

Memorandum 90-103

Subject: Study N-102 - Application of Administrative Procedure Act
(Application to the Governor and Governor's Office)

BACKGROUND

The Commission has made an initial decision that the adjudicative hearing provisions of the new Administrative Procedure Act should not apply to the Governor. The Commission asked the staff to further investigate the scope of this exemption, and in particular to indicate the extent of gubernatorial functions and any distinctions between the Governor and the Governor's office.

DISTINCTION BETWEEN GOVERNOR AND GOVERNOR'S OFFICE

The California statutes make few distinctions between the Governor and the Governor's office. Although the supreme executive power of the state is vested in the Governor, executive branch agencies and officers are not generally conceived to be part of the Governor's office.

We have located two statutes that create executive branch agencies that are declared to be in the "Governor's office". These are the Office of Emergency Services (Gov't Code § 8585) and the Office of Planning and Research (Gov't Code § 65037). A review of their governing statutes reveals that these agencies were created for the purpose of assisting the Governor in the discharge of the Governor's functions. However, what makes these agencies more gubernatorial in character than other executive branch agencies that are under the Governor is not clear to the staff. The Governor's budget does not include these agencies within the operations of the Governor's office.

The ultimate authority on such matters, the State phone book, lists the two agencies as under, but not in, the Governor's office. But the telephone directory's organizational chart also includes four other agencies under the governor's office, even though their organic

statutes do not indicate such a relationship. These are the Department of Economic Opportunity, the Office of Criminal Justice Planning, the Office of Administrative Law, and the Department of Personnel Administration. In fact the statute creating the Department of Economic Opportunity provides that it is a separate independent entity in state government charged with functions, authorities, and responsibilities that have been transferred out of the Governor's office. Gov't Code § 12088.

To some extent the issue is moot with respect to administrative adjudications by most of these agencies, since the Administrative Procedure Act will apply only to constitutionally or statutorily required adjudicative hearings. It does not appear that the functions of agencies that might be considered as within the Governor's office involve constitutional or statutory hearings, with the exception of the Department of Personnel Administration.

The Department of Personnel Administration was created for the purpose of managing the nonmerit aspects of the state's personnel system. The director of the department is a gubernatorial appointee, with the consent of the Senate, whose duties include the holding of hearings concerning all matters relating to the department's jurisdiction. Gov't Code § 19815.4(e). The hearings are not subject to the existing administrative procedure act, and the department has adopted regulations governing its hearings. 2 Cal. Code Regs. 599.888, 599.894-599.910.

GOVERNATORIAL FUNCTIONS

The staff's research indicates two basic functions of the Governor where an adjudicative hearing may be constitutionally or statutorily required. These relate to (1) removal of appointive officers, and (2) executive clemency and review of parole decisions.

Removal of Appointive Officers

A gubernatorial appointee may serve at the Governor's pleasure, or may be dischargeable only for cause, depending on the governing statute. Whether a hearing is required for removal of the appointee is determined primarily by this distinction.

Officers serving at the Governor's pleasure. The general statutory rule is that if appointment of an officer requires the advice and consent or confirmation of the Senate and no fixed term of office is provided by law, the Governor "may at any time, without cause and without hearing" remove the incumbent from office. Gov't Code § 3002. This statute is in accord with the general constitutional doctrine that an officer serving at the pleasure of the appointing power may be removed without cause and without prior notice or opportunity to be heard. See, e.g., *Enomoto v. Brown*, 117 Cal. App. 3d 408, 172 Cal. Rptr. 778 (1981).

The staff has not attempted to identify all the gubernatorial appointees who serve at the Governor's pleasure and who therefore may be removed without a hearing.

Officers removable for cause. A number of statutes specify gubernatorial appointees the Governor may remove only for cause. Typical among these are members the Governor appoints to licensing boards under the Business and Professions Code. The general rule in these cases is that the Governor may remove a gubernatorial appointee for continued neglect of duties required by law, or for incompetence, or unprofessional or dishonorable conduct. Bus. & Prof. Code § 106.

