

## Second Supplement to Memorandum 92-22

Subject: Study N-107 - The Process of Administrative Adjudication --  
Sanctions in Proceedings (Letter from Judge Wein)

Exhibit 1 is a letter from Stuart Wein, Presiding Administrative Law Judge of the Occupational Safety and Health Appeals Board. He concurs with Judge Wolpman (see letters attached to basic memo and First Supplement) that administrative agencies should be authorized to impose monetary sanctions for bad faith tactics without having to petition the superior court for enforcement. Instead, he says the agency should have authority to make an order imposing monetary sanctions that would be included in the agency's decision. Sanctions would be subject to judicial review in the same manner as agency decisions generally. (The reference on page 2 of his letter to a "revised draft" of the First Supplement is to a now-obsolete internal draft that was not generally circulated.)

The provision on bad faith tactics, revised along the lines suggested by Judges Wein and Wolpman, might look as follows:

Bad faith tactics [revised]

A presiding officer or agency may order a party, the party's attorney, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or intended solely to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure. The order shall be included in the decision, and shall be supported by findings of fact as provided in Section [11518].

Comment. This section is new, and permits administrative agencies to impose monetary sanctions for bad faith tactics. An order imposing sanctions is included in the decision in the case, and is subject to judicial review in the same manner as administrative decisions generally.

For agency authority to seek the contempt sanction, see Section [set out below]. For enforcement of discovery orders, see Sections 646.310-646.380 [Memo 92-23].

Judges Wein and Wolpman appear satisfied with the provision in the basic memo permitting the agency to seek the contempt sanction by petition to the superior court. For convenience, that section is reproduced here:

Contempt [same as in basic memo]

(a) The agency may certify the facts to the superior court in and for the county where the proceedings are held if a person does any of the following in proceedings before the agency:

- (1) Disobeys or resists any lawful order.
- (2) Refuses to respond to a subpoena.
- (3) Refuses to take the oath or affirmation as a witness or thereafter refuses to be examined.
- (4) Is guilty of misconduct during a hearing or so near the place of the hearing as to obstruct the proceeding.

(b) As used in subdivision (a), "misconduct" includes the following:

- (1) Disorderly, contemptuous, or insolent behavior toward the presiding officer while conducting the proceedings that tends to interrupt the due course of the proceedings.
- (2) A breach of the peace, boisterous conduct, or violent disturbance, that tends to interrupt the due course of the proceedings.
- (3) Any other unlawful interference with the process or proceedings of an administrative agency.

(c) The court shall thereupon issue an order directing the person to appear before the court at a specified time and place, and then and there to show cause why the person should not be punished for contempt. The order and a copy of the certified statement shall be served on the person. Thereafter the court has jurisdiction of the matter.

(d) If a person is charged with refusing to respond to a subpoena and it appears to the court that the subpoena was regularly issued, the court shall order the person to appear before the officer named in the subpoena at the time and place fixed in the order and to testify or produce the required papers. On failure to obey the order, the person shall be dealt with as for contempt of court.

(e) The same proceedings shall be had, the same penalties may be imposed, and the person charged may purge the contempt, in the same way as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.

Comment. Subdivisions (a), (c), and (e) continue the substance of former Section 11525 of the Government Code. Subdivision (b) is a clarifying provision drawn from Code of Civil Procedure Section 1209 (contempt of court). Subdivision (d) is drawn from the third and fourth sentences of Government Code Section 11188.

For monetary sanctions for bad faith tactics, see Section [set out above]. For enforcement of discovery orders, see Sections 646.310-646.380 [Memo 92-23].

Respectfully submitted,

Robert J. Murphy III  
Staff Counsel

STATE OF CALIFORNIA

PETE WILSON, Governor

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April 6, 1992

Robert J. Murphy III  
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4000 Middlefield Road, Suite D-2  
Palo Alto, CA 90303-4739

Dear Mr. Murphy:

With respect to memorandum 92-22 dealing with the related issues of contempt and sanctions in administrative hearings, I wish to concur with the suggestion of James Wolpman, Chief Administrative Law Judge of the Agricultural Labor Relations Board to the effect that administrative agencies be given the right to issue orders sanctioning misconduct. These orders, similar to any other administrative decisions or orders would have to be justified by appropriate findings and would provide for court review to assure due process. It is my feeling that such an approach is much more efficient than Government Code Section 11507.7 (discovery sanctions) which requires petitions to the Superior Court.

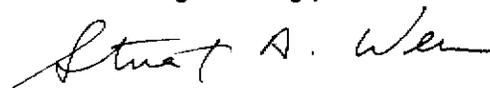
It has been our experience at the OSHA Appeals Board, which has adopted Government Code 11507.7 by incorporation (See Labor Code Section 6603(a),) that Superior Court proceedings to compel discovery are burdensome and not a practical alternative to administratively assuring discovery compliance. We are in the process of reviewing our regulations, and at least tentatively have planned to introduce a proposal which would expand our administrative discovery sanctions, as well as our powers to sanction misconduct.

As expressed by the D.C. Court of Appeal in Gyrodyne Company of America v. NLRB ( D.C.Cir. 1972) 459 Fed.2d 1329, 79 LRRM 2332 there is little justification for mandating a cumbersome and time-consuming enforcement procedure when there are alternative, well recognized means available for vindicating the (National Labor Relations) Board's power to require the production of relevant documents. "There is a constant danger that the aims of the Act will be frustrated by a party determined to delay the workings of justice. Indeed, the courts have discouraged collateral proceedings to enforce subpoenas for the very reason that they add to the already considerable delays inherent in the Board's procedures (Citation omitted)." 79 LRRM 2342.

I have reviewed your revised draft (First Supplement Memorandum 92-22) with ALRB Chief Administrative Law Judge Wolpman. We are both of the opinion that the requirement that an agency petition to the Superior Court (Subsections (b), (c) and (d)) will lead to the same types of problems generated by Government Code Sections 11507.7. Rather, we had both contemplated that sanction orders be reviewed at the same time and in the same forum as any other order or decision of the ALJ in a particular case. Thus, if review is sought for any other issue in a given matter, the court would not be called on to separately look at a sanctions order.

Thank you for the opportunity to comment on this matter.

Yours very truly,



Stuart A. Wein  
Presiding Administrative Law Judge  
Cal/OSHAB

SAW:amm

cc: James Wolpman, Chief Administrative Law Judge/ALRB  
Board Members, Cal/OSHAB  
Janet Eagan, Executive Officer, Cal/OSHAB  
Steven Churchwell, Chief Counsel, Cal/OSHAB