#N-101

ns77
12/26/89

Second Supplement to Memorandum 90-6

Subject: Study N-101 - Administrative Adjudication (Structural Issues--comments on consultant's study)

Attached to this supplementary memorandum as Exhibits 23 to 27 are copies of additional letters we have received commenting on our consultant's study of structural issues in administrative adjudication. Any further letters received sufficiently in advance of the January meeting will be attached to a third supplementary memorandum.

The staff synopsis of the comments received on the consultant's study appear in Memorandum 90-6.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

Charles J. Post
426 East Rustic Road
Santa Monica, CA 90402

213 459-7327

December 10, 1989

California Law Revision Commission
Study of Administrative Law
Adjudication Section
4000 Middlefield Road
Palo Alto, CA 94303-4739

Attn: Nathaniel Sterling, Asst. Exec. Sec.

Re: Revisions to the Administrative Procedures Act

Dear Mr. Sterling:

I am writing to express my personal view that administrative law judges be given authority to make binding determinations of fact in administrative adjudication under the APA.

This authority would free appointed boards to concentrate on policy matters. Fact determination would be more accurate. And disciplinary decisions would be more likely to focus on protection of the public rather than punishment.

I base this opinion on my experience as a Deputy Attorney General representing boards and bureaus within the Department of Consumer Affairs in disciplinary hearings from 1984 to the present, upon my experience advising elected and appointed officials as a municipal lawyer from 1976 to 1984, and upon my experience as a city council member from 1972 to 1976.

Very truly yours,

Charles J. Post

Charles J. Post

/cp

cc Michael Asimow, UCLA, Los Angeles

EXHIBIT 24

Natural Heritage Institute

CRONKHITE BEACH, BUILDING 1055
GOLDEN GATE NATIONAL RECREATION AREA
SAUSALITO, CA 94965
(415) 331-1232

A Non-Profit Corporation for Natural Resources Law • Energy • Environment • Water Resources • International Conservation

Gregory A. Thomas
President

December 11, 1989

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

Re: Comment on ADMINISTRATIVE ADJUDICATION: STRUCTURAL ISSUES, Professor Michael Asimow

Dear CLRC:

As one would expect, Professor Asimow's first phase report is a very useful product. I would like to be retained on the review list for subsequent phases.

My comment is directed to the later phases. It is the observation that, increasingly, regulatory and managerial agencies are occupied (maybe consumed) by technical and scientific issues that revolve on how the inherent uncertainties in the factual record are resolved by lay decision-makers. These uncertainties are irreducible in the sense that they are not readily amenable to resolution by further substantive inquiry, at least within typical time and financial constraints. While perhaps most pronounced in the field in which I practice--environmental and natural resources law--this a widespread phenomenon in public administration.

Given the expanding degree of deference that courts accord expert agencies in technical judgements, the reality is that policy and adjudicative decisions depend very largely upon how these uncertainties are resolved. That is to say, the allocation of burden of proof--one might say the burden of scientific uncertainty--in these administrative proceedings largely determines the outcome. In the environmental field, for example, the complexities of the physical and biological systems involved in controversies are usually such that the party that bears the burden of persuasion can be expected to lose. That burden is usually imposed on the party that asserts that the govenmental action at issue will give rise to adverse consequences on the environment. Given the usual asymmetry of resources as between exponents of environmental protection and applicants for government permits or

franchises, the outcome is almost pre-determined.[1] I give you the on-going proceedings before the State Water Resources Control Board to establish salinity and water quality standards for the San Francisco Bay and Delta as an excellent case in point.

This dysfunction in administrative process should be of growing concern as the interface between technology and the law increases. Whether the better solution is a uniform proof allocation rule for all agencies or a requirement that each agency grapple with the problem in its own procedural rules is an open question. I suggest that this matter be addressed in later phases of Professor Asimow's investigation.

Yours sincerely,

Gregory A. Thomas

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[1] Professor James Krier's 1970 observation on environmental litigation also holds for administrative proceedings:

> ...[B]urden of proof rules at present have an inevitable bias against protection of the environment....
>
> [E]ven in a world with rules against resource consumption (against, for example, pollution), the leverage inherent in resource consumers means that they can continue their conduct until sued. In short, they will almost inevitably be defendants, and those whose uses preserve rather than deteriorate will ineluctably be plaintiffs. And it is one of the simple facts of our present system that (for a host of reasons) plaintiffs most generally carry the major burden of providing most of the basic issues in a lawsuit. The result is striking: Even with a system of substantive rules against resource consumption, our present rules ensure that in cases of doubt about any facet of those rules, resource consumption will prevail. ["Environmental Litigation and the Burden of Proof", in Law and the Environment 105, 107 (M. Baldwin & J. Page eds. 1970)]

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December 11, 1989

Nathaniel Sterling, Esq.
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California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Re: Administrative Adjudication

Dear Mr. Sterling:

Enclosed is my comment on Dr. Michael Asimow's report.

