Memorandum 90-112

Subject: Study N-105 - Administrative Adjudication (Effect of ALJ Decision - consultant's background study)

Attached to this memorandum is Professor Asimow's background study prepared for the Commission on "Appeals Within the Agency: The Relationship Between Agency Heads and ALJs". The study deals with the relationship between the agency head and the hearing officer, including the effect to be given the hearing officer's decision.

Professor Asimow summarizes the recommendations made in the study thus:

(1) The Administrative Procedure Act should make clear that agency heads can hear cases themselves, but that all agencies can delegate the initial hearing to hearing officers for preparation of an initial decision.

(2) The Administrative Procedure Act should provide that agencies have the power to delegate final (rather than merely initial) decisionmaking authority to hearing officers, either in classes of cases or on a case-by-case basis. It should also provide that agencies can make the review of initial decisions discretionary rather than available as a matter of right. Finally, it should permit the reviewing function to be delegated to subordinate appellate officers or to panels of agency heads.

(3) The existing provisions relating to petitions for reconsideration should be revised.

(4) The present Administrative Procedure Act permits agency heads to summarily approve a proposed decision. This provision should be retained and it should apply to all hearing officer decisions. However, the parties should be entitled to receive a copy of an initial decision and file briefs with the agency prior to summary approval.

(5) The present Administrative Procedure Act allows agencies to reject an administrative law judge's proposed decision and decide the case for themselves. In such situations, the administrative law

judge's credibility determinations can be ignored. This provision should be changed so that administrative law judge credibility determinations are given greater weight. The study recommends that hearing officers be required to identify findings based substantially on credibility. It also would require reviewing courts to give great weight to hearing officer credibility determinations.

At the meeting we plan to have Professor Asimow review his findings and conclusions with us and to receive any input on these issues offered by interested persons and agencies. Our objective is to make initial policy decisions in this area.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

APPEALS WITHIN THE AGENCY: THE RELATIONSHIP BETWEEN AGENCY HEADS AND ALJs

by

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AUGUST 1990

**This report was prepared for the California Law Revision Commission by Professor Michael Asimow. No part of this report may be published without prior written consent of the Commission.*

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Copies of this report are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the report should not be used for any other purpose at this time.

CALIFORNIA LAW REVISION COMMISSION
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APPEALS WITHIN THE AGENCY: THE RELATIONSHIP BETWEEN AGENCY HEADS AND ALJs

by Michael Asimow[1]

August 10, 1990

Executive summary

This paper continues the author's study of the adjudicative process in California administrative agencies. An earlier phase of the study[2] recommended a single Administrative Procedure Act (APA) to apply to all California agencies and which would prescribe administrative procedure in every case in which a trial-type hearing is required by a statute or by the state or federal constitution. The study also concluded that, in general, agency heads should retain their adjudicatory responsibilities. Finally it recommended that there be no wholesale transfer of administrative law judges (ALJ's) to a central panel. The California Law Revision Commission accepted each of these recommendations. This paper attempts to define the relationship between agency heads and hearing officers

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[2]"Administrative Adjudication: Structural Issues," dated October 24, 1989, and available from the California Law Revision Commission.

(whether or not these officers are called ALJ's and whether or not a central-panel ALJ is employed).

The paper recommends as follows:

1. The APA should make clear that agency heads can hear cases themselves, but that all agencies can delegate the initial hearing to hearing officers for preparation of an initial decision.

2. The APA should provide that agencies have the power to delegate final (rather than merely initial) decisionmaking authority to hearing officers, either in classes of cases or on a case-by-case basis. It should also provide that agencies can make the review of initial decisions discretionary rather than available as a matter of right. Finally, it should permit the reviewing function to be delegated to subordinate appellate officers or to panels of agency heads.

3. The existing provision relating to petitions for reconsideration should be revised.

4. The present APA permits agency heads to summarily approve a proposed decision. This provision should be retained and it should apply to all hearing officer decisions. However, the parties should be entitled to receive a copy of an initial decision and file briefs with the agency prior to summary approval.

5. The present APA allows agencies to reject an ALJ's proposed decision and decide the case for themselves. In such situations, the ALJ's credibility determinations can be ignored. This provision should be changed so that ALJ

credibility determinations are given greater weight. The report recommends that hearing officers be required to identify findings based substantially on credibility. It also would require reviewing courts to give great weight to hearing officer credibility determinations.

Text of Report

This report addresses a number of important issues that concern the relationship between the individual who conducts the initial hearing in an administrative case and the head or heads of the agency that has ultimate statutory responsibility for making a decision in that case.

The report starts from certain key assumptions:

i) To the extent feasible, a single, completely revised Administrative Procedure Act (APA) will prescribe uniform procedures for all adjudication conducted by state agencies. The APA will apply to all agency hearings required either by a state statute or by the federal or state constitution.[3] However, the statute will also provide a range of possible procedures, with varying degrees of formality, depending on the particular issues to be resolved.

ii) Agency heads will retain the responsibility for ultimate decision in adjudicative matters.[4]

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[3]Thus the Act will not attempt to provide procedures in situations where neither statutory or constitutional law requires a trial-type hearing. This leaves a vast area of informal adjudication uncovered by the statute. In particular, the APA will not apply even though agency regulations or practice provide for a hearing where that hearing is not required by a statute or by procedural due process.

[4]However, as the previous study acknowledged, separation from adjudication from other regulatory tasks can be justified in particular situations. I have been convinced by the arguments in favor of a Tax Court separated from the existing Board of Equalization and Franchise Tax Board. I also believe that regulatory schemes that are identified as working poorly might well be improved by a streamlined system that separates adjudication from regulation and law enforcement. See Fellmeth, "Administrative Procedure Act Reform," 10 Calif. Regul. L. Rptr. 12 (Winter 1990) (calling for a streamlined system of hearings in medical discipline cases before specialized and independent ALJs, reviewable by a specialized judicial panel, without any agency-level consideration). However, this study is designed to cover all California agencies and thus does not

iii) There will be no wholesale transfer of administrative law judges (ALJs) from the agencies that now employ them to a central panel. The existing central panel should be retained and the hearings in additional classes of disputes should be transferred to the panel upon a showing that it would be appropriate to do so.

The Law Revision Commission has accepted each of these points. Thus the goal of this phase of the study is to prescribe the relationship between the initial and final decisionmaker, whether or not the hearing is conducted by an independent ALJ from the Office of Administrative Hearings (OAH). I believe that the same rules should apply to hearings conducted by independent OAH ALJs and to hearings conducted by hearing officers (whether or not called ALJs) who are employed by the agency that makes the ultimate decision.

The first portion of this report considers the roles of hearing officers and agency heads. This subject includes these issues: a) when initial and final decisionmaking authority can be transferred to hearing officers and b) when agency review of the initial decision can be discretionary rather than mandatory, delegated to subordinate appellate officers, or dispensed with entirely. The second portion of this report focuses on the relationship between fact findings made by the initial decisionmaker and the review power of the agency heads.

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address reforms that are specially tailored to the problems of a particular regulatory scheme.

A. The roles of hearing officers and agency heads

The prevailing adjudicative model in California agencies approximates that spelled out in the existing APA.[5] Under that model, although agency heads have the power to hear a case initially, they rarely do so. The initial hearing is by a hearing officer (often called an ALJ or an equivalent title); either the private party or the agency staff has the right to seek review of the initial decision at the agency-head level. This is the procedure followed, with numerous variations, at most non-APA agencies such as those that dispense benefits, regulate public utilities, handle civil service disputes, and make prison term determinations.

