Memorandum 92-4

Subject: Study N-107 - The Process of Administrative Adjudication (Consultant's Background Study)

The final installment of Professor Michael Asimow's background study for the Law Revision Commission on California administrative adjudication takes the following form.

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We made the study available for review by interested persons in October 1991, with a request for any comments by December 31, 1991. We have received comments from the Public Employment Relations Board (PERB) (Exhibit 1) and the Public Utilities Commission (PUC) (Exhibit 2). Their comments are summarized below. We will consider their comments in connection with the matters to which they relate as we proceed through the background study making policy decisions.

We note that both PERB and PUC believe they should be exempt from the general state Administrative Procedure Act in favor of their own statutes and regulations, as they are now. PUC states:

> The proposal to craft an APA to cover all state agency "adjudications" cannot take account of the CPUC's unique functions and the wide variety of "adjudications" conducted by the CPUC. These range from litigation of individual consumer complaints against utilities, to "adjudications" in which the Commission exercises its legislative function of setting rates for, or otherwise providing regulations governing, individual utilities. We continue to believe that the specific procedural requirements of the CPUC's varied caseload warrants retention of the separate statutory scheme now in place, and the CPUC's continued exemption from APA requirements.

The Law Revision Commission has decided to defer consideration of exemption requests until it has completed the task of preparing what appears to be a generally sound revision of the Administrative Procedure Act; at that time it will determine whether the statute appears adequate for the particular circumstances of the agency requesting exemption.

Variance by Agency Regulation from Statutory Framework

As a general matter, Professor Asimow notes that his proposal is to build a general statutory framework with basic default rules that agencies could vary by regulation to fit their particular needs. PERB is concerned that this will require it to readopt its entire body of regulations: The regulations have evolved and been tailored and perfected over the years to suit specialized needs of PERB litigation. To require PERB to go through the rulemaking process, and to require PERB to justify to the Office of Administrative Law reenactment of each regulation, is a substantial imposition on PERB's limited resources and an unwarranted expense, particularly in light of the state's budgetary problems.

> Aside from our concern that no real need for such an act has been demonstrated, much confusion and litigation would be generated over whether agencies' rules adopted under the new APA really replaced or actually contradicted or differed sufficiently to render this proposed APA inoperative. PERB should not be required to expend money and time to reenact a system which is accepted by public employee unions and management and is working well.

Outsider Initiatives

When agency action is initiated by a person outside the agency, such as an application for a license, Professor Asimow suggests that the agency should accompany any denial with a complaint (or statement of issues) that will serve as a basis for any subsequent hearing concerning the application and denial.

The PUC believes it would be inappropriate to shift the pleading burden to the PUC staff and require it to file a complaint alleging with specificity why something such as a rate increase should be denied. Instead, it appears the PUC would consider the outsider initiative directly, through the hearing process. It would not start with staff acceptance or rejection, followed by a commission hearing, as contemplated in Professor Asimow's procedural framework.

Time to Respond to Outsider Initiative

Professor Asimow recommends that when an application is made for agency action, the agency should have 30 days in which to accept or reject the application, and if the application is rejected, 90 days in which to hear and resolve the matter. PUC points out that these time limits would be totally unrealistic for it. Professor Asimow would accommodate such concerns by making clear that these periods "would serve as default provisions that could be varied by regulations."

Amendment of Pleadings

Professor Asimow suggests that pleadings should be freely amendable. PERB notes that in its case complaints are prepared by agents of the Board and provide the basis for the hearing, but may be amended in the discretion of the administrative law judge.

Private Prosecution

Professor Asimow notes that the existing Administrative Procedure Act implies that a third person can compel agency disciplinary action against a person, and suggests that this right (if it exists) be abolished. Both PUC and PERB find this concern to be inapposite to their types of administrative functions.

Intervention

The background study suggests rules governing intervention based on the 1981 Model State APA. PERB observes that intervention is now permitted by PERB rules.

Discovery

Professor Asimow recommends that civil discovery rules not be applied in administrative adjudications and that agencies other than central panel agencies be permitted to adopt their own discovery rules. Both PERB and PUC believe such agency discretion is appropriate.

