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First Supplement to Memorandum 92-4

Subject: Study N-107 - The Process of Administrative Adjudication
(Additional Comments on Background Study)

Attached to this supplementary memorandum is a letter from the Occupational Safety and Health Appeals Board concerning issues raised in the consultant's background study on the administrative adjudication process. We will raise the points made in the letter at the Commission meeting in connection with the matters to which they relate.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

STATE OF CALIFORNIA PETE WILSON, Governor

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January 16, 1992

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

Subject: Administrative Adjudication
Study N-107 (Adjudication Process)

Dear Dean Marzec:

We welcome the opportunity to express our views concerning the final installment of Professor Asimow's background study. To reiterate, it is our strong belief that alternatives to an all-encompassing administrative procedure act -- either by improving the existing APA or excluding agencies established to do adjudication, such as OSHAB, PERB, ALRB, WCAB, UIAB -- are preferable to the model statute proposed in the background study.

The introductory remarks of Professor Asimow underscore a major reason for our position on this issue. As reflected on page two of the study, "such an act will require a significant rule making exercise by all adjudicating agencies." Our agency, for one, has been undergoing this review independently over the past one and one-half years. While earlier drafts of Professor Asimow's reports have proven useful to us for review of our own procedures, it is clear that improvements to our rules comes better from reconciling our procedures to our respective constituents and program, rather than through reconciliation with those rules of other agencies who have different missions, problems and constituents. The regulatory review process is both time consuming and dependent upon significant staff input. Our agency as currently staffed (one legal counsel and eight administrative law judges are charged with the legal work of the program) is just not in a position to be undergoing a regulation review on an annual or biannual basis. The agency's staff counsel and presiding alj have occupied their time during the last one and one-half years on the present regulatory review. Hopefully, that review will conclude before the background study is completed. While future events may well require a re-examination of these regulations -- after all, the process is not a static one -- that review should not be triggered because of program needs of other agencies.

Certainly the initial commentary of Professor Asimow recognizes this problem in the admonition referred to on page 29, to wit, that "the commission should be wary of recommending anything that would increase agency costs, increase the duties of agency enforcement staff or ALJs ...". It is our contention that the model statute proposed would significantly increase agency costs, as well as increase the duties of agency staff.

Our specific commentary with respect to various portions of the final installment of study is as follows:

1. Introduction -- The Prehearing Stage, Subsection g, Settlement and Alternate Dispute Resolution (page 5): The suggestion that all "disputes can be settled on any terms that the parties deem appropriate" ignores the public rights aspect of certain programs. For example, parties before OSHAB may agree to have certain issues with respect to third party litigation resolved by a stipulation brought before our Board. Our program would have no jurisdiction over such agreements and would not approve them.

2. Discovery and Subpoenas, Subsection c, Exchange of Witness Statements (page 25): This paragraph does not take into account confidentiality requirements of various labor-related statutes (for example, OSHAB, PERB, and ALRB) which raise privileges not necessarily seen in other administrative contexts. For example, OSHAB operates under Labor Code Section 6309 which provides that "the name of any person who submits to the Division a complaint regarding the unsafeness of an employment or place of employment shall be kept confidential by the Division unless that person requests otherwise." Consequently, the identity of any complainants could not be revealed as part of prehearing discovery under OSHAB regulations (Title 8, Code of Regulations, Section 372). Under Agricultural Labor Relations Board regulations (Title 8, Code of Regulations, Section 20274) witness statements are not discoverable until after the witness testifies upon direct examination. This regulation follows NLRB and ALRB precedent, protecting the identity of employee witnesses in the labor dispute context.

3. Subpoena Enforcement: A recommendation that the party who has the subpoena issued petition the court for enforcement would be at odds with OSHAB's present regulation which leaves the ultimate determination to the agency itself as to whether or not subpoena enforcement is required. (Title 8, Code or Regulations, Section 372.5(a).) This regulation allows the Board (through its aljs or chief counsel) to make the determinations of relevancy, necessity, and the appropriateness of delaying a hearing for the time consuming court enforcement process. To allow the parties to make that determination would seriously impact the efficient scheduling of cases.