I have no quarrel with the APA model. It works well. The objective of this part of my report is to provide for a range of options to assure that adjudicating agencies can use that procedure which provides the best possible mix of fairness, efficiency, and participant satisfaction.[6] It is necessary to

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[5]The major difference, of course, is that the APA provides for a corps of ALJs employed by the Office of Administrative Hearings (OAH) who are assigned on a case-by-case basis to the agencies who wish to hold hearings. The existing APA applies mostly to disciplinary sanctions against professional licensees and a few other prosecutorial-type decisions. Of course, the adjudicative proceedings covered by the APA represent only a small fraction of the total number of adjudications.

[6]As explained in my prior report, I have tried to use these three criteria to evaluate particular administrative procedures. See prior report at 27-28.

There is much literature on the issues discussed in this part of my report. For discussions of the literature, see the excellent article by Cass, "Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis," 66 Bost. Univ. L. Rev. 1 (1986). My conclusion that agencies be given the maximum discretion to design their own review structures is informed by Cass' conclusions that empirical research fails to demonstrate a clear superiority for any one model on the criteria of efficiency, accuracy, and acceptability. Other situational variables (such as the difficulty of cases handled

have a range of possible procedures because administrative adjudicating functions vary enormously; the matters considered even by a single agency may differ dramatically in terms of their difficulty and importance.[7]

1. Power to delegate the hearing function

While most agencies use some variation of the APA model described above, not all of them do. For example, some environmental and land-use planning agencies hear every matter en banc at the agency head level. In some cases, their understanding is that this procedure is required by existing law.

The Coastal Commission, for example, hears every matter en banc and does not employ ALJs. The result is a crushing agenda consisting of some trivial matters and other extremely important matters. The Commission tends to hear anybody who wishes to speak (such as members of the affected communities). Frequently, there is not time for any of the matters to be heard and considered fully and the agency members (who are

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by the agency or the adjudicatory caseload) are more helpful in understanding agency review structures.

[7]The Administrative Conference of the United States concluded: "In order to make more efficient use of the time and energies of agency members and their staffs, to improve the quality of decision without sacrificing procedural fairness, and to help eliminate delay in the administrative process, every agency having a substantial caseload of formal adjudications should consider the establishment of one or more intermediate appellate boards or the adoption of procedures for according administrative finality to presiding officers' decisions, with discretionary authority in the agency to affirm, summarily or to review, in whole or in part, the decisions of such boards or officers." 1 C.F.R. §305.68-6.

part-timers) cannot possibly familiarize themselves with the enormous files. As a result, everyone involved feels frustrated and there may be an undue transfer of decisionmaking authority from the agency members to the staff.

Similarly, the Board of Equalization hears income and franchise tax cases en banc without any prior hearing officer decision.[8] Some attribute this inefficient procedure to the fact that the Board is elected and wishes to demonstrate its responsiveness to the voters by hearing every case regardless of importance. The result is a clogged agenda, rushed proceedings, and a perception among tax professionals that the decisions are made by staff rather than Board members.[9]

I believe that the agencies that hear cases en banc should have power to continue this method of decisionmaking, if they so choose.[10] But I also believe that the statute should give

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[8]The Board of Equalization deals with two different tax structures. In one class of cases (income and franchise taxes), it decides disputes between the Franchise Tax Board and taxpayers. It hears these cases by granting a trial-type hearing before the full Board. There is no hearing officer decision. In cases involving business taxes administered by the Board itself, disputes are heard by hearing officers and appeals are taken to the Board. Thus in business tax cases, the Board basically complies with the APA model; in income and franchise tax cases, it does not.

[9]I made no effort to find out whether this perception was valid, but the perception exists. It is one of the strongest reasons for pressure by tax professionals for an independent tax court.

[10]Some agencies, such as the Water Resources Control Board and the Energy Commission, split their members into panels for purposes of hearing certain types of cases. The panel writes a proposed decision which can be appealed to the full board. This approach seems to work well in these agencies with relatively small adjudicative caseloads. Assuming agencies are permitted to hear cases en banc, they probably should be permitted by statute to hear cases in panels also.

such agencies clear authority to delegate the task of holding the hearing and writing an initial decision to hearing officers employed by the agency.[11] This statute should allow agencies to adopt rules providing for delegation of the hearing function in all cases, or certain classes of cases, or certain individual cases designated by the agency heads. I believe this change would enhance the quality of Coastal Commission and Board of Equalization decisionmaking on all three axes: fairness, participant satisfaction, and especially efficiency.

Under the APA, when an agency chooses to hear a case at the agency-head level, an ALJ presides at the hearing.[12] This procedure makes sense for agencies that employ OAH ALJs but I would not expand it to non-OAH agencies.[13] I would leave the agencies that are not required to use OAH ALJs, and who choose to hear a case en banc, to decide for themselves whether or not to have a hearing officer preside at the hearing.

2. Review by the agency heads

The prevailing model allows either party to appeal an initial hearing officer decision to the agency heads. In most

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[11] Thus these agencies would not be required to engage OAH hearing officers who are not experienced in land-use or tax matters.

[12] APA §11512(a), (b). In such cases, the ALJ is also present during consideration of the case and, if requested, shall assist and advise the agency. APA §11517(a).

[13] For example, if an agency does not employ any hearing officers and hears all cases en banc, it would hardly be practicable to require it to employ hearing officers solely for the purpose of presiding at hearings.

cases, this appeal is available as of right. I believe that agencies (whether or not covered by the existing APA) should have available a greater range of possible appeal models. If a particular appellate structure fails to yield the ideal mix of accuracy, efficiency, and acceptability, it can be readily changed by amending the rules.

If an agency wants to allow appeals as of right to the agency heads, as is generally available under existing law, this should certainly be permitted. However, an agency should be empowered to adopt rules[14] under which an initial decision would i) be final, ii) be subject only to a discretionary rather than a mandatory appeal to the agency heads, iii) be appealable only to subordinate appellate officers (such as a judicial officer or an employee review board) rather than to the agency heads, or iv) be appealable as of right to subordinate appellate officers with discretionary appeal to the agency heads. In addition, an agency should be permitted to split itself into panels for the purpose of considering and deciding appeals.

The procedural rules that define an agency's appellate process could provide that a particular option would apply to i) all cases decided by the agency, ii) all cases within a described class of cases, or iii) individual cases so designated

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[14]Of course, the rules that define an agency's appellate process should themselves be adopted only after full public participation under the rulemaking provisions of the APA. The appropriate procedures for rulemaking will be discussed in a subsequent phase of my report.

by the agency at the time that the matter is first set for hearing.[15]

Agency review of initial decisions made by hearing officers is costly. It occupies the time of staff members who have to process the appeals and of the agency heads who must hear arguments in the cases and decide them. The consideration of appeals in individual cases may distract agency heads from other important business such as consideration of proposed rules or proposed legislation or engaging in economic analysis of the future of the industry that the agency is supposed to regulate. Especially where the agency heads are part-timers, the burden of deciding adjudicative appeals may be quite substantial. Yet most agencies make agency-level review available as a matter of right in every case, giving at least some consideration to every appeal; indeed, some agencies provide for agency-level review even if no party requests it.[16]

The agency appeal stage can be enormously time consuming; it can delay a final decision by months or years with possible damage either to public or to private interests. Thus it would seem that both the effectiveness of regulatory programs, and

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[15]A party should be permitted to move, before the hearing, that a case be transferred from the ALJ-final docket to the agency-appeal docket because it presents important issues that might call for agency legal interpretation or policymaking. An agency's exercise of discretion to treat a case as ALJ-final should not be judicially reviewable.

[16]For example, the State Personnel Board automatically reviews every ALJ decision.

the efficiency with which an agency discharges its functions, could be promoted by diminishing the number of appeals that the agency heads must contend with.

