

Memorandum 93-47

Subject: Study N-100 — Administrative Adjudication (Comments on Tentative Recommendation--analysis of comments on first portion of tentative recommendation)

The letters received on the tentative recommendation on administrative adjudication are attached to Memorandum 93-45 and its supplements. That memorandum and its supplements summarize general points made in the letters. This memorandum analyzes specific points made in the letters addressed to the first portion of the tentative recommendation.

References in this memorandum to statutes are to the Government Code unless otherwise noted. References to Exhibit pages are to the Exhibit attached to Memorandum 93-45 and its supplements.

Preliminary Part

Page 2. The tentative recommendation states that the administrative procedure statutes relating to adjudication and judicial review have been little changed since 1945. The Office of Administrative Law points out that judicial review of rulemaking has received more recent attention. Exhibit pp. 100-101. The staff would delete the reference to judicial review, which is not the subject of the current tentative recommendation.

The tentative recommendation states that the State Personnel Board is wholly uncovered by the Administrative Procedure Act. The Board notes that Section 11513 relating to evidence actually applies to them. Exhibit p. 109. The staff would revise the text to read "largely or wholly uncovered".

Page 5. The tentative recommendation states that it is often the case that the most important elements of an agency's procedural code are not written. The State Personnel Board notes that its procedural provisions are written. Exhibit p. 109. The staff would add language to the footnote making clear that there are agencies such as SPB whose procedural rules are written.

Page 6. The tentative recommendation notes as an advantage of a uniform procedural statute that judicial interpretations could be used for all agencies. The State Personnel Board argues that interpretations should be unique to each agency. Exhibit pp. 109-110.

The tentative recommendation states that school districts are subject to the Administrative Procedure Act under Section 11501. The California School Employees Association points out that under the Education Code this is limited to certificated employees. Exhibit pp. 78-79. The staff would make this clarification in footnote 21 and in the Comment to Section 612.120.

§ 610.010. Application of definitions

The definitions set out in this article would apply to the entire Administrative Procedure Act, although the present draft is limited to adjudication only. The Office of Administrative Law is concerned that when the draft is expanded to cover rulemaking, the definitions may be inappropriate, and OAL may lose its authority to issue interpretive regulations governing the meaning of terms used in the rulemaking statute. Exhibit pp. 101-102. We have noted their concern in the past, and can assure them that we will address these issues when we turn to rulemaking.

§ 610.190. Agency

The Department of Social Services notes that the expansive definition of "agency" includes persons or units acting on behalf of an agency. They think it may not be clear just what "agency" has acted. Exhibit p. 134. For example, if the agency head delegates authority to act to a division chief, the division chief is not the agency for purposes of appeal. The staff disagrees with this analysis—the delegate is the agency for purposes of the statutory provisions; where it is necessary that the agency head act, the statute specifies that it be the agency head.

The Public Utilities Commission notes that it would be an "agency" within the meaning of this section. However, it is not clear whether one of its staff divisions, such as Division of Ratepayer Advocates, is an "agency", since the staff division has no authority to issue decisions or take other similar action. Exhibit pp. 49-50.

Because DRA does not act on behalf of the PUC, it would not be an agency within the meaning of the definition. The staff would add this information to the Comment as illustrative of how the section is to be applied.

§ 610.310. Decision

The Public Utilities Commission objects to language in the Comment to the effect that ratemaking and licensing applications of general application

addressed to all members of a class of providers or licensees are regulations and as such are subject to the rulemaking provisions of the administrative procedure act. Exhibit p. 50. In order not to prejudge this issue, the staff would delete from the Comment the words "subject to its rulemaking provisions".

§ 610.350. Initial pleading

The Unemployment Insurance Appeals Board states that the definition of "initial pleading" does not adequately describe determinations made by the Employment Development Department. Such determinations are neither an accusation nor an institution of an investigation. Exhibit p. 36. The references in the draft to accusations, etc., are illustrative and not comprehensive. We would add a reference to a "determination of an agency", to cover EDD.

§ 610.460. Party

Both the Public Utilities Commission and the California Energy Commission note that although the agency may be taking action, the agency is not a "party" to the proceeding in the sense that one of its staff divisions acts as a party. Exhibit pp. 49-50; 122. In this case the staff division is authorized to participate in the proceeding on behalf of the agency and should be considered as a party. The definition of "agency" accommodates this situation. We would add language to the Comment making clear that a party may include the agency's staff that is taking action.

The Department of Social Services objects to including intervenors in the definition of "party", since that would give intervenors rights in every provision where the term "party" is used. Exhibit p. 134. The staff thinks inclusion of intervenors is appropriate. Intervenors are allowed only in cases where the rights of the intervenor are substantially affected by the proceeding and will not impair the orderly and prompt conduct of the proceeding. The presiding officer may impose appropriate limitations on the involvement of the intervenor. See Sections 644.110-644.120.

