#N-103

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06/28/90

First Supplement to Memorandum 90-89

Subject: Study H-103 - Administrative Adjudication (ALJ Central Panel--California Unemployment Insurance Appeals Board)

This memorandum collects material the Commission has previously received concerning application of the ALJ central panel concept to the California Unemployment Insurance Appeals Board. The material includes:

Exhibit 1--Recommendation of Commission consultant against removal of CUIAB ALJs to central panel (October 1989)
Exhibit 2--Opposition of CUIAB to removal of ALJs to central panel (May 14, 1990)
Exhibit 3--Recommendation of Commission staff against removal of CUIAB ALJs to central panel (May 18, 1990)
Exhibit 4--Opposition of David Schlossberg to removal of CUIAB ALJs to central panel (May 24, 1990)
Exhibit 5--Support of Paul Wyler for removal of CUIAB ALJs to central panel (May 29, 1990)
Exhibit 6--Opposition of CUIAB representative at Commission meeting to removal of ALJs to central panel (May 31, 1990)

Also received, but not reproduced here, are 30 pages of CUIAB regulations (22 Cal. Code Regs. § 5000 et seq.), 300 pages of Index-Digest of Precedent Decisions, and 600 pages of Legal Principles/Points of Inquiry.

To summarize, the California Unemployment Insurance Appeals Board is an independent state agency, consisting of gubernatorial and legislative appointees. Its function is to act as a tribunal for hearing appeals from actions by the Employment Development Department concerning unemployment insurance, disability insurance, and employment tax. Parties before the Appeals Board may include the department, the employer, or the employee. The Appeals Board employs 130 administrative law judges to help it dispose of the approximately 138,000 cases that come before it annually.

The Commission's consultant has concluded, and the staff agrees, that no useful purpose would be served by transferring the Appeals Board administrative law judges to a central panel. The Appeals Board

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, assignmesnts, 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 type 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

EXHIBIT 3

Extract from
MEMORANDUM 90-72

Analyzed below are the comments of agencies that have so far responded in writing to the Commission's request for comment on this matter.

UNEMPLOYMENT INSURANCE APPEALS BOARD, CALIFORNIA

Exhibit 7 is a letter from the California Unemployment Insurance Appeals Board. The board is an independent and autonomous body whose functions are purely adjudicatory; it decides disputes between parties that are external to it. Administrative law judge personnel matters are controlled by the board and are not subject to review by any of the parties whose cases the administrative law judges rule upon.

The board opposes removal of its administrative law judges to a central panel for a number of reasons, including: (1) There is no reason for such a relocation, since the integrity of the administrative hearing process is assured by the independence of the board. (2) Such a relocation would not be cost-effective since the board as currently constituted processes disputes efficiently and economically. (3) There is a large workload and tight time restrictions which the board must meet. (4) This is a joint federal-state program which is federally-funded; apportionment to central panel funding would be difficult. The board also mentions professionalization within the board's administrative law judge corps and the fact that a significant number of the judges themselves would be opposed to removal to a central panel. The board notes that the concern that has been expressed about administrative law judge burnout could be addressed by an exchange program among agencies that employ administrative law judges.

The Commission's consultant, Professor Asimow, has recommended to the Commission that the board's administrative law judges not be transferred to a central panel. He notes that the parties to disputes adjudicated by the board are external to it and thus it possesses no built-in conflict of interest; the Department of Labor might object to any change in board procedure that might cause a failure to meet the strict DOL time limits for disposal of cases; board judges are dispersed throughout the state so that new office space might have to be obtained; and the volume of cases is immense, so that administrative law judges from a central panel could have difficulty accommodating to the quite different work style required at the board. The staff agrees there does not appear to be a good reason to remove the administrative law judges from the California Unemployment Insurance Appeals Board.

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 Schlossberg

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 Bright...

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

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

A long-running dispute over independence.

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.

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 indep... ence and ability to act impartially.

"The Social Security Administra... doesn't treat judges like judges," ... Nahum Litt, the chief administra... law judge at the Department of La... "They treat them as other employe...

Mr. Litt said the problem arose f... a conflict between budget-min... agency officials and judges who ... supposed to be disinterested in the... cal effects of their rulings.

"The agency has consistently trie... control the ability of A.L.J.'s to func... as independent adjudicators," ... Ronald J. Bernoski, an administra... law judge in Milwaukee who is se... tary of the law judges' association.

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

Both men testified last month a... hearing of the House Ways and Me... Committee, but only after being p... licly assured that the agency would ... punish them for their testimony.

-14-

PLEASE REPLY TO:
PAUL WYLER
1300 W. Olympic Blvd., 5th Fl.
Los Angeles, CA 90015
(213) 744-2250

May 29, 1990

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

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

EXHIBIT 6

CALIFORNIA LAW REVISION COMMISSION
Edited Transcript of Meeting - May 31, 1990
Administrative Law - ALJ Central Panel

Mr. McArdle is called.

