#N-105 ns84
09/10/90

First Supplement to Memorandum 90-112

Subject: Study N-105 - Administrative Adjudication: Effect of ALJ Decision (Comments on Background Study)

Attached to this memorandum are two letters commenting on Professor Asimow's background study on the relationship between the agency head and the administrative law judge. Exhibit 1 is a letter from the Public Employment Relations Board. Exhibit 2 is a letter from Paul Wyler. We will analyze these letters at the Commission meeting.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

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September 6, 1990

Edwin K. Marzec
Chairperson
California Law Revision Commission
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Dear Mr. Marzec:

These comments are in anticipation of the Commission's consideration of Professor Michael Asimow's recommendations in the August 1990 report (N-105) at its September 13, 1990 meeting.

PERB is presently not subject to the APA for hearing purposes. We believe that PERB's historical development, including the use of an advisory board made up of our constituent parties, has enabled us to achieve the "best possible mix of fairness, efficiency, and participant satisfaction," advocated by the Professor in his report. Indeed, as will be related below, many of his recommendations are and have been part of PERB's operating procedures for some time. The PERB continues to meet with its advisory body on a quarterly basis to review our operations and procedures.

In reviewing the recommendations in the report, we hope the Commission will proceed with due regard for the very substantial differences in the statutory and structural constitution of the different agencies. The Professor's recommendations, flowing from concerns about single-head agencies or part-time boards, should not result in substantive changes to boards such as PERB, where the five members serve full time.

PERB, as well as other agencies, operates under statutory mandates that must be accommodated in any proposed legislation that would affect the agency's procedures, as required by its enabling legislation. PERB administers three legislative Acts: the Educational Employment Relations Act, (Chapter 10.7, commencing with section 3540), the Higher Education Employer-Employee Relations Act, (Chapter 12, commencing with section 3560,) and the Dills Act, (Chapter 10.3, commencing with section 3512) of the Government Code. It would be a great disservice to the public sector labor relations community to change indirectly a very technical and legislatively prescribed system of dispute resolution, by the enactment of a universal "all agency" set of procedures, whose aegis is an effort to resolve problems not known to PERB's constituents.

In addition, the statutory scheme of judicial review for each agency should be considered. Some agency decisions are reviewable in the Superior Court. Others, such as PERB, are reviewed only by the District Court of Appeal. (Government Code section 3542.) Hence, the nature or level of judicial review may dictate and justify differences in internal structure and processing of agency decisions.

Prefatory to responding to the Professor's recommendations, in seriatim, we wish to briefly outline PERB's case processing and decision review.

By statutory authority (Government Code section 3541.3(g)) and through regulations (see generally, Chapter 3 commencing with section 32165, and Chapter 4 commencing with section 32300 of Division I of title 8, California Administrative Code) the following procedures occur:

> Parties file unfair practice charges with the PERB that are investigated by regional attorneys, members of the General Counsel's staff. If a prima facie case is found to exist, a complaint is issued by the PERB against the alleged offending party. The complaint is processed by the Division of Administrative Law through settlement conference and to formal hearing. The charging party carries the burden of prosecuting and proving the charge. The parties present evidence, both testimonial and documentary and exercise cross-examination and rebuttal opportunities. The hearing is recorded and the parties obtain, at their option, a transcript of the hearing. They may elect to file post-hearing briefs. The ALJ issues a proposed decision to the parties. In the absence of exceptions by one or both of the parties, the proposed decision becomes final and binding on the parties, but does not constitute precedent. Either or both parties may take exception to the proposed decision, which is in the nature of an appeal to the Board itself. The Board will review the entire record in light of the exceptions and may reverse, sustain or modify the proposed decision, or even remand for further evidence or ruling. Unfair practice decisions of the Board itself are reviewed by the Court of Appeal.

The Board also has extensive responsibility in representation matters which involve unit determinations, conduct of certification and decertification elections, as well as determinations of impasse, and assignment of mediators and factfinders.

Our observations on the Professor's report follows.

The Professor recommends:

> (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.

RESPONSE. The enabling legislation gives PERB both the power to resolve cases and to delegate the hearing. Government Code sections 3541.3(h), (i) and (k). PERB regulations implement these policies. Section 32168(a) provides "Hearings shall be conducted by a Board agent designated by the Board, except that, the Board itself or a Board member may act as a hearing officer." Among the powers delegated to PERB agents is the power to "Render and serve the proposed decision on each party." (PERB regulation 32170 (1).)

