

## Second Supplement to Memorandum 99-21

### Judicial Review of Agency Action: Selected Issues

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Attached is a letter concerning the basic memo:

*Exhibit pp.*

1. Letter from Nancy Yamada, California State Employees Ass'n . . . . . 1-2

#### **Exhaustion of Administrative Remedies**

CSEA objects to the staff proposal to enact a new Section 1098 in the Code of Civil Procedure to give courts statutory authority to relieve a party from the requirement of exhaustion of administrative remedies on grounds similar to existing case law. CSEA says codification would “prevent courts from developing the law.” The staff believes the opposite is true. The proposed statute would replace the rigid rule that the exhaustion requirement is jurisdictional with a more flexible rule that would allow courts to recognize new exceptions to the exhaustion requirement, to broaden existing exceptions, or to excuse exhaustion based on a balancing of factors. The thrust of the proposed section is to give the court more discretion to excuse exhaustion when justified.

CSEA objects to language in the Comment to proposed Section 1098 (basic memo p. 4) that the futility exception excuses exhaustion “if it is certain, not merely probable, that the agency would deny the requested relief.” CSEA says a more accurate statement of case law would be to say instead that futility is shown when the petitioner “can positively state” what the agency’s decision would be if presented with the question. The staff would have no objection to revising the Comment as suggested by CSEA:

*Futility.* The exhaustion requirement is excused under paragraph (2) of subdivision (b) if it is certain, not merely probable, the petitioner can positively state that the agency would deny the requested relief. *Ogo Assocs. v. City of Torrance*, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (1974).

**Superior Court Venue for Mandamus to Review State Agency Action**

CSEA supports the staff proposal to add Sacramento County as a permissible county for superior court review of state agency action.

Respectfully submitted,

Robert J. Murphy  
Staff Counsel



# California State Employees Association

Local 1000, SEIU, AFL-CIO, CLC

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April 7, 1999

California Law Revision Commission  
Attn: Brian Hebert  
4000 Middlefield Road, Room D-1  
Palo Alto, California 94303-4739

Re: **Judicial Review of Agency (Action Study N-200 )**  
**Memorandum 99-21**

Dear Commission Members:

The California State Employees Association (CSEA) has reviewed Memorandum 99-21. CSEA does not believe that the codification of the exhaustion doctrine is necessary. Codification of existing case law will prevent courts from developing the law, even though compelling circumstances might dictate such a change or development.

Furthermore, although the proposed comments to California Code of Civil Procedure section 1098 in regard to futility purport to clarify and codify existing case law, it actually redefines the law. It states that the exhaustion requirement is excused "if it is *certain*, not merely probable, that the agency would deny the requested relief." (Memorandum 99-21, p. 5.)

The futility exception, currently defined by case law, is a limited exception. *County of Contra Costa v. State* (1986) 177 Cal.App. 3d 62,77, 222 Cal.Rptr 750, 761. It requires that the petitioner be able to "positively state" what the agency's decision in the particular case would be. *Ogo Assocs. v. City of Torrance* (1974) 37 Cal.App.3d. 830, 834, 112 Cal.Rptr 761, 763. Undeniably, the current standard requires more than the mere probability that the agency would deny the requested relief. However, "certain" is defined as indisputable or inevitable and appears to raise the standard for determining futility, and will only fuel litigation over the issue of certainty.



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In regard to the other recommendations in Memorandum 99-21, CSEA supports adding Sacramento County as venue for challenging state agency action and mandating agencies to provide specific notice of the last day for review.

Thank you for your consideration in this matter. Please call me if you have any questions or would like to discuss these issues.

Sincerely,



NANCY T. YAMADA  
Attorney

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