#N-105

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04/10/91

First Supplement to Memorandum 91-4

Subject: Study N-105 - Administrative Adjudication: Effect of ALJ Decision--Additional Comments of State Agencies

Attached are letters we have received from the Department of Consumer Affairs and the Board of Prison terms concerning Memorandum 91-4 and the attached draft. We will raise their issues orally at the meeting as we reach the relevant place in the Commission's deliberations.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

STATE OF CALIFORNIA—STATE AND CONSUMER SERVICES AGENCY PETE WILSON, Governor

DEPARTMENT OF Consumer Affairs 1020 N STREET, SACRAMENTO, CA 95814

(916) 322-5252

April 4, 1991

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

Re: Study N-105--Administrative Adjudication

Dear Mr. Arnebergh and Members of the Commission:

We have received Memorandum 91-4 and its attachments and we appreciate the opportunity to provide continuing comment on this project. We were pleased to see that the staff's revised draft has considered our concerns about the provisions which would give great weight to the credibility findings of administrative law judges.

We agree with your staff's recommendation that further consideration be given to the issue of whether there should be one statute governing administrative adjudication for all state agencies. We would prefer the commission to accept the third alternative proposed by staff, i.e. to improve the existing Administrative Procedure Act ("APA") for agencies currently governed by that act (and perhaps those which might be added to it without increasing its complexity) without the added complexity which would be imposed by a statute designed to cover very disparate types of proceedings. We believe it would be detrimental to lose existing judicial precedents which interpret the current act. Nor do we wish to see the process made more difficult and cumbersome either for our agencies or for licensees and their attorneys who appear before them.

We take issue with Professor Asimow's premise that a uniform APA will create a level playing field. Those who work regularly in an area of administrative law will always have the advantage of familiarity with the laws, rules and process. We would point out that the statute cum regulation approach will result in a complex and very cumbersome process, particularly since regulations are currently more difficult than statutes to locate and research. This approach could in fact result in an

added advantage to those familiar with an agency's law and process. Indeed, if state agencies are able to adopt regulations to supplement and tailor a uniform APA to their needs, this will undoubtedly foster greater diversity where there is now uniformity.

A complex and cumbersome process also works against those many licensees who choose to represent themselves in adjudicative proceedings. It will be far more difficult for those individuals to unravel relevant statutes and locate regulations. If one of the primary concerns is with uncodified procedures, the commission might wish to consider, in addition to modifying the current APA, creation of a second statute for those agencies with lengthier, more complex or very specialized proceedings. This second statute could incorporate specific requirements for codifying in regulation all of the procedures used by these agencies for adjudicative proceedings.

We are in the process of reviewing in detail both the staff draft and the most recent report prepared by Professor Asimow. We would like to reserve comment at this time since we wish to see what action the commission will take with regard to the issue of a uniform APA for all agencies. That decision will impact our view of the proposed changes.

Finally, while we believe that the presiding officer's statement identifying specific evidence upon which a determination of witness' credibility is based will be helpful to a licensing board (§ 642.720), experience has demonstrated that it would not be in the overall public interest for a reviewing court to be <u>required</u> to give great weight to such a determination. In one recent case, an Administrative Law Judge appeared to have improperly weighed the testimony of certain witnesses and dismissed the accusation. The board nonadopted the proposed decision and imposed discipline on the licensee. The board's action was upheld by the Superior Court. If the reviewing court had been required to give great weight to the credibility findings of the Administrative Law Judge, the result would likely have been different. We believe the court's authority to exercise independent judgment in the review of these cases is sufficient protection for all parties. In view of the potential problems illustrated by the above case and because existing protections are adequate, we oppose the proposed amendments to § 1094.5 of the Code of Civil Procedure.

We look forward to continuing to work with the Commission in the course of this project.

