#N-107

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07/02/92

Second Supplement to Memorandum 92-37

Subject: Study N-100 - Administrative Adjudication (Combined Draft of Statute--comments of California School Employees Association)

Attached to this supplementary memorandum is a letter from the California School Employees Association concerning issues involved in the administrative adjudication process. We will take up its concerns at the meeting in connection with the matters to which they relate.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

csea California School Employees Association

July 1, 1992

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

Re: Study N-100: Administrative Adjudication, Memorandum 92-37

Dear Mr. Marzek:

California School Employees Association represents over 165,000 California public school classified workers plus many city, county and other local government workers. CSEA frequently appears in adjudicatory hearings before state agencies such as the Public Employment Relations Board, the Department of Motor Vehicles, the Employment Development Department and the Public Employees Retirement System.

Section 647.110, subdivision (b), of the combined draft of the proposed statute concerning administrative adjudication includes as a matter appropriate for a conference adjudicative hearing:

> "(4) A disciplinary sanction against a public employee that does not involve discharge from employment or suspension for more than 10 days."

The staff note addresses the issue raised by California School Employees Association at the Commission's May 21, 1992 meeting. The staff relies on a footnote in Skelly v. State Personnel Board (1974) 15 Cal.3d 194, 203, fn. 16. That footnote refers to Government Code section 19576 which at the time of the Skelly decision provided for "an investigation with or without a hearing" for state employees suspended without pay for 10 days or less. Subsequently, the 10-day period specified in that statute was reduced to five days. (Stats. 1982, c. 916, p. 3353, § 1.) Further, Skelly concerned only predeprivation safeguards, not the right to an ultimate evidentiary hearing.

Taylor v. State Personnel Board (1980) 101 Cal.App.3d 498, another case cited in the staff note, also partially relies on Government Code section 19576. (Id. at 502.) It too should be read in light of the 1982 amendment reducing the 10-day period to five days. Only in Civil Service Association v. City and County of San Francisco (1978) 22 Cal.3d 552 does the Supreme Court address, without reference to the Government Code, the adequacy of a Skelly-type hearing as the only process, predeprivation or postdeprivation, due to a disciplined permanent public worker.

2045 Lundy Avenue P.O. Box 640 San Jose, CA 95106 (408) 263-8000 FAX (408) 954-0948

(Id. at 564.) While the court found the abbreviated procedures adequate in that case, those suspensions were for only five days.

None of these cases support the proposition that, in the case of employee discipline, a full evidentiary hearing is required only for discharge and suspensions exceeding five days. For example, in Ng v. State Personnel Board (1977) 68 Cal.App.3d 600, the court noted that "[t]he right to an evidentiary hearing extends equally to dismissals and demotions." (Id. at 606.) A permanent state worker has the right to a full evidentiary hearing for any discipline except that specified in Government Code section 19576. (Gov. Code § 19578.)

It is my understanding that the State Personnel Board provides evidentiary hearings even for suspensions of 5 days or less since, as a practical matter, the administrative burden is usually no greater than that of the investigation required by Government Code section 19576.

Finally, California School Employees Association objects to the phrase "public employee" in this subdivision instead of "state employee". The Commission has repeatedly stated that the administrative procedures of local agencies are not covered by this project. Many school districts have promulgated rules of procedure, pursuant to Education Code sections 45113 or 45306, which, although not providing all procedures available under the APA, do afford full evidentiary hearings for all suspensions without pay. (E.g., San Juan Unified School District, Board Policy 4272.)

For all these reasons, subdivision (b)(4) of section 647.110 should be deleted from the draft statute or, at least, the subdivision should be limited to a state employee appealing a disciplinary sanction listed in Government Code section 19576.

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The words "or certificate" should be added to section 647.110, subdivision (b)(5). A school bus driver, for example, can lose permanent employment if the school bus driver's certificate is suspended or revoked, even if the driver's license is unaffected. For the same reason, the same words should be added after the word "license" in section 648.310, subdivision (b), section 650.140 and section 650.150, subdivision (a).

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California School Employees Association supports the first alternative listed for section 648.450, subdivision (b). To require a hearsay objection during an administrative hearing is nonsensical since it would always be overruled on the ground that direct evidence could still be received that the hearsay would supplement. Under the second alternative, the objection could be raised for the first time during administrative review but, given that parties often represent themselves or choose a lay representative for such proceedings, agencies should simply train their hearing officers to apply the rule stated in subdivision (a) rather than relying on this trap for the unwary.

Thank you for the opportunity to present these comments to the Commission.

Sincerely,

William C. Heath

WILLIAM C. HEATH
Deputy Chief Counsel

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