#N-105 ns85
11/21/90

First Supplement to Memorandum 90-129

Subject: Study N-105 - Administrative Adjudication: Effect of ALJ Decision (Comments of OSHA Appeals Board)

Attached is a letter we have received from The Cal OSHA Appeals Board commenting on issues involved with the study of the effect of the administrative law judge's decision. We will raise the issues orally at the meeting as we reach the relevant place in the draft attached to Memorandum 90-129.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

STATE OF CALIFORNIA
GEORGE DEUKMEJIAN, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

1006 FOURTH STREET, 4TH FLOOR
SACRAMENTO, CA 95814—3370
(916) 322-5080

November 20, 1990

Roger Arnbergh, Chairman
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Subject: Administrative Adjudication:
Effect of ALJ Decision
Memorandum 90-129 (NS)
Meeting of November 30, 1990

Dear Mr. Arnbergh:

Thank you for the opportunity to express our views regarding Professor Asimow's background study and the staff draft statute. While there may be much merit in the "single APA" concept for agencies that do not specialize in administrative adjudication, we feel that Occupational Safety and Health Appeals Board better achieves the goals of fairness, efficiency, and participant satisfaction in its present non-APA status. As a "second generation" administrative tribunal, OSHAB's procedural rules already incorporate many of the reforms suggested by Professor Asimow. For example, our ALJs issue final decisions which are served on all parties simultaneously. (Labor Code § 6604(a); 8 Cal. Code Regs. § 385(c).) The Board, upon petition of the parties or on its own motion, may reconsider any decision of the ALJ. (Labor Code § 6614(a) and (b).)

The APA model contains provisions that would be costly or inconvenient to our agency. Specifically, under Government Code § 11508 the parties "by agreement may select any place within the state" as a hearing site. OSHAB controls the place of hearing under Labor Code § 6602, and under § 376(b) of our regulations "[t]he Appeals Board may set the place of hearing at a location as near as practicable to the place of employment where the violation is alleged to have occurred." Government Code § 11502(d) provides that all proceedings "shall be reported by a phonographic reporter, unless all parties consent to having the proceedings reported electronically." It is also assumed that the phonographic report will be converted into a "transcript." (See Government Code § 11517(c).) The applicable Labor Code sections do not lock our agency into this procedure, which would result in additional cost and great delay in the issuance of ALJ decisions and, ultimately, OSHAB decisions after reconsideration.

Generally, the focus of the APA is upon hearings arising out of proposed license revocations and petitions for license. (See Government Code § § 11503, 11504). Dating back to 1945, the central premise was that hearing officers assigned to such proceedings were mere gatherers of evidence who, once having developed a record, made suggestions to the agency as to what facts might be found and, in some instances, how the law might be applied to these facts. This product, the so-called "initial decision," then went to the agency, not to the parties. The agency would review the hearing officer's product, changing the "draft" to whatever extent it desired before presenting a final decision. It is many of these "first generation" characteristics which are the primary target of Professor Asimow's proposed reforms.

Our agency, on the contrary, was created in 1973 as an adjudicatory body. Most of Professor Asimow's APA reform ideas have already been embodied into our procedural rules. Thus, it might be said that OSHAB had "something to lose and nothing to gain" by being placed under the APA. Additionally, being a part of the APA would carry with it the danger of future change, based on perceived problems or needs of other, dissimilar agencies, without sufficient concern for how the change may impact our particular OSHAB proceedings.

Specific problems in the staff draft are too innumerable to repeat in this letter. Some salient examples, include: the § 610.460 definition of "party" which would need to be expanded to include organizations and entities that appear before us. The requiring of certified mail under § 613.010 would be an additional cost to the agency, with duplicative service also required on the parties as well as upon the attorney of record. Under OSHAB procedures, service on the party's representative is sufficient as it is in reality. The sections dealing with administrative law judges and assignment (§ § 640.230, 640.250) appear to make all ALJs employees of the Office of Administrative Hearings, which may revive the notion of a centralized ALJ panel to which we directed our criticism earlier this year. Section 642.710, requiring orders to issue within 30 days after submission merely duplicates our applicable regulation. (8 Cal. Code Regs. § 385(a).) An amendment to Code of Civil Procedure § 1094.5 does not seem necessary in light of existing case precedent deferring to ALJ credibility resolutions. (See, e.g., Lamb v. W.C.B.A. (1974) 11 Cal. 3d 274.)

