputes addressed through collective bargaining or voluntary negotiations in the framework of protected concerted activities are not legal claims, disputes subject to legal proceedings have often been disposed of in the course of negotiating a new collective bargaining agreement. Well developed case law under the NLRA and ALRA also encourages the creation of grievance and arbitration procedures, and these processes were well developed in the context of labor law before alternate dispute resolution arose in most other fields of law.

NLRA and ALRA precedent provides that our proceedings may be deferred to give the parties the opportunity to resolve them through grievance and arbitration procedures. While the Board would be willing to consider further development of alternative dispute resolution procedures, such mechanisms are highly developed in labor law and the APA's provisions for such procedures would at best add little to the existing statutory scheme and decisional law.

Discovery Provisions and Pleading Practice

The APA provides for liberal discovery compared to what has prevailed under both the ALRA and the NLRA. The reasons for the lack of discovery procedures under both the ALRA and the NLRA are set forth in the ALRB's decision in Giumarra Vineyards, Inc. (1977) 3 ALRB No. 21. These substantially parallel those relied on by the United States Supreme Court in NLRB v. Robbins Tire & Rubber Co. (1978) 437 U.S. 214. That case upheld the NLRB's policy to withhold employee statements unless and until that employee was called as a witness in an unfair labor practice or representation adjudicative hearing. The Court noted that the operation of the NLRB depends almost entirely on the cooperation

of employees in giving written statements. Since employees are subject to innumerable overt or subtle pressures from their employer, the Court recognized that prehearing discovery, as contemplated by section 645.220-.230 could potentially dry up the source of evidence upon which the NLRB's (and ALRB's) processes depend. In this context, the NLRB and ALRB have been reluctant to impose discovery obligations on employers and unions, because they have no discovery access to the most important source of evidence in Board proceedings, i.e., employee statements.

To manage the production of documents shortly before and in hearing, the ALRB has developed significant procedures for formal prehearing conferences that do not exist at the NLRB . These procedures remove many of the disadvantages that otherwise might exist because of the complete absence of discovery.

Section 645.220 allows for extremely liberal pleading practices. For example, any complaint allegation not responded to is deemed to be denied, while under the ALRB's regulations, absence of any response is deemed an admission. (8 Cal. Code of Regs., sec. 20232.) The APA appears to have adopted the assumption underlying the federal rules of civil procedure that the availability of discovery compensates for the lack of precision in pleading. Since the ALRB provides only limited discovery, (NLRB proceedings still have no discovery), relatively precise pleadings are essential to enable the ALJ to maintain effective control in the prehearing conference.

## CONCLUSION

Based on the foregoing, it is respectfully requested that the ALRB be exempted from the provisions of the APA. The processes created and regulated by the ALRA, and on the federal level, the NLRA, have been exempted from both the federal and state Administrative Procedures Acts. The procedures created by the APA are so much at variance with the statutory scheme of the ALRA that application of the APA would amount to major modification of the underlying statute.

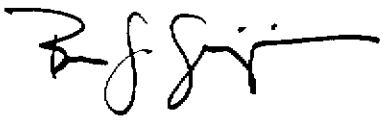
Absent exemption, the ALRB would by rulemaking, opt out of most of the non-mandatory terms of the APA. This would include Article 3 of Part 4, Chapters 1, 2, 5, 6, 7, and most of 8. This would be an expensive exercise and would only partly remedy the damage to the existing statutory scheme caused by application of the APA.

Therefore, it is submitted that the arguments for exemption are compelling in that the ALRA would be seriously modified and

disrupted by the APA. Most of the reforms required by the APA, such as rulemaking, fair hearing and prehearing procedures, and accessibility of precedent, are already in place. The ALRB could continue to incorporate such procedures voluntarily as it has in the past through rulemaking.

Thank you for thoughtfully reviewing the foregoing considerations.

Very truly yours,



BRUCE J. JANIGIAN
Chairman

BJJ/bl

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September 10, 1993

Jerold A. Prod
Deputy Director
Legal Affairs Division
Department of Corrections
1515 S St.
Sacramento, CA 95814

Dear Mr. Prod,

I enjoyed speaking with you this afternoon about the impact of the proposed new California Administrative Procedure Act, currently under consideration by the Law Revision Commission. The letter written to the Commission by Melissa Meath suggests that the Act's adjudication provisions should omit completely the adjudication conducted by your Department, including parole revocation hearings. I agree with Ms. Meath's reading of the proposed Act--all constitutionally required hearings provided by your department would be covered.