§ 610.670. Respondent

The State Personnel Board finds the terminology of this section and Section 610.672 confusing, since the adversely affected employee actually initiates an adjudicative proceeding and it is odd to think of the employee as the respondent. Exhibit p. 110. "Terms should be clarified to encompass SPB process and avoid

confusion that would result from changing terminology after more than 40 years of history."

The staff has no ready solution for this problem. It is a consequence of unification of procedures that some terminology must change. We think that after some initial disruption the people having to make the change will learn to cope with it and accept the new terminology as normal.

§ 610.672. Responsive pleading

The Unemployment Insurance Appeals Board is concerned that the definition of "responsive pleading" seems to require a greater degree of specificity than is appropriate for its proceedings. Exhibit p. 36. The section is not intended to do this, but to pick up whatever type of responsive pleading an agency uses. See Section 642.350 (responsive pleading). We would make this clear in Section 610.672 by revising the section to provide that a responsive pleading "includes a notice of defense or other appropriate matter".

§ 610.910. Operative date

The State Personnel Board is concerned that the proposed deferral of the operative date of the statute for one year would not allow sufficient time to comply with all the statutory requirements for adopting regulations. Exhibit p. 109. Apparently Section 610.940, which allows adoption of interim regulations without OAL review, does not solve the problem. "Too short a period to comply with all notice, comment and response requirements under APA rulemaking procedures, given the numerous and diverse SPB constituents."

The staff would have no problem deferring the operative date of the statute a year and a half, as opposed to a year.

§ 610.940. Adoption of regulations

Robert E. Hughes of Long Beach thinks there is no need for a provision allowing adoption of interim regulations without OAL review, since provisions for emergency regulations already exist under the administrative procedure act. Exhibit p. 74. However, the emergency regulation procedure is limited to cases where necessary for immediate preservation of public peace, health and safety, or general welfare, and provides a short-fuse review process. It would not be appropriate for the kind of massive procedural regulation revision by all agencies contemplated by this statute.

The State Water Resources Control Board approves the transitional rulemaking provisions as essential. Exhibit p. 81. They believe the statute should go farther, however:

(1) Regulations adopted for the purpose of varying the adjudicative provisions of the administrative procedure act should not be subject to OAL review at all. "Even without OAL review, administrative rulemaking procedures are sufficiently cumbersome that agencies are reluctant to engage in rulemaking unless absolutely necessary. Agencies are not likely to adopt rules modifying APA adjudicatory procedures unless they have good reason to do so."

(2) If OAL review is retained, interim regulations should remain valid until such time as permanent regulations are approved by OAL, to cover the situation where an agency has adopted permanent regulations during the interim period but OAL has rejected them.

The staff sees merit in the concept of exempting adjudicative proceeding regulations from OAL review. However, if they do remain subject to OAL review, there should be some time after which the interim regulations expire. The current draft allows two and a half years to obtain OAL approval. Perhaps three would be better.

§ 612.120. Application of division to local agencies

The California School Employees Association would like to see the statute applied to local agencies as well as state agencies. Exhibit pp. 78-79. We have not attempted this because the difficulties we would encounter in trying to make one size fit all would become insurmountable due to the very different circumstances of local agency adjudication.

§ 612.150. Contrary express statute controls

The State Water Resources Control Board agrees with the concept that special statutory provisions should prevail over the general provisions of the administrative procedure act. Exhibit p. 81. However, they believe the emphasis of the Commission should not be to eliminate nonconforming statutes. "Extra emphasis should be given to allowing agencies to identify special and unique statutes which need to remain on the books. Otherwise, more rulemaking will be necessary to reenact a provision which has been voided by statute."

We have tried to address this problem by writing to agencies requesting them to identify statutes that should remain in place. We plan to write them again with a listing of proposed repeals when we have completed our search.

SWRCB identifies several specific provisions applicable to it that should be retained. Exhibit pp. 81-82. The staff will review those provisions and communicate further with SWRCB if we come to a different conclusion.

The State Personnel Board points out that under this provision a number of statutes applicable to it would remain intact notwithstanding contrary provisions in the administrative procedure act. Exhibit p. 109. The staff is reviewing the provisions identified by SPB.

The Department of Social Services approves this section, pointing out that it resolves an existing problem in the law and prevents important statutes from being inadvertently repealed by implication. Exhibit p. 134.

The California Energy Commission notes that the section preserves a contrary statute "expressly applicable to a particular agency". Exhibit pp. 122-123. Some statutes, such as the California Environmental Quality Act, are generally applicable to state agencies. Is it intended that the general statutes be preserved as well? The Commission has adopted the approach that general statutes such as this will be reviewed and either specifically conformed to the APA or specifically exempted. However, to the extent we miss one, what is the rule? The staff would preserve the special rules of the general statute unless the special rules of the general statute have been specifically examined and superseded.

§ 612.160. Suspension of statute

This section would allow the Governor to suspend an APA provision if necessary to avoid loss of federal funds or services. The State Water Resources Control Board asks how a delay in the receipt of funds or services would be handled. Exhibit p. 82. The staff would include in this section delay as a ground for suspension of an APA provision.