Tim McArdle (Secretary and Chief Counsel, California Unemployment Insurance Appeals Board):

Thank you. My name is Tim McArdle. I am Secretary and Chief Counsel for the California Unemployment Insurance Appeals Board. The Appeals Board looks upon this study and the reforms that are likely to be the outcome of this study in a very positive light. We view it as a very positive development, and congratulate this Commission on taking on this historic undertaking.

I want to start by just saying a few words - a description - about the Appeals Board itself. The Board is an independent agency whose functions are purely adjudicatory. The Board itself consists of a seven-member Board that serves staggered four year terms. Five members are appointed by the Governor, one member is appointed by the Speaker of the Assembly, and one member by the Senate Rules Committee. The Board structurally is organized into a lower authority and a higher authority. The lower authority consists of approximately 115 administrative law judges, stationed at eleven offices of appeals throughout the state, who hear and decide cases involving unemployment insurance, disability insurance, and employment tax cases, from decisions made by the Employment Development Department. Last year, the lower authority issued approximately 138,000 dispositions. The higher authority, here in Sacramento, consists of the seven Board members and fifteen administrative law judges, who review appeals taken from decisions of administrative law judges and issue decisions based upon those appeals, using the substantial evidence test. Appeals from final Board decisions are by way of writ of mandate in Superior Court. We have approximately 278 cases before the Superior Courts around the state at the present time. Approximately 12 cases are in the Courts of Appeal.

We have spent some time with Professor Asimow during the course of his study - during the development of his study - and have passed on comments to him and to your staff during the past approximately 18 months. As I say, generally the Board considers this study in a very positive light. We have had some minor problems along the way, but we've voiced our concerns here and we felt that they've been adequately addressed.

With the central panel, however, the Appeals Board has taken an official position in opposition to having its ALJs removed to a central panel; the sentiments were expressed in my letter to you of May 14th. The staff has responded to the letter. The letter really is a

point-by-point analysis of the issue. Professor Asimow has advised, and the staff has recommended, that our judges be left where they are. I'm not going to take up your time this afternoon with a repetition of what I've already put in that letter.

I would like to comment, though, that the essence of the letter is that the Appeals Board is an agency that is working well right now. It is an agency that is providing due process of law at every stage of the proceedings to the literally hundreds of thousands of parties that appear before it every year. There has been no compelling case made for a change in the present structure. As Board counsel, I've litigated hundreds of cases before the superior courts, and courts of appeal, and never once has the adequacy of the due process the Board provides, at least on a structural level, ever been challenged or indeed been brought into issue. Of course, there have been some individual lapses, but they have been addressed on an individual basis. But the adequacy of the structure of due process provided for in the current system has never been questioned.

In my letter of May 14th, I said that I would provide you with additional economic data, in terms of the Board as an efficient and economical agency, and I made the statement in there that I seriously doubted that the Board's function could be handled more economically by a central panel. I have that data with me today, and I'll leave it with Mr. Sterling. Basically, cutting to the bottom line, last year the Board expended approximately 25 million dollars in its operations, and in the process disposed of 145,000 cases. So, I think that's a mighty testament to an agency that's working well right now from an economic standpoint. *(A copy of the data provided is attached to this transcript.)*

I submitted my letter on May 14th, and on May 17th our judges convened for an annual conference. We had the privilege of being joined by Professor Asimow, who conducted an informal poll of our judges. The question posed to them was whether or not they favored being removed to a central panel, with the understanding that they would still be hearing basically the same types of cases they hear now - unemployment, disability, and employment tax. By about a 3 to 1 margin they opposed the idea of being removed to a central panel. The issue was rephrased to allow for an opportunity to hear different types of cases, while still hearing unemployment cases in the mainstream, but an opportunity for occasional rotational assignments to hear a variety of cases. And, when the issue was framed that way, it was about evenly split, with perhaps a slight majority favoring removal to a central panel. Now, in my May 14th letter, right toward the end, I suggested that very point to the Commission. I suggested that, perhaps in an agency particularly such as ours - a high-volume agency - that our judges might be subject to job stress, to job burnout, perhaps - after years and years of hearing the same types of cases - to a disinterest in the function as a whole. That there should be some way to create some kind of apparatus within state government, whereby our ALJs could rotate to another agency for a limited term on a voluntary basis to hear other types of cases. I've heard Professor Asimow make that same

recommendation a couple of times this afternoon, at least that same observation. I would urge it upon you to consider that seriously in your deliberations on this issue.

On behalf of the Appeals Board, I want to thank you for this opportunity and the opportunities you've given us in the past to share our concerns and our comments with you. I'd be glad to entertain any questions you have.

Mr. Plant:
We're talking now about the upper level - you referred to the upper level. What is the relationship between the administrative law judges - the fifteen - and the board members at that upper level.

Mr. McArdle:
The fifteen administrative law judges at the higher authority work directly for the Board. They are assigned cases. They read the transcript and the exhibits, and then propose a decision to a randomly-selected panel of two members of the Appeals Board. In proposing their decisions, they employ a substantial evidence test to the decision reached by the administrative law judge who heard and decided the case originally. They work directly for the Board.

