#N-103

ns97
05/30/90

Second Supplement to Memorandum 90-72

Subject: Study N-103 - Administrative Adjudication (Central Panel--views of agencies and others)

Attached to this memorandum are letters concerning the concept of using central panel hearing officers for various agencies. The letters include comments from the following agencies:

Coastal Commission, California
Corporations, Department of
Franchise Tax Board
Health and Welfare Agency
    Social Services, Department of
    Health Services, Department of
    Developmental Services, Department of
    Rehabilitation, Department of
    Statewide Health Planning and Development, Office of
    Aging, Department of
    Unemployment Insurance Appeals Board, California
    Employment Development Department
    Emergency Medical Services Authority
Oil and Gas, Division of
Public Employment Relations Board
Public Utilities Commission
State Board of Equalization
State Personnel Board, California
Transportation, Department of
Water Resources, Department of

Also included are comments from the following administrative law judges:

Moore, Barbara D. (Agriculture Labor Relations Board)
Schlossberg, David (Department of Social Services)
Sobel, Thomas (Agriculture Labor Relations Board)
Wolpman, Jim (Agriculture Labor Relations Board)
Wyler, Paul (Unemployment Insurance Appeals Board)

Because of the volume of material and the shortness of time, the staff has not prepared an analysis of these letter for this meeting.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

STATE OF CALIFORNIA—THE RESOURCES AGENCY GEORGE DEUKMEJIAN, Governor

CALIFORNIA COASTAL COMMISSION
631 HOWARD STREET, 4TH FLOOR
SAN FRANCISCO, CA 94105
(415) 543-8555

May 29, 1990

Edwin K. Marzdec
Chairperson
California Law Revision Commission
400 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Marzdec:

I am responding to the California Law Revision Commission's proposal that state agency hearings be conducted by an administrative law judge employed by the Office of Administrative Hearings (OAH). Based on over seventeen years experience with the Coastal Commission and other State agencies, I would strongly oppose the proposal. Requiring all Coastal Commission hearings to be conducted by an ALJ would be inefficient, extremely costly, add unnecessary and unwarranted red tape to an already complex process, and would cause hardships and delays for members of the public, development permit applicants, other public agencies and especially local governments.

In your letter of May 3 you set forth several reasons to support use of a central panel of administrative law judges to conduct administrative hearings. I question several of those arguments as being essentially self-serving and not based on fact. Simply having an ALJ conduct a hearing does not guarantee fairness. More importantly, administrative hearings held without an ALJ can and do, with some exceptions, I am sure, assure fairness. I strongly believe that the hearings of many agencies (e.g. the Coastal Commission, the San Francisco Bay Conservation and Development Commission, the Coastal Conservancy) provide relatively more fairness because they are less formal, less structured, more easily understood, easier to participate in without the need to be represented by an attorney and less costly than are ALJ hearings. In my view, the assumptions implicit in the argument that only hearings conducted by an ALJ can provide fairness are not warranted.

Additional arguments in support of the proposal include economic savings, greater professionalization of the ALJ corps, and a record of success. I am convinced using ALJs for Coastal Commission hearings will significantly increase the costs of such hearings to the State of California, local governments, the public wishing to participate in the process and permit applicants. The Coastal Commission currently conducts dozens of public hearings at each of its monthly meetings (each meeting usually lasts four days). These hearings are conducted without the formality of Administrative Procedure Act procedures such as cross examination or formal introduction of evidence. Obviously, using ALJs for such hearings together

with APA procedures would substantially lengthen the time needed to conduct them and would make them much more expensive.

As to the purported rationale of "professionalization", I suggest that as beneficial as that may be for reasons of benefit to the individual ALJs, this is not a good reason to embark on a costly, new procedural path with few, if any, real general public benefits. Finally, as to the record of success, I would question that conclusion as well. Certainly the use of ALJs from the Office of Administrative Hearings by the Agricultural Labor Relations Board in the '70s during that agency's start-up period proved to be a dismal failure. I am certain that like the ALRB, if such a requirement were to be imposed on the Coastal Commission it would have to add hearing officers to its own staff. The specialized knowledge required to implement the land and water use policies of the Coastal Act are so unique that using OAH hearing officers would be unworkable.

In conclusion, I sincerely believe this proposal lacks merit. I would hope the Law Revision Commission will identify ways to simplify administrative procedures and not find ways to make them more costly and cumbersome. I could expand on all the points made here if that is necessary. Suffice it to say, I hope this proposal is given a quiet but expeditious burial.

Sincerely,

PETER M. DOUGLAS
Executive Director

cc. Members, California Coastal Commission
Alan Pendleton, ED, BCDC
Peter Grenell, EO, Coastal Conservancy

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, *Governor*

DEPARTMENT OF CORPORATIONS

IN REPLY REFER TO:

FILE NO: _____ _____

May 29, 1990

Edwin K. Marzec, Chair
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94303-4739

Re: Proposal to Create Central Panel of Administrative Law Judges

Dear Mr. Marzec:

This letter is in response to the proposal to be considered by the California Law Revision Commission concerning the creation of a single administrative law judge corps under the jurisdiction of the Office of Administrative Hearings. While the Department of Corporations currently utilizes the services of the Office of Administrative Hearings under the various laws administered by it, in one instance under the Corporate Securities Law of 1968 the Commissioner of Corporations is expressly authorized to approve the terms and conditions of a securities issuance or exchange in what is called a "Section 3(a)(10) hearing" authorized by the federal Securities Act of 1933. Section 3(a)(10) provides an exception from the federal securities registration requirement under the Securities Act of 1933 where the approval of the transaction is subject to a fairness hearing by a state or federal court or governmental authority authorized by law to grant such approval. Specifically, Section 25142 of the Corporations Code establishes this hearing authority as exclusive to the Commissioner of Corporations as the state securities law administrator. Accordingly, if the Office of Administrative Hearings is to be authorized to preside over all hearings, an exception should be made for the above-described hearings under the Corporate Securities Law of 1968.

Very truly yours,

WILLIAM KENEFICK
Assistant Commissioner
(916) 322-3633

WK:kw

LOS ANGELES 90010
3700 WILSHIRE BOULEVARD
(213) 736-2741

SACRAMENTO 95814-3860
1115 11th STREET
(916) 445-7205

SAN DIEGO 92101-3697
1350 FRONT STREET
(619) 237-7341

SAN FRANCISCO 94102-5389
1390 MARKET STREET
(415) 557-3787

STATE OF CALIFORNIA
FRANCHISE TAX BOARD
SACRAMENTO, CALIFORNIA 95867

May 30, 1990

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

Attention: Edwin K. Marzec
Chairperson

RE: Conduct of Administrative Hearings

Dear Mr. Marzec:

Your letter of May 3, 1990, to State Controller and Chairman of the Franchise Tax Board, Gray Davis, concerning administrative law judges holding all administrative hearings in California has been referred to me for reply.

As Executive Officer of the Franchise Tax Board, I believe implementation of this proposal would be less beneficial to taxpayers and the State than our current system. At present, an individual or corporate taxpayer may protest a proposed increase in tax liability and have a hearing before an agency representative. The assigned hearing officer is specifically educated in the complexity of the applicable tax law. He or she is also aware that all taxpayer information is required by statute to be kept confidential. In addition, these hearings are generally conducted by department personnel working at seventeen District Offices throughout California and at our out-of-state facilities in New York, Chicago and Houston. In 1988 some 36,000 protests were filed. Although many protests are resolved without a hearing, the more difficult cases usually require a conference of some sort. Therefore, considering the factors of educational specialization, confidentiality of information, geographical demands and number of hearings, it would appear that substituting a corps of administrative law judges for the current system could result in higher costs and a possible reduction in the quality of service due the taxpaying public.

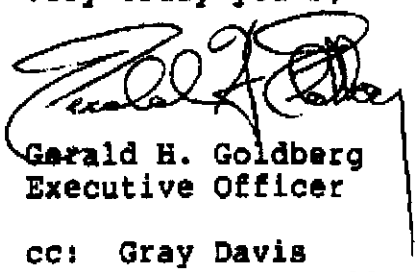
A key reason cited in your letter advocating centralization is that a neutral hearing officer can help achieve both fairness and the appearance of fairness. Under our present system, fairness

is a quality required on the part of the Franchise Tax Board. It is a "requirement" because a taxpayer who is dissatisfied with the results of a department hearing can statutorily appeal that decision to another agency, the California State Board of Equalization. As an independent administrative body, that Board's review and appellate function dictates that all departmental decisions be based solely on the proper application of the tax law.

The quality of fairness and neutrality of department hearing officers has been further aided by the recent passage of the Taxpayer's Bill of Rights. Revenue and Taxation Code § 21008 specifically provides that an employee of the Franchise Tax Board cannot be evaluated based upon additional tax assessments or collections. Therefore, a career path is not impeded by any adverse decision rendered by a hearing officer of this agency. Furthermore, past statistics reflect that a significant number of audit determinations are reversed or revised at the hearing officer level, an additional indication that hearing officers are bias free.

The concept of a central panel of administrative law judges may be appropriate for some state agencies. It does not, however, provide any significant advantages that would justify substituting it for the process now in place regarding administrative hearings held by the Franchise Tax Board.

Very truly yours,



Gerald H. Goldberg
Executive Officer

cc: Gray Davis
State Controller

GEORGE DEUKMEJIAN, *Governor*

STATE OF CALIFORNIA

HEALTH and WELFARE AGENCY
OFFICE OF THE SECRETARY
1600 NINTH STREET, ROOM 460
Sacramento, California 95814
(916) 445-6951

MAY 30 1990

CA LAW REV. COMM'N

MAY 30 1990

RECEIVED

Edwin K. Marzec
Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Dear Mr. Marzec:

I am writing in response to your May 3, 1990 letter regarding the proposal which would require all administrative agency hearings to be conducted by the Office of Administrative Hearings in the Department of General Services.

The Health and Welfare Agency is opposed to this proposal of consolidating all hearings to the Office of Administrative Hearings. The intent of such a consolidation is to be commended. However, we believe that the systems we currently have in place result in hearings being conducted expeditiously. In addition these hearings are conducted by impartial, effective experts in a variety of fields. We have attached individual responses from the Departments within our Agency which details the specific reasons for our opposition.

We appreciate the opportunity to comment on this proposal, please keep me informed on the Commission's recommendations. If you have any further questions, please contact John Ramey, Deputy Secretary at (916) 445-0196.

Sincerely,

CLIFFORD L. ALLENBY
Secretary

cc: See next page

cc: California Unemployment Insurance Appeals Board
Department of Aging
Department of Developmental Services
Department of Health Services
Department of Rehabilitation
Department of Social Services
Emergency Medical Services Authority
Employment Development Department
Office of Statewide Health Planning

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY

DEPARTMENT OF SOCIAL SERVICES
744 P Street, M.S. 17-50, Sacramento, CA 95814

May 23, 1990

Edwin K. Marzec
Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Dear Mr. Marzec:

I am writing in response to your May 3, 1990 letter regarding the proposal to remove all agency Administrative Law Judges (ALJs) to a central panel.

The Department of Social Services (DSS) is opposed to the reassignment of ALJs employed by the agency to a central panel. While the current central panel that exists in the Office of Administrative Hearings (OAH) works well for our licensing matters, we do not believe that DSS ALJs who hear public assistance cases should be removed to a central panel.

One of the major reasons we are opposed to this proposal is based on the nature of public assistance cases and the unique system which has been established by Goldberg v. Kelly and federal law. Public Assistance cases differ from other administrative law areas in several respects: 1) it is a poverty law area and for this reason private attorneys rarely handle such cases; claimants appear unrepresented in approximately 90% of the hearings; 2) the DSS is the single state agency responsible for the fulfillment of the hearing provisions set forth in federal regulations; 3) the hearings are required by Goldberg v. Kelly to be informal and "tailored to the capacities and circumstances of those who are to be heard," and 4) because claimants may be destitute, disputes must be resolved in a speedy manner. Federal and state laws require that all hearing requests be scheduled for hearing and a decision issued within 90 days of the filing date. In Food Stamp cases, a 60-day requirement exists.

As a result of this unique system, public assistance cases have been exempt from many of the central panels created in other states. For example, when the central panel was created in Minnesota, the agency that conducts public assistance hearings was exempt because the then United States Department of Health, Education and Welfare threatened to withhold all federal funds

unless the Minnesota Department of Human Services was allowed to have its own employees conduct the appeals. This contention was also raised in the debate over the creation of a central panel in New York.

Although there are a few states which have included welfare cases in their central panel, the volume of cases heard by these agencies is very low. While a central panel may improve efficiency in processing cases for those agencies that require only a limited number of cases, it is not geared to agencies with a high volume/mandatory time requirement caseload. The DSS receives approximately 45,000 to 50,000 appeals each year and conducts 9,000 to 10,000 hearings per year. As I have previously mentioned, these appeals must be processed, scheduled and decided within 90 days of the appeal. As a result, extensive case processing and calendaring procedures have been implemented to deal with this volume in a timely manner. DSS is the single state agency responsible for the timely resolution of these appeals and such accountability would be lost if the agency no longer had control over case processing. While including DSS in a central panel would probably not improve our case processing ability, it may adversely affect it.

An additional reason for opposing a reassignment of DSS ALJs is the expertise or specialization required to hear welfare appeals. Social Services' ALJs conduct hearings in a wide variety of programs. These programs include Aid to Families with Dependent Children, Food Stamps, Food Stamp Intentional Program Violations, Medi-Cal, Medi-Cal Disability, In-Home Supportive Services, Child Welfare Services, Refugee Assistance, Foster Care Rates Hearings, and County Audit Appeals. The ALJs are dealing with a large, complex and constantly changing body of law, regulations and policy letters. The lack of legal representation in the hearings requires the ALJs to take a much more active role in the conduct of the hearings in order to ensure that the full factual picture is presented. This requires a detailed understanding of a complex body of law.

The key argument offered in support of the central panel is that a neutral hearing officer can help achieve fairness and the appearance of fairness and that an ALJ's career path should not be controlled by the agency against which the ALJ may make an adverse decision.

The DSS resolves disputes between public assistance recipients and county welfare departments. The DSS is not a party to the disputes addressed by the ALJs. Although the state does provide a portion of the funds for welfare benefits, the funding is a combination of federal-state-county funds for some programs and 100% federal funding for Food Stamp benefits. Therefore, we agree with Professor Asimow's conclusion that a central panel is best suited for licensing agencies that exercise prosecutorial

functions and not for benefit-disbursement agencies which do not exercise strongly conflicting functions.

Professor Asimow also points out that there is no history in California of the independence of ALJs being compromised by the agencies for which they work. The DSS has taken several steps to ensure the independence of its ALJs. A separate division was created within the department for the ALJs and the adjudications function. This division is separate from our program bureaus and legal division. The Welfare and Institutions Code was also revised to provide that ALJs shall prepare fair, impartial, and independent proposed decisions. Finally, in 1986 when our staff was reclassified from hearing officers to ALJs, I delegated final decision authority to the ALJs for certain routine cases. In 1988, a further delegation was made to the Supervising ALJs to adopt some of the more difficult cases. Therefore, the ALJs are issuing decisions based on their own findings and in a majority of the cases, the decisions are adopted as final by the ALJ or the Supervising ALJ.

We also agree with your consultant's conclusion that the cost savings that could result from a central panel may be illusory. The cost of implementing a central panel in California is likely to be significant given the number of ALJs and hearing officers and the different civil service classifications. Since there appears to be little information available regarding the fiscal impact of the proposal, we would urge that the central panel not include those agencies whose functions have been traditionally exempt in other central panel states and where it has not been established that the independence of the decision-making process has been compromised by the present system.