Of course, many cases are important and difficult and merit plenary review. However, if a case (or a particular class of cases) is likely to be relatively unimportant in terms of the regulatory program, to involve no significant issues of policy or discretion, or to present purely factual issues, it may well represent a wise allocation of agency resources to supply only a fair initial hearing without an agency appeal.[17] As an alternative, an appeal might be provided but only to one or more of the agency heads, rather than en banc.[18]

Where a case presents no issues of importance to a regulatory program, an appeal of the initial decision is unlikely to be successful, so the loss of an appeal remedy should not be, and should not seem, unfair to litigants. Instead, dispensing with appeals will speed up the administrative pro-

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[17]ALJs of the Department of Social Services (DSS) are empowered to make final decisions in cases involving welfare, food stamps, and certain Medical disputes. However, either party can request a rehearing which, if granted, is provided before a different ALJ.

If the ALJ disagrees with established DSS policy (and in certain other situations), the ALJ prepares a proposed decision that is appealed to the ALJ's supervisor (and in certain cases, to the Director). The decision to delegate final authority to ALJs occurred because of heavy time pressures and court orders mandating quicker decisions.

[18]The Unemployment Insurance Appeals Board and Workers Compensation Appeals Board hear cases in panels except for unusually important matters.

cess and allow truly disgruntled litigants to get to court much faster.

Agencies should also be permitted to make appeals discretionary rather than available as a matter of right. Under a discretionary appeal regime, the litigant who is dissatisfied with an initial decision would have to request a hearing before the agency. If the agency heads felt that the case did not merit their review, they would simply deny review. Thus agency appeal would resemble the California Supreme Court's practice of granting hearings only in a small percentage of the cases in which a hearing is sought.[19]

Finally, agencies should explore the option of using subordinate employees to hear appeals (such as judicial officers or employee review boards).[20] Subordinate appellate officers might discharge either of two functions. First, the appellate officers might furnish the only appeal to which a litigant is entitled in a given class of cases.[21] Second, the officers

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[19]This option is similar to an existing procedure: summary affirmance of an initial decision. See part C below. I recommend that summary affirmance be retained and be available whether or not the agency adopts rules taking advantage of the various procedural options discussed herein.

[20]See 1981 Model Act §4-216(a)(2)(ii) and (iii) which allows the agency to delegate final review power, or intermediate review power, to one or more persons. See generally Freedman, "Review Boards in the Administrative Process," 117 U.Pa.L.Rev. 546 (1969).

[21]Employee reviewers make final decisions in both formal and informal hearings in driver's license cases conducted by the Department of Motor Vehicles. See Vehicle Code §§14105.5, 14110.

might supply an appeal as of right with a discretionary subsequent appeal to the agency heads.[22] In the latter type of case, the discretionary appeals would be limited to cases in which important questions of law and policy are at issue.

Subordinate appellate officers consist of one or more employees who serve as professional hearers of appeals and are entitled to the same protections from outside influence as are hearing officers. Indeed, it might be possible for personnel to rotate between service as trial and appellate judges, thus providing a more varied professional experience for administrative judges. The quality of review provided by subordinate appellate officers may well be superior to that provided by the agency heads who are often not qualified or experienced in dealing with legal materials and procedures, are part-timers, are necessarily distracted by other regulatory tasks, and who may delegate part or all of the reviewing or opinion-writing function to anonymous staff members.[23]

Of course, there is a disadvantage to the use of subordinate appellate officers: they are not qualified to be

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[22]The review board might also be useful in considering interlocutory appeals on such questions as evidence, privilege, joinder, discovery, disqualification of the hearing officer and similar procedural disputes.

[23]Cass' study, supra note 6 at 17 showed that review by subordinate appellate officers tended to be quicker than agency head review and to produce fewer appeals than where agency head was available. This may indicate that the losers find agency head review more satisfying than subordinate review. Or it may indicate that losers think they have a better chance to prevail at the agency head level. In any event, the data are inconclusive.

policymakers. Where a case presents important issues of law or policy, the agency heads may wish to have the last word. In such cases, an optimal solution might be to give litigants an appeal as of right to subordinate employees with a discretionary appeal to the agency heads, to be exercised only in the rare case in which the decision will serve as a significant precedent.

B. Agency reconsideration[24]

Under the APA, any party can petition for reconsideration of an agency decision or reconsideration can be granted on the agency's own motion.[25] A reconsideration petition can serve as a substitute for or a supplement to the right to appeal a decision within an agency and it is desirable that the right to petition for reconsideration be maintained. For example, a party can petition for reconsideration on the grounds of factual or legal error or because additional proceedings are required (perhaps by newly discovered evidence). This permits the quick correction of errors without the need for judicial intervention. Even if the right to agency appeal is curtailed

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[24]This part concerns petitions to a decisionmaker that it reconsider a decision that it has already made. It does not apply to agencies like the Workers' Compensation Appeals Board which use the term "reconsideration" to apply to the appeal from the ALJ to the Board.

[25]APA §11521. In some non-APA agencies, the term "rehearing" is used instead of reconsideration. A new APA should state uniform rules for all agencies, but, as discussed below, these would be default rules so that the agency could vary them by adopting a rule to that effect.

in some cases, as suggested above, the right to petition for reconsideration would remain as a safety valve in the case of error.

The existing APA also provides that the right to seek judicial review is unaffected by the failure to seek reconsideration before the agency. This is a desirable provision that should be retained and applied to all agencies.[26] However, I believe that the existing California statute providing for reconsideration is not entirely satisfactory and that the provision in the 1981 Model Act would be better.[27]

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[26]APA §11523. Model Act 4-218(1) also so provides as does the federal APA. §704. Absent such a provision, under present law a petition for reconsideration is required before a litigant can seek judicial review. Alexander v. State Personnel Board, 22 Cal.2d 198, 137 P.2d 433 (1943) (Traynor, J. dissenting urged that reconsideration not be treated as a remedy that must be exhausted). In addition, statutes of some agencies (such as the Public Utilities Commission) require petitions for reconsideration before a litigant can seek judicial review. I believe that petitions for reconsideration should never be required as a prerequisite to judicial review. In most cases, seeking reconsideration from an agency that has made up its mind is pointless.

Of course, if an agency actually grants reconsideration, it would be improper to seek judicial review since the order would not be final.

In a later phase of this study dealing with judicial review, I will recommend a provision that specifically provides for the relationship between judicial review and reconsideration. See generally CEB, Calif. Admin. Hearing Practice §4.67-4.70 (1984 and 1990 Supplement).

As discussed below, I endorse the provision in the Model Act that allows an agency to vary the reconsideration provisions by making rules. However, I would not permit agency rules to require a litigant to petition for reconsideration before seeking judicial review.

[27]1981 Model APA §4-218.

First, the existing California statute ties reconsideration to the effective date of an order.[28] Ordinarily an agency has thirty days (in some cases forty days) to order reconsideration, but the power to order reconsideration expires on the effective date of a decision.[29] If the agency orders an immediate effective date for its decision, it cannot reconsider the decision. In contrast, the Model Act provides that a petition for reconsideration can always be filed within ten days after rendition of a decision, regardless of its effective date.[30] I would favor breaking the link between the effective

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[28]Ordinarily a decision is effective thirty days after it is mailed unless a reconsideration is ordered within that time or the agency orders that the decision shall become effective sooner or a stay of execution is granted. §11519(a).

[29]§11521(a).

[30]I would retain the provision in §11521 that cuts off an agency's power to grant reconsideration after forty days (thirty plus an optional ten--it would be simpler to just provide for 40 days in all cases). It seems desirable that there be a fixed period after which all parties can treat the decision as final. The forty day period should start running as of the date that a petition for reconsideration is filed. I would also retain the provision in §11521 that provides that a petition for reconsideration is deemed to be denied if it is not acted on within the period for granting a petition. This clears the way for judicial review within a relatively brief period unless the agency actually grants reconsideration.

