#N-107

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Third Supplement to Memorandum 92-4

Subject: Study N-107 - The Process of Administrative Adjudication
(Comments on Background Study from Department of Consumer Affairs)

Attached to this supplementary memorandum is a letter from the Department of Consumer Affairs concerning issues involved in the administrative adjudication process. We will take up their concerns at the meeting in connection with the matters to which they relate.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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

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April 20, 1992

EDWIN K. MARZEC, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Study N-107: The Process of Administrative Adjudication

Dear Mr. Marzec,

By way of introduction, the Department of Consumer Affairs is an umbrella agency for some 38 professional and vocational licensing boards and bureaus, licensing approximately 2 million persons. These independent boards and bureaus annually process a large number of license disciplinary actions under the Administrative Procedure Act. For that reason, the department has a significant interest in the Law Revision Commission's current study of the APA.

DCA Legal Office attorneys have attended previous meetings of the Commission when this matter was discussed, and we have twice previously provided written comment on various aspects of the study and proposed revisions to the APA.

We appreciate the Commission's openness and solicitation of input and wish to provide additional input at this time. Our comments are based on Professor Asimov's 10/01/91 report entitled "The Adjudication Process", and CLRC Memorandum 92-4, issued 1/13/92, with a supplement dated 2/26/92.

While there are a number of issues and recommendations with which the Department of Consumer Affairs agrees, there are also a number with which we have concerns.

Areas of Agreement

Professor Asimow's October 1991 report contains a number of recommendations with which we agree, including the following:

1. We agree with the recommendation that the level of proof in an administrative adjudicatory proceeding should be changed from clear and convincing evidence to a preponderance of the

evidence, which was the standard prior to Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal.App. 3d 853, 185 Cal.Rptr. 601.

2. We agree that a revised APA should not provide for a right of private prosecution whereby a third party could compel an agency to hold a hearing. The agency should be able to control and direct its resources without having its workload and enforcement priorities set by private parties. Nor should an agency have to expend scarce public funds for what might only be private purposes.

3. We agree that civil discovery rules should not be incorporated into the APA. The APA provides a simple, relatively quick and less cumbersome forum in which administrative matters can be adjudicated. To add current civil discovery rules to the administrative adjudicatory process would make the process time-consuming and costly. It would also place at a disadvantage those licensees who are unable to afford the services of an attorney.

4. We believe to be reasonable the recommendation that subpoenaed documents could be produced at any reasonable time and place rather than only at the hearing.

5. We would strongly support the recommendation to add an emergency adjudicative procedure or a provision for interim or temporary license suspension pending a hearing. This would certainly increase the level of protection for consumers.

Is There a Need for Substantial Revision of the APA?

Even though we realize that the Commission is well down the road on its study of proposed revisions, we believe it is never too late to step back and again critically examine the initial premise - that California's Administrative Procedure Act is in need of substantial revision.

When the study was first undertaken, the general purpose of the proposed revision of the APA was to "level the playing field" so that persons, including attorneys, not regularly appearing before administrative agencies would know the procedural rules of the agencies. It was recognized that a significant number of agencies were not under the APA, and that procedures which had historically developed in those agencies varied widely. In effect, only those with very specialized knowledge could effectively utilize any given process.

We continue to question, as we did in our April 4, 1991 written comments, whether it is necessary to substantially revise the current APA in order to solve what is described as a problem. An obvious detriment flowing from a substantial revision of the APA is the loss of years of legal precedent. We further foresee our licensing boards and bureaus having to expend significant sums of money as the numerous new provisions in the proposed revisions of the APA are tested by litigation.

From our monitoring of the Commission's discussions of this matter, we view the continuing practical problems as follows. There is an attempt to adopt a standard APA applicable to every agency. Under this ideal, everyone would know exactly what the rules are for each administrative agency. However, every time a change is proposed, some agency comes forward with very legitimate reasons why the proposal will not work for them. The response is to create an exception for that agency.

This creation of a set of rules which agencies may "opt out of" seems to be a concession, and supports our view, that one APA will <u>not</u> work for all agencies. We would support the concern in this area recently expressed by the Public Employment Relations Board, the California Public Utilities Commission, and the Occupational Safety and Health Appeals Board, all of whom have pointed out major difficulties with the model statute proposed.

