

Memorandum 90-71

Subject: Study N-102 - Application of Administrative Procedure Act
(Application to University of California)

The Commission has made a tentative decision to draft the new Administrative Procedure Act so that it will apply to the University of California as well as to other state agencies, and has invited the University to comment on this concept. Attached to this memorandum is a letter from Philip E. Spiekerman of the Office of the General Counsel of the Regents. Mr. Spiekerman plans to attend the Commission's July meeting to respond to questions or concerns the Commission may have about the applicability of the Administrative Procedure Act to the University.

In brief, Mr. Spiekerman's letter indicates that (1) the Legislature is constitutionally proscribed from applying the Administrative Procedure Act to the University; (2) regardless of the Constitution, the unique kinds of student and faculty issues the University deals with are not amenable to standard Administrative Procedure Act treatment; and (3) the University will oppose any effort to apply the Administrative Procedure Act to it.

The staff questions the uniqueness of the issues faced by the University since they are pretty much the same as issues faced by the State University system, the Community College system, and school districts, all of which are to various degrees subject to the current Administrative Procedure Act.

However, the staff agrees with Mr. Spiekerman's analysis that the Legislature may not constitutionally require the University to adhere to the Administrative Procedure Act. The staff has previously and independently made the same analysis and come to the same conclusion, which it presented to the Commission at the April 1990 meeting. For this reason, the staff renews its recommendation that the University of California be exempted from application of the Administrative Procedure Act, thus:

§ 615.010. Application of division to state

615.010. Except as otherwise expressly provided by statute:

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

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

(c) This division ~~applies~~ does not apply to the University of California.

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

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

Subdivision (b) supersedes Section 11342(a). It is drawn from 1981 Model State APA § 1-102(1). Express exclusions from the application of this division are the Legislature, the courts, and the Governor. Note that it is only "the Legislature", "the courts", and "the Governor", that are excluded, and not "the legislative branch", "the judicial branch", and "office of the Governor", and that exemptions from the division are to be construed narrowly. For an express statutory exception to the Governor's exemption from this division, see Bus. & Prof. Code § 106.5 ("The proceedings for removal [by the Governor of a board member in the Department of Consumer Affairs] shall be conducted in accordance with the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the Governor shall have all the powers granted therein.")

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

Subdivision (c) recognizes that the University of California enjoys a constitutional exemption. See Cal. Const. Art. 9, § 9 (University of California a public trust with full powers of government, free of legislative control, and independent in administration of its affairs). Nothing in this section precludes the University of California or any other exempt agency of the state from electing to be governed by this division. See Section 615.030.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

CA LAW REV. COMM'T

OFFICE OF THE GENERAL COUNSEL

JUL 11 1990

RECEIVED



James E. Holst
GENERAL COUNSEL

July 9, 1990

California Law Review Commission
4000 Middlefield Road, Room D2
Palo Alto, CA 94303-4739

Re: California Administrative Procedure
Act/University of California

Ladies and Gentlemen:

The University has been informed that in the course of reviewing and possibly recommending revisions to the California Administrative Procedure Act (hereafter "APA"), the Law Review Commission is seriously considering a proposal to encompass the University of California within the provisions of a revised APA. No definite decisions along these lines have yet been made; at this early stage of review the University has been invited to provide its position on this matter. As this letter will explain, it is well settled that regulation of the kind being considered would not be permitted by the California Constitution.

As you know, the University is not currently subject to the APA; it, therefore, adheres to University rather than APA promulgated procedures. The University is not a "state board, commission or officer" as these terms are used in Government Code section 11500, subdivision (a). The Legislature has not purported to make the APA applicable to the University.

If the Legislature attempted to do so, its legislation subjecting the University to the APA would not be constitutionally valid. The University asserts this position for principled and practical reasons. On the basis of principle, it is important that the University maintain its independence in order to safeguard its stature and productivity. From a practical point of view, the University's rules affect only a certain class of people (academics, students, and University employees). It would be extremely burdensome and costly to the University if it

had to follow APA procedures. The University has developed and implemented its own administrative and adjudicatory procedures that are effective, and, particularly with respect to adjudicatory matters, are fair and consistent with due process.

The California Constitution reposes in the University nearly exclusive responsibility and authority for self-governance. The California Supreme Court has stated:

"Article IX, section 9 provides: '(a) The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services. . . .'

"Article IX, section 9, grants the regents broad powers to organize and govern the university and limits the Legislature's power to regulate either the university or the regents. This contrasts with the comprehensive power of regulation the Legislature possesses over other state agencies.