Subpoenas

The background study suggests that agencies not presently having subpoena power should be given it. PUC observes it now has such power and no additional statutory authority is necessary for it. However, PUC believes that enforcement of subpoenas in the superior court, as suggested in the study, is not appropriate for it, since original jurisdiction in all PUC matters is in the Supreme Court under Public Utilities Code Section 1759.

Prehearing Conference

The background study suggests that the prehearing conference available in central panel hearings should be used generally, noting that some other agencies provide for such conferences. PERB remarks that it has a routine practice of scheduling settlement conferences in every case. "A large percentage of cases are settled and never go to a full hearing. Settlements are encouraged at all stages of the hearing process and the ALJ has full authority to approve a settlement before or during hearing."

Declaratory Orders

Professor Asimow recommends that declaratory relief be provided in the administrative forum, just as actions for declaratory judgments are allowed in civil law.

PERB is opposed to any requirement that it be obligated, or even permitted, to render a declaratory order on request--PERB has no need of such a power in order to accomplish its mission, and such a power "would seriously interfere with the bargaining process."

PUC likewise opposes a declaratory relief provision. It would "bog down the CPUC and prevent it from efficiently regulating the state's public utilities and related businesses. Attempting to answer the numerous kinds of questions that could be raised by petitions for declaratory relief would lessen the CPUC's ability to resolve the important kinds of controversies that are already litigated before the CPUC."

Consolidation and Severance

The background study notes that some agencies have regulations enabling consolidation of related cases. PERB points out that its administrative law judges have such authority.

Settlement and Alternative Dispute Resolution

Professor Asimow suggests a number of ways to encourage alternative dispute resolution. PERB notes that collective bargaining agreements generally provide for alternative dispute resolution such as binding arbitration and these govern cases before PERB. PUC is interested in alternative dispute resolution, but would find such types as binding arbitration inappropriate where PUC's legislative function is involved. PUC has to retain the ability to reject a proposed settlement whenever it is not in the public interest.

Evidence

The general rule in administrative adjudication is that rules of evidence are less formal than in judicial proceedings, and Professor Asimow believes this is appropriate. PERB agrees rules of evidence should not be made more technical. "The whole purpose of PERB is to facilitate the collective bargaining process which in many cases is too long as it is. PERB would oppose any recommendations that tend to lengthen the process."

Admission of Affidavit Evidence

Professor Asimow suggests that evidence by affidavit be admissible, based on 30-days notice and an opportunity to cross-examine the affiant. PERB notes that it provides approximately the format suggested by Professor Asimow as to written evidence. PUC routinely admits prefiled written evidence with live testimony limited to cross-examination, and is concerned that the 30-day notice requirement might interfere with PUC's use of prefiled testimony.

Power of Agencies to Reverse ALJ Evidence Rulings

The background study argues that in central panel hearings, the administrative law judge's evidentiary rulings impliedly cannot be reversed by the agency head. Professor Asimow would codify this rule explicitly and apply it to all agencies. It is not clear whether an agency would be allowed to override this rule by regulation.

Both PERB and PUC object to this proposal. PUC points out that exclusion of evidence by the administrative law judge could preclude Commissioners from considering highly probative evidence in deciding an important issue of public policy. The argument that administrative law judges are lawyers whereas agency heads are not does not apply to PUC, where in some cases the reverse is true; moreover, formal rules of evidence are irrelevant in PUC proceedings. "Thus, this proposal, like others to which the CPUC has objected in the past, would tend to transfer decisionmaking responsibility away from the Commissioners who are constitutionally responsible for the decisions of the CPUC."

PERB believes likewise, stating that this proposal "would seriously diminish PERB's legislatively delegated authority in the field of collective bargaining." Administrative law judges are hired to assist the board in the fulfillment of its mandated functions, not vice versa. "This is a policy decision that should not be made by the Legislature in the context of improving administrative procedure. Such a policy should only be considered by the Legislature when the subject is labor relations between the public employer and public employees."

Residuum Rule

The "residuum rule" precludes a decision from being based exclusively on hearsay evidence. Professor Asimow recommends that this be retained for central panel agencies and be made optional for other agencies. PUC agrees that the rule should not automatically apply to its hearings. PERB would support continuation of the rule for it as it has worked well in practice.