Thus, PERB has already implemented an administrative process envisioned by recommendation (1).

The Professor recommends:

> (2) The Administrative Procedure Act should provide that agencies have the power to delegate final (rather than merely initial) decision-making 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.

RESPONSE. PERB's historical approach, as expressed in regulation, is to delegate final decision-making authority to its agents in the absence of appeal by any party to the decision. (PERB regulation 32305.) Because of PERB's jurisdictional stature in unfair practice matters (reviewed by the DCA, rather than Superior Court, Government Code section 3542(b) and (c)), the Board is the equivalent of the Superior Court. Government Code section 3541.3(k) authorizes the Board to delegate its powers to any member of the Board or to any person appointed by

the Board for the performance of its functions. This authority is qualified by the following language: ". . . no fewer than two board members may participate in the determination of any ruling or decision on the merits of any dispute coming before it. . . ." (Government Code section 3541.3(k).) Thus the PERB Board must retain final decision-making authority rather than according such power to a Board agent. For the same reason, appeals may not be conditioned or made discretionary. The Board must make the final decision in the absence of the parties acceptance of a proposed decision.

Arguments advanced by Professor Asimow (page 11) for discretionary review are not applicable to PERB. This agency was created to administer the collective bargaining statutes, one prime responsibility of which is to resolve unfair practice disputes. The Board is a full-time Board with legal support, and is designed to address these issues. Finally, unlike the concern the Professor advances (that the agency reviews every appeal even if no party requests it), PERB only reviews proposed decisions that are excepted to by one or both of the parties. (PERB regulation 32300.)

By statute, PERB is empowered to adjudicate cases by panel designation. (Government Code section 3541(c).) PERB reviews appeals of proposed decisions through panel members of the Board, hence creation of subordinate employees to hear appeals is unnecessary.

In conclusion, we believe the legislation under which we operate precludes absolute delegation of final decisions to ALJs, and further precludes making appeals from such decisions discretionary.

The Professor recommends:

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

RESPONSE. The Professor's concern seems more related to what the current APA provisions (Government Code section 11521) do not contain with regard to reconsideration. He does criticize the timing element of the existing APA provision. PERB is not currently subject to the provision. We have, however, enacted regulations (Article 3, commencing with section 32400) addressing the issue. Consistent with the Professor's suggestion, the PERB regulation does not require a reconsideration request to be filed to exhaust administrative remedies. We tie the timing of the

filing of the request for reconsideration to the date of the service of the decision, rather than the date of the decision itself.

The Professor criticizes the existing APA because it is limited to agency final decisions and does not apply to initial decisions, a feature he finds desirable.

If "initial decision" is the equivalent of a proposed decision under PERB procedures, this recommendation would inject a new level of review by the issuing ALJ, of his own decision. This would cause substantial delay in the disposition of cases. Rather, as PERB regulations now provide, the review of the proposed decision is by the PERB Board. Arguable errors in the proposed decision can be rectified by the PERB on review by way of exceptions filed by the parties. This process is consistent with the Professor's stated goals of efficiency and fairness.

Within this same section of the report, the Professor urges retention of the agency's authority to accept or modify the proposed decision, but urges that the provision be amended to allow the parties to file briefs or make arguments before the agency in favor of or opposing the ALJ's decision.

PERB procedures already provide for the opportunity to brief the exceptions to or support for the proposed decision. See generally, Chapter 4 (commencing with section 32300) of PERB regulations. In addition, the parties may request oral argument. (Section 32315.)

Thus, with the exception of extending reconsideration to initial decisions, if that is intended to apply to proposed decisions, PERB's practices are currently consistent with the Professor's recommendation. The reconsideration concept should not be extended to proposed decisions.

The Professor recommends:

> (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 any summary approval.

RESPONSE. Unlike the comments in the Professor's report (pages 18 - 22), the parties before PERB do have the right to file briefs before the Board, on Board review of a proposed decision. See generally, Chapter 4 (commencing with section 32300) of PERB regulations.

Thus, PERB's practice (and regulations) implement the Professor's recommendation.