4. Declaratory Relief (page 38): It is not apparent how these issues would be raised by our agency which is charged with

deciding actual disputes between the enforcement arm of the OSHA program and (normally) the appellant-employer. The statement that the burden on the agency to incorporate declaratory orders would not be severe because hearings will not be required does not realistically assess agency staffing needs.

5. Agency Consolidation (page 43): It is unclear from the proposal which agency would ultimately determine which cases are consolidated.

6. System of Settlement Judges (page 49): While some language regarding settlement procedures is probably going to be helpful in any adjudicative setting, again the cost of setting up a system of settlement judges must be evaluated realistically. OSHAB currently has eight aljs who hear cases throughout the entire State of California. It is not practical logistically to set aside any number of them to sit as "settlement" judges on the formal basis recommended by Professor Asimow.

7. Evidentiary Rules (page 52): As discussed, these have varied from agency to agency based on statutory replication of other models (for example, ALRB and NLRB) or through adoption of APA (Government Code) requirements. It is not clear why these rules should be uniform any more than a probate court should adopt identical rules of procedure as a domestic relations department. It seems to make more sense to tailor these rules to individual programs, the formality of the particular hearing, the types of constituents appearing before these agencies (i.e., lawyers vs. non-lawyers) and the ultimate issues to be resolved -- i.e., benefits entitlement, professional license revocation, violation of health or safety law, etc.

8. ALJ Rulings On Admission and Exclusion of Evidence (page 67): There does not seem to be any reason why an agency should not be able to review an alj's rulings on these evidentiary issues in a manner similar to the way other alj determinations are reviewed. As a practical matter, an alj who erroneously excludes or admits some evidence normally will not create "prejudicial error", but in the OSHAB model, for example, an error of law is one of the five statutory grounds for granting reconsideration at the Board level. Whether the error is evidentiary (procedural) or substantive should make no difference to the Board's ability to review same. Ultimately, an error that is prejudicial should be correctable by the agency charged with the obligation of making final findings of fact and conclusions of law.

9. Hearsay Objections (pages 71-72): Insofar as an agency proceeding is handled by an attorney, it is perhaps preferable to require hearsay objections be made for all objectionable evidence. The record on review would be that much cleaner. However, if an agency is charged with presiding over hearings in which lay people either represent themselves, or have no recourse to an attorney, it would seem inappropriate to require timely technical objections.

Particularly with respect to those agencies that utilize the residuum model -- that is hearsay evidence is admissible, but cannot be used to base findings of facts -- continuous hearsay objections would tend to delay, rather than to facilitate the hearing process. In those situations, it is easier for the alj to make a preliminary statement that all hearsay objections will be preserved, but that under Government Code Section 11513, no findings of fact will be based solely on such evidence.

10. Nonsuits (page 75): OSHAB presently has no regulatory provisions for allowance of nonsuit. The ALRB has recently enacted such a provision, after many years without it. It is not clear that it should be required in every context. On the one hand, it would seem beneficial to allow the alj/agency to make a determination if the enforcement party is unable to prove its case. On the other hand, the hearing process may be elongated, rather than streamlined, if errors or recurrent errors in granting nonsuits are made and cases have to be reheard. Additionally, some agencies' rules vary with respect to whether or not adverse parties can be called as witnesses under Evidence Code 776. In the ALRB context, they may. However, under the OSHAB model, APA guidelines are followed and the employer (the appellant) could be called only after the Division has presented its case and the employer has rested. If the employer rests and then moves for nonsuit, is the Division still entitled to call the employer as a witness?

11. Tape Recordings (page 105): OSHAB hearings are conducted by electronic means, which seems to work well given our level of informality. Transcripts, however, may be essential for the more lengthy hearings.

12. Findings (page 110): This section points out further the difficulty of following a uniform methodology of drafting findings of fact and conclusions of law. The more summary examples found in many OAH hearings may be adequate to those cases. They would be insufficient, however, in the more complicated labor relations hearings often set before the ALRB or PERB. Nor would they be sufficient for OSHAB, which often involves highly technical factual findings including complicated engineering and health methodologies.

Our presiding administrative law judge, Stuart A Wein, plans to attend the next Law Revision Commission meeting and will be available to answer any questions you may have concerning this letter. Thank you again for the opportunity to respond to the latest installment of Professor Asimow's study.

Yours Very Truly,

Elaine W. Donaldson, Chairman
OSHA Appeals Board