The Department of Social Services suggests that the Secretary of the agency affected, rather than the Governor, suspend the APA when faced with a potential loss of federal funds. "This will avoid the problem of having the director of a department make this decision by removing it to a cabinet level decision, but will not overburden an already overburdened Governor." Exhibit p. 135. The staff is not concerned about this problem. As a practical matter, the Governor will not

initiate this type of action but will respond to advice from the Governor's cabinet level appointees.

§ 613.110. Voting by agency member

This section allows voting by mail or other means, but apparently the State Water Board would prefer to retain its in person voting requirement. Exhibit p. 82. The staff has no problem leaving that special statutory requirement in place. It would override this section. It might be useful to refer to it in the Comment.

§ 613.120. Oaths, affirmations, and certification of official acts

Robert E. Hughes of Long Beach finds this section objectionable because it gives to people who may not be "sworn" and even perhaps newly hired clerical staff wide authority to administer oaths and certify acts. Exhibit p. 77. This continues an existing provision of the Administrative Procedure Act, and the staff has not heard of any abuses or other problems with it.

§ 613.210. Service

The Department of Insurance notes that this section refers to service on a party's attorney "or authorized representative", and suggests that the term be defined. Exhibit p. 94. The term is defined in Section 613.310 et seq. We would add a reference to these provisions in the Comment.

The Department of Social Services is concerned that this section eliminates the ability of an agency to effectuate service by registered mail. Exhibit p. 135. The staff does not understand this concern, since Section 613.220 makes clear that service by mail includes registered mail.

§ 613.220. Mail or other delivery

The Department of Health Services suggests that faxed or electronic service or notice be followed up with hard copy. Exhibit p. 14. The staff agrees that this is sound practice. However, the statute should make clear that the electronic service or notice is *the* service or notice and failure of a person to receive the hard copy does not invalidate the service or notice.

§ 613.230. Extension of time

The Department of Health Services points out that the time extension for mailed notice should not apply to faxed notice if receipt of a complete and legible

copy is confirmed telephonically. Exhibit p. 14. The staff would make this revision.

The Unemployment Insurance Appeals Board points out that the extension of time for mailed notice would cause problems in complying with federal time mandates. Exhibit p. 36. The staff would revise the section to make clear that it is only the times provided in this statute that are extended by five days. If an agency has adopted its own time periods by regulation or if a special statute is applicable to it, the agency may specify whether the times are to be extended for mailed notices.

The State Board of Control and the State Water Resources Control Board have concerns similar to that of UIAB, relating to processing claims and acting in urgency situations. Exhibit pp. 46, 82. The staff would handle this concern the same way--by making clear that the five day extension is a rule of construction applicable to the time provisions of this division and not to other statutes or regulations.

§ 613.310. Self representation

The Department of Health Services notes that it would be useful to clear up the issue of *in pro per* representation in the case of a non-natural person. Exhibit p. 14. The Commission has considered this matter. The Comment states that "In the case of a party that is an entity, the entity may select any of its members to represent it, and is bound by the acts of its authorized representative." Perhaps this should go in statute text rather than Comment.

§ 613.320. Representation by attorney

The State Water Resources Control Board believes the agency should be able to regulate representation by an attorney. Specifically, it should be able to preclude an attorney from practice before the agency in appropriate cases, such as intentional misrepresentations to the agency. Exhibit p. 82. The Commission has considered this matter and concluded that disciplinary regulation of this sort is the province of the State Bar and not of administrative agencies; as long as the attorney is authorized to practice law, that should include agency practice.

§ 614.110. Conversion authorized

The Department of Insurance is concerned that the conversion provisions are predicated on absence of "substantial prejudice" to a party, and the definition of substantial prejudice is left to the courts. Exhibit p. 94. "Once the courts become

involved, the administrative process grinds to a halt (unless the court would be reviewing the proceeding for prejudice after it was concluded)." In fact, they answer their own concern, since court involvement would only occur later, at least under the judicial review provisions presently being considered by the Commission. This would be an argument for combining adjudication and judicial review in one package, as initially determined by the Commission.

The Unemployment Insurance Appeals Board says that the conversion provisions have no application to it, but it is unclear whether the agency should just ignore them or what. Exhibit p. 37. The provisions are not intended as mandatory, and if they are irrelevant they should be ignored. The staff will add explanatory language to this effect in the Comment.

§ 614.120. Presiding officer

The State Water Resources Control Board points out that it may be more appropriate for the agency head than the presiding officer to obtain a successor presiding officer for a converted proceeding. Exhibit p. 83. This is a good point in the staff's opinion, and we would make the change.

§ 614.150. Agency regulations

The Department of Insurance indicates that adoption of regulations governing conversion will be difficult since a determination whether a person is prejudiced is made on a case by case basis. Exhibit p. 94. "Nevertheless, regulations may at least provide some guidance as to when conversion is appropriate." The staff agrees with these observations, and can suggest no improvements in this section.

Respectfully submitted,

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Executive Secretary