With regard to the concept that professionalism of the ALJ corps might be enhanced by expanding the central panel, it would seem that this objective could certainly be achieved without the necessity of being removed to a central panel. Currently, the Chief ALJs from various agencies are discussing with the State Bar the possibility of reviving the Administrative Law College as a statewide training vehicle for all ALJs. The College could certainly be used to enhance the professionalism of the ALJ corps by providing for education and training.

The state hearing process is intended to provide an aggrieved welfare recipient with a speedy and informal means to challenge an administrative action which may reduce or terminate vitally needed benefits. Given the nature of public assistance cases and

the unique system established by federal law, it has been exempt from many of the central panels created in other states for the reasons set forth in this letter. We believe that the objectives of the administrative law decision-making process are fulfilled by the present system established within our agency.

Thank you for the opportunity to comment on the ALJ central panel proposal; please keep me informed of the Commission's recommendations and if you have any further questions, please contact Mr. Thomas Wilcock, Chief Administrative Law Judge at (916) 322-7247.

Sincerely,

for LINDA S. McMAHON
Director

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF HEALTH SERVICES
714/744 P STREET
P.O. BOX 942732
SACRAMENTO, CA 94234-7320
(916) 445-1248

Mr. Edwin K. Marzec
Chairperson, California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Marzec:

EMPLOYMENT OF ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS

This is in response to your letter of May 3, 1990, regarding the captioned matter. Thank you for this opportunity to share this Department's concerns regarding the employment of Administrative Law Judges (ALJs).

The Department of Health Services opposes the creation of a central panel of ALJs for several reasons. First, a central panel would be more costly to operate. All state agencies are now operating in an era of toughening fiscal constraints, a state of affairs not likely to improve in the foreseeable future. This Department in particular, with its high-cost and high-profile programs, is required to scrutinize its budget carefully and maximize its return for every dollar spent. We have had occasion to utilize the services of the Office of Administrative Hearings (OAH) when in-house workload required it. Although the hearings were professionally and competently handled, the administrative expenses were significantly higher than they would have been had in-house ALJs been employed. We can only assume that a central panel would have expenses similar to those of OAH and would be required to pass those along to the agencies served. Such an increase in costs would be unacceptable. It should be noted that having our ALJs employed by the Department permits management easily to adjust ALJ work assignments to accommodate fluctuating caseloads, thereby assuring full utilization of staff resources.

Second, the issues heard by our small, stable staff of ALJs are often technically very complex and require a high level of expertise in constantly evolving areas of the law, expertise which can be gained only through years of experience and continuous involvement. Each of our current staff has at least 10 uninterrupted years experience in the health law field, most of which was earned as ALJs adjudicating disputes involving a variety of programs. Even if a centralized panel were divided into various specializations, this high level of expertise would become diluted as staff inevitably rotated among the divisions within the

panel. Loss of this advantage would lead to more incorrect decisions which in turn would increase program and litigation expenses to both the state and the affected appellants.

Third, it is vitally important that this Department carefully monitor and control case calendaring and decision preparation time frames. The statute controlling most of our administrative hearing process imposes strict time frames for hearing and decision, and the penalties for failure to adhere to them can result in significant reductions in overpayment recoveries by the Department. It is important that our hearings be unencumbered by competing demands to assure that cases are swiftly and efficiently adjudicated, and that statutory time frames are routinely met. It is also important that the non-ALJ managers responsible for case calendaring and time frame monitoring be directly answerable to the agency that will bear the cost of any penalties. From the standpoint of effective, reasonable management, the Department must oppose any proposal that would punish one agency for the inability of another agency to meet deadlines.

Finally, the Department is unconvinced that creation of a centralized panel is necessary to achieve fairness or the appearance of fairness, or to increase the professionalism of our ALJs. Many of the issues currently heard by our ALJ staff involve millions of dollars, and, as you might imagine, a highly competent, aggressive adversarial bar has developed to represent appellants in these cases. Yet in the 15+ years that our administrative hearings have been held by "captive" ALJs, challenges to their fairness have been extremely rare and invariably unsuccessful. A good, objective measure of the impartiality, independence and professionalism of the Department's ALJs is the simple fact that the appellants and their legal representatives are, to an overwhelming extent, satisfied that they are receiving fair hearings and correct, impartial decisions.

In conclusion, this Department and the public served by the in-house ALJs are satisfied that the current administrative hearing system operates efficiently and fairly. We are constantly looking for ways to improve our hearing system and, through

training, the adjudicatory skills of our ALJ staff, but feel that no fundamental and potentially costly changes are needed. Again, thank you for this opportunity to comment on this proposal. If you have any further questions, please do not hesitate to contact Elisabeth C. Brandt, Deputy Director and Chief Counsel (Telephone: (916) 322-2784).

Sincerely,

Tamera Mitchell

for Kenneth W. Kizer, M.D., M.P.H.
Director

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF DEVELOPMENTAL SERVICES
1600 9TH STREET
SACRAMENTO, CA 95814
TTY 323-5901 (For the Hearing Impaired)

(916) 323-3131

Edwin K. Marzec, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Marzec:

CONDUCT OF ADMINISTRATIVE HEARINGS

This is in response to your letter of May 3, 1990, regarding proposed legislation which would require all administrative agency hearings to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

The proposed legislation could significantly impact our department, depending on which state agency hearings are subject to review by the Office of Administrative Hearings. Consequently, clarification needs to be provided. For example, pursuant to Welfare and Institutions Code sections 4690.2, 4691 and 4745, the department is required to provide a process for service providers to appeal various actions taken by the department, and the regional centers which contract with the providers for provision of services to developmentally disabled individuals. The appeal processes specified in those statutes as well as the department's regulations under Title 17 of the California Code of Regulations, provide for and contemplate a less formal process than would be required if the hearings were conducted by the Office of Administrative Hearings. Due process is afforded to the providers through these appeal mechanisms, and they comply with the intentions of the Legislature in requiring the department to establish such a process. To require the department to provide a more formalized process seems inappropriate under the circumstances, and would result in an unnecessary increase in cost as well as potential delays in providing the required review.

Although the department does currently use the Office of Administrative Hearings for the purpose of conducting client fair hearings and fiscal audit appeals pursuant to Welfare and Institutions Code sections 4700 et seq., and 4640.2, we question

the need for such a formalized process for all of our state agency hearings. The critical issue is whether due process is being provided to the affected individuals. If it is, and if it can be provided in a less formal process, nothing more should be required. We are especially concerned about this proposal because of the impact it could have, not only on our existing regulations, but also on proposed regulations which the department is in the process of developing.

Thank you for the opportunity to provide our comments to you regarding this proposal. If you need more information, or if I may be of further assistance, please do not hesitate to contact me.

Sincerely,

GARY D. MACOMBER
Director
Office of the Director

State of California - Health and Welfare Agency GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF REHABILITATION
830 K Street Mall, Room 322
Attn: Legal Affairs
Sacramento, CA 95814
(916) 445-0187

May 23, 1990

Edwin K. Marzec, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Marzec:

RE: Administrative Hearings

This letter responds to your letter dated May 3 regarding conduct of administrative hearings. The Department is strongly opposed to the proposal you are considering recommending to the legislature that if an administrative hearing of a state agency is required by statute, the hearing must be conducted by an administrative law judge employed by the Office of Administrative Hearings (OAH).

We are familiar with the hearing office section of OAH because they conduct hearings for us under the Direct Services Contracts Act, Health and Safety Code Section 38050, primarily audit appeals by non-profit organizations. They have done an excellent job for us over the last five years.

However, the requirement of an ALJ corps, or central panel, would eliminate the Department of Rehabilitation's statutorily created Board which currently hears client appeals pursuant to Welfare and Institutions Code sections 19700 et seq. The Department is opposed to your proposed recommendation for the following reasons:

1) The legislature itself intended the use of lay people to adjudicate rehabilitation appeals. A majority of the Board members are disabled persons who have overcome their disabilities. Those who are not disabled have been selected for their interest and leadership in activities which encourage and enable the disabled and otherwise disadvantaged to participate fully in the economic and social life of the community.

2) The preparation time for a formal hearing conducted under the Administrative Procedure Act or similar statute would cause the Department to be out of compliance with the federal requirement to hold hearings within 45 days of the request (34 C.F.R. section 361.48).

3) The community of people with disabilities prefers the Department's procedure of informal hearings which can be adapted to individual needs, where appellants are not required to hire an attorney or any other representative, and the rules of evidence do not apply. The informal atmosphere allows appellants to explain their situation to people who have had experience with similar problems. Additionally, the Vocational

Rehabilitation Appeals Board has been able to recommend changes in policy to aid the Department in providing better services to the community of people with disabilities.

4) The existence of the Board is fiscally prudent as Board members are paid only for hearings attended and are not salaried employees.

5) Your letter notes that a key argument for a central panel of administrative law judges is the provision of a neutral hearing officer. The Vocational Rehabilitation Appeals Board currently provides neutral hearings. The Board members are not employees of the Department of Rehabilitation. Their careers are not dependent upon employment by the State of California. Extremely specialized training has been provided to the Board by the Institute of Administrative Law, McGeorge School of Law. This training in administrative hearing procedure and technique has given the Board members the perspective of impartial hearing officers with special expertise in the issues of disabilities and vocational rehabilitation. Additionally, the members have personal experience with the problems of employment and disability. The Commission's letter recognizes the concern that a hearing officer may need familiarity with an individual agency which would require specialized training. Continued use of Board members selected by the criteria of the Welfare and Institutions Code eliminates any need to train additional hearing officers in the problems of the disabled.

In conclusion, the Vocational Rehabilitation Appeals Board has served the Department for twenty-one years. Both the Department and the disabled community which it serves prefer the unique, informal, non-legalistic forum of the Board for resolving client appeals. The Department encourages you not to make the recommendations you are considering to the legislature.

If you need additional information, please contact me at (916) 445-0186.

Very Truly Yours,

Elizabeth A. Solstad

ELIZABETH A. SOLSTAD
CHIEF COUNSEL

STATE OF CALIFORNIA--HEALTH AND WELFARE AGENCY GEORGE DEUKMEJIAN, Governor

OFFICE OF STATEWIDE HEALTH PLANNING AND DEVELOPMENT
1600 9TH STREET
SACRAMENTO, CA 95814
(916) 322-5834

MAY 24 1990

Edwin K. Marzec, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Marzec:

I am writing to express the concerns of the Office of Statewide Health Planning and Development about the proposal regarding the conduct of administrative hearings that the California Law Revision Commission is considering recommending to the Legislature. The proposal basically has two elements. First, if an administrative hearing of a state agency is required by statute, the hearing would have to be conducted by an administrative law judge. Second, all administrative law judges would be part of a central panel employed and assigned by the Office of Administrative Hearings in the Department of General Services. Although my office has no real concerns about the second part of the possible proposal, we do have serious reservations about the first element.

There are two types of appeals made to our Office that by statute are provided an administrative hearing. First, pursuant to Health and Safety Code Section 443.37, any health facility affected by any determination made under the Health Data and Advisory Council Consolidation Act may petition the Office for review. The hearing shall be held before an employee of the Office, a hearing officer employed by the Office of Administrative Hearings, or a committee of the California Health Policy and Data Advisory Commission (CHPDAC). The Commission members are appointed by the Governor and the Legislature, and represent various facets of the health care field and the general public. In practice, the decisions that are appealed are penalty assessments for late filing of mandatory reports. The Office's policy has been to have such penalty appeals heard by a committee of the Commission. The proposal being considered would, if adopted, force us to change this practice.

Additionally, Health and Safety Code Section 15080 establishes a Building Safety Board to advise the office and act as a board of appeals with regard to seismic safety of hospitals. The Board "shall act as a board of appeals in all matters relating to the administration and enforcement of building standards relating to hospital buildings..." (H & S Code Section 15080). This Board is

comprised of 17 members appointed by the Director of the Office and six ex officio members (non-voting) who are members by virtue of their positions in state government. The appointive members must be from various specified professional categories, with the exception of four general members. The proposal being considered would also prohibit this Board from performing its mandated function.

The Office feels strongly that each of these panels is currently functioning extremely effectively. The members are experts in their field and are fair and objective. Because they are appointed for their professional expertise and experience, their judgement is respected. As the Law Revision Commission recognizes, a key concern with the central panel idea is that it may not provide essential expertise in certain subject areas. The Office has found that using Commissioners and Board members, rather than Administrative Law Judges, to hear these two specific, technical types of appeals works very well, and that the appellants are satisfied with the processes.

We recognize the Law Revision Commission's concern that a hearing officer employed by an agency might have some difficulty in achieving fairness and the appearance of fairness in a matter involving the agency. However, the members of these panels are not employees of the Office. In the case of the CHPDAC members, they are not even appointed by the Office.

The Office also believes that having these impartial panels hear appeals is more efficient and economical than having an administrative law judge perform the same function, and it allows us to provide better service to our constituents. We can schedule appeals easily, and quickly if necessary, and at a time and place reasonably convenient to the petitioner. We have roughly between ten and twenty hearings each year and it would be both very cumbersome and very expensive for us to have to use the Office of Administrative Hearings for all of them.

We are also reluctant to make the hearing processes more formal and litigious. Currently our constituents make appropriate use of the appeals processes available to them. A more formal and expensive process, for which they would probably feel a need to retain an attorney, might have to wait longer, and might have to travel longer distances, could curtail the exercise of the important right to appeal. We would not like to impose such a burden on those we serve.

The Office of Statewide Health Planning and Development strongly urges the California Law Revision Commission not to recommend to the Legislature that all mandated appeals be heard by an Administrative Law Judge employed and assigned by the Office of Administrative Hearings.

MAY 24 1990

Thank you for the opportunity to comment on this possible proposal. If there are any questions, or if we can provide any clarification about our concerns, please feel free to contact Beth Herse of my legal staff at (916) 322-1212.

Sincerely,

Larry G. Meeks
Director

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF AGING
1600 K STREET
SACRAMENTO, CA 95814
TDD Only (916) 323-8913
Fax Only (916) 327-3661
(916) 322-5290

May 23, 1990

Mr. Edwin K. Marzec
Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Marzec:

CALIFORNIA LAW REVISION COMMISSION PROPOSAL THAT IF AN ADMINISTRATIVE HEARING OF A STATE AGENCY IS REQUIRED BY STATUTE THE HEARING MUST BE CONDUCTED FOR THE AGENCY BY AN ADMINISTRATIVE LAW JUDGE EMPLOYED AND ASSIGNED BY THE OFFICE OF ADMINISTRATIVE HEARINGS IN THE DEPARTMENT OF GENERAL SERVICES.

After looking into this matter, and discussions by our Chief Legal Counsel and Legislative Liaison we have determined the following:

The Department of Aging does not conduct administrative hearings, so the proposal does not affect the Department.

In the event that a departmental need for hearings were to arise, we would like to point out that one of the cornerstones of administrative law is flexible due process, that is, affording only that due process which is necessary. The flexibility arises both from the need to have a cost - effective hearing process where hearings are available and to afford only the due process necessary to the issues. For example when an interest deserves due process protection, only the procedures which protect that interest should be employed. In short, a full evidentiary hearing is not necessary in every case. It may be sufficient to send a letter and medical reports if the only issue is a medical condition to be reviewed or a formula to be applied by an expert.

Informal in person or telephone conferences may be sufficient where only facts and argument are sought. In Goss v Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed. 2nd 725 (1975) an informal conference with abbreviated notice and opportunity to present reasons against suspension from school was held constitutionally sufficient. There are numerous other examples of flexible due process in operation and the law is well settled that a trial-type hearing is not always necessary.

As for cost, the Office of Administrative Hearings charges administrative agencies $109 per hour for administrative law judge time whether for hearing time, pre-trial time, travel, or decision writing. That figure must be considered in the light of the number and type of cases to be heard.