Burden of Proof

Generally, the proponent of an order has the burden of proof by a preponderance of the evidence, and Professor Asimow would keep these basic rules. PERB notes that it follows the general rules on burden of proof.

Official Notice

Professor Asimow would expand the scope of official notice by the trier of fact in administrative adjudications. PERB notes that it follows the general Administrative Procedure Act rules on official notice.

Conference Hearing

Professor Asimow proposes to allow an informal administrative adjudication in conference style, if the agency elects by regulation to authorize it. PUC notes that less formal proceedings might by useful in some types of PUC adjudications, but that some amendments of PUC statutes will be necessary to enable this to happen. Also, the "conference hearing" outlined in the background study omits some features that PUC would find useful, such as pre-hearing conferences and prefiled testimony.

Emergency Procedure

Professor Asimow recommends creation of an emergency adjudicative procedure with quick judicial review, as in a licensing suspension. PUC is concerned that quick judicial review may preclude the Commission from giving a full hearing on the issues, and also that it will be incompatible with original jurisdiction in the Supreme Court.

Transcripts

Professor Asimow suggests as a cost-saving device that electronic recording be authorized for hearings with a transcript made from the recording when necessary. PERB states that this is done routinely in their agency.

Findings and Reasons

Professor Asimow recommends adoption of the 1981 Model State APA requirement of detailed findings. PERB notes that findings of fact are included in its administrative law judge decisions and in the Board's decision if there is an appeal. Their findings are detailed, as well as the conclusions of law.

Precedent Decisions

Professor Asimow suggests that agencies be required to designate and make available significant decisions as precedential and to maintain an index of issues resolved in such decisions. PERB notes that in its case only formal Board decisions become precedent, and that all Board decisions are published and considered precedential.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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December 31, 1991

Edwin K. Marzec
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Dear Mr. Marzec:

These comments are in response to Professor Asimow's final installment dated October 4, 1991, and express our concerns about his recommendations as they relate to the Public Employment Relations Board (PERB or Board). PERB's letter of September 6, 1990, explained in detail the structure and operation of PERB, so the Commission should be familiar with our purpose and functions.

PERB is greatly concerned over the possible impact of the "default plan" recommended by Professor Asimow. If the default plan is adopted, the Commission could deny all requests for exemption by agencies such as PERB on the premise that any agency could enact or reenact all its rules, and thus retain its current structure and operation. The Board would object to such a result for a number of reasons. It would be costly and time consuming at a time when PERB staff has been reduced because of the budget crisis, and may be further reduced if the budget crisis continues. PERB's current rules of practice have been in existence for over ten years, and have already accomplished over 90 percent of the recommendations of Professor Asimow. They are fully understood and accepted by practitioners in the field of labor law. Furthermore, there has been ample opportunity to challenge any rule that might be unfair or illegal in the courts and this has not happened. The "default plan" would require PERB to justify to the Office of Administrative Law and, apparently, the Office of Administrative Hearing, a complete reenactment of all its rules without any clear evidence before the Commission that it is necessary.

The Board renews its request that PERB be exempt from the new Administrative Procedure Act (APA), if enacted and, nothing has been demonstrated as to <u>why</u> PERB should be included at all.

PERB also takes issue with Professor Asimow's stated purpose, found on page 67 of his final installment which is as follows:

> "Moreover, the general thrust of my recommendation has been to increase the

> authority of the ALJ's vis a vis agency heads or matters that fall within the ALJ's official competence."

His suggestions that the ALJ's rulings on admission of evidence and determinations of credibility of witnesses be final and not reversible by agency heads, coupled with a prohibition against the agency itself hearing a matter de novo, would seriously diminish PERB's legislatively delegated authority in the field of collective bargaining. Indeed, initial statutory authority for all Board functions is derived from the five member Board. ALJ's are creatures of the five member Board (See Government Code Section 3541.3(k)). Over 700,000 employees are covered by the Higher Education Employer-Employee Relations Act, the Ralph C. Dills Act and the Educational Employment Relations Act. This is a policy decision that should not be made by the Legislature in the context of improving administrative procedure. Such a policy should only be considered by the Legislature when the subject is labor relations between the public employer and public employees.