Sincerely yours,

KEN CAMERON

KC:lk

Enclosure

ADMINISTRATIVE ADJUDICATION
STRUCTURAL ISSUES

COMMENT ON REPORT OF MICHAEL ASIMOW

Dr. Asimow's recommendations are reviewed here from the viewpoint of simplicity, brevity and fairness in administrative adjudication.

> Conclusion (i) A comprehensive APA (code) would prescribe the procedure for any adjudicatory hearing required by statute to be conducted by any state government agency.

This conclusion is sound. There is no good reason for the various procedures now existing, all of which have come into existence with differences attributable to minor historical factors.

> Conclusion (ii) Adjudication should not be separated, across-the-board, from other functions.

This conclusion is bad for the single reason that those who prosecute cannot be expected to judge impartially.

Any attempt to have judging and prosecution carried on within the same government entity will lead to long and futile controversy about degrees of independence of the judges. Eliminate such waste of time and energy by a complete divorce between the functions, either by a separate administrative appeals tribunal or by making the administrative law judge's findings and conclusive final unless appealed to a court.

Where agency participation is needed, as to obtain consistency and uniformity, formal participation, oral or written, by an agency representative as a party should be allowed at whatever stage of the procedure the agency desires.

> Conclusion (iii) The issue is whether some or all of the administrative law judges who decide workers' compensation, unemployment appeals, business tax cases, and other disputes not covered by the Office of Administrative Hearings under the present APA system, should become independent and be formed into an administrative law judge corps, employed by the OAH or some successor agency.

Asimow's recommendation is against "making such a fundamental change." This conclusion is bad for two reasons: First, if the administrative law judge is to be independent of agency influence as proposed by this

writer with respect to conclusion ii), the administrative law judge cannot work for the agency; second, specialization for particular subject matter areas can be accomplished administratively in a corps of hearing officers, under the direction of a single person or a small board.

Conclusion (iv) Adjudication should be defined as in the Model State Administrative Procedure Act of 1981, with an appropriate model provided for every case of adjudication.

Conclusion (v) This conclusion approves a set of hearing procedures of varying formality, either a formal type hearing, as in the first procedural model of the 1981 MSAPA, or one of a number of less formal procedures, including "conference hearings" and "summary adjudicative proceedings."

Recommendations iv) and v) must be examined together. They should both be adopted. Where one corps of administrative law judges exists to define and make uniform, by rule, the appropriate type of hearing procedure in any class of dispute, the aims of simplicity, brevity and fairness can be accomplished.

* * * * * * * *

(V)

Asimow's general conclusion requires no comments other than those already made.

Ken Cameron

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3088

December 12, 1989

Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Administrative Adjudication: Structural Issues by Professor Michael Asimow.

Dear Mr. Sterling:

Thank you for the opportunity to review and comment upon the recommendations advanced in Professor Asimow's report. These comments are ours alone, and do not reflect the views of the Public Employment Relations Board. At such time as the Commission is considering its own recommendations, we would appreciate the opportunity to present such proposed recommendations to the Board for its' consideration and comment.

PERB has been charged by the Legislature to administer three separate acts covering public sector labor relations. A substantial portion of our activities are devoted to quasi-judicial proceedings in matters of representation and unfair practice cases.[1] Thus, PERB is very interested in any developments that might impact those procedures.

We agree with one of Professor Asimow's recommendations, need clarification on the second and withhold judgment on the third. In brief, the specialization required in some fields of law, such as the labor relations statutes administered by PERB, requires that the presiding ALJ possess a high degree of expertise. Such expertise necessitates a separate classification of ALJ's. Indeed, the enhanced specialization in labor relations is the underlying basis for legislative conferral of primary and initial jurisdiction in such matters in specially created agencies such as PERB, rather than the courts.

[1] PERB administers the Ralph C. Dills Act, the Educational Employment Relations Act, and the Higher Education Employer-Employee Relations Act (Government Code Sections 3512 - 3524, 3540 - 3549.3 and 3560 - 3599, respectively)

By organizational structure, as more particularly described below, PERB ALJs are separate from other units within the agency. This arrangement, coupled with the finality of the ALJ's proposed decision in the absence of exceptions, provides sufficient independence to allay the appearance of bias. Thus, there is no need to remove PERB ALJs to a central statewide agency. We therefore agree with the recommendation that there not be a central core of ALJs.

With regard to the issue of separation of adjudication from other agency functions (such as rulemaking), the agency's regulatory function is an important part of its operations, and requires intimate familiarity with the substantive issues involved (see the detailed PERB regulations set forth at title 8, California Code of Regulations, section 31001 et seq.) Thus, we concur that there should be no presumption in favor of separation of adjudication from other agency functions, such as rulemaking. However, we are uncertain of the context of the recommendation. Is there another question pending about the practice of agency rulemaking and performance of adjudicatory functions?