The statutes do not generally specify a hearing for removal for cause, although there are a few exceptions to this generalization. The Governor may remove a member of the Board of Accountancy for neglect of duty or other just cause "after hearing". Bus. & Prof. Code § 5002. The Governor may remove a member of the Board of Chiropractic Examiners "after receiving sufficient proof" of inability or misconduct, although the statute specifies no procedure for receiving proof. Bus. & Prof. Code § 1000-2.

Despite the general silence of the statutes on this matter, due process of law requires that an appointive officer who is removable only for cause receive notice and an opportunity to be heard. See, e.g., *Bannerman v. Boyle*, 160 Cal. 197, 116 Pac. 732 (1911). Before a public employee in California may be dismissed, the employee must receive, at a minimum, notice of the proposed action, the reasons therefore, a copy of the charges and materials on which the action is

based, and the right to respond either orally or in writing. *Skelly v. State Personnel Board*, 15 Cal. 3d 194, 124 Cal. Rptr. 14 (1975). A board member removed by the Governor apparently is entitled to a hearing, but whether the board member would receive the same procedural protections as a state employee has not been determined.

One statute currently applies the Administrative Procedure Act to the Governor where removal of the board member is for misconduct relating to a licensing examination:

Bus. & Prof. Code § 106.5. Removal of board member by Governor

106.5. Notwithstanding any other provision of law, the Governor may remove from office a member of a board or other licensing entity in the department if it is shown that such member has knowledge of the specific questions to be asked on the licensing entity's next examination and directly or indirectly discloses any such question or questions in advance of or during the examination to any applicant for that examination.

The proceedings for removal shall be conducted in accordance with the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the Governor shall have all the powers granted therein.

Executive Clemency and Review of Parole Decisions

Executive clemency. Article 5, Section 8(a) of the California Constitution gives the Governor power to grant a reprieve, pardon, or commutation, after sentence, "subject to application procedures provided by statute".

The statutes provide no procedures for application for, or granting of, reprieves by the Governor.

The statutes do provide procedures for application for pardon and commutation of sentence. Penal Code §§ 4800-4852. These procedures allow, and in some cases require, the Governor to transmit the application to the Board of Prison Terms and to the Supreme Court for investigation and recommendation to the Governor. The statutes detail no other procedures for the Governor or the Supreme Court, but do provide procedural detail for investigation and hearing by the Board of Prison Terms.

Review of parole decisions. Article 5, Section 8(b) of the California Constitution gives the Governor power to affirm, modify, or reverse parole decisions concerning convicted murderers during the 30 days before the decisions take effect, "subject to procedures provided by statute". The statutory procedure is found in the Boatwright-Eaves Parole Review Act of 1988. Under this procedure, the Governor's review is based on materials provided by the parole authority, and if the Governor's decision is to reverse or modify the parole authority's decision, the Governor must send a written statement to the inmate specifying the reasons for the decision. Penal Code § 3041.2.

In addition to the Constitutional power to review parole decisions, the Governor has statutory authority to revoke the parole of a prisoner. Penal Code § 3062. The United States Supreme Court has outlined due process requirements for parole revocation:

Our task is limited to deciding the minimum requirements of due process. They include (1) written notice of the claimed violations of parole; (2) disclosure to the parolee of evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (6) a written statement by the factfinders as to evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense; it is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial. *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. at 2604, 33 L. Ed. 2d at 498 (1972).

The California statutes implementing the constitutional requirements are fairly minimal. No parole may be suspended without cause, which cause must be stated in the order revoking the parole. Penal Code § 3063. The parolee must receive copies of reports pertaining to the proceedings. Penal Code § 3063.5. Parole revocation proceedings must be conducted by a panel of not less than two persons. Penal Code § 3063.6. Whether the two-person panel requirement applies to the Governor is unclear. Also unclear is whether the Governor in fact ever acts to revoke parole under Section 3062; the staff suspects this is very rare indeed.

CONCLUSIONS

The staff sent a preliminary draft of the foregoing material to the Governor's office for review and comment. The preliminary draft included the following tentative staff conclusions:

(1) Since we do not know what agencies, exactly, are considered part of the Governor's office and since the agencies we have been able to identify do not generally hold adjudicatory proceedings, the best solution is to exempt just the Governor from coverage of the Administrative Procedure Act.