Basically the arguments in favor of the Law Revision proposal are fairness, appearance of impartial administrative law judges, economies and emphasized professionalism for the Office of Administrative Hearings. The proposal may also result in additional staff for that office. Uniformity of due process afforded is not argued by the law revision proponents, but one need only look at the Article III court system to see that full evidentiary hearings are afforded in every case and a bottleneck in case disposition is the apparent result of that uniform standard.

Sincerely,

Chris Arnold

CHRIS ARNOLD
Acting Director

State of California - Health and Welfare Agency

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
714 P Street, Room 1750
P. O. Box 944275
Sacramento 94244-2750 (916) 445-5678

May 14, 1990

Edwin K. Marzec, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Administrative Law Judge Central Panel

Dear Mr. Marzec:

I am writing in response to your letter of May 5, 1990, and to provide you with this Board's position on the concept of removing all administrative law judges to a central panel.

Initially, we note that the central panel that exists in the Office of Administrative Hearings has proven quite effective in its current application. Doubtless, the panel could be expanded to include the adjudicatory functions of other agencies, where it can be established that the independence of the ALJs and the integrity of the decision-making process is compromised by the existing structure. We do not believe that such an argument can be made in the case of California Unemployment Insurance Appeals Board (CUIAB) ALJs and this Board would oppose the removal of its ALJs to a central panel.

You state in your letter that the central panel is a matter that has received strong support from a number of ALJs. Certainly, there are a number of individuals who favor the concept. Although CUIAB ALJs have not been polled on the subject, a significant number are known to oppose being removed to a central panel. Moreover, we note that Professor Asimow polled ALJs at two agencies (WCAB and PUC) where ALJs might have been considered likely to support a central panel and found that they actually opposed the idea by a margin of 47 to 37. Thus, while individual ALJ support provides, at most, a collateral reason for a central panel, it appears that even this marginal justification does not exist.

You state in your letter that a key argument for a central panel is that a neutral hearing officer can help achieve both fairness and the appearance of fairness. You note the particular significance of a situation where a hearing officer's career path may be controlled by the agency against which the officer may make an adverse decision.

We agree with these sentiments. We wish to draw your attention to the fact that the CUIAB is an independent and autonomous body. Its functions are purely adjudicatory. It enjoys the status of a department of state government. All parties to cases heard and decided by the CUIAB and its ALJs are external to it. All personnel matters such as hiring, promotions, assignments, etc., are performed within the CUIAB and are not subject to review, criticism, or any other type of input from any other entity, including the Employment Development Department. To underscore this point, in its status as a party, the EDD may file mandamus actions against the CUIAB in superior court. We are currently litigating four such cases, including two that have reached the court of appeals. Further, in an appropriate case, the CUIAB has and exercises the authority to declare EDD regulations invalid. The CUIAB also issues certain of its decisions as precedents which are binding on EDD for the legal principles set forth in those decisions.

You also state that centralization would result in greater economy. We seriously doubt that a central panel could adjudicate unemployment insurance and related disputes more economically than is currently being done by CUIAB. At the May 31 meeting, I will present figures citing a cost per disposition at CUIAB's lower authority and higher authority. These figures will be by the year for a multiyear period and will represent all costs associated with a disposition. I anticipate that the Commission's staff will have presented it with comparable figures from OAH so that the validity of this point can be examined in the light of hard data.

You note the success of the current central panel in OAH and state that professionalism of the ALJ corps might be enhanced by centralization. We do not doubt the success of OAH as presently constituted. We do not believe, however, that centralization would have any particular effect on professionalism. There are several factors which affect professionalism, not the least of which is an enlightened management. Most critical is the attitude of the ALJs themselves. For many years, CUIAB ALJs have had their own organization, the Administrative Law Judges Association. This group, which enjoys the full support of the Appeals Board itself, has

worked diligently to enhance the stature of ALJs and to provide for education and training, including scholarships to the National Judicial College. It sponsors an annual Forum, open to the public and aimed at the main CUIAB constituent groups, including organized labor, legal aid groups, employer management, and EDD staff. It is difficult to see how removal of CUIAB ALJs to a central panel would in any positive way affect ALJ professionalism.

You mention loss of expertise as a potential problem area. Specialization is a necessary factor in most areas of administrative adjudication, but it takes on an added dimension in the case of unemployment insurance and related law.

Currently, CUIAB's ALJs at the lower authority are calendared to hear 28 cases per week. Approximately 70% of all appeals are heard and decisions issued within 30 days of the appeal being filed. The time limit is a regulatory requirement of the federal Department of Labor. These time limits must be kept while providing full due process of law to the parties at every stage of the proceedings, including statutorily required statements of fact and reasons for decision in every decision. Thus, it is not simply a question of specialization but also one of what Professor Asimow termed an immense workload coupled with rigid time requirements.

The unemployment insurance program is a joint federal-state effort. The essential parameters of the program are set forth in federal law (26 USC 3301 et seq., 42 USC 501 et seq.). The administration for the program, including appeals, is federally funded. Only a fractional portion of CUIAB's funding comes from state funds, and then from dedicated monies. It would be difficult at best to provide funding to what would have to be a dedicated portion of the central panel devoted to CUIAB cases. A cumbersome bureaucratic apparatus would have to be constructed to sort out the funding morass that would result from centralization.

One of the opportunities presented by a central panel that makes the concept attractive is the variety of cases that its ALJs hear. Because of this, central panel ALJs presumably are less prone to job burnout than are ALJs who hear the same types of cases year in and year out. Currently, there is movement of ALJs among various agencies but the transfer procedure is slow and cumbersome. Perhaps an apparatus could be established to facilitate the movement of those ALJs who want to hear different cases to other agencies for a specified term. In this way, ALJs could get the variety and stimulation and avoid the burnout without the necessity of being removed to a central panel.

The complications noted above raise a larger question of the desirability for CUIAB ALJ centralization in the first place. The CUIAB is an organization that is now operating at a high level of efficiency, effectiveness, and economy. Centralization does not appear to offer any opportunities to improve an organization that is working well now. The ills that a central panel has proven to cure so well are not present in CUIAB.

Thank you for the opportunity to comment on the ALJ central panel concept. We look forward to meeting with you on May 31.

Very truly yours,

TIM McARDLE, CHIEF COUNSEL

EDD Serving the People of California

State of California / Health and Welfare Agency

George Deukmejian, Governor

May 21, 1990

REFER TO: 53:37:Law.Rev:jm
(916) 445-9212

Mr. Edwin K. Marzec
Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Marzec and Members of the Commission:

PROPOSAL FOR CENTRALIZED ADMINISTRATIVE LAW JUDGE CORPS IN THE DEPARTMENT OF GENERAL SERVICES

The Employment Development Department is opposed to the creation of an Administrative Law Judge Corps or a requirement that all administrative hearings required by statute be heard by an administrative law judge in the Department of General Services.

The Employment Development Department employs no administrative law judges. However, the Department is a party to all of the thousands of Unemployment Insurance Appeals Board administrative hearings held each year. These administrative proceedings are, to a large extent, federally funded and governed by federal regulations. Among these regulations are time frames within which hearings must be held and decisions rendered. The Unemployment Insurance Appeals Board is an independent adjudicatory agency. The arguments in favor of a central panel, e.g., appearance of fairness, economy, and elimination of adverse decisions by the judge against his/her employing agency, simply do not apply to the Unemployment Insurance Appeals Board.

The same reasoning exists for retaining the administrative law judges at the State Personnel Board. These judges are not in the position of making decisions adverse to the agency which employs them. They hear hundreds of cases a year in an atmosphere of fairness and neutrality and with sensitivity and expertise that can only be acquired by specialized experience. We do not believe that such experience can be acquired in the atmosphere of an Administrative Law Judge Corps.

Sincerely,

Alice Gonzales

ALICE GONZALES
Director
Employment Development Department

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

EMERGENCY MEDICAL SERVICES AUTHORITY
1030 15TH STREET, SUITE 302
SACRAMENTO, CALIFORNIA 95814
(916) 322-4336

May 21, 1990

Edwin K. Marzec
Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303--4739

Dear Mr. Marzec:

We have considered the possible revision of the law governing administrative procedure in California. We are opposed to the concepts proposed in your May 3, 1990 letter. Since the hearing officers may not necessarily have the expertise required to hear agency specific cases, we believe that the existing program should be continued.

Thank you for the opportunity to comment on this matter.

Sincerely,

Daniel R. Smiley
Interim Director

DRS/dmw

cc: Maggie DeBow

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY GEORGE DEUKMEJIAN, Governor

OFFICE OF STATEWIDE HEALTH PLANNING AND DEVELOPMENT
1600 9TH STREET
SACRAMENTO, CA 95814
(916) 322-5834

MAY 24 1990

Edwin K. Marzec, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Marzec:

I am writing to express the concerns of the Office of Statewide Health Planning and Development about the proposal regarding the conduct of administrative hearings that the California Law Revision Commission is considering recommending to the Legislature. The proposal basically has two elements. First, if an administrative hearing of a state agency is required by statute, the hearing would have to be conducted by an administrative law judge. Second, all administrative law judges would be part of a central panel employed and assigned by the Office of Administrative Hearings in the Department of General Services. Although my Office has no real concerns about the second part of the possible proposal, we do have serious reservations about the first element.

There are two types of appeals made to our Office that by statute are provided an administrative hearing. First, pursuant to Health and Safety Code Section 443.37, any health facility affected by any determination made under the Health Data and Advisory Council Consolidation Act may petition the Office for review. The hearing shall be held before an employee of the Office, a hearing officer employed by the Office of Administrative Hearings, or a committee of the California Health Policy and Data Advisory Commission (CHPDAC). The Commission members are appointed by the Governor and the Legislature, and represent various facets of the health care field and the general public. In practice, the decisions that are appealed are penalty assessments for late filing of mandatory reports. The Office's policy has been to have such penalty appeals heard by a committee of the Commission. The proposal being considered would, if adopted, force us to change this practice.

Additionally, Health and Safety Code Section 15080 establishes a Building Safety Board to advise the office and act as a board of appeals with regard to seismic safety of hospitals. The Board "shall act as a board of appeals in all matters relating to the administration and enforcement of building standards relating to hospital buildings..." (H & S Code Section 15080). This Board is

comprised of 17 members appointed by the Director of the Office and six ex officio members (non-voting) who are members by virtue of their positions in state government. The appointive members must be from various specified professional categories, with the exception of four general members. The proposal being considered would also prohibit this Board from performing its mandated function.

The Office feels strongly that each of these panels is currently functioning extremely effectively. The members are experts in their field and are fair and objective. Because they are appointed for their professional expertise and experience, their judgement is respected. As the Law Revision Commission recognizes, a key concern with the central panel idea is that it may not provide essential expertise in certain subject areas. The Office has found that using Commissioners and Board members, rather than Administrative Law Judges, to hear these two specific, technical types of appeals works very well, and that the appellants are satisfied with the processes.

We recognize the Law Revision Commission's concern that a hearing officer employed by an agency might have some difficulty in achieving fairness and the appearance of fairness in a matter involving the agency. However, the members of these panels are not employees of the Office. In the case of the CHPDAC members, they are not even appointed by the Office.

The Office also believes that having these impartial panels hear appeals is more efficient and economical than having an administrative law judge perform the same function, and it allows us to provide better service to our constituents. We can schedule appeals easily, and quickly if necessary, and at a time and place reasonably convenient to the petitioner. We have roughly between ten and twenty hearings each year and it would be both very cumbersome and very expensive for us to have to use the Office of Administrative Hearings for all of them.

We are also reluctant to make the hearing processes more formal and litigious. Currently our constituents make appropriate use of the appeals processes available to them. A more formal and expensive process, for which they would probably feel a need to retain an attorney, might have to wait longer, and might have to travel longer distances, could curtail the exercise of the important right to appeal. We would not like to impose such a burden on those we serve.

The Office of Statewide Health Planning and Development strongly urges the California Law Revision Commission not to recommend to the Legislature that all mandated appeals be heard by an Administrative Law Judge employed and assigned by the Office of Administrative Hearings.

MAY 24 1990

Thank you for the opportunity to comment on this possible proposal. If there are any questions, or if we can provide any clarification about our concerns, please feel free to contact Beth Herse of my legal staff at (916) 322-1212.

Sincerely,

Larry G. Meeks
Director

STATE OF CALIFORNIA—THE RESOURCES AGENCY GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF CONSERVATION
DIVISION OF OIL AND GAS
1416 9th STREET, ROOM 1310
SACRAMENTO, CALIFORNIA 95814
(916) 445-9686
TDD (916) 324-2555
TELEFAX (916) 323-0424

May 24, 1990

Mr. Edwin K. Marzec
Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Marzec:

In response to your letter of May 3, 1990, which outlines a plan to have an administrative law judge or central panel conduct hearings for State agencies, we have the following concerns.

Our primary concern with this proposal is that Division of Oil and Gas (Division) proceedings for administrative review must be conducted within the time prescribed by statute. Pursuant to Sections 3352 and 3353 of the Public Resources Code, a hearing must be held within 10 days from the receipt of an appeal and a finding rendered within 10 days after the hearing. Whether an administrative law judge or central panel would be able to respond within the time constraints prescribed is questionable. Our experience with hearings involving administrative law judges indicates that decisions were not issued for 2 to 14 months from the hearing date.

Normally, our hearings concern very technical and complex issues. A broad background in geology, hydrology, and petroleum engineering is necessary to fully understand most issues and to make an objective decision. The Division has this necessary expertise, thus enabling a review to be obtained within the strict time limits.

Further, we object to the suggestion that an administrative law judge or central panel is needed to provide a neutral hearing officer to help achieve both fairness and the appearance of fairness. It has always been the interest of the Division to provide administrative proceedings that afford the applicant a fair hearing. The internal-review procedures and the provisions for appeals to the State Oil and Gas Supervisor and the Superior Courts serve to assure that no person in the Division may use the compliance and enforcement procedures in a capricious or arbitrary manner.

It is incumbent upon an agency to be sensitive and respond to legitimate concerns and criticisms. This agency has been shown to be objective and fair in its findings. In the many years the Division has been conducting hearings, only one finding has been overruled by the Superior Court. In addition, no complaints have ever been received indicating the Division did not provide an objective or fair hearing.

In summary, the authority for enforcement actions and issuance of civil penalties without lengthy hearings or formal court action expedites and simplifies the entire process, thereby making it more efficient and effective for both the agency and defendants. We cannot see how such changes to the conduct of administrative hearings would improve the current process.

We therefore oppose the proposal of making it mandatory for an administrative hearing to be conducted by an administrative law judge. Instead, a State agency should be given the opportunity to choose whether an administrative law judge is deemed necessary.

If you have any questions, please feel free to call me.

Sincerely,

M. G. Mefferd
State Oil and Gas Supervisor

MDS:MGM:ju

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3088

May 24, 1990

Edwin K. Marzec
Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Marzec:

The Public Employment Relations Board (PERB or Board) is in receipt of the California Law Revision Commission staff recommendations concerning the reassignment of administrative law judges (ALJ) to a central statewide panel to serve all state agencies. The Commission staff recommends that PERB ALJ's not be reassigned to the central panel, and the Board is in agreement with this recommendation. That PERB ALJ's not be reassigned to the central panel is the position of this Board, and we are pleased your staff accepted the Board's position and rationale.

To save Commission members' time at the public meeting on May 31, 1990, the Board will not testify on staff's recommendation. However, representatives from PERB will be present to answer questions the members might have. We trust the Commission will accept the staff recommendation or, if a different conclusion is to considered, that the Board be notified and given an opportunity to express its views.

Thank you.

