

First Supplement to Memorandum 92-37

Subject: Study N-100 - Administrative Adjudication (Combined Draft of Statute--continuances)

Attached to this memorandum is a letter from Steven M. Kahn, Deputy Attorney General. Mr. Kahn is concerned that the draft provisions relating to continuances omit a provision that is currently found in the Administrative Procedure Act. Existing Government Code Section 11524(c) provides:

In the event that an application for a continuance by a party is denied by an administrative law judge of the Office of Administrative Hearings, and the party seeks judicial review thereof, the party shall, within 10 working days of the denial, make application for appropriate judicial relief in the superior court or be barred from judicial review thereof as a matter of jurisdiction. A party applying for judicial relief from the denial shall give notice to the agency and other parties. Notwithstanding Section 1010 of the Code of Civil Procedure, the notice may be either oral at the time of the denial of application for a continuance or written at the same time application is made in court for judicial relief. This subdivision does not apply to the Department of Alcoholic Beverage Control.

This provision requires a party, when an application for a continuance is denied, immediately to seek judicial review. Failure to seek judicial review within the 10-working-day period bars judicial review as a jurisdictional matter. Apparently this means the issue cannot be raised in the ordinary course of judicial review on the merits, but this is not clear. California Administrative Hearing Practice § 2.112 (Cal. Cont. Ed. Bar 1984).

This particular provision was added to the law in 1979 by agency-sponsored legislation. It applies only in a proceeding presided over by an administrative law judge of the Office of Administrative Hearings. It is not clear whether a party may seek immediate review of this issue in proceedings before other agencies, as opposed to raising it with other issues after exhaustion of administrative remedies.

Mr. Kahn states that this provision should be retained a number of reasons:

(1) It ensures prompt resolution of the continuance issue, without having to proceed with a lengthy hearing only to have it negated by a court later on the ground that a continuance should have been granted.

(2) It provides the only means for an agency to challenge a continuance which it believes was improvidently granted.

(3) It provides a check on an administrative law judge's action in determining whether or not there is good cause for a continuance.

(4) There is no indication of any problem with the existing statutory scheme.

The discussion at the Commission meeting where it was tentatively decided to omit this provision was to the effect that it is an anomaly. There are many decisions made on procedural and substantive matters throughout the course of the adjudicative proceeding, and as a general rule there is no immediate judicial review of these matters. They must all wait until the end of the administrative process before they receive judicial review. To allow intervening appeals on issues such as this can tie up the proceeding and hinder the administrative adjudication process. The continuance issue is not unique: judicial reversal of the administrative decision on any of the myriad of possible procedural and substantive decisions in the proceeding could result in the need for a rehearing. The question was asked of agency representatives present at the Commission meeting when this matter was discussed whether any of them had encountered a problem in practice relating to continuances. None had. However, the fact that this provision was enacted as recently as 1979 may indicate there was a problem in the past. The Commission decided to highlight this change and request further input on it when it circulates its tentative recommendation for comment.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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June 23, 1992

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

RE: Administrative Adjudication Study N-107
Deletion of Government Code §11524
(Section 643.320(c))

Dear Dean Marzec:

At its meeting on May 21, 1992, the Commission decided to delete current Government Code §11524 from the draft of its new Administrative Procedure Act (proposed §643.320(c)). We believe that this decision is erroneous and that proposed §643.320(c) should be retained.

Government Code §11524 is useful for a number of reasons. It resolves the issue of whether a continuance should be granted prior to the commencement of an administrative hearing. Where the Office of Administrative Hearings denies a request for a continuance, the moving party must act within the statutory time or the superior court will lack jurisdiction in the future to consider the issue. This means that if a request for a continuance is denied and the hearing goes forward without challenge, there is no risk that an otherwise proper decision will be negated by a superior or appellate court months or years later on the grounds that a continuance should have been granted. This has obvious financial benefits to all parties who would otherwise be required to repeat a hearing that lasted anywhere from hours to months.

Secondly, §643.320(c) provides the only means for an agency to challenge a continuance which it believes was improvidently granted. Removal of this section would deprive an agency of its only opportunity to overturn such a decision. Furthermore, the

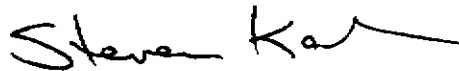
Edwin K. Marzec, Chairman
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mere existence of the statute provides a check on an administrative law judge's action in determining whether or not there is good cause for a continuance.

Finally, the proposed deletion of this section is but another example of the whimsical modification of the current APA in circumstances where there is no indication of any problem with the existing statutory scheme.

Sincerely,

DANIEL E. LUNGREN
Attorney General

A handwritten signature in dark ink, appearing to read "Steven Kahn", with a long horizontal flourish extending to the right.

STEVEN M. KAHN
Deputy Attorney General

SMK:hfb