As promised, I have enclosed a copy of my article published in the UCLA Law Review that explains the reasons for trying to enact a California APA that covers all adjudications in which a statute or the constitution requires a hearing. Pp. 1071-79 give the argument for having a single adjudicatory Code. Pp. 1084-90 give the argument for having such a Code where the Act covers all adjudications required by statute or the constitution. One major advantage is that it will not be necessary to constantly litigate about what the state and federal constitutions require; the APA and accompanying regulations will set forth a constitutionally acceptable framework. The ground rules will then be readily available to anyone (lawyer or otherwise) who is engaged in dispute settlement with your Department.

Please take a look at the provisions for conference hearings at §647.110 of the draft statute (discussed at pp. 1096-1100 of the article). These hearings are sharply stripped down procedures that call for limiting or abolishing both direct and cross examination. Under §647.110(a)(2), these provisions apply to prison discipline and to any other area that the agency designates by regulation (provided that it would be constitutional to do so). Conference hearings would be most appropriate, I think, for the hearings your department conducts. Most other provisions (notice, venue, pleadings, discovery, timing, open hearings, etc.) that might pose a problem for your department can be varied by regulation. It might be necessary to provide explicit exceptions for your department from some otherwise non-alterable provisions such as right to counsel (§613.320) or ex parte contact (§648.520). I would be supportive of any suggestions you would have in this regard.

I would oppose, however, Ms. Meath's suggestions for entirely omitting Department of Corrections hearings from the APA. Many agencies have asked to be excluded; so far, at least, the Commission has stood firm against this suggestion. It has, however, been willing to make appropriate exceptions to provisions in the Act to accommodate special problems that agencies have drawn to our attention. I hope the same will be possible in the case of your agency.

Ms. Meath says that the cost of adopting regulations that vary the default provisions in the Act would outweigh any overall benefit to the process. I would respectfully disagree with this argument. There is great benefit to a rulemaking procedure, in which the public will be involved, that assesses the legitimate needs of the agency as compared to the legitimate interests of those who have disputes with the agency. Those regulations will then be an easily accessible source of information on precisely what procedures an agency will employ for the different sorts of disputes it resolves. While rulemaking can be time-consuming, the Act will provide ample time for the agency to study the problem, propose rules, conduct hearings on the rules, and have them adopted and approved by OAL long before the Act goes into effect. I really think the effort is well worth the cost.

The Commission and I greatly appreciate your letter calling to our attention the problems your Department might encounter under the new APA and I assure you we will try to solve those problems within the confines of the Act.

As I mentioned to you, the Commission will meet in Sacramento on September 24, probably in Room 3191 of the State Capitol. If you will check with Nat Sterling at the Commission (415-494-1335) he can tell you when on the agenda it's likely that your issues will come up. Also, I'd appreciate hearing

from you prior to the 24th what position you have decided to take on the issues discussed in this letter.

Sincerely,

Michael Asimow

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Sept. 15, 1993

Nat Sterling
California Law Revision Commission
4000 Middlefield Rd.
Palo Alto, CA 94303

Dear Nat,

The correspondence from the Department of Corrections caused me to reconsider §641.110(a) which is a very key section of the Act. I think the Comment needs to say something about hearings required by the state or federal constitutions. We do not want to Act to apply to situations in which due process requires some sort of adjudicatory procedure which is less than a formal hearing or a conference hearing. If we did that, we would be providing more elaborate and costly procedure than the constitution requires, as the Department of Corrections pointed out. Thus §641.110(a) should omit the words "or other adjudicative proceeding" and the Comment should read:

"This section does not apply to adjudicatory proceedings required by statute or by the state or federal constitution which fall short of an on-the-record hearing. Nor does it apply to an on-the-record hearing which an agency chooses to conduct even though such is not required by constitutional or statutory law. For example, this section does not apply to an informal conference. See Goss v. Lopez, 419 U.S. 565 (1975) (due process requires a conference between student and disciplinarian before short suspension from school at which student can present his story). Similarly, it does not apply to proceedings which the agency can require to be conducted through a review of written documents. See Hewitt v. Helms, 459 U.S. 460 (1983) (informal nonadversary review of decision

to place prisoner in administrative segregation which must include at least a written statement by prisoner).

However, this section does apply to informal oral on-the-record hearings required by the constitution or by statute. For example, pre-termination hearings that must be accorded to a discharged employee fall within this section. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (prior to termination of public employee, Board must provide notice of charges and provide employee with written or oral response opportunity); Skelly v. State Personnel Bd., 15 Cal.3d 194, 124 Cal.Rptr. 14 (1975) (same). Such hearings could be conducted as conference adjudicative proceedings if so provided by agency regulations. See §647.110."

Sincerely,

Michael Asimow