Following are comments concerning specific proposals contained in Professor Asimow's final installment:

1. Right of Private Prosecution

Professor Asimow suggests that the right of private prosecution permitted by the APA be abolished. Since PERB is a neutral body before whom individual employees, unions and management appear and advocate unfair labor practices and other matters in an adversarial setting, the prohibition is simply inappropriate.

2. Intervention

Intervention is now permitted by PERB rules.

3. Discovery

With respect to discovery and subpoenas, the field of labor relations is extremely sensitive in the area of disclosing the identity of employees who might be involved in labor disputes because of fear of retaliation. Consequently, pretrial discovery under PERB is extremely limited because of the nature of labor relations.

4. Prehearing Conferences

PERB has a routine practice of scheduling settlement conferences in every case. A large percentage of cases are

settled and never go to a full hearing. Settlements are encouraged at all stages of the hearing process and the ALJ has full authority to approve a settlement before or during hearing.

5. Consolidation and Severance

ALJ's have authority at PERB to consolidate similar cases.

6. Settlement and Alternative Dispute Resolution

The collective bargaining agreements generally provide for alternative dispute resolution such as binding arbitration and these govern cases before PERB.

7. Declaratory Orders

PERB would disagree with Professor Asimow's conclusion that the authority to issue declaratory orders may be implied under the current APA. It is a fundamental rule in administrative law in California that the only powers that can be exercised by administrative agencies are those specifically enumerated or implied as necessary to accomplish the agency's business. PERB has no need of such a power to do business. To grant such authority to PERB and make it obligatory upon request would seriously interfere with the bargaining process. Even if discretionary, it would still interfere with the bargaining process.

8. The Hearing Process

PERB, because it is a neutral hearing body which provides an adversarial process, follows the current APA and provides approximately the format suggested by Professor Asimow as to rules of evidence, burden of proof, official notice and written evidence.

9. Findings

At PERB, ALJs make extensive findings in the form of a formal decision which has no value as a precedent. Only if the decision is appealed to the Board where a formal decision is rendered does the case become precedent. All decisions of the Board are published and are considered precedential.

10. Prehearing Process

Complaints are prepared by agents of the Board and provide the basis for the hearing, but may be amended in the discretion of the ALJ.

11. Transcripts and Briefs

Hearings are recorded electronically and transcripts are routinely prepared and available to the ALJ and parties during the briefing and decision preparations.

12. Evidence Code

PERB would agree with Professor Asimow's recommendation not to adopt the evidence code or make the rules of evidence more technical than they are now in administrative hearings. The whole purpose of PERB is to facilitate the collective bargaining process which in many cases is too long as it is. PERB would oppose any recommendations that tend to lengthen the process.

13. Residuum Rule

PERB would support continuation of the "residuum rule" as it has worked well in practice.

14. Findings

Because PERB presides over adversarial proceedings as a neutral body, findings of fact are included in the ALJ decision and in the Board's decision if there is an appeal. Findings are detailed as well as the conclusions of law.

Conclusion

The Law Revision Commission apparently proposes to adopt an new APA for all administrative agencies which would apply in the absence of rules adopted by agencies which conflict or differ from the ideal model. Aside from our concern that no real need for such an act has been demonstrated, much confusion and litigation would be generated over whether agencies' rules adopted under the new APA really replaced or actually contradicted or differed sufficiently to render this proposed APA inoperative. PERB should not be required to expend money and time to reenact a system which is accepted by public employee unions and management and is working well.

Sincerely,

Deborah M. Hesse
Chairperson

cc: Janice Rogers Brown
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January 3, 1992

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Comments on Background Study on Administrative Adjudication: "The Adjudication Process"

Dear Chairman Marzec:

The following are the comments of the Legal Division of the California Public Utilities Commission (CPUC) on Professor Asimow's background study on the adjudication process. They are presented for the consideration of you and your fellow Commissioners at your meeting on January 23-24.