Sincerely,

Deborah M. Hesse
Chairperson

DMH/ab

ADDRESS ALL COMMUNICATIONS
TO THE COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE: (415) 557-

Public Utilities Commission

STATE OF CALIFORNIA

COMMISSIONER

May 24, 1990

Edwin K. Marzec
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Employment of administrative law judges and hearing officers

Dear Mr. Marzec:

Thank you for your letter of May 3, 1990 asking how the California Public Utilities Commission (CPUC) views proposals that would remove administrative law judges (ALJs) from CPUC employment and reassign them to the Office of Administrative Hearings in the Department of General Services (OAH), which would in turn provide ALJs for CPUC hearings. The CPUC strongly opposes such proposals.

Let me first explain that the Public Utilities Commission's status as a constitutional agency and the history of the Commission's decision-making process have important ramifications for the issue you have raised. Constitutional provisions as provided in Article XII, Sec. 2 state that "Subject to statute and due process, the Commission may establish its own procedures." CPUC commissioners, as individuals appointed by the Governor, are made ultimately responsible by the Consitution and by statute for rendering decisions and establishing policy for the regulation of utilities. As a consequence, when the CPUC commenced operations in 1911 as the Railroad Commission, Commissioners conducted hearings themselves. Many years later, hearing officers, the precursors to today's ALJs, were hired to assist the Commissioners in conducting hearings and developing a record. The key point is that the ALJs were intentionally positioned to work closely with and assist the Commissioners in the hearing and decision-making process, not to serve as decisionmakers with status independent of the Commission.

Article XII, Sec. 2 provides the Constitutional basis for establishing the procedure of installing hearing officers/ALJ's to assist the commissioners. The Commission is generally exempt from the provisions of the Administrative Procedure Act. Thus it is not only appropriate, but necessary, to distinguish the CPUC from other state agencies both in terms of the procedural requirements they must follow and the function of ALJs within the agencies' day-to-day activities.

Your letter notes that a key argument for the use of a central ALJ panel is the appearance of fairness when the ALJ's "career path is not controlled by the agency against which the officer may make an adverse decision." This rationale is not applicable to the CPUC. Unlike ALJs who primarily review benefit or licensing determinations already made by the agency that employs them, CPUC ALJs do not review determinations already made by the agency, rather they draft the agency's initial decision. Also importantly, much of the work of CPUC ALJs does not involve the application of a pre-existing set of rules to particular individuals. For example, much of the workload of a CPUC ALJ consists of utility ratemaking cases. For another example, CPUC ALJs preside over generic cases designed to examine the structure of an entire segment of the utility industry and to determine the types of utility services which should be available to the public. Both proceedings require intense technical knowledge of the industries under CPUC jurisdiction. The importance of expertise required cannot be stressed too strongly.

Just as in the CPUC's early days, such policymaking decisions require close cooperation between the ALJs and the CPUC's Commissioners. The Commissioners are the <u>only individuals</u> vested with constitutional and statutory responsibility to make these policy decisions. Employment of the CPUC's ALJs by a separate agency, in a misguided and inappropriate attempt to make the ALJs more independent of the Commissioners, would interfere significantly and in a number of ways with the existing working relationships between the Commissioners and ALJs which are so essential for effective decisionmaking.

First, ALJs often work with the Commissioners in drafting the changes to the ALJ's proposed decision that are incorporated in the Commission's ultimate decision. As the apparent purpose of removing the ALJs from the CPUC is to restrict Commission access to the ALJs, and vice versa, it seems extremely unlikely that this practice could continue if the ALJs worked for a central panel at OAH. This change would deprive the Commissioners of the assistance of the person most knowledgeable about the record in the proceeding and diminish the influence of the ALJ over the ultimate decision. Thus, rather than increasing the efficiency of the CPUC's decisionmaking, the use of a central panel would substantially hinder our decisionmaking and require the employment of additional CPUC personnel to assist the Commissioners in reviewing and revising proposed decisions. It must be pointed out, however, that such additional advisors could never be as valuable a resource to the Commissioners as the ALJ who presided over the hearings and assembled the evidentiary record.

Second, in keeping with longstanding practice, CPUC ALJs operate under an assigned Commissioner system where a Commissioner is assigned jointly with the ALJ. In larger cases it is not unusual

for assigned Commissioners to issue rulings, shape the course of the proceeding, include and exclude issues, and set priorities among issues. If ALJs were located in the OAH they would not be available to the Commissioners to do this jointly -- either the Commissioner would do it and the ALJ's function would be reduced to hearing evidence and preparing a proposed decision, or the ALJ would inappropriately, and perhaps unconstitutionally, assume all of these functions. Without the ability to confer with the assigned Commissioner, the ALJ might well render procedural decisions in conflict with the assigned Commissioner's intentions. This would simply result in lengthy delays in reaching final decisions and inconsistent management of the CPUC's docket of cases.

Worse yet, if the CPUC's ALJs were employed by the OAH, thus severing the long-standing relationship in which ALJs work for the Commissioners, the CPUC could lose the ability to control its own caseload. This untenable result would likely follow because the Commission would no longer employ the ALJs or control their schedules, which in turn control the schedule of all CPUC hearings. Moving the ALJs to another agency would cost the CPUC the flexibility to coordinate related decisions assigned to different ALJs since the CPUC would no longer control the scheduling or order of decision output. The importance of this point cannot be overstated as it is absolutely critical for the effective management of the Commission's business that certain related cases are decided on a timely basis in a predetermined order. The most salient example are the yearly rate cases, in which the Commission must reach a decision in the rate of return/attrition proceedings early in November in order to include their rate impacts in the general rate case decisions which have to be signed out before December 31st. We view it as highly unlikely that the CPUC's demanding caseload can be effectively coordinated if a key resource, the ALJs, are controlled by an outside agency faced with competing demands for ALJs and hearing time.

Even more grievous, since the ALJ would be part of a different agency, the ALJ would likely lose the assistance of the CPUC's Commission Advisory and Compliance Division (CACD) for the calculation and preparation of tables and advice on complex subjects such as rate design. In any one of the last few years, the absence of such communication between the ALJs and the Commission's CACD staff would have created absolute chaos during the crucial decisionmaking period in November and December, and would, under no uncertain terms, jeopardize the best interests of consumers.

Finally, the CPUC needs ALJs who are expert in a number of fields, including engineering, financial analysis and public utility economics. To ensure the availability of such expertise, the CPUC generally employs as ALJs persons who have previously

worked for the Commission, both lawyers and non-lawyers, with these extensive backgrounds. This degree and diversity of pre-existing expertise would, in our view, be impossible for the OAH to duplicate, even if it had a separate sub-panel specializing in public utilities cases.

We shall be pleased to send a representative to the Law Revision Commission's May 31st meeting to address these issues further and to answer any questions you or your fellow Commissioners may have. I sincerely appreciate the interest you have demonstrated in our agency and your willingness to consider our views on matters which are so vital to the effective functioning of the Public Utilities Commission.

Cordially,

G. Mitchell Wilk,
President

cc: Commissioners

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 445-3956

May 30, 1990

Mr. Edwin K. Marzec
Chairperson
California Law Review Commission
4000 Middlefield Road, Suite D02
Palo Alto, CA 94303-4739

Re: Centralization of Administrative Law Judges

Dear Mr. Marzec:

This is in response to your letter of May 3, 1990 concerning the potential reassignment of Administrative Law Judges and hearing officers from state agencies to the Office of Administrative Hearings. The State Board of Equalization opposes the proposal that hearing officer functions be transferred from this agency to a centralized agency created to handle all administrative hearing functions.

The State Board of Equalization is a constitutional agency made up of four members elected from Equalization districts, and the State Controller as an ex officio member. The Board is unique in state government because it is a popularly elected board. It is directly answerable to the people for its own actions as well as those of its employees. This direct accountability contains an inherent incentive for fairness and impartiality that is not present in appointed bodies which are at least one step removed from the electoral process.

The Board is sensitive to the concerns of taxpayers with respect to the issues of fairness and the perception of fairness. The Board sponsored the Taxpayers' Bill of Rights, incorporated into the Revenue and Taxation Code at Section 7080 et seq., to codify the principles of bias-free tax administration. It established an Appeals Unit to separate the judgment function from the advocacy function.

The Legislature has, through the Taxpayers' Bill of Rights, expressed a concern about the length of time required to resolve petitions for redetermination and claims for refund. That legislation required the Board to adopt a plan to reduce the time required. In order to give effect to these legislative concerns, it is important that the Board have direct control over the activities of the hearing officers, the number of persons assigned to the hearing function, and the scheduling of hearings. Removing the hearings from the jurisdiction of the Board to a central panel controlled by the Department of General Services will mean that this direct concern with the administration of the tax laws will be lost. Demands of other agencies will have equal demand for the time of hearing officers at the central panel. Further, the transition will inevitably lead to slowdowns in the hearing process.

The Board enforces and administers the California Sales and Use Tax Law and other excise tax laws concerning alcoholic beverages, cigarettes, gasoline, diesel fuel, electricity, telephone services, hazardous waste, and solid waste. The Board collects approximately $15 billion a year in state excise taxes, and $4 billion a year in city, county, and district taxes, for distribution to local governments.

In the course of its audit activities, if the Board finds that there has been an underpayment of tax the Board may compute and determine the amount required to be paid. The Board is required to issue a written Notice of Determination to the taxpayer. The taxpayer, if it believes the assignment is erroneous or excessive, may file a written Petition for Redetermination. During the pendency of the petition, the tax need not be paid. By statute, the taxpayer is entitled to an oral hearing before the elected Board.

The Board has established an Appeals Unit made up of attorneys in the Staff Counsel classification and auditors in the Supervising Tax Auditor classification. A Petition for Redetermination is initially scheduled for a preliminary hearing before the staff hearing officer. It is expected that at the staff hearing the taxpayer will present all of the evidence that supports the taxpayer's position. It is the primary purpose of the staff hearing to establish the facts in the case and the application thereto of the law and regulations. The hearing officer then prepares his or her Decision and Recommendation to the Board.

If the recommendation is acceptable to the taxpayer, the matter is scheduled for action before the Board on the Board's

nonappearance schedule for final disposition. If the taxpayer disagrees with the recommendation of the hearing officer, the taxpayer is entitled to, and may request, an oral hearing before the Board. The oral hearing is a de novo proceeding. The taxpayer may subpoena witnesses. The statements are taken under oath or affirmation.

At the hearing, the staff is represented by a member of the Board's legal staff or by a member of the Board's audit staff, both of which are administratively separate from the Appeals Unit. The Chief of the Appeals Unit attends the hearing to outline orally to the Board the facts and issues, and to prepare a Statement of Action to be transmitted to the taxpayer consistent with the disposition of the case made by the Board. The decisions of the Board are not generally reported, but are reported as minute orders only.

If the decision of the Board is adverse to the taxpayer, the taxpayer may pay the tax and, upon denial by the Board of a Claim for Refund, file a Suit for Refund in the Superior Court. The Superior Court proceeding is a de novo proceeding.

As stated above, the State Board of Equalization opposes the proposal that the hearing officer function be transferred from the agency to a centralized hearing authority. We are generally in agreement with Professor Michael Asimow's conclusion, in his analysis of October 1989 prepared for your commission, that the case is not strong enough to support a government-wide removal of hearing officers from the agencies for which they hear cases. We particularly think that such a removal would be inappropriate in the case of a taxing agency--especially a taxing agency whose activity is directed by elected officials.

The concept in question is incompatible with good tax administration. One of the most important principles of tax administration is the principle of uniformity. This principle has two components - uniformity of interpretation as between taxpayers on a contemporaneous basis, and uniformity of interpretation over time. Taxpayers in the same circumstances must be subject to the same tax burdens. Taxpayers must know how the tax has been applied in the past, so that for tax planning purposes they will know how the tax will be applied in the future.

The Board is thus vitally concerned with the issue of accuracy. The hearing process must produce a result that is factually correct in each case and a result in accordance with the public interest and with the objectives that the Legislature has sought to achieve in creating the tax program. The Board is

concerned with the relationship between accuracy and the issue of specialization and expertise. Tax law is highly technical. Tax law is a specialty recognized by the State Bar. The Board's review staff is fully familiar with the relevant statutory provisions, case law and regulations. The review staff is familiar with the continuing administrative decisions of the Board itself, as it processes its oral hearing calendar. The hearing officer, as employees of the agency, are acutely attuned to issues of confidentiality. The Board is concerned that if the hearing function were transferred to a central administrative hearing agency, there would be a loss of structure, consistency and confidentiality, with no offsetting benefit.

Additionally, the issue of centralized versus decentralized administrative hearing service was studied by the Department of Finance in 1977. The Department concluded at that time that "Policy considerations aside, there is no clear and obvious evidence that a centralized administrative law court would be either functionally or economically preferable to the present decentralized structure." We suggest that there is no evidence today of any demonstrable social or economic benefit to be derived from centralizing responsibility for review and evaluation of tax assessments.

For the reasons state above, it is the view of the Board that it would best be able to carry out its duties to enforce and administer the tax in a fair and equitable manner if it were to retain its internal review apparatus.

Sincerely,

Cindy Rambo
Executive Director

CR:sr

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

CALIFORNIA STATE PERSONNEL BOARD
801 CAPITOL MALL • P.O. BOX 944201 • SACRAMENTO 94244-2010

May 21, 1990

Mr. Edwin K. Marzec
Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Marzec:

I am responding to your letter of May 3, 1990, concerning the recommendation to remove Administrative Law Judges and Hearing Officers from state agencies and reassign them to the Office of Administrative Hearings, Department of General Services. I disagree with this recommendation.

The State Personnel Board is a constitutional agency with quasi-judicial authority to review adverse actions, rejections on probation, and a variety of other matters involving primarily state civil service employees. The State Personnel Board has and continues to function as a neutral agency in deciding these matters. We believe that the employment of Administrative Law Judges by this agency has functioned effectively and efficiently over the years, especially considering the expertise and knowledge developed by the Administrative Law Judges while employed in our agency. I do not believe the specialization of Administrative Law Judges at General Services provides the equivalent.

I can appreciate the interest in creating an organizational appearance which portrays the fairness of Administrative Law Judges. I have considerable difficulty in accepting that Administrative Law Judges employed by General Services would appear more fair than the State Personnel Board. General Services is an agency headed by a Governor's appointee, an agency which takes numerous adverse actions and an agency which would be an interested party and have a vested interest in the adverse action decisions of the Administrative Law Judges.

Finally, I don't think the concern regarding control over career paths is relevant for this agency. This department, unlike General Services, rarely takes an adverse action or rejection on probation.

In summary, any proposal to centralize Administrative Law Judges, which involves the staff employed by the Board, would be opposed.

Sincerely,

Gloria Harmon

GLORIA HARMON
Executive Officer
(916) 445-5291

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF TRANSPORTATION
LEGAL DIVISION
1120 N STREET, SACRAMENTO, CA 95814
P.O. BOX 1438, SACRAMENTO, CA 95812-1438
(916) 445-5830

May 30, 1990

Edwin K. Marzac, Chairman
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear Mr. Marzac:

In re: Conduct of Administrative Hearings

Pursuant to a conversation with Mr. Sterling of your staff, the following comments are submitted on behalf of the Department of Transportation concerning the question of whether, in the case of administrative hearings required by statute to be conducted by state agencies, the hearings should be required to be conducted by an administrative law judge from the Office of Administrative Hearings. Arguments stated for this include the object of fairness and the appearance of fairness, and the influence of the potential impact of a decision adverse to the agency on the hearing officer's career. These arguments are with apparent reference to those types of hearings where the state agency assumes the role of prosecutor and judge.

First, there are certain cases where hearings are required by statute, without the public agency assuming that dual role. See, for example, the Subletting and Subcontracting Fair Practices Act, Public Contract Code section 4100 et seq. There, hearings may be held by a state (or local) agency to resolve a dispute between a prime contractor and subcontractor regarding the listing of subcontractors for a construction project. Ordinarily, decisions are made by an engineer, with knowledge of technical matters. No purpose would appear to be served by referring such hearings to the Office of Administrative Hearings, especially when any delay could adversely affect an ongoing construction project.