(2) It is premature to decide whether the Department of Personnel Administration, which is arguably part of the Governor's office and does hold hearings, should also be exempt from coverage of the Administrative Procedure Act.

(3) Since removals by the Governor of gubernatorial appointees for cause are subject to due process, the Governor may well wish to adopt the Administrative Procedure Act if we manage to devise a simple, expeditious, and constitutional general procedure. We might keep this possible application of the statute in mind as we draft the Administrative Procedure Act.

(4) As to clemency decisions, the statutory silence on the procedures of the Governor and Supreme Court is appropriate. Whether the Board of Prison Terms procedures in this area should fall within the Administrative Procedure Act is a matter we will investigate when we review the procedure of the Board of Prison Terms generally.

(5) As to parole revocation decisions, it is too early in the study to tell whether the Administrative Procedure Act is satisfactory for Board of Prison Terms hearings. We don't know the extent of the Governor's activities in this area, but we do know that the Governor is subject to the same constitutional requirements as the Board of Prison Terms. If we end up applying the Administrative Procedure Act to parole revocations by the Board of Prison Terms, it would make some sense also to apply it to parole revocations by the Governor.

The Governor's Legal Affairs Secretary responded promptly, and rather curtly, to the effect that:

(1) They believe the staff's analysis is inaccurate and they disagree with virtually all of the conclusions.

(2) They do not believe this aspect of the Commission's study is necessary, and the Commission should not expect that any recommendations it makes will impact the operations of the Governor's office.

(3) They thank the staff for the opportunity to respond, but do not believe that further amplification is necessary, given the nature of their concerns and disagreements.

In light of the real political concern displayed in this response, the staff believes the Commission should simply exempt the Governor and the Governor's office from the Administrative Procedure Act. This approach is less than helpful in its failure to define the Governor's office and in its lack of guidance as to appropriate administrative procedures where a hearing may be statutorily or constitutionally required. But it does preserve the integrity of the Governor's office, which appears to be their primary concern in this matter.

Thus we would revise proposed Section 615.010 along the following lines:

§ 615.010. Application of division to state

615.010. Except as otherwise expressly provided by statute:

(a) This division applies to all agencies of the state.

(b) This division does not apply to the Legislature, the courts, or the Governor and Governor's office.

(c) This division applies to the University of California.

Comment. Section 615.010 supersedes former Section 11501. Whereas former Section 11501 specified agencies subject to the Administrative Procedure Act, Section 615.010 reverses this statutory scheme and applies this division to all state agencies unless specifically excepted. The intent of this statute is to subject as many state governmental units as possible to the provisions of this division.

Subdivision (a) is drawn from 1981 Model State APA § 1-103(a). Agencies exempt from this division are *[to be drafted]*.

Subdivision (b) supersedes Section 11342(a). It is drawn from 1981 Model State APA § 1-102(1). Express exclusions from the application of this division are the Legislature, the courts, and the Governor and Governor's office. Note that it is only "the Legislature", and "the courts", ~~and "~~the Governor", that are excluded, and not "the legislative branch", and "the judicial branch", ~~and "~~office of the Governor", and that exemptions from the division are to be construed narrowly.

Subdivision (b) exempts the Governor's office, and is not limited to the Governor. For an express statutory exception to the Governor's exemption from this division, see Bus. & Prof. Code § 106.5 ("The proceedings for removal [of specified board members] shall be conducted in accordance with the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the Governor shall have all the powers granted therein.")

Subdivision (c) makes clear that the University of California is governed by this division, notwithstanding Section 9 of Article 9 of the California Constitution.

Note. The Commission is investigating the scope of the exemptions for the courts and ~~the Governor~~, with respect to the functions of different elements of the court system and gubernatorial ~~functions~~. The draft may be made more specific, and may be phrased in terms of functions rather than entities.

The exemption for the Governor's office has not yet been reviewed to determine whether it is appropriately extended beyond the Governor for purposes of administrative rulemaking.

Respectfully submitted,

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