"The courts have also recognized the broad powers conferred upon the regents as well as the university's general immunity from legislative regulation. '. . . "[T]he power of the Regents to operate, control, and administer the University is virtually exclusive. [Citations.]'" (San Francisco Labor Council v. Regents of University of California (1980) 26 Cal.3d 785, 788; original emphasis in first paragraph, emphasis added in second paragraph.)

"Thus, the University is intended to operate as independently of the state as possible." (Tafoya v. Hastings College (1987) 191 Cal.App.3d 437, 443.) In fact, with respect to matters of internal regulation, University policies have been characterized as enjoying a status equivalent to that of state statutes. (Regents of University of California v. City of Santa Monica (1978) 77 Cal.App.3d 130, 135.)

In addition to the areas of legislative control enumerated in the Constitution, there are limited implied categories of permissible regulation of the University by the Legislature:

" . . . the university is not completely free from legislative regulation. In addition to the specific provisions set forth in article IX, section 9, there are three areas of legislative regulation. First, the Legislature is vested with the power of appropriation, preventing the regents from compelling appropriations for salaries. [Citations.]

"Second, it is well settled that general police power regulations governing private persons and corporations may be applied to the university. [Citations.] For example, workers' compensation laws applicable to the private sector may be made applicable to the university.

"Third, legislation regulating public agency activity not generally applicable to the public may be made applicable to the university when the legislation regulates matters of statewide concern not involving internal university affairs. [Citation.]" (San Francisco Labor Council v. Regents of University of California, *supra*, at p. 789.)

The APA does not fall within any of the constitutionally recognized categories of permissible legislative regulation of the University. Nor does it fall within any of the three categories of implied legislative authority enumerated in San Francisco Labor Council. The APA is not related to appropriation of funds. The APA is not a general police power regulation. And, while it is directed to "public agency activity," the APA, if applied to the University, would regulate "matters of statewide concern . . . involving internal university affairs." It thus would run afoul of the University's constitutionally recognized full powers of self-governance.

The University's virtual autonomy in self-governance has been consistently recognized by California courts. San Francisco Labor Council, *supra*, cites many of the relevant court holdings. See particularly Regents of University of California v. City of Santa Monica (1978) 77 Cal.App.3d 130; Cal. State Employees' Assn. v. Regents of University of California (1968) 267 Cal.App.2d 667; Ishimatsu v. Regents of University of California (1968) 266 Cal.App.2d 854, 863-864; Goldberg v. Regents of the

University of California (1967) 248 Cal.App.2d 867; 30 Ops.Cal.Atty.Gen. 162, 166 (1957).

As noted above, the need for independence from the APA is grounded, in many instances, on practical considerations. Certain issues arising out of University activities that might be the subject of APA hearing procedures are so unique to the University that it would make no sense to invoke those procedures. Decisions relating to faculty appointment, tenure, and promotion, for instance, are of great significance to the University and generate issues that must be and are addressed by University academics with the requisite expertise to most effectively handle these matters. Such matters are addressed within the framework of shared governance between the University's academic administrators and Academic Senate. Decisions in this area, and any associated hearings, are thus effected in cooperation with the University's Academic Senate. It would not be appropriate for a nonacademic administrative law judge to address such matters. The University would resist any attempt to force relinquishment of its role in this area.

The following constitute other areas of unique significance to the University: academic grievance and disciplinary matters; personnel actions relating to researchers and instructors who are not members of the University's Academic Senate; student disciplinary matters; student grade grievances; issues relating to student admissions, advancement, and degrees; student housing matters.

For the legal reasons discussed above, the University's position is that the Legislature is not empowered to require the University to abide by the APA. For the practical reasons referred to above, the University's position is that there should be no attempt to make the APA applicable to the University.

The University of California is often characterized as the premier public university in this country. Its faculty, its students, and its research have made great contributions to the welfare of this state and nation. It is recognized throughout the world for its academic excellence. The University has achieved its prominence in no small part because of its independence and freedom from legislative intrusion and control. As noted above, this independence has been consistently recognized by California courts. Indeed, the University has been characterized as a fourth branch of the state government


California Law Review Commission
July 9, 1990
Page 5

and as a constitutional corporation constituting a branch of the state government equal and coordinate with the Legislature, the judiciary, and the executive.

At a time when the need for quality higher education is recognized as being of paramount significance to the health and welfare of this nation, it would be unwise to attempt to impose outside controls upon a university that has achieved so much through self-governance. The University is prepared to defend its constitutionally sanctioned self-governance.

During your meeting on July 27, 1990, I will be available to respond to questions or concerns you may have about the applicability of the APA to the University.

Sincerely,


Philip E. Spiekerman
University Counsel

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