Mr. Plant:
So they make a recommendation to the Board.

Mr. McArdle:
That is correct.

Mr. Plant:
And the Board can either accept that or reach another conclusion.

Mr. McArdle:
That's absolutely correct.

Judge Marshall:
The recommendation is based on a review of the ALJ's decisions, is it not?

Mr. McArdle:
That's right. There is no further hearing conducted at the higher authority. It's strictly a review of the transcript and the exhibits.

Judge Marshall:
How often is there a reversal of what the ALJ does?

Mr. McArdle:
First of all, about 10% of the ALJs' decisions are appealed to the higher authority. Basically, you have two types of parties appearing before the Board - claimants and employers. In employer appeals to the Board, last year, we reversed about 14% of ALJ decisions. For claimant appeals, it's closer to 10%. In other words, the vast majority are affirmed. I might add that our ALJs in the field reverse the Employment Development Department about 40 to 45% of the time.

Judge Marshall:
What's the salary range on the ALJs?

Mr. McArdle:
I was afraid you'd ask that. I'm not really sure; I think that it tops out about $74,000 a year.

Judge Marshall:
Would you have any objection to the removal of the power to promote or to pay, to say, the State Personnel Board?

Mr. McArdle:
Well, right now, the salary is already established by the state Department of Personnel Administration, and state civil service laws and rules provide for the hiring and promotion of ALJs. Since we are already a completely self-contained adjudicatory agency, answerable not to anybody else but to itself and of course its appointing powers, I don't really see a need for removing that particular promotional authority to another agency.

Judge Marshall:
What promotions are there, anyway?

Mr. McArdle:
Well basically, the only promotional level or opportunity within the agency is to presiding administrative law judge. We have 11 of those. We have two career executive assignments as well.

Judge Marshall:
And their salary is what?

Mr. McArdle:
The presiding ALJ is 5% above the working ALJ.

Unidentified Commissioner:
Are the ALJs in the lower authority and the higher authority on the same level, salary-wise?

Mr. McArdle:
Yes, they are.

Unidentified Commissioner:
It's not a promotion?

Mr. McArdle:
No, it's not. In fact, they transfer back and forth; we rotate the lower authority ALJs to the higher authority so they have a chance to review their peers' work and provide an additional perspective on their job.

Mr. Marzec:
Do you have - I've asked this question and I'll continue to ask it - do you have written guidelines for the ALJs?

Mr. McArdle:

Our hearing procedures for the higher authority are contained in Title 22 of the California Code of Regulations. In addition, we have in-house procedures. We have a decision-writing manual, and things of that nature; we have annual training sessions and the like. But the procedures are in the regulations.

Mr. Marzec:

Could we secure a copy of your procedures, and your decision-writing manual?

Mr. McArdle:

Certainly.

Prof. Asimow:

Mr. McArdle, I wondered if you could tell the Commission (this is not really germane to today's inquiry, but it's an issue that they'll be facing in the near future) about your system of precedent decisions. To me, it's an excellent part of your procedure, and it's not something you generally see in most state adjudicating agencies where there really is no way for you to look up the adjudicatory law of most licensing agencies. Could you talk about that a little?

Mr. McArdle:

Sure, thanks; in fact I meant to mention that. Since 1967 the Board has had the statutory authority to designate certain of its decisions as precedents. By "precedent" I mean that they are binding upon the Board, upon its administrative law judges, and upon the Employment Development Department, for the legal principles set forth in those decisions. The decisions are fully indexed and digested; that's a publication which I update annually. To date, we've had 479 precedent decisions since 1967. They cover areas of tax, of employment rulings, of unemployment insurance, disability insurance, and so on. Not only are they challengeable in superior court by way of writ of mandate, but also any Californian can challenge precedent decisions by an action for declaratory relief. So, those challenges are not limited to the parties in the case.

Judge Marshall:

That's in superior court?

Mr. McArdle:

In superior court, that's right.

Mr. Marzec:

Any further questions? Do you have anything further?

Mr. McArdle:

I have nothing further.

Mr. Marzec:

Thank you very much.

C U I A B

Dispositions

Higher Authority

SFY 87/88	13,978
SFY 88/89	12,882

Lower Authority

SFY 87/88	132,141
SFY 88/89	132,943

Total

SFY 87/88	146,119
SFY 88/89	145,825

Cost of Operations

	Dependent/EDD	Independent/EDD
Higher Authority		
SFY 87/88	$ 4,415,938	$ 4,466,811
SFY 88/89	$ 4,359,064	$ 4,415,478
Lower Authority		
SFY 87/88	$21,036,883	$21,285,262
SFY 88/89	$20,301,412	$20,576,846
Total		
SFY 87/88	$25,452,821	$25,752,073
SFY 88/89	$24,660,476	$24,992,324

Cost Per ~~Hearing~~ Decision

Higher Authority		
SFY 87/88	$316	$320
SFY 88/89	$338	$343
Lower Authority		
SFY 87/88	$159	$161
SFY 88/89	$153	$155
Total		
SFY 87/88	$174	$176
SFY 88/89	$169	$171