I would retain the provision in §11521 that allows an agency to order reconsideration on its own motion. §4-218 does not seem to provide for own-motion reconsideration. However, an agency's decision to order reconsideration on its own motion should be subject to the same time limits within which a party can file a petition for reconsideration.

I would also retain the provision in §11521 that allows an agency to extend the time for filing a petition for reconsideration by not more than thirty days. In some circumstances, the statutory deadline for filing a petition may not be sufficient.

As noted below, the statute should permit agency rules to vary the statutory time periods for petitioning for reconsideration and for granting a petition.

date of an order and reconsideration of the order.

Second, the Model Act permits an agency to vary the reconsideration provisions by adopting a rule for this purpose. Since a new APA is to have much wider application than the existing statute, the default provisions for reconsideration may not work well for some agencies. I see no reason why an agency should not adapt the reconsideration provisions to suit its own circumstances.

Third, the Model Act makes clear that it is permissible to petition to reconsider either an initial or a final agency decision. The California statute appears to be limited to reconsideration of agency decisions.[31]

Fourth, the Model Act has a desirable provision requiring a statement of findings and reasons when an agency grants a reconsideration petition.[32]

C. Summary approval of the initial decision

Under the existing APA,[33] agency heads can accept the ALJ's proposed decision in its entirety or they can reduce the

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[31]It should be understood that if a reconsideration provision is granted, the case is reopened but the usual procedural rules apply. Thus, as discussed below, if reconsideration is granted for the purpose of taking additional evidence, the evidence must be presented to the hearing officer, not to the agency heads. This would be contrary to the provisions in existing §11521(b).

[32]§4-218(3). I do not believe that such a statement should be required if reconsideration is denied.

[33]Government Code §11517(b) allows agencies to approve a proposed decision in its entirety or reduce the proposed penalty and adopt the balance of the proposed decision.

proposed penalty and adopt the balance of the proposed decision. In these situations, the respondent receives a copy of the ALJ's proposed decision within thirty days after the agency receives it. However, the agency is not required to give the parties any opportunity to file briefs or make arguments before the agency in favor of or opposing the ALJ's decision.[34] There is no requirement that a transcript be prepared or that the agency heads familiarize themselves with the ALJ's decision, much less the record in the case.[35]

I favor the retention of the section 11517(b) procedure (and its extension to all California agencies that will be cov-

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[34]Dami v. Dep't of Alcoholic Beverage Control, 176 Cal. App. 2d 144, 1 Cal. Rptr. 213 (1959) (Tobriner, J.); Stoumen v. Munro, 219 Cal. App. 2d 302, 314, 33 Cal. Rptr. 305 (1963).

[35]See Hohreiter v. Garrison, 81 Cal. App. 2d 384, 184 P.2d 323 (1947), the leading case upholding this procedure. In Hohreiter, Justice Peters settled the question of whether §11517(b) meets the traditional requirement of the Morgan case that "he who decides must hear." Morgan v. United States, 298 U.S. 468 (1936). The Morgan rule is satisfied by the full hearing provided by the ALJ. Even though formally the agency heads make the final decision (when they approve the ALJ's decision), they can do so by rubberstamping it. They need not familiarize themselves with the record to approve the ALJ's decision. See also Tenth Biennial Report of the California Judicial Counsel 24 (1944). In Hohreiter, the court pointed out an additional and cumulative reason why the agency pro-forma approval of the ALJ decision was not objectionable: the independent judgment review provided by the Superior Court. However, the rule is the same even if substantial evidence rather than independent judgment review is provided. Dami v. Dept. of Alcoholic Beverage Control, supra. See also Strode v. Bd. of Med. Examiners, 195 Cal. App. 2d 291, 297-98, 15 Cal. Rptr. 879 (1962) (agency can summarily approve proposed decision where it had previously referred case back to ALJ to take additional evidence).

ered by a broadened APA), so that it will be available in any case in which an appeal is provided as a matter of right.[36]

However, I believe there should be one modification in existing law. The parties should be permitted to file briefs with the agency heads after they have received their copy of the proposed decision.[37] If there is some fundamental error in the proposed decision, the parties should be able to call it to the agency's attention.[38] It seems unfair that the agency's con-

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[36]This recommendation is similar to one made above: that agencies be authorized to adopt rules making appeal in all cases or in certain cases discretionary rather than mandatory. However, the section 11517(b) procedure should apply whether or not agencies have adopted rules providing for a system of discretionary appeals.

[37]The briefs could be in the form of a request for hearing which points out errors in the initial decision or indicates that important issues are involved that merit plenary consideration by the agency heads.

[38]This recommendation is consistent with one of the most famous state administrative law cases, Mazza v. Cavicchia, 15 N.J. 498, 105 A.2d 545 (Sup.Ct. NJ 1954). Mazza involved a New Jersey procedure in which the findings and conclusions of a "hearer" in a license revocation case were transmitted to the agency head for final decision but were never shown to the licensee. The court said: "The hearer may have drawn some erroneous conclusions in his report, or he may even have made some factual blunders. Such mistakes are not uncommon in both judicial and administrative proceedings; indeed, the whole process of judicial review in both fields is designed to guard against them. But if a party has no knowledge of the secret report or access to it, how is he to protect himself? An unjust decision may very likely be the result where no opportunity is given to those affected to call attention to such mistakes. That is why it is a fundamental principle of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert." 105 A.2d at 555. See B. Schwartz, Administrative Law §7.23 (2d ed. 1984)

sideration of the initial decision could occur in the absence of some kind of adversary presentation of views. The Attorney General, the agency staff, and any affected private parties should all have the right to request the agency heads to review (rather than summarily affirm) an ALJ decision.[39]

With that modification, I would preserve the right of the agency heads to summarily affirm the ALJ decision.[40] In such a situation, there would be no need for the preparation of a transcript and no further briefing or oral argument. The agency heads would be required to consider the parties' briefs along with the proposed decision but would have no obligation to familiarize themselves with the record. This provision serves important objectives of economy and efficiency. Preparation of transcripts is costly; oral argument before the agency heads consumes considerable time. If the agency heads are satisfied with the proposed decision, they should be able to terminate the case without further proceedings.

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[39]Under present law, parties can request reconsideration of an agency decision, including a summary affirmance. See Part B above. Thus it might be argued that the right to seek reconsideration is a sufficient protection; therefore it is not necessary to provide for filing briefs before summary affirmance. I disagree. An agency is naturally reluctant to reopen a matter which it has already summarily affirmed. Moreover, depending on whether the time limits in existing law are revised, as suggested in Part B, a party might not have sufficient time to seek reconsideration after receiving the proposed decision and summary affirmance.

[40]Or, if the agency has adopted a system of discretionary review, to decline to hear the appeal.

In such a situation, the parties have received one full and complete hearing before the ALJ. By writing briefs attacking or supporting the proposed decision, they have had an opportunity to persuade the agency heads to give the case plenary consideration. No principle of due process requires that they be given an appeal, or a new hearing, if the agency chooses not to conduct one. The next stop for the dissatisfied person is the court house.[41]

D. Agency rejection of the ALJ decision: deference to findings of fact

1. Present law--agency de novo decisions

If an agency decides to reject the ALJ's proposed decision, the existing APA[42] permits the agency to decide the case upon the record, with or without taking additional evidence.[43] In these cases, the parties have an opportunity to present oral or written argument before the agency heads.[44] Although the

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[41]Hohreiter v. Garrison, supra. This proposal follows the 1981 Model Act, §§4-215(h) and 4-216. These provisions require the service of ALJ decisions on all parties but permit the agency, by rule, to retain discretion to review some, but not all issues, or to not exercise any review.