Is it not possible to "fine tune" the existing APA, and simply propose a new set of statutes for non-APA agencies? The new statutes could require those agencies to adopt their adjudicative procedures by administrative regulation. The statutes could contain those basic elements of due process which must be included in each agency's regulations. The agencies would then be free to add whatever unique provisions are necessary to the orderly, efficient operation of their programs.

The value we see in this approach is that it preserves historical legal precedent, creates a minimal disruption and expense for current APA agencies, "levels the playing field" for persons appearing before non-APA agencies, and allows non-APA agencies to tailor their regulations to address unique aspects of their operations. It would also allow those who appear before non-APA agencies to find all of the required procedures in one place. In contrast, the proposed act would be very confusing to lay individuals trying to represent themselves in non-APA process adjudicatory proceedings.

Administrative Hearings - When Required

The proposals now before the Commission concerning when hearings are required continue to concern us very much. It is quite unclear when an evidentiary hearing will be required. It does appear, however, that "adjudicative proceedings" will indeed be required where administrative hearings are not now required.

Our concerns focus on license applicants. Current Government Code Section 11504 does not specify those cases in which a statement of issues must be filed in order to deny a license. Similarly, Section 11504 does not specify when a formal evidentiary hearing must be afforded to the license applicant. We do not see these omissions as a defect.

Business and Professions Code Section 485, pertaining to this department's applicants for licensure, does specify that upon denial of an application for any of the causes specified in Section 480, a statement of issues shall be filed and the applicant shall be entitled to an evidentiary hearing. The causes specified in section 480 include conviction of a crime substantially related to the applicant's profession. The evidentiary hearing is specifically intended, pursuant to section 482, to afford the applicant the opportunity to introduce "competent evidence of rehabilitation."

This statutory scheme is indeed sufficient. It comports with essential due process requirements. That is, an evidentiary hearing should be constitutionally required only when there is indeed a significant issue of material fact to be resolved.

We do not see why evidentiary hearings should be statutorily required when there are no significant issues of fact to be resolved by the licensing agency. Proposed Section 642.030 would indeed seem to require such evidentiary hearings merely because applicants request them. At best, some form of "adjudicative proceeding" short of an evidentiary hearing would apparently be required, unless the agency secures express statutory authority to exempt it from such requirements. See subd. (c) of proposed Section 642.030.

The costs of new adjudicative proceedings could be enormous. Licensure applicants frequently do contest, informally and without evidentiary hearings, the agency's judgments concerning an applicant's qualifications. And the agency's judgments are often of necessity subjective in character. See, e.g., 70 Ops.Cal.Atty.Gen. 292 (1970). Should the State Bar be required

to conduct an "adjudicative proceeding" for each individual who wishes to contest his or her score on the bar examination?

Under the circumstances, we do endorse the approach suggested in the Staff Note to Section 642.030 namely: "It might be better to phrase this section in the reverse -- that an agency need not act unless otherwise required by statute -- if that in fact is the only relevant circumstance."

Declaratory Orders

The proposed revision of the APA contains extensive provisions relating to declaratory decisions, a concept not included in the existing APA. (Chapter 1, Article 3, Sections 641.310 - 641.360.) It is not entirely clear from the proposed language whether an agency may refuse to implement these provisions.

We fail to see the value of creating a formal bureaucratic process for what essentially constitutes a request for a legal opinion from an agency. The ability to request an opinion from an agency as to whether that agency's law affects a stated set of facts now exists informally. We would maintain this is a much better approach to the matter.

With regard to the specific proposals, we have a number of concerns which we briefly note here.

There is a concern with:

* the Office of Administrative Hearings adopting regulations to govern the procedure for an agency issuing a legal opinion (declaratory decision). (Section 641.310(b).)

* the very tight time frames for notice to interested parties and the issuance of a declaratory decision. (Sections 641.330, 641.350.)

* the legal ramifications of denial of a petition if the decision is not timely issued. (Section 641.350(c).) Does this mean the agency's law does not apply to the facts presented? What if the law does apply but the agency was simply unable to meet the statutory deadline for issuance of the opinion? These are major issues which must be resolved.