With regard to the recommendation that a single APA be developed, and made applicable to all state agencies, we reserve judgment until the specifics of such a proposed APA are available.

Preliminarily, to the extent the Commission might be persuaded by those arguments advanced on pages 16 and 17 regarding accessibility and consistency, we would call your attention to the below-listed procedures by which PERB operates. The premises asserted in the report do not apply to PERB proceedings. Second, before responding to a recommendation that all agencies conform to a single new set of procedural rules, it would be helpful to identify the agencies involved. The report acknowledges that some agencies are served by the Office of Administrative Hearings. Some fourteen state agencies have their own core of ALJs. A list of such agencies is appended. Third, the Commission might consider the diversity of the "nature" of hearings conducted by agencies potentially subject to a new proposed APA. Some agencies, such as PERB, conduct hearings that involve disputes between parties; i.e., an employee organization or individual and the employer. PERB's role is that of a neutral to resolve the dispute. Other agencies resolve entitlement questions; i.e., benefits or licenses where the dispute is between the party and the agency. A single set of procedural rules may not be appropriate for both types of proceedings.

Unlike unnamed agencies referred to in the report, PERB does not conduct its adjudicatory functions in the absence of regulations on procedural issues or rules unknown to practitioners before PERB. Indeed, PERB utilizes an "Advisory Committee" of advocates which meets quarterly to provide input and reaction into proposed procedural issues. Since its inception in 1975, PERB has implemented extensive regulations governing its administrative proceedings, and has periodically reviewed and revised these rules. (See title 8, California Code of Regulations, commencing with section 32165, section 32605, and section 51200.) Thus, we believe our current regulations provide adequate notice to the parties and insure reasonable direction on the procedural aspects of PERB hearings. Finally, in this context, PERB staff is obliged to and does apply the rules consistently. The regulations provide an opportunity for appeal of proposed decisions to the Board itself, including contentions that PERB regulations were not properly applied or followed.

PERB's methodology addresses the concerns expressed in the report. For example, unfair practice charges filed by parties are investigated by regional attorneys in the office of the General Counsel. If a prima facie case of violation of an act administered by PERB is found, a complaint is issued and served upon the parties. An informal settlement conference is conducted by an ALJ from the Division of Administrative Law. If the case does not settle, the issues are refined and the matter is set for formal hearing before a different ALJ. The Charging Party is responsible for prosecuting the case and carries the burden of proof. After hearing, at which both sides have the opportunity to present evidence, oral or documentary, and cross-examination, the ALJ issues a proposed decision which, in the absence of exceptions by either side, becomes final and binding on the parties but does not serve as Board precedent. Decisions appealed to the Board by way of exceptions are resolved by the Board, serve as PERB precedent, and are reviewable only by the California Courts of Appeal.

PERB procedures were developed to accommodate the needs and requirements of constituents and the agency. They are, in short, tailor-made. It would be unfortunate to have different requirements imposed upon this existing structure, without fair consideration of how the Board operates. We trust that the opportunity to provide such input will come before the Commission reduces its conclusions to proposed legislation.

Again, thank you for the opportunity to comment on the report.

Sincerely,

Christine A. Bologna
General Counsel

Gary M. Gallery
Chief Administrative Law Judge

CB/GMG:em

cc: Debbie Hesse
Executive Director

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, *Governor*

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
1001 Sixth Street, Suite 401
Sacramento, CA 95814

December 22, 1989

Professor Michael Asimow
School of Law, UCLA
Los Angeles, CA 90024

Subject: Administrative Adjudication; Structural Issues, October 1989

Dear Professor Asimow:

We appreciate receiving your study dated 10/25/89. This letter responds to the study's statement that "observers" say that the Alcoholic Beverage Control Appeals Board is a "rubber stamp" of the Department of Alcoholic Beverage Control.

For a different perspective, namely that of an administrative law judge, see the enclosed "Outline of Administrative Practice Before the Office of Administrative Hearings" (March 1989). Please see page 6, first full paragraph; see also page 11, last full paragraph. In both instances, the following statement is made: "The ABC [Appeals] Board will review ABC's decision based on the record of the hearing (transcript and exhibits), upholding it if there is substantial evidence to support it. In practice, however, the ABC [Appeals] Board often applies its own independent judgment in reviewing ABC decisions."

In any event, the ABC Appeals Board is bound by the substantial evidence test in reviewing decisions of the Department of Alcoholic Beverage Control. See Business and Professions Code §23084(d) ("Whether the findings are supported by substantial evidence in the light of the whole record").

The ABC Appeals Board is not an ultimate factfinder. Thus, it is unlike the ALRB, the CUIAB, and the WCAB.

On an unrelated minor point, litigants do not "appeal" from ABC Appeals Board decisions. They petition the Court of Appeal for a writ of review. See page 25, footnote 50 of your study.

Sincerely yours,

William B. Eley

WILLIAM B. ELEY
Senior Staff Counsel

cc: California Law Review Commission
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