[42]APA §11517(c).

[43]Section 11517(c) also permits the agency to refer the case back to the ALJ to take additional evidence. It can then either summarily affirm or reject the second ALJ decision. Strode v. Board of Medical Examiners, 195 Cal.App.2d 291, 15 Cal. Rptr. 879 (1961).

[44]Under this statute, the agency can require the argument to be written rather than oral. McGraw v. DMV, 165 Cal. App. 3d 490, 211 Cal. Rptr. 620 (1985). I would require agencies to permit oral and written arguments in connection with agency consideration of a rejected ALJ proposed decision.

parties receive a copy of the ALJ's proposed decision,[45] the proposed decision has no further importance in the case.[46] The agency is free to make its own determinations of credibility (or of any other issue), even though it takes no additional evidence and never sees or hears the witnesses. Apparently, a reviewing court does not consider the reversal of the ALJ's decision as a relevant factor in deciding whether to affirm or

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[45]In a questionable decision, the Court of Appeals indicated in dictum that parties might not have the right to receive a proposed decision that has been rejected by the agency before briefing and arguing the case at the agency level. Compton v. Bd. of Trustees of Mt. San Antonio College, 49 Cal. App. 3d 150, 157-58, 122 Cal. Rptr. 493 (1975) ("...it is clear that from the moment of the agency's rejection thereof [the proposed decision], it serves no identifiable function in the administrative adjudication process or, for that matter, in connection with the judicial review thereof"). But see Dami v. Dept. of ABC, 176 Cal. App. 2d 144, 149-50, 1 Cal Rptr. 213 (1959), an opinion by Justice Tobriner that assumed (without deciding) that a respondent should have access to the proposed decision before argument to the agency in a §11517(c) case. Whether Compton is correctly decided or not, it graphically indicates the irrelevance of a rejected proposed decision under existing California law.

[46]Indeed, in non-APA cases, there may be no right to receive a copy of the ALJ's decision. See Travelers Indemnity Co. v. Gillespie, -- Cal. 3d --, 266 Cal. Rptr. 117, 130-31 (1990). In this non-APA case, a hearing officer held a hearing and wrote a recommended decision; the Insurance Commissioner then wrote a final decision, refusing to disclose the hearing officer's decision. Because there were no credibility issues, and because there was no allegation that the Commissioner had acted arbitrarily, the insurance companies were unable to prove any prejudice from non-disclosure of the report. Indeed, citing Compton supra, the Supreme Court stated that "the hearing officer's recommended decision, once rejected, ceased to have any legal significance in this case." Id. at 131.

I believe that parties should always have access to the hearing officer's decision without any need to prove prejudice. See Mazza v. Cavicchia, supra note 38.

set aside the agency decision.[47]

I believe that this provision of existing law is unsatisfactory. While California has an outstanding corps of ALJ's[48] who are professional triers of fact, their decisions often turn out to be of little importance. An agency that is dissatisfied with a proposed decision simply rejects it and makes its own determinations of fact, law and policy from the cold record. Since agency heads are frequently part-time appointees who have little time to give to their agency responsibilities, the actual determination of rejection (and the preparation of a new opinion) is done by agency staff. This cavalier treatment of ALJ proposed decisions sharply detracts from the vitally important function of ALJ's as a check on the possible institutional bias of the agency heads or staff. When an agency, reading a cold record, overturns an ALJ's plausible credibility determination, based on the ALJ's

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[47]I found no case that squarely so holds; some people I interviewed believe that reviewing courts do in fact pay close attention to the credibility determinations in rejected proposed decisions. See, however, Compton v. Board of Trustees of Mt. San Antonio College, supra, stating in dictum that a rejected proposed decision has no identifiable function on judicial review; National Automobile & Casualty Co. v. Industrial Accident Commission, 34 Cal. 2d 20, 27-30, 206 P.2d 841 (1949), which seems to indicate that the fact that an agency reversed the credibility determinations of its referee is entitled to no special significance on judicial review.

[48]Here I refer to both the independent ALJs who work for OAH and the much greater number of ALJs who work for specific agencies.

demeanor findings, and substitutes a different finding of credibility,[49] the parties have every right to be concerned.

2. Proposed reform--great weight to hearing officer credibility determinations

The existing law in which the credibility findings of an ALJ[50] count for nothing should be changed. I favor a reform that will provide greater finality for fact findings made by the hearing officer (whether or not called an ALJ) that turn on determinations of credibility. However, this recommendation is limited to credibility determinations: I would not favor according greater finality for other sorts of determinations such as the ALJ's drawing of non-testimonial inferences from the evidence, an ALJ's predictions, or his or her applications of the law to the facts, legal interpretation, discretion, or policymaking. The challenge, then, is to design a system that will provide a reasonable degree of finality for credibility determinations without stripping agencies of too much of their adjudicatory power and--very critically-- without creating a confusing, litigation-breeding standard.

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[49]The claim here is that an ALJ's assessment of credibility is to be preferred to the assessment of people who have not heard the witnesses. Needless to say, any assessment of whether an individual is telling the truth is relatively unreliable but probably an ALJ's assessment is less unreliable than that of someone who makes the decision from a cold record. See Lareau and Sacks, "Assessing Credibility in Labor Arbitration," 5 Labor Lwyr 151 (1989).

[50]When I use the term ALJ here, I refer to the findings of any officer, regardless of title, that conducts the initial hearing in an APA adjudication.

I recommend that a new California APA adopt the approach now taken in California workers' compensation. In these cases, the credibility determinations of a Workers' Compensation Judge (WCJ) are entitled to "great weight." This means that they must be taken quite seriously by courts that review final Workers' Compensation Appeal Board ("Board") decisions under the "substantial evidence" test. Where the Board rejects a WCJ's findings based on solid, credible evidence, the amount of evidence required to sustain the Board's findings under the substantial evidence test is greater than would normally be the case.[51] Thus the new test should be placed in the judicial review section of the statute.[52]

The well-established federal rule, under the Universal Camera case, is quite similar to the California workers' com-

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[51]Lamb v. WCAB, 11 Cal. 3d 274, 281, 113 Cal. Rptr. 162, 520 P.2d 978 (1974); Garza v. WCAB, 3 Cal. 3d 312, 318, 90 Cal. Rptr. 355, 475 P.2d 451 (1970); Western Elec. Co. v. WCAB, 99 Cal. App. 3d 629, 160 Cal. Rptr. 436 (1979).

The California workers' compensation rule has occasionally been applied to judicial review of other non-APA California agencies. Millen v. Swoap, 58 Cal. App. 3d 943, 947, 130 Cal. Rptr. 387 (1976) (Department of Social Services); Apte v. Regents of Univ. of Calif., 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312 (1988) (Chancellor's decision overturning a hearing committee).

[52]Code of Civil Procedure §1094.5. In a subsequent phase of my study dealing with judicial review, I will recommend modernization of this confusing and antiquated judicial review provision. However, the language suggested in the text could readily be placed in any judicial review statute.

pensation rule.[53] Under Universal Camera, reviewing courts that apply the substantial evidence rule discount agency findings that overturn ALJ credibility determinations but not agency findings based on expertise, policy, economic analysis, or discretion.[54] A number of states have adopted the Universal

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[53]In Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), the Court held that the evidence supporting a conclusion based on credibility is less substantial when an examiner who has observed the witnesses has drawn conclusions different from the agency's. However, in a subsequent case, the Court rejected a formulation under which the agency could not overrule its hearing officer on a credibility finding without a very substantial preponderance in the evidence supporting such reversal. This went too far in the direction of treating the examiner like a special master or like a trial judge. FCC v. Allentown Broadcasting Corp., 349 U.S. 358 (1955). Thus the Supreme Court's test preserves an agency's power to overturn the fact findings of its ALJs, even on credibility issues, but requires a more persuasive showing in such cases to meet the substantial evidence standard.