Consider also the review of Relocation Assistance determinations, where the role of this agency in the appeal process is a matter of both state and federal law (Government Code section 7266; 49 C.F.R. section 24.10).

Second, even where otherwise appropriate, any referral to an outside hearing officer should be limited to those cases where a hearing is expressly required by statute. The argument that, in the absence of a statutory requirement, constitutional due process requires a hearing (c.f. Merco Const. Engineers, Inc. v. Los Angeles Unified School Dist. (1969) 274 Cal.App.2d 154) should not be the basis for referring informal hearings to an outside hearing officer. To fail to limit referral to cases where clearly required by statute would expose agencies to uncertainty, as well as to a nonsubstantive argument which could cloud the process.

There are many examples of informal hearings which, although not required by statute, are afforded in connection with public contracts. Consider, for example, the relief of bidders (see Public Contract Code section 5100 et seq.) and the evaluation of good faith efforts of bidders to achieve Minority Business Enterprise Goals. Matters relating to the responsiveness and responsibility of bidders should be left to the awarding agency. (See City of Inglewood v. Superior Court (1972) 7 Cal.3d 861, 870-871; Taylor Bus Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal.App.3d 1331.) If any discretion is to be exercised in such cases, it should be that of the contracting agency. (See M. Steinthal & Co. v. Seamans (D.C. Cir. 1971) 455 F.2d 1289, 1301, 1303).

In summary, if any such administrative hearings are to be conducted through the Office of Administrative Hearings, that requirement should be limited to specifically identified types of hearings expressly required by statute, excluding those which properly belong with an agency decision maker.

Very truly yours,

Richard W. Bower

RICHARD W. BOWER
Assistant Chief Counsel

STATE OF CALIFORNIA—THE RESOURCES AGENCY GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF WATER RESOURCES
1416 NINTH STREET, P.O. BOX 942836
SACRAMENTO, CA 94236-0001
(916) 445-9248

May 24, 1990

Edwin K. Marzec, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Marzec:

This is in reply to your letter of May 3, 1990 to David Kennedy, Director of the Department of Water Resources. Your letter requested our views on your Commission's study of the desirability of having all statutorily mandated hearings of State agencies conducted by administrative law judges (ALJs).

The Department of Water Resources is certainly not opposed to the concept of a centralized panel of ALJs. Nor are we opposed to the concept of giving State agencies the flexibility to use ALJs in particular, specific statutorily mandated situations. However, because of the unique engineering nature and stringent operational requirements of this Department, we are concerned about any effort to mandatorily require the use of ALJs in all situations.

Our concern is based on the fact that several types of hearings for which the Department has statutory authority are especially time and expertise critical. Two examples that readily come to mind are certificate revocations for unsafe dams and hearings related to substitution of listed subcontractors on public works contracts. With respect to the latter, the contracts often involve flood control projects or projects involving the State Water Project. It is our view that having to rely on outside personnel (typically non-engineers) to make recommended engineering-related findings and conclusions could lead to delayed decision-making on these matters and otherwise compromise the State's best interest.

As a final thought, it should be pointed out that mandating ALJ-conducted hearings in an across-the-board manner can be expected to dramatically increase the costs of such hearings for all parties concerned. This is because of the likelihood that participants in such hearings will typically employ counsel to advocate their positions before ALJs. At least as far as this

Department's experience is concerned, I am not convinced that the resultant increase in costs would lead to more equitable results.

Please contact me at (916) 445-8207 if you need further information concerning our position on this matter.

Sincerely,

Susan Weber

Susan Weber
Chief Counsel

May 29, 1990

Mr. Edwin K. Marzec, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA. 94303-4739

Dear Mr. Marzec:

As Administrative Law Judges at the California Agricultural Labor Relations Board, we oppose the concept of a central panel of hearing officers who would conduct all administrative proceedings in the state, even if there were provisions to accomodate the need for specialization. And, if such a panel were created, we strongly believe we should not be included.

First, let me briefly state our concerns about the central panel concept. We do not believe it is a foregone conclusion that such a move would result in either efficiency or economy. Nor do we believe it would guarantee or even measurably improve the independence of ALJs.

OAH now has about 24 judges; the new panel would have about 700 judges. Such a dramatic increase would mean a significantly more bureaucratic structure which might well reduce efficiency. The Department of Finance in 1977, after considering a similar proposal, rejected it, saying it was not convinced a central panel would be more economical that the present system and that, in fact, it might be more costly. A copy of that report is enclosed.

The bigger bureaucracy causes other concerns. One of the reasons given by the Commission for expanding OAH into a comprehensive central panel is to avoid even the appearance of undue influence on ALJs from within the agency where they reside. Such a large agency would be a political powerhouse and might well result in more politicization vis a vis ALJs rather than less.

The inevitable supervisorial layers would mean substantive review of ALJ decisions with increasing opportunity for "suggestions" that revisions be made. If such pressure emanated from the top political appointees, it would be much harder than now to isolate such pressure and to trace it to its source. Further, the opportunity for undue influence is manifestly more likely if all ALJs in the state are in one agency since it is unlikely that every state agency which now employs ALJs would succumb to a temptation to interfere with the independence of ALJ decisions.

Despite the fact that our agency has a history of being accused of being politically biased, it has been remarkably free of such pressures. We believe, however, that if the Commission feels this is a problem in other agencies, or simply a potential problem to

be headed off, the best approach is to deal with it directly. One possibility is promulgating a code of ethics and/or other laws for ALJs and agency heads to prohibit such interference. We recognize that, as with any other such rules, they can be violated in both blatant and subtle ways. But, at least the rules would set standards and could be enforced whereas establishing a central panel in the hope that it would achieve the desired end does not accomplish even this much.

Second, for a number of reasons, we believe it would be inappropriate to include ALJs from the ALRB in any such central agency. Our agency is closely modeled on the National Labor Relations Board which has always maintained its own staff of hearing officers. Statutorily, we are bound to follow its precedent where applicable.

In the 55 years that the NLRB has been in existence, it has created a substantial body of legal precedent; currently, there are more than 300 volumes of NLRB decisions. There is also an extensive body of federal appellate and supreme court cases interpreting the NLRA. Additionally, there are the 15 years of accumulated precedent under our Act where the ALRB has tailored the national law to fit California agriculture.

Labor law is a speciality. Few general practitioners venture into the area; the State Bar has even been considering certifying it as a special field of practice, like tax law. We, like the ALJs at PERB, are specialists within labor law.

Even if a central panel were to have specialists designated for labor law or agricultural labor law, expertise would be lost by isolating ALJs from the ALRB. The NLRB is recognized as an expert agency, and its expertise is accorded deference in the federal courts. Our agency has similar status. Expertise derives in no small measure from the fact that ALJs benefit from being surrounded by the day to day administration of the law and being aware of ongoing issues and agency procedures. Similarly, the agency benefits from the ALJs who, at least at the ALRB and PERB, are among the most long-term employees. They are a significant part of the institutional memory of the agency.

Especially in hearing election matters, which are investigative in nature, agency expertise is vital since the role of the ALJ, who in this context is called an Investigative Hearing Examiner, is to elicit the facts on his or her own rather than relying primarily on the parties. This requires not only familiarity with the applicable legal precedent but also the industry and the agency's election procedures.

Another aspect of our specialized role argues against including us in an expanded OAH. Both the ALRB and PERB often handle long and complex cases. The ALRB currently has pending before it a backpay case involving over 200 employees which required over 54 days of hearing and voluminous exhibits. California, aside from Hawaii,

is the only state with a meaningful agricultural labor relations statute. Adapting traditional labor law principals to this new arena requires extensive factfinding and legal discussion which is quite different from the function of a number of other agencies where the law is quite settled and the main concern is processing cases as quickly as possible.

Early in its history, the ALRB experimented with using ALJs from OAH. The differences between the needs of the two agencies was quickly apparent. The cursory decision in one such case, which followed standard OAH procedure, was so deficient that the Board felt compelled to comment on it in writing and to reconsider the matter de novo. This decision, as well as two others written by hearing officers from the central panel, simply did not contain the depth of analysis which the Board members and practioners expect from an agency modeled on the NLRB.

We note that Wisconsin, which is listed in your Memorandum 90-36 as a central panel state, was one of the earliest states to create a state labor board, and it has always maintained its own staff of hearing officers. Specialization within the central panel was not deemed appropriate there, and we do not believe it is appropriate here.

We appreciate the opportunity to express our views and hope they will be of assistance to you in your evaluation of this proposal.

Sincerely,

Barbara D. Moore
Thomas Sobel
Jim Wolpman

CENTRALIZED VS. DECENTRALIZED SERVICES, PHASE II

ADMINISTRATIVE HEARINGS

PREPARED BY

STATE OF CALIFORNIA
DEPARTMENT OF FINANCE
PROGRAM EVALUATION UNIT

ROY M. BELL
DIRECTOR OF FINANCE

ROBERT L. HARRIS
PROGRAM BUDGET MANAGER

BERNARD P. DONNELLY
CHIEF, PROGRAM EVALUATION

NOVEMBER 1977

ATTACHMENT A-1

PREFACE

The Department of General Services' Office of Administrative Hearings, with the State and Consumer Services Agency concurring, requested an inventory of the State's various quasi-judicial hearing units. Their intent was that we find the extent to which agencies of state government might be holding administrative hearings outside the authority of the Administrative Procedure Act (APA) and to gather, for the first time, the basic information necessary to determine the appropriateness of "universal application of the APA," i.e., centralized administrative hearings.

The work plan for this report was designed to fulfill the requested inventory for the Office of Administrative Hearings and to provide for the possibility of a more detailed workload study. The detailed study had been requested by Department of Finance budget staff contingent upon our discovery of significant fiscal advantages to centralization. We feel that this report provides the information necessary to initiate the policy decision process. Further, since no apparent significant fiscal savings accrue to centralization of administrative hearings, we believe that a detailed workload and staffing analysis would most appropriately follow the development of a consistent state policy toward quasi-judicial administrative hearings.

We would like to thank the many representatives of the State's various administrative hearing units who assisted us in our compilation of data. Special thanks are due Mr. Jack Clevenger, Chief Administrative Law Judge for the Unemployment Insurance Appeals Board, and Mr. Herbert Norbriga, Director of the Office of Administrative Hearings, for their contributions to our understanding of the administrative hearing process.

This report is the second in a series of Department of Finance studies of "centralized versus decentralized" services. Phase I (Report Number D77-40, dated August 1977) was published in December 1977 and included reviews of buildings and grounds, space management, fleet administration, records management and office machine repair. Phase III, due for completion Spring, 1978, concerns State Police services.

KIRK STEWART
PROJECT MANAGER

JOHN H. PARKER

PREPARED UNDER THE GENERAL
SUPERVISION OF:

STAN NIELSEN

PRINCIPAL PROGRAM REVIEW ANALYST

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ABBREVIATIONS AND ACRONYMS

AB	ASSEMBLY BILL
ALO	ADMINISTRATIVE LAW OFFICER
ALJ	ADMINISTRATIVE LAW JUDGE
APA	ADMINISTRATIVE PROCEDURE ACT
Cal OSHA	CALIFORNIA OCCUPATIONAL SAFETY and HEALTH ADMINISTRATION
ERCDC	ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION
FCC	FEDERAL COMMUNICATIONS COMMISSION
FY	FISCAL YEAR
HA	HEARING AUDITOR
HO	HEARING OFFICER
IHE	INVESTIGATIVE HEARING EXAMINER
LA	LOS ANGELES
OAH	OFFICE OF ADMINISTRATIVE HEARINGS
PUC	PUBLIC UTILITIES COMMISSION
SB	SENATE BILL
SF	SAN FRANCISCO
UI	UNEMPLOYMENT INSURANCE
US	UNITED STATES
WRCB	WATER RESOURCES CONTROL BOARD

SUMMARY

This report presents original research data resulting from the first comprehensive review of the State's administrative hearing units. Seventy-six agencies holding quasi-judicial hearings are discussed and 29 of those are compared in a detailed display of jurisdictional, caseload, staffing and procedural data.

Based upon our review, we conclude that:

- All of the State's quasi-judicial hearing units are operating consistent with statutory authority. It is noted, however, that in most cases, statutory authority does not preclude contracting for adjudicatory services from the Office of Administrative Hearings.
- Many administrative hearings are conducted by hearing officers who are employed by the agency involved in the dispute.
- The extreme range in case complexity and caseload volume found among the various hearing units make relative productivity comparisons of doubtful value, given current data.
- The qualifications and salary ranges of the nearly 500 administrative adjudicators vary considerably.

There are strong opposing arguments concerning the appropriateness of a decentralized hearing function with agency-employed hearing officers. Resolution of these important policy issues is more crucial to the present debate concerning the organization of fair hearing processes than are the detailed cost analyses of such a change.

We recommend that the Office of Administrative Hearings (OAH) moderate the policy discussions concerning the issues associated with a centralized hearing function. Statutory or budgetary changes affecting the State's current decentralized process should reflect the input of adjudicators as well as the State Bar, affected program managers and affected client groups. The authority for OAH to undertake such an effort is found in Government Code Section 11370.5.

Policy considerations aside, there is no clear and obvious evidence that a centralized administrative law court would be either functionally or economically preferable to the present decentralized structure. Therefore, we recommend no change at this time.

To retain its value, the material gathered for this report should be maintained, and *we recommend that the Office of Administrative Hearings, under its authority found in Government Code Section 11370.5, carry out this responsibility.*

CHAPTER I

INTRODUCTION

The State's various boards, commissions and departments hold three distinct types of administrative hearings. First, are internal management hearings dealing with the routine administrative details of an organization; an example would be departmental budget hearings. Next, are the quasi-legislative hearings held by an agency to secure input from interested parties concerning rule-making or policy adoption. The third type of administrative hearings, and the subject of this report, is the quasi-judicial hearing - the formal processes of dispute resolution between a state agency and an aggrieved party that must be exhausted prior to judicial review. The California Administrative Procedure Act (APA), adopted in 1945, is the primary guide for the State's administrative adjudication hearings.[1/] The various sections of the APA define the steps which must be taken by listed agencies to provide "due process" to clients who are affected by agency actions.[2/] The purpose of the APA was to provide a forum for administrative appeal of a decision, rule, or regulation made by an agency or a representative of an agency which would have a detrimental effect on the rights of that agency's

1/Government Code Sections 11500-11528.

2/The requirement for administrative agencies to provide for an administrative appeal process containing elements of "due process" is reinforced by U.S. Supreme Court Rulings Goldberg vs Kelly 397 U.S. 254, (1970), United States vs. Western Pacific Railroad Co., 352 U.S. 59, 63-64, 7756E. 161, 165, 1 L.Ed. 2d 126 (1956).

clients. Other authorities and legal standards for the conduct of administrative hearings range from the State Constitution to Federal regulations.

Quasi-judicial hearings are conducted by about seventy state agencies and cover a broad spectrum of jurisdictional authority, case complexity, and procedures. The Office of Administrative Hearings (OAH), Department of General Services, has stated:

> A large and increasing number of State agencies are avoiding the application of the Administrative Procedure Act to controversies arising from their administrative actions. The convenience of a standardized process of dispute resolution, the economies of centralized personnel and operations, and the fundamental fairness of independent hearing officers are not available in the typical administrative lawsuit in California. Yet, those advantages could be realized if the APA were given universal application.
>
> Before universal application of the APA can be advocated effectively, it is necessary to ascertain the scope of departure from the APA by State agencies.3/

During this study, we have determined "the scope of departure from the APA by state agencies,"4/ and this information is displayed in the Pocket Supplement, "Administrative Hearings in California State Government," and discussed in Chapter II. The "convenience," "economies," and "fairness" of consolidated administrative hearings as postulated by OAH are discussed in Chapter III.

