

Fourth Supplement to Memorandum 92-37

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

Attached to this supplementary memorandum is a letter from Elaine Donaldson, Chairman of the Occupational Safety and Health Appeals Board, commenting on the second half of the combined draft of the administrative adjudication statute. We will take up OSHAB's concerns at the meeting in connection with the matters to which they relate.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

DEPARTMENT OF INDUSTRIAL RELATIONS

OCCUPATIONAL SAFETY

AND HEALTH APPEALS BOARD

1006 FOURTH STREET, 4TH FLOOR

SACRAMENTO, CA 95814-3370

(916) 322-5080

FAX(916) 445-6331 or ATSS 8-485-6331

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July 6, 1992

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

Subject: Administrative Adjudication
Memorandum 92-37, Study N-100 (Combined Draft of Statute)

Dear Dean Marzec:

We again welcome the opportunity to respond to the combined draft of the administrative adjudication statute. We share your staff's concerns (Page 2 of #N-100) that the model proposed will impose additional costs on some agencies to promulgate regulations merely to maintain the status quo. In an era of severe budgetary difficulties, this does not appear to be an efficient way to streamline state administrative proceedings. Additionally, the end product--an amalgam of "default" rules and ad hoc modification or elimination of procedures on an agency-by-agency basis--may well make the rules less comprehensible to practitioners, thus achieving an effect exactly contrary to the model's stated purpose.

With respect to specific proposals (commencing with Section 645.110 at page 55 of #N-100), we offer the following commentary:

1. Section 645.340. Stay of proceedings

The administrative enforcement procedures for discovery should be an improvement over the time-consuming and cumbersome court enforcement scheme under the existing administrative procedure act. However, because discovery maneuvers can be utilized to delay proceedings, it might be more appropriate that the "default" is for proceedings not to be stayed absent extraordinary circumstances. The language as drafted refers only to the presiding officer's "discretion".

2. Section 645.370. Review of presiding officer's order

While judicial review of discovery rulings should be part of the regulatory scheme, it is not clear that administrative proceedings will be facilitated by interim judicial review. Consideration might be given to limit most discovery issues to review following issuance of the Agency's final decision.

3. Section 645.440. Refusal to respond to subpoena

Because the materiality of a witness' testimony should be a critical factor in determining whether to certify a refusal to respond to a subpoena, the Agency may be in a better position to seek court enforcement. This seems to be the role contemplated by Sections 11188 and 11525 of the Government Code.

4. Section 646.210. Settlement

As drafted, the parties may settle upon "any terms that are appropriate". The Agency may well have policy considerations, jurisdictional limitations, or statutory prohibitions from approving certain terms or conditions in a proposed settlement. For example, references to third party civil liability may or may not be appropriate for settlements approved by the ALRB or OSHAB, agencies specifically structured to litigate issues between the enforcement branch of the government and the public.

5. Section 647.110. When conference hearing may be used

OSHAB hearings involve allegations of work place safety and health violations. While civil penalties have been recently increased by statute, a good number of our cases (generally, appeals by employers) involve amounts less than \$1000. Additionally, many of our hearings focus on "mitigation"; that is, the employer concedes the violation, but seeks a deduction from the proposed civil penalty because of extenuating circumstances. Our hearings are informal, but do not reach the level of informality proposed for the "conference hearing". The parties are entitled to examine and cross-examine witnesses, documents must be received into evidence with proper foundation, etc. It is not clear that any efficiency could be achieved by permitting these hearings to be conducted under both models. Nor is it likely that the parties before us would be assisted by this dual track procedure.

6. Section 648.130. Default

Since the OSHAB proceeding commences with the employer's filing of a notice of appeal (from a Division of Occupational Safety and Health citation), our regulations permit the dismissal of the appeal for employer's failure to appear at a hearing. An opportunity to establish good cause for the failure to appear is provided. Where no "response", i.e., appeal from a citation is taken within fifteen days, the Division's action becomes a final order of the Appeals Board by operation of law, again with a proviso to allow late appeals for good cause. (Labor Code Section 6601.) The drafted section, in contrast, would appear to require some taking of evidence, perhaps complicating our regulatory scheme rather than streamlining procedures for the practitioners before us.

7. Section 648.140. Open hearings

Subsection (a)(1) permits the parties to determine whether or not a hearing may be closed. This practice would be contrary to OSHAB procedures mandating that hearings are open to the public. Matters requiring confidentiality (e.g., identification of complaining witnesses, trade secrets) can be handled through in

camera review without limiting public access to the hearing itself.

8. Section 648.240. Provision for interpreter

Subsection (b) does not specify when requests for interpreters need be made. An at-hearing request may result in a case being continued, thus causing administrative delay and added costs to the parties. Section 648.270 provides only for "timely" notice of interpreter need.

9. Section 648.250. Cost of interpreter

The draft includes the specific exemption of the Workers' Compensation Appeal Board with respect to interpreter regulations contained in Government Code Section 11513(d). An agency, for budgetary reasons, or by virtue of the parties before it, may wish to modify the default rule so that the party seeking the interpreter should pay the costs absent equitable circumstances to the contrary. It is not clear that an agency would be permitted to modify the default rule, if the agency, unlike the WCAB, is not specifically referred to in this section.

10. Section 648.310. Burden of Proof

It is not clear why only agencies involved in adjudicative proceedings required by statute to be conducted by an ALJ employed by the Office of Administrative Hearings should be permitted to provide a different burden than preponderant evidence. For example, an agency may wish by regulation or precedential decision to require clear and convincing evidence to establish some element of a violation or penalty.

11. Section 648.320. Presentation of testimony

The Government Section 11513(b) proviso for calling a respondent only if the respondent does not testify on its own behalf has been adopted by OSHAB. (Title 8, Code of Regulations, Section 376.1(b).) However, other agencies, for example, the ALRB, may allow parties to be called under Evidence Code 776 as part of the agency's case in chief. It is not clear that statewide uniformity on this issue is a worthy goal, or if so, which rule is preferable.

12. Section 648.340. Affidavits

The change from the 10-day requirement of Government Code Section 11514 (incorporated as OSHAB Regulation 372.4) to 30-days for notification of testimony by affidavit may not be realistic for the less formal hearings in which the parties are given little more than 30-60 days for preparation.

We have previously commented upon our concerns regarding the timeliness of hearsay objections (Section 648.450); ex parte communications (Section 648.510); and issuance and form of decisions (Sections 649.110, 120). Because of budgetary constraints and staffing considerations, we will likely not be able to send a representative to the July 9 meeting in San Diego. However, our

Presiding Administrative Law Judge, Stuart A. Wein, will be available in our Sacramento office to answer any questions you may have concerning this letter. Thank you for this additional opportunity to respond to the administrative adjudication project.

Yours very truly,

A handwritten signature in cursive script, reading "Elaine W. Donaldson". The signature is written in dark ink and is positioned above the typed name.

Elaine W. Donaldson, Chairman
OSHA Appeals Board