The Ninth Circuit summarized the Universal Camera rule as follows: "We have found no decision sustaining a finding by the [Labor] Board which rests solely on testimonial evidence discredited by the ALJ....Even when the record contains independent, credited evidence supporting the decision...the Board's supporting evidence must be stronger than usual when it rejects a hearing officer's findings." Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074 (9th Cir. 1977).

[54]For examples of ALJ findings to which the agency was not required to defer, see Lorain Journal Co. v. FCC, 351 F.2d 824, 828 (D.C. Cir. 1965), cert.den., 383 U.S. 967 (1966) (whether various business arrangements represented a transfer of control); AFTRA v. NLRB, 395 F.2d 622 (D.C.Cir. 1968) (whether parties had bargained to an impasse). In the latter case, the court remarked: "We are satisfied, however, that the Board's decision does not rest on a divergent view of credibility of witnesses as to evidentiary facts so much as a different overall judgment as the proper inferences to be drawn from the largely undisputed evidence concerning the salient ultimate fact. The Examiner also has expertise and experience in this field. But the statute gives the final say, assuming support in the record, to the collegial conclusion of the board members, who likewise have particular expertise, and also, presumptively, a judgment enhanced by the perspective of experience in affairs and a breadth of gauge that warranted a Presidential nomination to high office and Senate confirmation." Id. at 628.

The Universal Camera test applies only to "testimonial inferences" (those derived from judgments that a witnesses is

Camera approach.[55]

I also suggest that California adopt a provision contained in the recently adopted Washington statute.[56] Under this provision, an ALJ must identify "any findings based substantially on credibility of evidence or demeanor of witnesses."[57] This provision is valuable because it requires the ALJ to highlight his or her findings that are credibility-based and reminds the

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testifying truthfully) and not "derivative inferences" (those which do not depend on credibility judgments). Penasquitos Village, Inc. v. NLRB, supra; Universal Camera Corp. v. NLRB, 190 F.2d 429 (2d Cir. 1951) (Frank, J. concurring).

Even as to non-credibility findings by an ALJ, courts require the agency to explain why it rejected a well supported ALJ conclusion. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 853 (D.C.Cir. 1970), cert.den. 403 U.S. 923 (1971); Retail Store Employees Union v. NLRB, 360 F.2d 494 (D.C.Cir. 1965) (whether certain actions constituted a "conspiracy"--Board failed to explain its rejection of ALJ conclusion that conspiracy existed). This principle derives not from the substantial evidence test but from the requirement that an agency's decision not be arbitrary and capricious.

[55]See, e.g., Matter of Simpson v. Wolyansky, 38 N.Y.2d 391, -- N.Y.S.2d-- (1975); Gregory v. Bernardi, 125 Ill.App. 376, 465 N.E.2d 1052 (1984).

[56]Rev. Code of Wash. Ann. §34.05.461(3) and .464(4) (1989 Supp). See Anderson, "The 1988 Washington Administrative Procedure Act--An Introduction," 64 Wash. L. Rev. 781, 816 (1988).

[57]The Washington statute also requires reviewers to "give due regard to the [ALJ's] opportunity to observe the witnesses." This part of the Washington provision seems unnecessary, in light of the recommended requirement that reviewing courts discount agency findings that disagree with ALJ credibility-based findings. I am concerned that the statute not add additional steps that might cause confusion and might require the consideration of extraneous side issues by reviewing courts.

agency of its obligation to give great weight to such findings.[58]

If these recommendations are enacted, an agency will seldom overturn ALJ credibility findings. Its disregard of ALJ credibility determinations would seriously jeopardize its prospects for success on appeal. However, an agency would remain free to reject ALJ findings that are not based on credibility of witnesses.[59] Even as to findings relating to credibility, an agency might persuasively reject an ALJ's findings because, relying on its expertise in the field, it can explain to the satisfaction of a reviewing court that certain testimony accepted by an ALJ is inherently implausible.

This reform is carefully limited to credibility determinations, yet it does not require agencies or courts to draw a bright line between findings that are or not based on credibility (or necessarily to agree with the ALJ's description of the findings as credibility-based). As discussed below, it is often difficult to decide whether a finding is or is not in-

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[58]However, the agency need not agree with the ALJ that a particular finding is, or is not, based substantially on credibility. Regardless of whether the ALJ or the agency heads were right or wrong in labelling the findings, the ultimate question remains the substantiality of the evidence supporting a particular result, giving great weight to the ALJ's determinations based on credibility and demeanor. Moreover, the agency's rejection of the ALJ's determination that a finding is credibility-based should not itself be judicially reviewable.

[59]See Power v. WCAB, 179 Cal. App. 3d 775, 224 Cal. Rptr. 758 (1986) (choice between expert witnesses about connection between stress and obesity).

herently based on a credibility determination or on something else. The recommendation only requires agencies (and courts reviewing agency decisions) to give great weight to ALJ determinations where that weight is justified.[60] The courts should have no difficulty applying it on a case-by-case basis, simply discounting appropriately to the extent that an agency has rejected ALJ credibility-based determinations. There is plenty of relevant authority, both in California workers' compensation cases, and in federal law, on which courts can draw.

I recommend that a revised statute discard the provision in existing law that allows the agency heads to reject an ALJ decision and rehear the case themselves.[61] Instead, in cases where an agency wishes to reject an initial decision, it should have the power to remand a case to the same ALJ with instructions for further proceedings.[62] This permits an agency suffi-

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[60]The Florida approach, discussed below, require courts to make a clear-cut determination in each case whether the agency has erred by rejecting an ALJ credibility determination. As discussed below, I believe this forces agencies and courts to draw a bright line which is difficult to define and to apply.

[61]This recommendation (prohibiting agencies from rehearing cases heard by ALJs) obviously does not apply when a statute requires the agency heads to decide certain issues themselves. See Greer v. Bd. of Educ. of Santa Rosa, 47 Cal. App. 3d 98, 121 Cal. Rptr. 542 (1975) (dismissal of probationary teachers--certain issues are decided by the ALJ but other issues are reserved to the school board).

[62]See 1981 Model Act §4-216(g). Present California law requires that in the case of a remand for additional evidence, the ALJ should prepare a proposed decision and the parties will have a chance to argue to the agency before the agency acts (even to approve the proposed decision). GC §11517(c); Tenth Biennial Report p. 24.

Under the Florida statute discussed below, an agency cannot rehear a case assigned to an ALJ or even remand it for additional proceedings to the ALJ, except in exceptional circumstances. Henderson Signs v. Florida Dept. of Transp., 397

cient flexibility to deal with perceived flaws in an ALJ decision. However, if an agency were permitted to reject the ALJ decision and rehear the case en banc from scratch, a wide avenue would open up for avoidance of the proposed statute giving great weight to ALJ credibility findings. Moreover, such a procedure would confront a reviewing court with conflicting credibility determinations, which would create serious difficulties in applying the statute. This provision also serves the cause of efficiency, for it would be cumbersome and time consuming for busy agency heads to rehear cases en banc and it seems unlikely that they would often find the time to do so.

One puzzle in applying the "great weight" test involves independent judgment review by courts.[63] Where a non-constitutional agency decision deprives a person of a vested, fundamental right, the reviewing trial court exercises independent judgment review--the decision involves a cold record but the court reweighs the evidence considered by the agency. My suggestion would be that in such cases, the court should consider the ALJ proposed decision along with the agency final decision, giving whatever weight to either decision it finds appropriate. Naturally, the court is likely to be more impressed

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So.2d 769 (1981). This probably goes too far in the direction of giving finality to ALJ decisions.