The Professor recommends:

> (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. ALJ's should be required to identify findings based substantially on credibility. Reviewing courts should be required to give great weight to ALJ credibility determinations.

RESPONSE. The PERB is opposed to the recommendation that imposes a higher standard of deference to ALJ credibility findings that must be given by the PERB, and to the courts that review PERB decisions. This Board has already developed a standard of deference to the ALJ's findings of fact based upon credibility, and, in so doing, has accepted the standard of review espoused by the Universal Camera case (citation omitted), and relied upon by the Professor.

PERB will afford deference to the ALJ's findings of fact which incorporate credibility determinations, but the Board will consider the entire record, including the totality of testimony offered, and is free to draw its own and perhaps contrary inferences from the evidence presented. (Santa Clara Unified School District (1979) PERB Decision No. 104; Los Angeles Unified School District (1988) PERB Decision No. 659.)

The reasons advanced by the Professor (agency heads are frequently part-time appointees who have little time to give to their agency responsibilities, the actual determination of rejection is done by staff) simply does not apply to this Board. At PERB, proposed decisions on appeal are reviewed by a panel of full-time Board members who, along with their legal advisors, give the full record a complete and exhaustive review.

We are further opposed to this recommendation because, in shifting focus of the standard of deference from the reviewing agency to the reviewing court (the new test is to be placed in the judicial review section of the statute), the agency is faced with having to accord almost absolute deference to the ALJ's findings. The Professor seems to agree with this assessment as he acknowledges, on page 29 of the report, that agencies will seldom overturn credibility findings, "because its disregard of ALJ credibility determinations would seriously jeopardize its prospects for success on appeal." He further states, in footnote 57, page 28, that the recommendation means that the "reviewing courts discount agency findings that disagree with ALJ credibility findings."

The Professor additionally recommends that ALJs be required to identify "any findings based substantially on credibility of evidence or demeanor of witnesses." As a matter of practice, ALJs do resolve conflicts in testimony expressly in the proposed decision, where such conflict is dispositive of an issue. We believe, however, such an absolute requirement is impractical. As the Professor acknowledges (page 36), "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 determination."

Because we are opposed to an absolute deference to the ALJ's findings of fact based upon credibility determinations, we oppose this recommendation, and the recommended requirement that the ALJ be required to identify such findings.

The report further recommends (page 30) that existing authorization for agencies to reject the "initial decision" and rehear the case itself be deleted, and that agencies be required to remand the case back to the ALJ for further proceedings. This recommendation, and the rational set forth (page 31), simply ignores the purpose and role of agencies like PERB and the PERB Board, as outlined above. As the Professor recognizes (footnote 61), the recommendation cannot apply where the agency is required to make the determinations itself. It is the statutory responsibility of the PERB Board to make unfair practice determinations under the three Acts (EERA, SEERA, and HEERA), and it cannot delegate that responsibility to subordinates.

In conclusion, we reiterate our hope that the Commission will consider the very substantial differences in agencies statutory

responsibilities, their organizational structure and nature of judicial review, in reviewing the recommendations. The specific statutory requirements for agencies such as PERB must be given deference in any effort to standardize hearing procedures. Furthermore, given the Board's final responsibility in dispute resolutions, we oppose imposition of a standard of deference to ALJ findings of fact based upon credibility that would virtually deny the agency Board its statutory mandate to carry out its responsibilities. Finally, we oppose the recommendation that there be mandatory reconsideration at the proposed decision level.

Thank you for the opportunity to express our views on these issues.

Member, Willard A. Shank, will attend your Concord meeting and answer any questions you might have concerning PERB.

Cordially,

Deborah M. Hesse
Chairperson

DMH/lmg

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September 7, 1990

California Law Revision Commission
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RE: ADMINISTRATIVE ADJUDICATION - THE RELATIONSHIP BETWEEN AGENCY HEADS AND ALJs (APPEALS WITHIN THE AGENCY)

Dear Persons:

Prior to the submission of the second phase of the report of Professor Asimow, which was prepared and issued August 10, 1990, Professor Asimow requested comments from interested persons.

I enclose herewith a copy of my comments submitted to him which I think are equally relevant at this time and ask that these comments be included in the Commission's records.