3/Memorandum, Herbert Nobriga, Director, Office of Administrative Hearings, to Leonard M. Grimes, Jr., Secretary for Agriculture and Services, June 7, 1977.

4/For the purposes of this study, a "departure from the APA" was defined as the existence of a person or unit within a department or division who holds quasi-judicial hearings without employing the OAH or without specific statutory authority to hold such hearings.

Our analysis of the accumulated data gave no indication that a significant fiscal reason for centralization exists; therefore, we did not exercise our option to perform a detailed workload and staffing study. Future resolution of the philosophical conflicts inherent in the issue of centralization of administration hearings may cause such a detailed workload study to become more appropriate.[5/]

5/ The 1976 Judicial Council study of Municipal Court "weighted caseloads" cost about $51,000 excluding overhead costs and judges' liaison time. A similar study of Superior Court caseload standards conducted in 1974 by a private consulting firm was estimated to cost over $60,000 for consulting fees alone. (Consolidation of the Superior Court study with two other ongoing contracts actually permitted a reduced billing of about $37,000 for consulting fees.) Since the administrative adjudication system in California is larger and more diverse than either the Municipal or Superior Court systems, a study similar to the "weighted caseload" studies mentioned above could easily cost more.

CHAPTER II

THE EXTENT OF ADMINISTRATIVE HEARINGS IN STATE GOVERNMENT

To determine the extent to which administrative adjudicatory hearings are being held by state agencies, the first task is definition of what constitutes such a hearing and the second is to find which agencies hold hearings in conformity with the definition.

For this study, a quasi-judicial hearing was defined as one having the following elements:[1/]

1. All parties should give sworn testimony and have the right to testify.
2. All parties should have the opportunity to cross examine (or question) witnesses.
3. A permanent record of the hearings should be available for review.
4. The hearing should follow (generally) rules of evidentiary and procedural due process.
5. The hearing officer (or agency) should have subpoena power for persons and records.
6. The hearing officer should make a proposed/final decision based on the evidence presented.
7. Timely notice of the hearing should be given to all parties.
8. When one of the parties is not competent in the English language, an interpreter should be allowed to be present.
9. The hearing should be public.

1/These elements were agreed upon by Mr. Herbert Korbrige, Director, Office of Administrative Hearings, and Mr. Jack Clevenger, Chief Administrative Law Judge, Unemployment Insurance Appeals Board.

These elements constituted our screening questionnaire, shown in Appendix A, and were used to determine which of the State's boards, commissions and departments are conducting quasi-judicial hearings.[2/]

Of the 133 agencies contacted, those found to hold quasi-judicial hearings were identified for further in-depth study. Those agencies which did not hold quasi-judicial hearings were placed on separate lists according to the types of hearings usually held, i.e., quasi-legislative hearings and quasi-legislative hearings with some quasi-judicial elements.[3/] The agencies holding quasi-judicial hearings were separated into two groups, one comprised of agencies subject to the Administrative Procedure Act[4/] and conducting hearings in accordance with that statute and the other comprised of agencies which conduct hearings under authorities other than the APA. Because we sought to describe the extent of departure from the APA, we contacted all of the agencies in the latter group - the non-APA hearing units - and gathered their responses to our fair hearing questionnaire, a copy of which is shown in Appendix A. Among the APA hearing units, we interviewed every unit except the licensing boards within the Department of Consumer Affairs.

2/We exercised some subjectivity in our screening process. Fair hearing elements 4, 5, and 6 were considered essential to the definition of a quasi-judicial hearing. The absence of one or two of the remaining elements was considered "within tolerance."

3/The lists showing agencies holding quasi-judicial hearings and quasi-legislative hearings appear in Appendix B. A list was not made for agencies holding internal management hearings since such hearings are quite common throughout state government.

4/These 53 agencies are specified in Government Code Section 11501.

those licensing boards uniformly follow the APA and use the Administrative Law Judges of the Office of Administrative Hearings to conduct their hearings whenever the function is delegated.[5/]

The fair hearing questionnaire was developed from the following list of 17 questions, the first 10 of which were specifically asked by the Office of Administrative Hearings in their memorandum requesting this study:

1. What agencies are conducting hearings outside the APA?
2. What kinds of disputes are involved?
3. How many hearing officers are employed to conduct such hearings?
4. Do the hearing officers write proposed or final decisions?
5. Are the hearings recorded, and if so, by what means?
6. What compensation is paid the hearing officers?
7. Do any agencies engage private hearing officers, and if so, how many, for what kinds of hearings, and at what compensation?
8. Do any hearing officers perform other duties for the agencies, and if so, what duties?
9. What statutes (giving citations) enable agencies to conduct their own hearings with their own staff?
10. What trend, if any, is ascertainable about the number of disputes being heard by agencies outside the Administrative Procedure Act?
11. What funding sources and attendant controls exist among the hearing functions?
12. What decision-review mechanisms exist (related to #4)?
13. What administrative function overlaps are occurring among hearing offices?

5/Hearings conducted by the boards themselves do not require an Administrative Law Judge.

14. What circuit-riding overlaps are occurring and how much "slack time" is involved?

15. What is the relative impact of both the size of the body of law being ruled upon and its velocity of change?

16. What are the minimum qualifications of the hearing officers (including those grandfathered)?

17. What are other states' practices in the area of quasi-judicial hearings?

The answers to the preceding questions are displayed in the chart titled "Administrative Hearings in California State Government" and included as a pocket supplement in this report.

To retain its value, the material gathered for this report should be maintained, and *we recommend that the Office of Administrative Hearings, under the authority found in Government Code Section 11370.5,* [5/] *carry out this responsibility.*

Review of the pocket supplement will give the reader an insight into the breadth of the quasi-judicial administrative hearing process presently found in California State Government. In terms of organizational size alone, 75 state agencies holding quasi-judicial hearings employ nearly 500 hearing officers whose salaries amount to approximately 13 million dollars per year.[6/] By slightly relaxing criteria for the identification of agencies holding quasi-judicial hearings we could have included several agencies from Appendix B, List 2, in this group.

5/Government Code Section 11370.5 directs OAH to:

> study the subject of administrative law and procedure in all its aspects; to submit its suggestions to the various agencies in the interests of fairness, uniformity and the expedition of business; and to report its recommendations to the Governor and Legislature at the commencement of each general session....

6/This cost is an extrapolation based upon the approximate median salary range of $2200 per month multiplied by the number of hearing officers.

The principal conclusions which we reached from our review of the chart data are:

- California's administrative adjudication units, though decentralized, are all operating consistent with statutory authority. Among the APA agencies specified in Government Code Section 11501, those with the smaller caseloads tend to use the services of the Office of Administrative Hearings while others have separate hearing unit authority. It is noted, however, that, in most cases, such statutory authority does not preclude contracting for adjudicatory services from OAH.

- The extreme range of case complexity found among the various hearing units makes relative productivity evaluation among hearing officers of doubtful value, given current data.

- Relative productivity comparisons of hearing unit support personnel would not be accurate with present data due to the broad differences in the duties of the staff, the formats of decisions produced, and differences in the written decision production process in the various hearing units.

- Hearing Officers' minimum legal qualifications vary from no legal experience to five years' practice as a member of the State Bar. Salary ranges vary accordingly.

- Many administrative hearings are conducted by "captive" hearing officers who are employed by the agency involved in the dispute.

CHAPTER III

CENTRALIZATION OF ADMINISTRATIVE HEARINGS - THE ISSUES

California's administrative adjudication process is, at present, largely decentralized. With the exception of the Office of Administrative Hearings, those persons who hear administrative disputes are usually employed by the agency involved in the dispute, e.g., Administrative Law Judges (ALJs) from the Department of Benefit Payments, the Public Utilities Commission, and the Unemployment Insurance Appeals Board. This decentralized system of "captive" hearing officers is consistent with existing systems in other states,[1/] and with California court decisions concerning due process,[2/] as well as with the concept of a "single state agency" totally responsible for administration of federally funded programs.[3/] The Office of Administrative Hearings has suggested that the present decentralized system of administrative adjudication be abandoned and replaced with a system which would centralize all of California's quasi-judicial administrative hearings. The result of such centralization, OAH feels, would be possible savings in numbers of support personnel, more

1/We called the State Attorney Generals' Offices for answers to the other states questionnaire (Appendix A) to determine what procedures Pennsylvania, Illinois, Ohio, Texas, West Virginia, and New York had developed to deal with administrative dispute resolution. All of the states, except New York, responded to the telephone interview. In responding states, the Attorney Generals' Offices described a decentralized system of administrative adjudication similar to California's system.

2/Leeds vs. Gray (1952) 109 CA2d 674, 242 P2d 48.

3/Section 204 of the Intergovernmental Cooperation Act of 1968 allows states to apply for and receive waivers for the Single State Agency requirement. See also 45 CFR 205.101(a)(14).

efficient utilization of the workforce and available facilities, and standardization of the dispute resolution process.[4/] We have discovered no concrete evidence to support or refute this hypothesis in its entirety.

An issue raised by OAH as a corollary to the issue of centralization concerns the "fundamental fairness of independent hearing officers" vis-a-vis "captive" hearing officers. The authority of some agency administrators to change or reject a hearing officer's legal determination is seen by some as an inappropriate power. This argument must be tempered in the context of "independence" of hearing officers because agency review of proposed decisions is not confined to the decisions of "captive" hearing officers. Decisions written by OAH ALJ's are generally proposed decisions and are also subject to review by the agency head. Nonetheless, proponents of "independence" maintain that a hearing officer whose proposed decision will be reviewed by his or her own agency head will feel more constrained to closely follow agency policy when writing a decision than would an independent adjudicator and that such constraint is detrimental to fundamental fairness. A related item is the view "that hearing officers should not be subjected to salary and promotion influences from the agency which they serve."[5/]

Another point raised by advocates of independent hearing units is that the clients of an agency may not feel that a hearing officer employed by the agency with which they are in dispute will fairly consider their arguments and evidence even though all the elements of due process may be present during the hearing.

4/Memorandum, Herbert Noriega, Director OAH, to Leonard Grimes, Jr., Secretary for Agriculture and Services, June 7, 1977.

5/Quoted from a 1956 report of the State Bar Committee on Administrative Agencies and Tribunals by Mr. George Coan, former Director of OAH, during a recent State Bar symposium on administrative law. The full text of Mr. Coan's remarks can be found beginning on page 165 of the Proceedings of the Public Law Section, published by the State Bar and dated September 25, 1977.

The proponents of "captive" or agency-employed hearing officers point out that the "captive" hearing officer has more expertise in the laws dealing with the particular agency and that this expertise results in fair, speedy, and inexpensive administrative adjudication. Further, the decisions of "captive" hearing officers are seen as more consistent with past decisions and with agency policy. It is this last point, "consistency" of decisions with agency policy, that fires the philosophical enmity between opponents and proponents of "captive" hearing officers. Those supporting agency-employed hearing officers feel that the hearing unit should be an instrument of policy enforcement assuring that the policies of the agency are applied consistently to all clients of the agency through all levels of agency administration. Opponents feel that the hearing officer should not be forced into the agency mold but should be free to rule on the policies and actions of agencies without constraint.

Still, the philosophical controversy over centralization revolves around the question of the "fairness" of administrative adjudicators. Do agency employed or "captive" adjudicators provide a "fair hearing?" Another part of this same issue is expressed by the question: Do we desire to create an "administrative law court" by centralizing all administrative hearings in one body? In answer to the first question, the California Supreme Court, in Leeds vs. Gray (1952) 109 CA2d 874, has ruled that if the elements of due process are present in an administrative hearing held by an agency employed adjudicator then the parties to that dispute have received a "fair hearing."[6/] Chief Justice Warren Burger

6/Separate authority in regulation and statue also provides for the existence of separate hearing units within agencies. Refer to the "authority" line on the Pocket Supplement.

in a speech given this year at the National Conference on Minor Disputes, sponsored by the American Bar Association, addressed the second question by saying:

> Perhaps some may disagree, but certainly there ought to be a clear consensus on the proposition that the complex procedures, refined and developed for certain types of more complex cases, are inappropriate and even counter-productive when applied to the resolution of the kinds of disputes which are the focus of our attention today.
>
> What is beginning to emerge, through the fog, is that we lawyers and judges--aided and abetted by the inherently litigious nature of Americans--have created many of these problems.
>
> It may be that even if we disciples of the law do not invent new problems, we have done far too little to solve them or channel them into simpler mechanisms that will produce tolerable results.
>
> If we are completely honest, we must at least consider whether we are not in reality, somewhat like Pogo, the brainchild of that philosopher-humanist, Walt Kelly, who proclaimed "We have met the enemy, and he is us."
>
> I do not suggest in fact the "enemy" we have met is the legal profession. But the "enemy" may be our willingness to assume that the more complex the process, the more refined and deliberate the procedure, the better the quality of justice which results. But this is not necessarily so. My submission is that we continue to engage in some ruthless self-examination and inquire whether our facination with procedure, with legal tests--now often evolving three or four tiers deep--has not led to a smug assumption, that conflicts can be solved only by law-trained people. It is possible that--because of our training--we have tended to cast all disputes into a legal framework that only legally trained professionals can cope with and in traditional legal ways. If that is so--and I put it as a question--we are in a vicious cycle.

Turning from the philosophical issues involved in the debate over centralized administrative hearings to a discussion of some organizational options for adjudicators, it should first be recognized that substantial change from the present decentralized system would require enabling legislation. The State's various hearing units currently have specific state or Federal statutory authority for their existence.

The organizational form of the administrative hearing function could lie at any of several points on a continuum between the present decentralized system, which includes some employment of "captive" adjudicators, and a fully consolidated and independent "administrative law court."

A fully centralized "administrative law court" would probably feature such characteristics as: (1) formal hearing processes, (2) central calendaring of adjudicator caseload and travel, (3) Administrative Law Judge assignment to cases dependent upon calendar requirements instead of case specialization, (4) pooled support staff operations, (5) common hearing facilities for all case types, (6) a single responsible administrator, and (7) a higher-level review authority independent of the agencies for which the cases are being heard. From an economic standpoint, these features appear desirable if one assumes that the less centralized systems harbor slack time in adjudicator and support staff schedules, hearing facility vacancies, and narrower-than-necessary supervisory spans of control.[7/]

But consolidation carries some risk of higher costs as well. First, as suggested by Chief Justice Burger in the earlier quotation, process formalization can, by itself, increase hearing complexity and costs with no promise of a better quality of justice. Second, central calendaring of ALJ assignments without regard to case type would probably lead to a leveling upward of minimum qualifications and salary ranges among ALJS.[8/]

7/Data in the pocket supplement do not support an assumption that ALJ non-productive time can be lessened by consolidated calendaring. Among agencies experiencing high rates of client non-appearances (e.g., Benefit Payments and DIAB), such "washout" rates are usually anticipated by over-calendaring cases.

8/This type of personnel and pay adjustment would be likely to occur even in a "departmentalized" administrative court since rotation of ALJs among the various departments would probably be practiced in an attempt to provide for the ALJs' professional growth.

Third, if support staff were pooled and assigned cases without regard to case type (e.g., welfare, licensing or rate setting), some existing case processing efficiencies probably would be lost. The implications of the latter point also apply to the ALJs who could be expected to lose some productivity when assigned to hearings dealing with widely differing subjects.

Clearly, some incremental steps toward centralization could be immediately undertaken, e.g., regional consolidation of support functions, shared hearing facilities, contracted hearing officer coverage of remote location hearings, and so forth. However, such incremental steps should be considered only after the policy questions raised in this report have been addressed. Failure to do so could result in a range of agency response from spotty use of independent adjudicators to the creation of a defacto "fourth branch" of government (an independent Administrative Law Court). Such results would be policy making by default and would not allow the full range of discussion that the issue deserves.