[63]In a subsequent phase of my research, I will make recommendations concerning whether the independent judgment standard should be retained.

by credibility findings of an ALJ who heard the witnesses rather than those made by agency heads who did not hear them.[64]

3. Other models for increasing the deference given to hearing officer's credibility determinations

I considered but rejected a number of other approaches to the problem. This section discusses those models and explains why I rejected them.

Some states permit agency heads to reject the findings of ALJs but require written findings to explain why the agency did so.[65] Thus a court is assured that the decision of the agency to reject the ALJs fact findings was at least reasoned and deliberate.

However, I do not believe that goes far enough to address the problem. ALJ credibility determinations should ordinarily be preferred to those of the agency heads who make their decisions on a cold record. An agency should not be permitted to override an ALJ's credibility findings simply by making explicit findings of its own that it prefers to believe a witness the ALJ disbelieved or vice versa.

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[64]The issue was raised but not decided in Gore v. BMQA, 110 Cal. App. 3d 184, 191 n.1, 167 Cal. Rptr. 881 (1980).

[65]See Beaty v. Minnesota Board of Teaching, 354 N.W.2d 466, 472 (Minn.App. 1984) (agency must explain reasons for deviation from hearing officer's findings); New Jersey Dept. of Pub. Advoc. v. New Jersey Bd. of Public Utilities, 189 N.J.Super. 491, 460 A.2d 1057, 1062 (1983) (explanation for rejecting ALJs findings assures reasoned consideration); Pieper Electric, Inc. v. LIRC, 118 Wisc. 2d 92, 346 N.W.2d 464 (1984) (Wisc.App.) (agency must explain disagreement with examiner's personal impression of material witnesses).

I also considered but rejected a model based on the Florida statute.[66] This provision requires agency heads to accept ALJ findings supported by competent substantial evidence. A similar model is used at the federal level in connection with the review by the Labor Department Benefits Review Board of decisions of ALJs in cases arising under the Longshoremen's and Harbor Workers' Compensation Act and the Black Lung Benefits Act.[67] As interpreted by the courts, that model requires the Board to sustain ALJ findings that are supported by substantial evidence in the record as a whole.[68] The California Unemployment Insurance Appeals Board has also held that the "findings of the trier of fact who heard the evidence and observed the

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[66]Florida Stats. §120.57(1)(b)10. See generally 2 A. England & H. Levinson, Florida Administrative Practice Manual §13.09 (1979 and current supp).

[67]The Longshoremen's provision is 33 U.S.C. §921(b). It is made applicable to the Black Lung Act by 30 U.S.C. §932(a).

[68]Thus the fact findings of the Board are of no importance, even if it delivers a full opinion and its findings are supported by substantial evidence. The only issue is whether the ALJ's findings are supported by substantial evidence. Dotson v. Peabody Coal Co., 846 F.2d 1134, 1137 (7th Cir. 1988). Reviewing courts review the Board's decision independently to ascertain whether the Board correctly applied the substantial evidence test to the ALJ's decision. See, e.g., Old Ben Coal Co. v. Prewitt, 755 F.2d 588 (7th Cir. 1985); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327 (9th Cir. 1980).

This peculiar arrangement seems to have arisen accidentally when Congress amended the Longshoremen's statute in 1972 to substitute ALJ's for the Deputy Commissioners who had formerly made the original decision (reviewable by the federal district court for substantial evidence) and inserted the Board as a new appellate level between the ALJs and the courts. The Longshoremen's procedure was then incorporated into the Black Lung statute.

witnesses in the tribunal below will be disturbed only if arbitrary or against the weight of the evidence."[69]

This approach focusses on the agency heads, requiring them to accept adequately supported ALJ findings. In contrast, the model I have suggested above is targeted on reviewing courts, instructing them that an agency reversal of ALJ credibility findings weakens the substantiality of evidence supporting the agency final decision. For reasons to be discussed below, I believe that it is better to direct the statute at reviewing courts rather than at the agency heads.

One major problem with the model focussing on agency heads is that it requires a bright line to be drawn between findings based on credibility (where the trier of fact must be sustained if the finding is supported) and other findings (where the trier of fact need not be sustained regardless of whether it is supported). The cases that have wrestled with the Florida provision indicate that it is very difficult to draw this line and the necessity for doing so will produce much controversy and litigation.

Some Florida cases (the better reasoned in my view) seem to successfully limit the statute to credibility determinations. Those cases distinguish findings based on credibility

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[69]In the Matter of William C. Hamlett, Precedent Benefit Decision P-B-10 (1968). Similarly, by statute, the Alcoholic Beverage Control Appeals Board must uphold findings of the Department of ABC that are supported by substantial evidence in the light of the whole record. Bus. & Prof. C. §23084(d).

from findings based on opinion or those infused by policy considerations for which the agency has special responsibility.[70] Other cases indicate that the agency heads must accept any supported finding except for those relating to unique questions not susceptible to "ordinary methods of proof."[71] The distinctions required by either approach are extremely difficult to

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[70]McDonald v. Department of Banking and Finance, 346 So.2d 569 (D.C.A. 1977) (ALJ finding that new bank has a reasonable prospect of financial success need not be accepted by agency but it must explain its reasons for departing from the finding); Boyette v. State Prof. Prac. Council, 346 So. 2d 598 D.C.A. 1977) (agency need not accept conclusion that rape conviction would not impair a teacher's effectiveness); Holden v. Fla. Dept. of Corrections, 400 So.2d 142 (1981) (agency need not accept finding relating to the effect on prison security of a prisoner's marriage). The statute was appropriately applied in Tuveson v. Fla. Govrs. Counc. on Indian Affairs, 495 So.2d 790 (1986), requiring an agency to accept a finding that an individual's action was motivated by racial discrimination.

[71]For examples of cases in which agencies have been reversed because they rejected ALJ findings, see Harac v. Bd. of Architecture, 484 So.24 1333 (D.C.A. 1986) (clash of expert opinion about whether applicant passed the architecture licensing exam); Johnson v. Bd. of Med. Examiners, 456 So.2d 939 (D.C.A. 1984) (whether doctor appropriately prescribed dangerous drugs); Reese v. Bd. of Med. Examiners, 471 So.2d 601 (D.C.A. 1985) (same); Nest v. Bd. of Med. Examiners, 490 So.2d 987 (D.C.A. 1986) (whether doctor once suspended for treating patients while drunk can now safely practice medicine); Shablowski v. State Dep't of Environmental Reg., 370 So.2d 50 (1979) (whether fill of river would interfere with marine life to such an extent as to be contrary to public interest--strong dissent); Lord Chumley's of Stuart, Inc. v. Dep't of Revenue, 401 So.2d 817 (D.C.A. 1981) (whether shareholder should be treated as having conveyed property to his corporation even though he failed to do so formally); Cenac v. State Bd. of Accountancy, 399 So.2d 1013 (1981) (whether all of the tasks performed by corporation are generally performed by accountants)

Some of these cases appear to use the Florida statute as a surrogate for an independent judgment standard of judicial review (which does not exist in Florida), so that a greater quantum of evidence is needed to revoke a professional license. See Johnson v. Bd. of Med. Exam., supra.

draw on a case by case basis and have triggered much litigation. Because of this confusion, some judicial decisions have overturned agency decisions because the agency rejected ALJ findings that seem to turn both on policy considerations or expertise as well as on credibility.[72] I believe this inappropriately intrudes on the adjudicatory responsibility of the agency heads.