The CPUC is currently exempt from the Administrative Procedure Act (APA), and believes that that exemption ought to continue. We believe that a revised APA designed to cover all state agencies cannot adequately take account of the unique functions of the CPUC and the wide variety of cases litigated before the CPUC. However, we submit these comments because your Commission is currently studying proposals that would amend the APA and make the CPUC subject to it.

The Prehearing Stage

Professor Asimow recommends doing away with rights of "private prosecution" except where statutes provide initiation rights to third parties. (Study at 17 & n.33.) His study further seems to contemplate that agencies will litigate "outsider initiatives" only after the agency's staff has rejected the outsider's application and filed a complaint specifying the reasons for rejection. (Study at 11-12, 15.) These proposed procedures are understandable in the context of a licensing agency where staff has authority to grant licenses, but seem inapposite for handling the numerous kinds of rate and service issues that involve utilities subject to CPUC jurisdiction. For example, if a utility files an application for a rate increase, the CPUC's staff generally does not have authority to grant or to deny the application; the full Commission acts on the application. Moreover, the CPUC Legal Division believes it would be inappropriate to shift the pleading burden to the CPUC's staff and require them to file a complaint alleging with specificity why the increase should not be granted.

Professor Asimow recommends a 30 day period for agencies to respond to applications and a 90-day period to either grant or deny the application. (Study at 15-16.) These time periods, even as directory provisions, seem inappropriate for the wide variety of applications presented to the CPUC. These range from relatively routine applications for authority to operate trucking or bus companies, to highly complex applications for rate changes or for authority to construct pipelines or electric transmission lines. Many, if not most, of these applications must be approved or denied by the full CPUC, not by its staff. Moreover, many of these applications require a hearing before the CPUC can act, making the proposed time periods quite inappropriate (especially in light of the 30 day comment period imposed in certain kinds of cases by Public Utilities Code §311).

Professor Asimow recommends that civil discovery rules not be applied to administrative adjudication. He also recommends that agencies not required to use OAH ALJs be permitted to draft their own rules of discovery. (Study at 28-31.) We agree that civil discovery rules should not apply to CPUC adjudications and that the CPUC should be free to craft its own discovery rules. With regard to subpoenas (which the Study discusses at 27, 32), the CPUC does not need any additional statutory authority to issue subpoenas, as it already has that authority. (See Public Utilities Code §311(a),(b).)

Professor Asimow recommends that discovery requests not voluntarily complied with be enforceable in Superior Court. (Study at 33-35.) This provision seems inappropriate for the CPUC whose proceedings and decisions are reviewable only by the California Supreme Court. (See Public Utilities Code §1759.)

Professor Asimow recommends that agencies be required to issue declaratory orders. (Study at 41-42.) The CPUC has had a long-standing policy of not issuing declaratory orders. We believe that a mandatory provision requiring the CPUC to issue declaratory orders would bog down the CPUC and prevent it from efficiently regulating the state's public utilities and related businesses. Attempting to answer the numerous kinds of questions that could be raised by petitions for declaratory relief would lessen the CPUC's ability to resolve the important kinds of controversies that are already litigated before the CPUC.

Professor Asimow recommends a number of provisions dealing with Alternative Dispute Resolution (ADR). While the CPUC is interested in ADR, we are concerned that the proposed provisions for <u>binding</u> arbitration (study at 50) might be inappropriate for adjudications, such as rate-setting cases, that involve the CPUC's legislative function. The CPUC's Rules of Practice and Procedure currently permit the CPUC to reject a proposed settlement "whenever it determines that the . . . settlement is not in the public interest". (20 C.C.R. §51.7.) Such a

provision seems more in keeping with the CPUC's proactive role to safeguard the public interest.

The Hearing Process

Professor Asimow proposes a number of statutory provisions dealing with the presentation of evidence by means of affidavit. (Study at 63-64.) At the CPUC, direct evidence is routinely prefiled in written form, with the live testimony being limited to cross-examination, etc. We are concerned that the proposed provision requiring notice of the use of "affidavits" no more than 30 days before the hearing, might interfere with the CPUC's use of prefiled testimony.