With respect to the specific recommendations contained in Professor Asimow's report of August 13, 1990, our observations are as follows:

Recommendation No. 1

> "The Administrative Procedure Act (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."

OSHAB position: Title 8, California Code of Regulations, § 375.1 already provides for OSHAB assignation of an ALJ for hearing or permits the Board to hear the case itself.

Labor Code § § 6602 and 6605 are the statutory bases for the regulation, with Labor Code § 6604 authorizing OSHAB to delegate the initial hearings to hearing officers.

Recommendation No. 2

"The APA 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 decision 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."

OSHAB position: As stated above, the Labor Code already allows OSHAB to delegate final decision-making authority to hearing officers. ALJ decisions do not have to be reviewed and approved before the decision becomes final. OSHAB may take action with respect to an ALJ decision within 30 days after the decision is issued, but that is not obligatory. (See Labor Code § § 6609, 6614(b).) Labor Code § 6623 provides that "a decision following reconsideration shall be made by the Appeals Board and not by a hearing officer...." With a three-member Board there is no reason to set up two-person panels of Board members to review cases.

Recommendation No. 3

"The existing provisions relating to petitions for reconsideration should be revised."

OSHAB position: Insofar as this recommendation requires parties to seek Board reconsideration of its own decision before proceeding to court, that requirement is consistent with OSHAB existing practice. If the recommendation is to allow appeals directly from ALJ decisions to Superior Court, this procedure would contravene Labor Code § 6615 requiring the filing of the Petition for Reconsideration of an ALJ decision as a prerequisite to petitioning a court for writ. That is as it should be, as the case may involve policy considerations, may contain some factual or

legal error and OSHAB has been created just for the purpose of dealing with these issues. It should have the opportunity to do so before the case passes into the hands of the courts.

Recommendation No. 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."

OSHAB position: Decisions of the ALJ are served on the parties, and each party is entitled to petition to OSHAB (and file briefs) for reconsideration on one or more of the following grounds: 1) That by the order or decision the Appeals Board acted without or in excess of its power; 2) That the order or decision was procured by fraud; 3) That the evidence received by the Appeals Board does not justify the findings of fact; 4) That petitioner has discovered new material evidence which the petitioner could not, with reasonable diligence, have discovered and produced at the hearing; 5) That the findings of fact do not support the order or decision. (8 cAL. Code Regs. § 390.1(a).)

Recommendation No. 5

> "The present APA 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."

OSHAB position: As explained previously, for demeanor-based credibility resolutions the Appeals Board has traditionally deferred to the ALJ's findings. It is doubtful, however, that this area should be codified. Evidence Code § 780 describes some eleven factors a trier of fact may consider in determining the credibility of a witness. Only two of those, "(a) his demeanor while testifying and the manner in which he testifies," and "(j) attitude toward the action in which he testifies or toward the giving of

testimony" relate to hearing room conduct. Those are the only factors the ALJ is in a superior position to evaluate by virtue of his/her presence in the hearing room. However, there are many cases where credibility is resolved without regard to the hearing room demeanor and attitude of a witness or witnesses. Under those circumstances, a reviewer may be in just as good a position as the hearing officer to make the necessary credibility determination. OSHAB feels that it should be able to address credibility determinations which are not primarily demeanor-based where the party on reconsideration demonstrates there is some error in the finding. Codification of the Universal Camera ruling will only create a series of sub-issues, e.g., what is demeanor-based, what is credibility-based, and detract from the agency's ability to make case-by-case evaluations.

Thank you for this opportunity to express our views on these matters. Our Acting Presiding Administrative Law Judge, Stuart A. Wein, plans to attend your Los Angeles meeting and would be pleased to answer any questions you might have concerning OSHAB.

Yours very truly,

Elaine W. Donaldson

Elaine W. Donaldson,
Chairman

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