

Memorandum 91-75

Subject: Study N-103.01 - Voluntary Temporary Assignment of Hearing
Personnel

The Commission has previously directed that the staff investigate the possibility of making a recommendation to the 1992 legislative session concerning the establishment of a voluntary system for temporary reassignment of administrative law judges that would help combat ALJ burnout.

Attached is a draft of legislation to accomplish this. The Association of California State Attorneys and Administrative Law Judges has previously expressed a strong interest in pursuing this concept. The director of the Office of Administrative Hearings has expressed a willingness to administer such a system, although as of this writing we have not received a response from him concerning the workability of this particular draft.

The disadvantages the staff can see to going forward with legislation on this topic are:

(1) It gives up a potential sweetener to go in any package of legislation recommended by the Commission on administrative adjudication. The staff does not believe this is a serious loss, since it is not a significant sweetener.

(2) It is a fairly small recommendation that will consume Commission and legislative resources to enact; it would be more cost efficient to include it in a larger package. On the other hand, it may be some time before the larger package sees the light of day. And this can be viewed as a "trial balloon" to see where legislative and political interest in administrative procedure reform lies.

On balance, if the director of the Office of Administrative Hearings believes the present draft is workable, the staff recommends the Commission sponsor legislation on the subject in 1992.

Respectfully submitted,

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Executive Secretary

#N-103.01

ns82
10/10/91

Recommendation

ADMINISTRATIVE ADJUDICATION:

VOLUNTARY TEMPORARY ASSIGNMENT OF HEARING PERSONNEL

California has a central panel or corps of administrative law judges in the Office of Administrative Hearings. The office provides hearing personnel for state agencies conducting administrative adjudications under the state Administrative Procedure Act.¹ If the administrative law judge corps of the office is insufficient to fill the needs of the various state agencies, the director may appoint pro tempore part-time administrative law judges.²

However, the great majority of state administrative law judges are not employed by the Office of Administrative Hearings but are attached to a handful of major agencies, each of which has a specialized administrative law judge or hearing officer unit.³ The Law Revision Commission has estimated that at least 95% of the state's administrative law judges and hearing officers are employed by adjudicating agencies other than the Office of Administrative Hearings.

To appoint a pro tempore part-time administrative law judge when a qualified state administrative law judge or hearing officer may be available from another agency is wasteful of the state's limited

1. Gov't Code §§ 11501-2. The Office of Administrative Hearings has identified 95 state and miscellaneous agencies for which it currently conducts some or all adjudicative hearings.

2. Gov't Code § 11370.3.

3. Each of the following major adjudicative agencies employs a greater number of administrative law judges or hearing officers than the total number employed by the Office of Administrative Hearings: Board of Prison Terms, Unemployment Insurance Appeals Board, Department of Industrial Relations, Workers Compensation Appeals Board, Public Utilities Commission, Department of Social Services.

resources. Hearing personnel from the various state agencies should be made available to hear cases outside their agencies on a voluntary basis. Many administrative law judges will be interested in expanding their professional experience. The opportunity to serve elsewhere may also provide a welcome change of pace from the repetitive types of hearings experienced by hearing personnel in some of the large specialized agencies. This may help combat "burnout" of administrative law judges.⁴

The Law Revision Commission recommends that the director of the Office of Administrative Hearings be authorized to administer an exchange program for administrative law judges and hearing officers of various agencies, in preference to appointing pro tempore administrative law judges. The system would be voluntary for its participants, and would only be used if both the agency providing the hearing personnel and the agency receiving the hearing personnel agree to it. The Office of Administrative Hearings would be given the necessary authority to establish procedures to govern the exchange program, including apportionment of costs among the user agencies for personnel expenses and for administration of the program.

4. The "burnout" factor has been identified in the literature as one of the negative consequences of attaching an administrative law judge to a single agency for the hearing of cases. See, e.g., Thomas, *Administrative Law Judges: The Corps Issue* 15-16 (National Conference of Administrative Law Judges/American Bar Association 1987). This factor was also identified in a survey of selected California administrative law judges made by the Law Revision Commission's consultant on administrative adjudication. See Asimow, *Administrative Adjudication: Structural Issues* 47-48 (October 1989).

Recommended Legislation

An act to amend Section 11370.3 of, and to add Section 11370.31 to, the Government Code, relating to administrative procedure.

The people of the State of California do enact as follows:

Gov't Code § 11370.3 (amended), Personnel

SECTION 1. Section 11370.3 of the Government Code is amended to read:

11370.3. (a) The director shall appoint and maintain a staff of ~~full-time, and may appoint pro tempore part-time~~, administrative law judges qualified under Section 11502 which is sufficient to fill the needs of the various state agencies. The director shall also appoint hearing officers, shorthand reporters, and such other technical and clerical personnel as may be required to perform the duties of the office. The director shall assign an administrative law judge for any proceeding arising under Chapter 5 (commencing with Section 11500) and, upon request from any agency, may assign an administrative law judge or a hearing officer to conduct other administrative proceedings not arising under that chapter and shall assign hearing reporters as required. The director shall assign an administrative law judge for any proceeding arising pursuant to Chapter 20 (commencing with Section 22450) of Division 8 of the Business and Professions Code upon the request of a public prosecutor. Any administrative law judge, hearing officer, or other employee so assigned shall be deemed an employee of the office and not of the agency to which he or she is assigned. When not engaged in hearing cases, administrative law judges and hearing officers may be assigned by the director to perform other duties vested in or required of the office, including those provided for in Section 11370.5.

(b) The authority to assign an administrative law judge under this section includes authority to assign a person to serve as administrative law judge under Section 11370.31.

Comment. The former reference in Section 11370 to appointment of pro tempore part-time administrative law judges is superseded by Section 11370.31(a)(2).

Subdivision (b) is added to authorize the Director of the Office of Administrative Hearings (OAH) to make temporary assignments of hearing personnel from other agencies on a voluntary basis under Section 11370.31. This supplements the authority to appoint OAH personnel under subdivision (a).

§ 11370.31. Voluntary temporary assignment of hearing personnel

SEC. 2. Section 11370.31 is added to the Government Code, to read:

11370.31. (a) In response to an agency request for assignment of an administrative law judge, the Director of the Office of Administrative Hearings may:

(1) Designate in writing an employee of an agency other than the requesting agency to serve as administrative law judge for the proceeding, but only with the consent of the employee, the employing agency, and the requesting agency. The designee shall possess the same qualifications required of an administrative law judge employed by the Office of Administrative Hearings.

(2) If there is no designee available under paragraph (1), appoint a pro tempore part-time administrative law judge.

(b) The Office of Administrative Hearings may adopt, and the Director of the Office of Administrative Hearings may implement, regulations to establish the procedure for designation or appointment and allocation of costs under this section.

Comment. Section 11370.31 is new. It is drawn from Model State Administrative Procedure Act (1981) § 4-301(c). It supplements the authority of the Director of the Office of Administrative Hearings (OAH) to appoint OAH personnel under Section 11370.3. See Section 11370.3(b) & Comment.

The reference in subdivision (a)(2) to a pro tempore part-time administrative law judge supersedes the corresponding reference formerly found in Section 11370.3. Under subdivision (a)(2), use of pro tempore administrative law judges is subordinate to use of available personnel from other agencies.

The cost of running the system of voluntary temporary appointment of hearing personnel authorized by this section may be charged to the agencies for which hearing personnel are provided. Section 11370.4.