Professor Asimow recommends that agencies not be allowed to reverse an ALJ's ruling on the admission or exclusion of evidence. (Study at 66-67.) This proposal would overturn the CPUC's Rules of Practice and Procedure which currently provide that ALJ rulings on the admissibility of evidence "may be reviewed by the Commission in determining the matter on its merits." (20 C.C.R. §65.) In a case where the ALJ had excluded evidence on the grounds, for example, that it was irrelevant or filed too late or in conflict with some technical rule of evidence, this proposal would prohibit the Commissioners from considering that evidence even though they found it highly probative of how they should decide an important issue of public policy, or even though they found that other parties had not been harmed by any late filing. Thus, this proposal, like others to which the CPUC has objected in the past, would tend to transfer decisionmaking responsibility away from the Commissioners who are constitutionally responsible for the decisions of the CPUC.

In support of this proposal to make ALJ evidentiary rulings unreviewable by agency heads, Professor Asimow argues that agency heads are usually not lawyers. However, at the CPUC, many ALJs are not lawyers either. Moreover, the formal rules of evidence need not be applied in CPUC proceedings. (Public Utilities Code §1701; 20 C.C.R. §64.) Thus, the fact that some CPUC Commissioners are not lawyers versed in the fine points of evidentiary law provides no support for making evidentiary determinations of CPUC ALJs immune from review by the full CPUC..

Professor Asimow recommends immediate judicial review of agency license suspensions. (Study at 103.) Under a number of statutory provisions, the CPUC suspends the operating authority of truck or bus companies for safety-related reasons upon the recommendation of the California Highway Patrol (CHP). (See, e.g., Public Utilities Code §1070.5.) Under these sections, the licensee has an opportunity to persuade the CHP not to recommend suspension, but once a suspension recommendation is forwarded to the CPUC, CPUC staff promptly suspends the operating authority. Thereafter, the truck or bus company can promptly obtain a formal

CPUC hearing on the suspension. We are concerned that if immediate court review is authorized, courts may reach the merits of the suspension before the CPUC has had an opportunity to hear the issues. We are also concerned that a provision authorizing immediate judicial review might be inconsistent with existing law providing for judicial review of CPUC actions exclusively by the California Supreme Court. (See Public Utilities Code §1759.)

The CPUC Legal Division agrees that the residuum rule should not automatically apply to CPUC proceedings. (Study at 71.) We also believe that some CPUC adjudications might be better handled by less formal litigation, such as the "conference hearings" discussed by Professor Asimow. (See study at 87-97, especially 96.) However, his proposal that agencies be allowed to use conference procedures except when "some other statute mandates trial-type hearings" (study at 94, n.242), might be of limited use to the CPUC unless some provisions of the Public Utilities Code are amended to allow such informal kinds of hearings. (Compare Public Utilities Code §1708, California Trucking Assn. v. Public Utilities Comm., 19 Cal. 3d 240 (1977).) Moreover, due to the complexity of issues involved in CPUC cases, it might be desirable to have available a procedure that includes pre-hearing conferences, but does away with live cross-examination of witnesses, relying instead on pre-filed testimony and pre-filed rebuttal testimony. Professor Asimow's proposal for "conference hearings", in contrast, would do away with pre-hearing conferences and formal presentation of evidence, as well as live cross examination. (Study at 92.)

In short, although there are some specific proposals in the current background study that might be useful to the CPUC, overall we continue to believe that the proposal to craft an APA to cover all state agency "adjudications" cannot take account of the CPUC's unique functions and the wide variety of "adjudications" conducted by the CPUC. These range from litigation of individual consumer complaints against utilities, to "adjudications" in which the Commission exercises its legislative function of setting rates for, or otherwise providing regulations governing, individual utilities. We continue to believe that the specific procedural requirements of the CPUC's varied caseload warrants retention of the separate statutory scheme now in place, and the CPUC's continued exemption from APA requirements.

We thank you for this opportunity to comment on Professor Asimow's background study on the adjudication process. We expect that the Legal Division will send a representative to your January meeting to address the issues, and look forward to further participation in your Commission's consideration of this background study.

Sincerely yours,

Peter Roth, Jr.
General Counsel