Intervention

We disagree with the recommendation to allow third party intervention in administrative adjudicatory proceedings. While intervention may be appropriate in certain types of cases, we agree with Attorney Mark Levin that it is not appropriate in licensing matters. Even if the administrative law judge can place restrictions on the nature and type of intervention, we do not see any public purpose to be served by intervention. Indeed, it could only unduly lengthen the proceeding and thereby raise the costs to all parties.

In addition, we would emphasize that intervention would be particularly inappropriate in licensing agency disciplinary actions. In these matters the agencies are essentially engaged in law enforcement actions. Private persons ought not to be prosecutors of administrative disciplinary actions any more than they should be prosecutors of criminal actions.

Since the costs of license disciplinary actions are paid by the licensing entity, it is particularly inappropriate to allow third parties to utilize the APA forum for other purposes.

Alternative Dispute Resolution

We believe that the heading "alternative dispute resolution" is something of a misnomer when applied as in proposed section 648.210 to settlements of disciplinary actions. An administrative disciplinary hearing is not at all a forum for dispute resolution in the manner of a civil court. The administrative disciplinary process is instead in important respects akin to the criminal justice process.

This is not to suggest that the substance of Section 648.210, authorizing settlements of disciplinary actions, is inappropriate. We would emphasize, however, that administrative discipline is a special type of proceeding. We also note that the State Judicial Council is currently undertaking an extensive review of the possible expanded use of alternative dispute resolution.

A noteworthy omission from the Alternative Dispute Resolution provisions is any express indication whether the outcome is to be a matter of public record. Cf. Register Div., of Freedom Newspapers v. Orange County (1984) 158 Cal.App.3d 893. This becomes a matter of special sensitivity by reason of proposed section 648.210, which would authorize settlements

before the issuance of a "complaint". While a filed "complaint" would be a matter of public record, would this provision effectively authorize an agency to settle a case secretly by agreeing not to file a complaint?

Precedential Decisions

We do not believe that it would be appropriate for licensing agencies to adopt decisions as precedent. Each licensing case not only requires application of the law to a unique set of facts but also a consideration of any mitigating or extenuating factors.

If decisions become precedents, parties will be forced to appeal (or take writs) simply to eliminate a bad precedent, despite the fact that they might otherwise live with a bad decision.

Ex Parte Communications

The licensing boards in this department are being increasingly confronted with cases which are complex, sensitive and costly. The decision to file an accusation in such a case may on rare occasion effectively commit the board, due to projected litigation expenses, to engage in no other enforcement actions for a year or more.

Board members should not be statutorily foreclosed from personally reviewing an investigative file or from otherwise engaging in any form of preliminary investigation. Most importantly, members of licensing boards need to retain the option to decide whether to file charges. The usual, and of course preferable approach, is for a board to delegate to its executive officer the conduct of an investigation and the decision whether to file charges. But we are disturbed at the prospect that California agencies would be categorically barred from using a procedure which seems to work satisfactorily for agencies such as the Securities and Exchange Commission. (See Withrow v. Larkin (1975) 421 U.S. 35.)

Findings and Reasons

Professor Asimow has proposed a major change in current law with his recommendation that an agency state the reasons why it has selected a particular penalty. The setting of a penalty

currently is a matter within the sound discretion of the agency and the superior court will not typically inquire into how or why the agency arrived at a particular penalty. We believe the decision-making process of a multi-member body is sufficiently complex and the range of penalties so great that it would be very difficult to express this process in an agency's decision.

Quite apart from any difficulty in this regard, the proposed change would, at least by implication, fundamentally alter the relationship between the courts and the decision-making agencies. In cases of license discipline, under current law it is clear that the level of discipline to be imposed is committed to the sound discretion of the agency. A reviewing court may set aside the disciplinary order only for manifest abuse of discretion. This proposed change would effectively encourage reviewing courts to second guess the agency's decision-making process in setting penalties.

Miscellaneous Concerns

We would add a final note that many of the suggestions in the last study do not reflect a practical assessment of their impact on an agency's functioning and its limited fiscal resources - e.g. - unrealistic time limits for processing applications; permitting applicants to request hearings even where they do not currently have that right; allowing third parties to participate in proceedings; declaratory or advisory opinions.

We hope the foregoing comments are helpful to the Commission in its study of the Administrative Procedure Act. Again, we thank you for the opportunity to provide input.

Sincerely,

DERRY KNIGHT
Deputy Director
Legal Affairs

cc: All DCA Licensing Boards