The Florida statute seems too rigid, because it forces courts to draw a bright line between issues that do or do not require the use of expertise or the application of policy, or which are or not susceptible to proof by ordinary methods. If the issue falls on one side of the line, the agency can freely overturn its ALJ; if it falls on the other side of the line, it cannot and it has committed reversible error. The world of administrative adjudication is too unruly for such rigid distinctions, for many ALJ fact findings turn partly on credibility and demeanor conclusions, partly on intuitive and experiential determinations of whether testimony is plausible, and partly on policy determinations. Yet such distinctions must constantly be drawn under a statute like Florida's.

Because the Florida model requires the drawing of a bright line that is extremely difficult to define and apply, it would encourage litigation and generate a maze of confusing case law. It would also unduly inhibit agencies from overturning non-

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[72]See immediately previous footnote.

credibility based ALJ findings. As a result, I do not recommend it as a model for California.

While the federal workers' compensation statute has apparently not generated problems of line drawing, it seems clear that it has greatly demeaned the importance of the Benefits Review Board. That Board's legal and policy decisions are given no deference by reviewing courts[73] and, as noted above, its fact findings (no matter how adequately supported) are of no importance so long as the ALJ's findings are supported by substantial evidence.[74] Thus the agency heads are reduced to mere brief writers.

The approach I have suggested seems better. It simply requires a court to weigh in the substantial evidence or independent judgment balance that fact that the agency has rejected an ALJ's finding. Such a reversal would have great significance to the degree that the court perceives that the finding was based on credibility, but relatively little significance if the

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[73]Potomac Electric Power Co. v. Director, OWCP, 449 U.S. 268, 278 n.18 (1980); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 48-49 (2d Cir. 1976), aff'd without discussion of this point, 432 U.S. 249 (1977).

[74]Kalaris v. Donovan, 697 F.2d 376, 382-83 (D.C.Cir. 1983). In a persuasive concurring opinion, Judge Cudahy attacked the case law under the Longshoremen's and Black Lung statutes that has rendered the Benefits Review Board of no importance in any case that is taken to court. He pointed out that these cases reduce the Board to a largely advisory function, of no greater importance than a party's brief, and he deplored this result. The Board consists of competent professional fact finders, its opinions are detailed and analytical, and its decisions may well reflect policy determinations. Old Ben Coal Co. v. Prewitt, 755 F.2d 588, 592-94 (7th Cir. 1985).

court perceives that the finding was based on non-testimonial inferences, prediction, policy, or discretion. This sort of flexible, case-by-case standard seems better than more rigid approaches that require a yes-no classification of findings that often resist such classification. At the same time, it will compel agency heads to defer to ALJ findings that are wholly or almost completely derived from assessments of credibility and demeanor. The statute should do this much but it should not try to do more.

E. Conclusion

This report focuses on the relationship between the agency heads and the individual who hears the case. The relationship must be sensitive to the fact that the agency heads bear ultimate responsibility for an adjudicative decision. Yet it is vital that the hearing officer's proper function be respected as well.

Balancing these factors suggests that not every case should receive plenary agency consideration. In addition, the agency heads should continue to have the power of summary affirmance (but only after the parties have been allowed to file briefs focussing on the initial decision). Finally, great weight must be given to the credibility findings of the initial decisionmaker, but the agency heads should retain the power to substitute judgment on non-credibility-based fact findings as well as on questions of law and policy.

This redefined relationship between the hearing officer and the agency heads should promote the goals of fairness, ef-

ficiency, and party satisfaction. Thus it should improve the quality of California administrative adjudication.

§ 4–202. [Presiding Officer, Disqualification, Substitution]

(a) The agency head, one or more members of the agency head, one or more administrative law judges assigned by the office of administrative hearings in accordance with Section 4–301 [, or, unless prohibited by law, one or more other persons designated by the agency head], in the discretion of the agency head, may be the presiding officer.

(b) Any person serving or designated to serve alone or with others as presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this Act or for which a judge is or may be disqualified.

(c) Any party may petition for the disqualification of a person promptly after receipt of notice indicating that the person will preside or promptly upon discovering facts establishing grounds for disqualification, whichever is later.

(d) A person whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.

(e) If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, the substitute must be appointed by:

(1) the governor, if the disqualified or unavailable person is an elected official; or

(2) the appointing authority, if the disqualified or unavailable person is an appointed official.

(f) Any action taken by a duly-appointed substitute for a disqualified or unavailable person is as effective as if taken by the latter.

§ 4–215. [Final Order, Initial Order]

(a) If the presiding officer is the agency head, the presiding officer shall render a final order.

(b) If the presiding officer is not the agency head, the presiding officer shall render an initial order, which becomes a final order unless reviewed in accordance with Section 4–216. * * *

§ 4–216. [Review of Initial Order; Exceptions to Reviewability]

(a) The agency head, upon its own motion may, and upon appeal by any party shall, review an initial order, except to the extent that:

(1) a provision of law precludes or limits agency review of the initial order; or

(2) the agency head, in the exercise of discretion conferred by a provision of law,

(i) determines to review some but not all issues, or not to exercise any review,

(ii) delegates its authority to review the initial order to one or more persons, or

(iii) authorizes one or more persons to review the initial order, subject to further review by the agency head.

(b) A petition for appeal from an initial order must be filed with the agency head, or with any person designated for this purpose by rule of the agency, within [10] days after rendition of the initial order. If the agency head on its own motion decides to review an initial order, the agency head shall give written notice of its intention to review the initial order within [10] days after its rendition. The [10]-day period for a party to file a petition for appeal or for the agency head to give notice of its intention to review an initial order on the agency head's own motion is tolled by the submission of a timely petition for reconsideration of the initial order pursuant to Section 4–218, and a new [10]-day period starts to run upon disposition of the petition for reconsideration. If an initial order is subject both to a timely petition for reconsideration and to a petition for appeal or to review by the agency head on its own motion, the petition for reconsideration must be disposed of first, unless the agency head determines that action on the petition for reconsideration has been unreasonably delayed.

(c) The petition for appeal must state its basis. If the agency head on its own motion gives notice of its intent to review an initial order, the agency head shall identify the issues that it intends to review.

(d) The presiding officer for the review of an initial order shall exercise all the decision-making power that the presiding officer would have had to render a final order had the presiding officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the presiding officer upon notice to all parties.

(e) The presiding officer shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

(f) Before rendering a final order, the presiding officer may cause a transcript to be prepared, at the agency's expense, of such portions of the proceeding under review as the presiding officer considers necessary.

(g) The presiding officer may render a final order disposing of the proceeding or may remand the matter for further proceedings with instructions to the person who rendered the initial order. Upon remanding a matter, the presiding officer may order such temporary relief as is authorized and appropriate.

(h) A final order or an order remanding the matter for further proceedings must be rendered in writing within [60] days after receipt of briefs and oral argument unless that period is waived or extended with the written consent of all parties or for good cause shown.

(i) A final order or an order remanding the matter for further proceedings under this section must identify any difference between this order and the initial order and must include, or incorporate by express reference to the initial order, all the matters required by Section 4-215(c).

(j) The presiding officer shall cause copies of the final order or order remanding the matter for further proceedings to be delivered to each party and to the agency head.

§ 4-218. [Reconsideration]

Unless otherwise provided by statute or rule:

(1) Any party, within [10] days after rendition of an initial or final order, may file a petition for reconsideration, stating the specific grounds upon which relief is requested. The filing of the petition is not a prerequisite for seeking administrative or judicial review.

(2) The petition must be disposed of by the same person or persons who rendered the initial or final order, if available.

(3) The presiding officer shall render a written order denying the petition, granting the petition and dissolving or modifying the initial or final order, or granting the petition and setting the matter for further proceedings. The petition may be granted, in whole or in part, only if the presiding officer states, in the written order, findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the order. The petition is deemed to have been denied if the presiding officer does not dispose of it within [20] days after the filing of the petition.