Sincerely,

PAUL WYLER

PW:kc
Enclosure

PLEASE REPLY TO:
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July 12, 1990

Professor Michael Asimow
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Los Angeles, CA 90024

RE: ADMINISTRATIVE ADJUDICATION (SECOND PHASE)

Dear Michael:

I am responding in general at this time to your draft study regarding the relationship between the agency heads and the ALJ, which I understand relates solely to the operations of the Office of Administrative Hearings. The relationship between ALJs and the relationship between ALJs who are employed by their agencies, other than through the Office of Administrative Hearings, is a different situation and has to be dealt with differently.

I believe that the relationship between the ALJ and the agency should be considered analogous to the relationship between a trial judge and the Appellate Court. Although the agency has, in addition to its appellate jurisdiction, rule-making powers and the right to make policy which is different from that of the Appellate Court which makes policy only on a case-by-case basis, and which is subject to the rules of res judicata and stare decisis, the way the system operates, the ALJ model should be considered as equivalent to a trial judge and the agency model should be considered the equivalen to an appellate review body, or court. This may apply to any agency whether OAH or not.

If we adopt this ideal model then some of the defects in the administrative adjudicative procedure can be remedied. The ALJ decision is to be considered final or should be made final in all types of administrative adjudication subject to any exception where good cause can be shown that decision should only be recommended. The agency would not be prejudiced by such a rule because the agency would, under the statute, have the right to "appeal" from the ALJ decision to itself or to the appropriate agency appellate body. Similarly, an aggrieved party who lost before the ALJ can also file an appeal. The agency and the aggrieved party would have separate and independent rights to appeal from a decision of the ALJ with which they disagree.

In this way, if the agency feels the ALJ decision is contrary to agency policy or rules, it can, through the "appeal" review and correct the ALJ "error". Thus, with respect to your theory that the agency should have the power to approve the ALJ decision, that would not be necessary. The ALJ decision would be final as far as the agency is concerned unless it decides to appeal. By not appealing, the agency is deemed to have approved the ALJ decision.

If the agency wishes to reject the ALJ decision, this could be achieved by having the agency appeal to the appropriate appellate body, namely an appellate function in the agency or to the agency itself and giving the other litigants right to participate in the appeal. The agency should not summarily reject the ALJ decision but should appeal it and then if it decides to "reject" the ALJ decision, just like an appellate court might, it should publish an opinion, explaining why it disagrees with the decision of the ALJ and, just like an appellate body, should give ALJ credibility determinations and fact-finding determinations greater weight because the ALJ is the person who observed the witnesses and was able to determine credibility.

By leaving the ALJ in the position of making a recommended decision which can then be affirmed by the agency if it wishes or rejected, the administrative adjudicative process is diminished and the respect for the administrative adjudication proceeding is lessened. What is the point of making an argument or presenting facts to an ALJ if his findings are merely "recommendations" which can be overturned at the whim of the administrative agency?

The trial judge-appellate court model I have proposed above is a more satisfactory way of handling the matter. The agency's rights are retained and the ALJ proceeding becomes more significant. The parties who participate in the ALJ proceeding realize that they are before a court and not an advisory body, an advisory body which can make some findings and then have them rejected.

I believe the statute should require in all cases, except in such cases as might arguably be exceptional, that the ALJ decision is final, subject to appeal by the litigants and the agency itself. With respect to ALJ decisions, a decision can then be vacated, revised or corrected upon an appellate review.

I do not believe that my proposals in any way detract from the powers of the agency to set policy and to control their ALJs (if the ALJs are within their agency) or to control the decisions of the independent corps of ALJs in the OAH.

The model I have suggested is the one that is used in the Unemployment Insurance Appeals Board and I believe is also used at the Workers' Compensation Appeals Board. In each instance the decision of the judge is final. In the UIAB sphere, not only can the Department, as well as the litigants, appeal an ALJ decision but the Appeals Board itself has the right to, upon its own motion, vacate an ALJ decision and render a decision itself. In the workers' compensation sphere, I am not as familiar but I believe that the agency also has the right to challenge a workers' compensation judge's decision, as well as litigants. If this model is adopted throughout California, it would enhance the administrative process. I suggest you give it careful consideration.

Sincerely,

PAUL WYLER,
Administrative Law Judge

PW:kc