Sincerely,

JEFF MARSCHNER
Deputy Director
Legal Affairs

cc: All Agencies

State of California-Youth and Adult Correctional Agency Pete Wilson, Governor

Board of Prison Terms
545 Downtown Plaza
Suite 200
Sacramento, CA 95814

(916) 322-6729

April 8, 1991

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
400 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear Mr. Sterling:

Re: 3/1/91 Draft of the APA Regulations: Comments by the Board of Prison Terms

We have reviewed the draft of the adjudicative provisions of the Administrative Procedure Act. We understand that it may be extended to cover many more hearings by agencies in the state. With that possibility in mind, I would like to make a few comments about our administrative hearings and what we would have problems with in your current draft.

First, we have five principal hearings: parole revocation and parole revocation extension, life parole rescission, life parole consideration, life parole progress, and legal status review hearings. Of those five, only parole revocation (including parole revocation extension) and life parole rescission hearings have the requisite due process indicia to justify and require treatment under any format of the administrative procedure act. Also, since we settle by mutual agreement 75% of our parole revocation hearings (leaving 18,000 of these hearings actually heard last year), we presume that such settlements would not be affected or precluded by your process.

Second, because of Section 640.250(c)'s mention of reporters, it seems reasonable to mention that we tape record our parole revocation hearings and do not transcribe them. Also, because we are involved in law enforcement, Section 640.290(b) (study of administrative law and procedure) would give us a problem because without a special statute we might not be able to share the content of our particular hearings with an agency studying our hearings.

Third, in Section 642.720, you use the term "pleading." None of our hearings involve traditional pleadings or even reasonable substitutes for them. The case of Morrissey v. Brewer ((1972) 408 U.S. 471, 489) requires, in the case of parole revocation proceedings, that we supply the parolee with written notice of violations of parole and the evidence against him or her. We give notice of the subject of the hearing and the prisoner or parolee does not file a written response. In parole revocation and revocation extension hearings, the parolee does have an opportunity to admit, deny or make no plea to the particular charge before the hearing; however, he or she can change the plea to a given charge at the time of the hearing.

Finally, we have the following comments in the adjudication and review sections of the proposed statutes:

1. In Section 642.750, we would request that 30 days be extended to 120 days (see "2" below) and that the agency on review be permitted to vacate the decision and order a new hearing or correct mistakes in the decision including a mistake in the granting of credits.

2. Section 642.770 would cause us many problems. It creates a sequence of events which results in the hearing decision becoming final 30 days after the decision is made, is adopted, or becomes final. Our revocation hearing decisions, because they involve immediate decisions about personal liberty, are effective immediately, but they may be reviewed after they become effective and changes made as proposed in "1" above. As this section is currently proposed, it would result in liability for the State of California.

3. With regard to Sections 642.780 and 642.830, our current regulations provide that the parolee can appeal any issue at the hearing within 90 days after he or she receives the hearing decision (which is handed to the parolee at the end of the hearing). That deadline may be extended for good cause (for example, parolees are frequently moved from prison to prison and/or do not have access to the law library). The review procedures specified in these sections do not give the parolees (who are frequently poorly educated) enough time to request review of the proceedings.

4. Section 642.840 provides for review of a decision based on a transcript. We do not transcribe our parole revocation (and revocation extension) hearings which are appealed. Since we get approximately 3000 appeals a year, any move in this direction would involve a very significant cost to us.

5. Section 642.850 involves briefs or oral argument. While the parolee or prisoner or a representative may file a brief detailing his or her arguments, our review process involves neither opposing briefs nor oral argument.

6. Section 642.850 also involves a possible remand to the presiding officer. In the event that we order a new hearing, it is almost never remanded to the same two (or three in the case of rescission hearings) persons who heard the original case. An entirely new hearing is conducted. Since we have nearly 18,000 hearings a year, it is quite impractical to schedule the same two or three hearing officers for the new hearing.

We appreciate this opportunity to comment on the proposed regulations and their applicability. If you have any questions or comments, please contact me.

Sincerely,

Robert L. Patterson

ROBERT L. PATTERSON
Executive Officer