We recommend that the Office of Administrative Hearings (OAH) moderate the policy discussions concerning the issues associated with a centralized hearing function. Statutory or budgetary changes affecting the State's current decentralized process should reflect the input of adjudicators as well as the State Bar, affected program managers and affected client groups. The authority for OAH to undertake such an effort is found in Government Code Section 11370.3.

Policy considerations aside, there is no clear and obvious evidence that a centralized administrative law court would be either functionally or economically preferable to the present decentralized structure. Therefore, we recommend no change at this time.

APPENDIX A

QUESTIONNAIRE SAMPLES

SCREENING QUESTIONNAIRE

NAME OF AGENCY_____

ADDRESS_____

NAME & TELEPHONE NUMBER OF CONTACT PERSON_____

RANKING_____

WHICH OF THE FOLLOWING ELEMENTS ARE PRESENT IN YOUR (FAIR) HEARING PROCESS?

___ Sworn testimony and the right to testify

___ Hearing recorded or reported (record available for review or appeal)

___ Opportunity to cross-examine witnesses

___ Follow rules of evidentiary and procedural due process (re: Goldberg v. Kelly)

___ Subpoena power (persons and records)

___ Presided over by person who will make (proposed/final) decision

___ Held in English with interpreter allowed when respondent not English-speaking

___ Advance notice of hearing given

___ Is hearing public

FAIR HEARING QUESTIONNAIRE

1. Agency Name_____

2. What is the title of the person who conducts your agency's Fair Hearings? (Title)_____

3. By whom are the "Hearing Officers" used by your agency employed? (Parent Agency)_____

4. How many positions are involved in the conduct of hearings? (Hearing Officer Only)_____as of date_____

5. How much support staff is available to each Hearing Officer? (Number and types of each position in support)_____

6. What are the pay scales of each of the above named positions?

7. Are all hearings recorded? In what manner?_____

8. Are all hearings conducted in accord with Government Code? (Which Code)

9. What kinds of disputes are heard?_____

10. How many disputes are heard? (Types?)_____

11. What qualifications are necessary to be a "Hearing Officer" for your agency?_____

12. Do "Fair Hearing Officers" perform other duties for your agency? (What, if any?)_____

13. What Statutes or Codes are cited as authority for the existance of the Fair Hearing unit in your agency? (Please attach xerox copies if other than Gov't Code 11500 et al.)_____

14. What is the trend in the number of disputes heard by your agency? (Numbers growing? Types changing?)_____

15. Is any proposed legislation likely to affect administrative hearings in your agency? (Bill number, if any)_____

16. Should Hearing Officers be autonomous of agency control? Why?_____

17. What are the funding sources for your Fair Hearings?_____

18. Do Hearing Officers travel on a "Hearing Circuit"? (Where)_____

19. Frequency of travel?_____

20. Are the decisions of the Hearing Officer binding or subject to review?

21. What impact does the Hearing Officer's decisions have on the body of law? (Set & abide by precedent?)_____

22. How quickly does the law change with respect to your agency?_____

23. Has your agency encountered any administrative conflicts or overlaps in the Fair Hearing process?_____

24. Do your Hearing Officers use a queue system or an appointment by hour system?_____

25. What is the average number of missed appointments ("Washouts") per day?_____

26. Has the volume of laws and/or regulations affecting your agency changed significantly? How quickly? Increase or Decrease?_____

27. What is the mechanism of your decision review process?_____

28. Are any personnel now performing the duties of "Hearing Officer" not admitted to the California State Bar? (Why?)_____

REMARKS:

OTHER STATE'S QUESTIONNAIRE

NAME OF STATE_____

NAME OF CONTACT PERSON_____TITLE (If any)_____

TELEPHONE NUMBER_____

QUESTIONS:

I. Do the various agencies in your state hold quasi-judicial administrative hearings?

II. Are these hearings held pursuant to a law(s) similar to the Federal Administrative Procedures Act? (If so/not which law?)

-- Who does the hearing? (Title or position)

IV. What qualifications are necessary to conduct hearings?

V. What support staff is available to the person conducting hearings? (Permanent/temporary, civil service/private sector, assigned/contract)

VI. Are the laws affecting your state's hearings changing rapidly in volume, intent, or application?

APPENDIX B

LISTS OF AGENCIES BY HEARING TYPE

LIST 1

AGENCIES INCLUDED IN THE ADMINISTRATIVE PROCEDURE ACT,
GOVERNMENT CODE SECTION 11501

Board of Dental Examiners of California

Board of Medical Quality Assurance of the State of California, each of its three divisions, and Medical Quality Review Committees

Board of Osteopathic Examiners of the State of California

California Board of Nursing Education and Nurse Registration

State Board of Optometry

California State Board of Pharmacy

State Department of Health

Board of Examiners in Veterinary Medicine

State Board of Accountancy

California State Board of Architectural Examiners

State Board of Barber Examiners

State Board of Registration for Professional Engineers

Registrar of Contractors

State Board of Cosmetology

State Board of Funeral Directors and Embalmers

Structural Pest Control Board

Department of Navigation and Ocean Development

Director of Consumer Affairs

Bureau of Collection and Investigative Services

State Fire Marshal

State Board of Registration for Geologists

Director of Food and Agriculture

Labor Commissioner

Real Estate Commissioner

Commissioner of Corporations

Department of Benefit Payments

Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun

Board of Pilot Commissioners for Humboldt Bay and Bar

Board of Pilot Commissioners for the Harbor of San Diego

Fish and Game Commission

State Board of Education

Insurance Commissioner

Savings and Loan Commissioner

State Board of Dry Cleaners

Board of Behavioral Science Examiners

State Board of Chiropractic Examiners

State Board of Guide Dogs for the Blind

Department of Aeronautics

Board of Administration, Public Employees' Retirement System

Department of Motor Vehicles

Bureau of Home Furnishings

Cemetery Board

Department of Conservation

Department of Water Resources acting pursuant to Section 414 of the Water Code

Board of Vocational Nurse and Psychiatric Technician Examiners of the State of California

Certified Shorthand Reporters Board

Bureau of Repair Services

California State Board of Landscape Architects

Department of Alcoholic Beverage Control

California Horse Racing Board

School districts under Section 13443 of the Education Code

State Fair Employment Practice Commission

Bureau of Employment Agencies

INCLUDED IN THE ADMINISTRATIVE
PROCEDURE ACT UNDER GOVERNMENT
CODE SECTION 11502

Office of Administrative Hearings

LIST 1-A

AGENCIES HOLDING QUASI-JUDICIAL HEARINGS
BUT NOT INCLUDED IN THE ADMINISTRATIVE PROCEDURE ACT

Workers Compensation Appeals Board

California Public Utilities Commission

Board of Equalization

State Personnel Board

Water Resources Control Board

Agricultural Labor Relations Board

California Unemployment Insurance Appeals Board

Educational Employment Relations Board

Occupational Safety and Health Appeals Board

Commission on California State Government Organization and Economy

...y Resources Conservation and Development Commission

Athletic Commission

State Lands Commission (Permit Action)

Youth Authority Board

State Benefits and Services Advisory Board

State Board of Control

San Francisco Bay Conservation and Development Commission

Commission on Judicial Performance

Community Release Board

Franchise Tax Board

Department of Housing and Community Development

Department of Transportation (Board of Review)

LIST 2

AGENCIES HOLDING QUASI-LEGISLATIVE HEARINGS BUT HAVING SOME QUASI-JUDICIAL ELEMENTS IN THEIR HEARING PROCESSES

Commission on Housing and Community Development

Klamath River Compact Commission (Rare)

Health Facilities Commission (Appeals)

California Coastal Zone Commission

Reclamation Board

State Public Works Board

Solid Waste Management Board

Horse Racing Board

State Merit Award Board

State Transportation Board

Alcoholic Beverage Control Board

California Air Resources Board

Commission for Teachers Preparation and Licensing

California Job Creation Program Board

Board of Corrections

State Board of Forestry

Fair Political Practices Commission

CHART OF

ADMINISTRATIVE HEARINGS

IN

CALIFORNIA STATE GOVERNMENT

WILL BE PROVIDED UPON REQUEST

ATTACHMENT NO. 1

STATE OF CALIFORNIA—HEALTH AND WELFARE AGENCY

DEPARTMENT OF SOCIAL SERVICES

107 S. Broadway Rm. 6005
Los Angeles, CA 90012

(818) 368-1097

May 25, 1990

California Law Commission
4000 Middlefield Rd. Ste. D-2
Palo Alto, CA 94303

Attention: Nat Sterling

Dear Mr. Sterling:

I cannot believe that the State of California is still seriously considering a proposal that would include WCAB, UIAB and Social Services hearings to be handled by a central panel of ALJs.

My concerns are noted in the enclosed letter I wrote to Michael Asimow last year, and I will not repeat them here.

I understand that there was testimony by ALJs from the State Personnel Board concerning improper in-house pressure put upon them to write decisions in favor of management. If the State Personnel Board, or any agency, is guilty of the outrageous conduct alleged, then the hearing function must be removed from the agency's jurisdiction. But ALJ independence is not a problem at the WCAB, UIAB or Social Services, so this should not be a consideration when the Commission makes a recommendation concerning these three agencies.

It is surprising to me that the Commission has not conducted a formal poll of ALJs concerning the desirability and feasibility of including these agencies in a central panel. I imagine that there are some ALJs at WCAB and UIAB who suffer burn-out due to high workload or lack of variety of issues, and as a result they may desire to do other hearings. But ask them if they feel that it is reasonable to expect outside ALJs to hear their agencies' cases on a part-time basis along with a mixture of other cases. From my discussions with other ALJs at Social Services, I believe that at least 90 percent of us feel that the central panel concept for these three agencies is neither desirable nor feasible.

A central panel of ALJs for most agencies may be a good idea. But keep these three agencies out of it.

If you desire to discuss this matter further, please call.

Sincerely,

David Schlossberg
Administrative Law Judge

David and Linda Schlossberg

17321 ZOLA STREET
GRANADA HILLS, CALIFORNIA 91344
(818) 366-1097

March 13, 1989

Professor Michael Asimow
UCLA School of Law
Los Angeles, CA 90024

Dear Mike:

For the past two days I have been drafting a very long letter to respond to your question whether I (and my colleagues) believe there should be a central panel of all ALJs who conduct administrative hearings about public benefits.

But the answer to your question is such a resounding NO!, only a brief explanation is necessary (for me, four pages is brief).

The three state agencies that I am aware conduct public benefits hearings are Social Services, Uemployment Insurance Appeals Board (UIAB), and Workers Compensation Appeals Board (WCAB). My comments are directed about these agencies.

There are a few reasons why a central panel of ALJs might be desirable, generally, but those reasons don't apply to these three agencies.

First, a central panel ensures ALJ independence. If any of the three agencies had the problem allegedly existing at Social Security (see attachment), that would be reason alone to establish a central, independent panel totally removed from the agency. But independence is not a problem for ALJs employed by the three agencies. We don't need a central panel for our own protection, and I do not foresee even the slightest threat in the future to our independence.

Second, a central panel maintains the integrity of the hearing process. In a small agency the hearing function might be assigned as one of the duties of a top Department official, who as a practical matter is unable to render a truly objective decision. A central panel eliminates this problem. But the three agencies each employ at least 55 ALJs. We have our own separate bureaus and are not closely alligned with any of the parties. We are house ALJs in name only; we certainly are not in anyone's bedroom.

Third, a central panel can improve government efficiency in processing hearings. This would be true for agencies that require only a limited number of hearings and as a result they are not used to dealing with case processing problems or developing hearing procedures. But the three agencies conduct numerous hearings (several thousand a year at Social Services, tens of thousands at UIAB), and have been doing so for years. Procedures for processing cases, calendaring them, dealing with difficult parties, etc. have been tried, tested and for the most

part perfected in order to deal with the specfic problems and to meet the specific goals and objectives of each agency. A central panel for these three agencies would not improve case processing, but it might severly hinder it.

Fourth, a central panel could result in uniform hearing rules and procedures for all public benefits hearings. I could go on at length why this is not a good idea. But even if it were a good idea, we don't need to create a central panel of ALJs in order to accomplish that objective. For example, a small bureau could be established in the Health and Welfare Agency to oversee hearing procedures of public benefits hearings.

Fifth, a central panel overcomes the problems created by vacant positions and fluctuating case load. If a small agency employs four ALJs and one dies and the other transfers to another job, that can create a terrible backlog until replacement ALJs are hired and trained. A central panel loses ALJs too, but the impact on a small agency is hardly noticeable, since that agency's hearings will not significantly be backlogged due to the small percentage of hearings conducted for that agency. But a large agency such as the three under consideration does not require a central panel to overcome problems relating to fluctuating case load. These agencies can, and do, use retired ALJs for up to the maximum allowable 90 days per year.(Social Services doesn't hire retirees, but could).

Sixth, a central panel system could ensure uniform ALJ work load standards and conditions of employment. But I've never heard of any ALJ in these three agencies complain that they were being treated unfairly in comparison to the ALJs in the other two agencies. I think a general statement could be made that each of us in our agencies likes our conditions of employment and do not want someone to come in and fix a problem that does not exist. Besides, that is what we have a union for.

There are, however, two compelling reasons for not creating a central panel of public benefits ALJs.

First, the nature of the hearings and law of these three agencies requires specialization, not generalization. At Social Services we deal with a large, complex and ever-changing body of law, regulations and policy memos. In addition, we need to know when there is likely to be an unwritten policy governing a situation before us so that we will know whether to write a Final Decision (in accord with policy) or a Proposed Decision (contrary to policy). I would say that it takes a new ALJ at Social Services at least two years to develop a journey-level competency in knowledge of welfare law.

Years ago, OAH used to conduct Social Services hearings on an overflow basis. These cases were initially handled like their other cases, I am told, but soon they realized that a specialized unit had to be established to handle these hearings exclusively. (That's when I was hired, in 1972.) The emphasis in OAH-type hearings is on fact finding and use of judgment in proposing penalties. There is no place in their system for hearings that require a detailed understanding of a complex body of law.

We ALJs at Social Services began hearing disability cases about five years ago following a change in law concerning Medi-Cal eligibility. These hearings are essentially the same as Social Security holds. It is my understanding that new Social Security ALJs are provided with six weeks of concentrated training in medical matters before holding hearings. We have had perhaps five days of training in five years, not very much considering these cases constituted 15 to 20 percent of our case load. Morale dropped considerably. We hated resolving cases that we knew we were not competent to handle. I personally wrote the State Bar to ask whether it was ethical for me to continue to resolve these cases without adequate training. The State Bar said it did not want to get involved in a matter that might eventually involve employee discipline. (I resolved the ethical problem by finding disability if I had any doubt in favor of the claimant, a radical departure from the preponderance of evidence test.)

Several months ago a few ALJs volunteered to do these hearings exclusively. These ALJs have an interest in disability and are rapidly developing an expertise in the area because this is all they do. They are happy, and the rest of us are too, since we have to hold only a small number of these hearings.

And better decisions are being written because of the specialization.

Yet, it is my understanding that the knowledge of medical matters that we at Social Services need to do disability hearings competently does not approach that which WCAB ALJs require in order to accurately evaluate ever-conflicting medical reports presented by opposing counsel. There must be some reason why the State Bar has established Workers Compensation as one of the few specialty areas of law. There is simply no way a generalist could competently handle their hearings.

The law governing UIAB may not be as technical as Social Services nor require a specialization like WCAB. But their law is probably much more extensive than what OAH ALJs deal with. The UIAB is one of the most efficient agencies in government. Their ALJs conduct about 20 hearings per week and write the decisions immediately after each hearing. You don't develop that kind of efficiency with part-time ALJs, who are distracted with other types of hearings too.

The second compelling reason for maintaining the current system of separation may not be readily apparent to academicians. The nature of the hearing process and clientele are different for each agency, and each process is best suited for a different style of ALJ.

At Social Services the best ALJs have a little bit of the heart of a social worker (but not a bleeding heart). Our claimants are frequently just managing to get by. Their frustration with perceived incompetence at the initial eligibility level is apparent (and justified in many cases). The outstanding

ALJ at Social Services will patiently listen to the claimant and provide helpful advice. One specific example: There was an old lady in Needles who couldn't get new dentures from Medi-Cal because new ones had recently been authorized, but she had not utilized that authorization. This lady had no idea how to rectify the problem. A few phone calls by me to her dentist and to Sacramento resolved it. There is great joy for some of us in being able to do that.

But at UIAB the ALJs hold the hearing and write the decision in an hour. Certainly there is no time to provide a sympathetic ear or a helpful hand.

At WCAB the ALJ deals with attorneys, and all three of them are used to more formalized hearing procedures. The ALJ does not generally take as active a role in examining witnesses as Social Services and UIAB ALJs do. WCAB ALJs also conduct settlement conferences and must be skilled at it if they want a manageable case load.

This doesn't mean that an ALJ for one of the agencies would not be an effective ALJ at one of the other two. I worked at the Public Employment Relations Baord for two years, with its settlement conferences and formalized hearings. But my personality is better suited for the informal hearing procedure where I take active control of the hearing. I imagine the opposite is true for others. And even if we can effectively adapt to the different styles, how easy would it be for the ALJ to switch styles from day to day?

The current separation allows each agency to hire and develop ALJs in a manner that is consistent with its unique style and objectives. This should not be interfered with by imposing a central panel on them.

Conclusion

An OAH-type central panel works well for agencies that don't have many hearings and whose law is not very complex. That is not the case for the three public benefits agencies. Additionally, the nature of the hearings is best suited for different-styled ALJs. It would be a drastic mistake to create a central panel of ALJs for Social Services, UIAB and WCAB ALJs. As a final thought, if this proposal were seriously considered, the ALJs at the three agencies should be polled. I am confident that they would overwhelmingly oppose it.

I hope to be able to provide input on the other topics you are studying in administrative adjudication and rule making. Please contact me if you have any questions.

Sincerely,

David S[illegible]berg

tional Park's wilderness beach. | food chain, which could damage their | counts the damage to birds, because | them alive but covered in oil. | Jenkins, pastor of the ...

Judges Who Decide Social Security Claims Say Agency Goads Them to Deny Benefits

By MARTIN TOLCHIN
Special to The New York Times

WASHINGTON, Jan. 7 — Many of the judges who decide claims for Government disability and health insurance charge that they are being harassed by the Social Security Administration in an effort to reduce costs.

"We have gotten allegations from administrative law judges of coercion, threatened transfers and other kinds of pressures," said Representative Barney Frank, Democrat of Massachusetts, who is chairman of a House Judiciary subcommittee that will hold hearings on the allegations next month. "The harassment is all in the interest of keeping awards down for sick and needy people," Mr. Frank said.

The agency denies that it harasses the law judges. It says it monitors them to increase their productivity and reduce costs.

"We're not aware of any allegations of harassment," said Phil Gambino, chief spokesman for the Social Security Administration. "We recognize and support the need for independence."

But through their national organization, the Association of Administrative Law Judges, a number of judges have said the Social Security Administration imposes a monthly quota of cases and retaliates against those who do not meet it. Some say the agency also punishes those who award benefits it considers excessive.

Russell Barone, an administrative law judge in Chicago, said the agency recently turned down his request for a transfer to Buffalo because he had decided an average of only 31 cases a month instead of 37.

Paul Rosenthal of Newport Beach, Calif., the former chief administrative law judge at the Social Security Administration, said that as punishment for an effort to increase the judges' top salaries, now $71,377 a year, he was ordered not to accept an award from the American Bar Association in 1986. The award commended Mr. Rosenthal and the agency's judges for "outstanding efforts to protect the integrity of administrative adjudication within their agency."

Mr. Rosenthal said his persistent efforts on behalf of the law judges led the agency to demote him in March 1987. He retired last month.

Louis D. Enoff, the agency's Deputy Commissioner for Programs, said some agency officials considered the Bar Association award an insult to the Social Security Administration, feeling that it took the judges' side in their dispute with the agency. But he said he was unaware that Mr. Rosenthal had been ordered not to accept the award.

A long-running dispute over independence.

The judges, who have lifetime tenure, are part of a national corps, hired by Federal agencies to decide disputes involving eligibility and awards under Government programs. Their status is similar to that of Federal judges under a law that deems them "independent and secure in their tenure and compensation."

Of 1,034 administrative law judges, 696 work for the Social Security Administration, where they hear appeals from people denied disability or health insurance benefits. There are about 300,000 such hearings a year.

Charges of harassment have been made by judges working for other agencies, but the judges assert that the Social Security Administration is the worst offender.

In 1982 the agency began to review the decisions of all judges who allowed benefits in 70 percent of their decisions or more. It warned them that if their performance did not change, "other steps" would be considered.

That policy drew sharp criticism from Congress and brought a lawsuit from the Association of Administrative Law Judges. The agency dropped the review procedure in 1984, and the lawsuit was dismissed, although a Federal district judge in Chicago said the policy had "created an untenable atmosphere of tension and unfairness" that could have compromised the independence of the judges.

But some judges say the agency still exerts indirect pressure to hold down the benefits. The agency has taken away secretaries and lawyers reporting to individual judges, replacing them with personnel pools that the judges say remain under the agency's authority and are sometimes manipulated to discipline them. The agency says the move was needed for greater efficiency, but some judges say the net effect was to take away their independence and ability to act impartially.

"The Social Security Administration doesn't treat judges like judges," says Nahum Litt, the chief administrative law judge at the Department of Labor. "They treat them as other employees."

Mr. Litt said the problem arose from a conflict between budget-minded agency officials and judges who are supposed to be disinterested in the fiscal effects of their rulings.

"The agency has consistently tried to control the ability of A.L.J.'s to function as independent adjudicators," says Ronald J. Bernoski, an administrative law judge in Milwaukee who is secretary of the law judges' association.

W. C. Lynch, a Social Security Administration law judge in Eugene, Ore., who is a member of the association's board of directors, said, "There is a wealth of evidence that if an A.L.J. incurs the ire of the Social Security Administration, he very likely would not get certain assignments, travel arrangements, transfers and other things that he wanted. It's not too subtle."

Both men testified last month at a hearing of the House Ways and Means Committee, but only after being publicly assured that the agency would not punish them for their testimony.

PLEASE REPLY TO:
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May 29, 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
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RE: STUDY OF ADMINISTRATIVE LAW - ADMINISTRATIVE ADJUDICATION - CENTRAL PANEL CONCEPT

Dear Persons:

This letter is being written by myself as an individual and does not represent the views of any agency or organization. I am writing this letter in response to the letter of Tim McArdle, Chief Counsel, California Unemployment Insurance Appeals Board, dated May 14, 1990, and in response to Memorandum 90-72 of the staff of your Commission, pages 8 and 9, regarding the applicability of an expanded central panel concept to the Unemployment Insurance Appeals Board of the State of California.

I am personally unable to attend your meeting of May 31, 1990, in Sacramento, California, and would like the opportunity to attend a future meeting of your Commission (preferably in Los Angeles) to expand on the views set forth below.

GENERAL DISCUSSION

I request that the Commission defer until a future meeting any decision on whether or not any particular agency's ALJs be included in an expanded central panel until the views of all sides be considered, proponents and opponents. I am disturbed that the staff memorandum recommends that with respect to certain agencies their ALJs not be included in the expanded central panel merely upon the assertion or recommendation of that agency. Up to now the Commission has discussed the central panel concept from a general point of view and with some particularity as to certain agencies. Now that each and every agency is being considered it is recommended and urged that the Commission not decide the status of that agency's adjudicatory process (to include it in an expanded central panel or not) until all views are heard.

SHOULD THE ADMINISTRATIVE LAW JUDGES OF THE CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD BE INCLUDED IN AN EXPANDED CENTRAL PANEL?

With respect to the CUIAB, Mr. McArdle has submitted his views. He is an opponent of an expanded central panel for his agency. The views of the proponents of an expanded central panel in that agency should also be considered before a decision is made by the Commission.

I agree that there is a division of opinion among the Administrative Law Judges of the California Unemployment Insurance Appeals Board as to whether or not they should be included in an expanded central panel system. However, it is not the convenience of the ALJs that is the uppermost factor but the litigating public that is the uppermost consideration, together with possible cost savings. The principal argument in favor of an expanded central panel system is that it would promote greater appearance of fairness in the administrative adjudicatory process and would enhance the independence of the administrative law judge.

At a recent discussion held in San Jose, California, on May 17, 1990, Professor Asimow conducted a seminar concerning his work for the California Law Revision Commission. He conducted an informal poll among the Administrative Law Judges of the California Unemployment Insurance Appeals Board as to whether they favored being included in the central panel concept. The results of this poll are interesting. When the question was posed as to whether or not they would be in favor of being transferred to the expanded central panel but would be limited to hearing unemployment insurance appeal cases or disability insurance appeal cases as they are now, the vote was opposed to being included in the central panel project. When the question was posed as to whether or not they would be interested in being included in the central panel project provided that they would be given an opportunity to hear a greater variety of cases, the vote was in favor of being included in the central panel project.

Although in many respects, the CUIAB and its appeal process is separate and independent of the Employment Development Department and there is generally an appearance of independence and fairness, certain considerations or defects in that process should be considered:

1. The Employment Development Department (EDD) is a party litigant to each and every unemployment insurance and disability insurance appeal (see for example, Unemployment Insurance Code sections 410 and 1328);

2. Many of the appeals hearings are held in the field offices of the EDD for the convenience of the parties. Although a substantial number are held in the specialized appeals offices of the CUIAB it is estimated that approximately 50% of the cases are heard in the field offices of the EDD. Where the hearing is held in the specialized CUIAB appeals office, there is a greater appearance of fairness. Where hearings are held in the EDD field offices, there is an element of lack of fairness or lack of the appearance of fairness. The hearing is held in the office of a party

litigant. The claimant is summoned to the hearing by an ALJ in that office. The ALJ appears to be, under those circumstances, a mere functionary of the EDD office and is commonly identified with that office. It is no wonder that many times the claimants and even employers refer to the ALJ as a Department employee or functionary. This is a serious impediment to the appearance of fairness and the apparent independence of the Administrative Law Judge;

3. While all personnel matters, such as hiring, promotion, assignments are performed within the CUIAB and are not subject to review, criticism or input from EDD or any other entity, there are certain factors which must be considered. The California Unemployment Insurance Code provides in section 401 thereof that "There is in the department an appeals division consisting of the California Unemployment Insurance Appeals Board and its employees. . .". In this sense then the Appeals Board is a part of the EDD, which is a litigant before the Appeals Board. Section 403 of the code relates to budgetary aspects of the work of the Appeals Board. It states that all personnel of the "appeals division" shall be subject only to control of the Appeals Board or its agents but it then states that the Appeals Board shall prepare a budget concerning its costs of the "appeals division", the budget shall then be negotiated between the Appeals Board and the EDD and if there is a disagreement between the parties, the Governor of the state shall make a decision regarding that budget; the Department shall furnish equipment, supplies, housing and various services required by the appeals division and shall perform such other mechanics of administration as are agreed;

4. The funding of the appeals division or the Appeals Board derives from federal sources primarily (90% or so) and the rest of that budget is derived from state sources. The federal aspect of the funding is derived from the Federal Unemployment Tax levied upon employers which is collected by the United States and then placed in a special fund by the United States Department of Labor. The United States Department of Labor then allocates a portion of that fund to each state, including the State of California, for the operation of its unemployment insurance program, including the appeals function. That portion of the federal funding relating to the State of California, goes to the EDD first and based upon that portion of the unemployment insurance program that is allocated for appeals, a portion thereof is provided for the appeals division of the Appeals Board. It might be argued that in the handling and negotiation of the budget there is some indicia of lack of independence of the Appeals Board or appearance thereof since the Appeals Board derives its budget subject to negotiations with the EDD, a party litigant;

5. In practical application of the above paragraph, all of the equipment of the Appeals Board, including tables, chairs, bookcases, computer equipment, recording devices, telephones, typewriters, and even coat racks are labeled with the name of the EDD on them. It is true that subject to the negotiaton process the Appeals Board later pays the EDD for

this equipment. But the appearance is that ALJs conduct hearings with the property of a party litigant which may have been possibly leased or furnished to the Appeals Board. Most claimants and employers may not be aware of this but most claimants and employers will be aware of the fact that in approximately 50% of the cases they are appearing in an office of a party litigant and that appearance is manifestly unfair.

With respect to the argument that centralization could result in greater economy, this is a point to be determined. The Appeals Board has had ups and downs in its caseload. There are times when the caseload has gone down and there are times when the caseload has gone up. There have been times when ALJs have been laid off or threatened with layoff due to a lack of work or cut in budget. Under those circumstances, the central panel system makes sense when there is a need for more ALJs due to a heavier caseload or budgetary problems, or when ALJs could be transferred to other agencies or other types of cases when the caseload or budgetary situation so requires.

In addition, in each ALJ appeals office there is a separate library, separate equipment and separate clerical staff. The combination of clerical staffs, libraries, equipment and the like can, if properly utilized, result in budgetary economies. This is the whole point to the possiblity of a "pilot" project in determining whether an expanded central panel system will result in tax savings and budgetary economies.

With respect to the professionalism of the Administrative Law Judges, it is quite clear that an expanded central panel system would not decrease professionalism, although it would probably enhance it.

With respect to expertise,it has been argued all along that expertise need not be diluted and that by establishing specialized subpanels within the expanded central panel ALJs with expertise could continue to hear the cases they were familiar with.

It is urged that even though expanded central panel not be established that there be "an apparatus" to provide "movement" of ALJs to hear other cases in the sense of pooling of ALJs. There may be, on certain occasions, a limited access of ALJs from one agency to another. This could be more easily done through the central panel system.

With respect to each of the reasons set forth in the memorandum of the staff, the following reply is made:

1. Although the Appeals Board is independent, there are certain practical factors in the hearing of cases which denigrates from the appearance of fairness and the independence of the ALJ as above described;

2. It is necessary to experiment to determine whether a relocation of ALJs from CUIAB to the central panel would be cost effective and there are certain possibilities that exist that might point in that direction;

3. Under the concept of a specialized subpanel of ALJs, hearing unemployment insurance cases within the expanded central panel system, the workload and time restrictions would be retained;

4. The funding mechanism would be the same as in the OAH as present, namely each agency would be billed for the funding; at the present time the Appeals Board and the EDD must negotiate funding under section 403 of the California Unemployment Insurance Code and such a mechanism would be retained in a different form possibly;

5. It is not the question as to whether the judges themselves prefer an expanded central panel but whether the public would be benefitted thereby. It is not entirely clear what the ALJs themselves want based upon the foregoing information;

6. An exchange program among agencies would be helpful but such an exchange program would be better operating under an expanded central panel;

7. Even though the Department of Labor may object to the central panel, the State of Washington has included in the central panel the unemployment insurance appeals; and

8. New office space might not be necessary but in fact there might be a cutting down of office space.

For the foregoing reasons it is urged that the California Law Revision Commission not decide immediately the question as to whether the CUIAB ALJs be transferred or not transferred to an expanded central panel but defer the matter for further consideration until all evidence is in.

Respectfully submitted,

PAUL WYLER
Administrative Law Judge

PW:kc