
Second Supplement to Memorandum 93-30

**Subject: N-100 — Administrative Adjudication – Draft of Tentative
Recommendation (Comments of OAL)**

Attached to this supplementary memorandum is a letter from Herb Bolz of the Office of Administrative Law.

§ 601.010. Compilation of regulations governing adjudicative proceeding

Mr. Bolz suggests relocation of this section among provisions relating to rulemaking, since it imposes duties on OAL relating to compilation and publication of regulations. The staff has no problem relocating this section, but our preference would be to move it among the provisions relating to hearing procedures, since that is what it substantively relates to.

Mr. Bolz also indicates a need to specify what agency may adopt regulations concerning this section. We had not anticipated that any regulations would be necessary concerning compilation of regulations, or if any are necessary, the authority could be found somewhere in the general authority of OAL.

§ 610.010. Application of definitions

Mr. Bolz is concerned that some of the definitions may not be appropriate when applied to rulemaking procedures. See, e.g., Section 610.190 ("agency" defined). We will review the application of the definitions at the time we draft the rulemaking part of the statute.

§ 641.480. Study of administrative law and procedure

Mr. Bolz' letter indicates that the Offices of Administrative Hearings and Administrative Law are in agreement on the disposition of existing Government Code Section 11370.5, which authorizes OAH to study the subject of administrative law and procedure in all its aspects. Under the agreement, OAH would be authorized to study adjudicative procedure and OAL would be authorized to study rulemaking procedure. Each statute would be located among

the provisions relating to that agency. This appears appropriate to the staff and we will implement the agreement in the draft.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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May 6, 1993

Law Revision Commission
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Karl Engeman
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File: _____
Key: _____

Re: CLRC Administrative Law Study concerns

Dear Karl:

At the March meeting of the California Law Revision Commission, I suggested that draft section 615.180 of the proposed new APA be revised as follows:

Section 615.180. Study of administrative ~~law and procedure~~ adjudication

"(a) The office [OAH] is authorized and directed to:

(1) Study the subject of administrative ~~law and procedure~~ adjudication in all its aspects.

* * * *

You agreed to the above noted revision at the meeting. In a phone conversation on April 29, we also agreed that it was appropriate to propose a new section, which would read as follows:

Section 6---.---. Study of administrative rulemaking

"(a) The Office of Administrative Law is authorized and directed to:

(1) Study the subject of administrative rulemaking in all its aspects.

* * * *

This new section simply repeats the language of current Government Code

section 11370.5, substituting "rulemaking" for "law and procedure." Section 11370.5 was added by Statutes of 1961, chap. 2048, sec. 7, and apparently was overlooked when the Legislature shifted rulemaking-related duties to the Office of Administrative Law ("OAL") in 1979. Since section 11370.5 appears to be a useful provision, it seems logical to assign to OAL the responsibility for *rulemaking* law, after specifying that the Office of Administrative Hearing is responsible for *adjudicatory* law. Indeed, enactment of proposed section 6--- would facilitate OAL's efforts to make the rulemaking portion of the APA less burdensome for state agencies, while preserving public participation and the benefits of independent legal review of proposed regulations.

In a phone conversation on May 4, I suggested--and you agreed--that it would be appropriate to place the proposed "Study of Administrative Rulemaking" section in a new part of the draft APA which contained solely OAL-related material. This new OAL part would also contain section 601.010 ("Compilation of regulations governing adjudicative proceeding (sic)"). Both of these statutory sections impose duties upon OAL. It makes sense to put them either in the current OAL/rulemaking statute (Gov. Code sections 11340-11356) or a part of the new statute devoted to OAL-related material.

In a recent meeting with State Senate staff, concerns were expressed to OAL about statutes which assigned overlapping regulatory duties to two or more different agencies. Agencies with overlapping statutory mandates, it was said, often adopted regulations which were inconsistent each other. Mindful of these concerns, OAL will urge the Commission to draw the new statute in such a way that it is crystal clear (1) which new provisions *OAH* is responsible for administering and, if necessary, adopting implementing regulations and (2) which new provisions *OAL* is responsible for administering, and, if necessary, adopting implementing regulations.

Similarly, it is important that a specific agency (presumably either OAL or OAH) have the power to adopt regulations to implement, interpret, and make each article of the new APA. For instance, it is not clear which agency has the power to adopt regulations interpreting Chapter 1 ("Preliminary Provisions") of

Part 1 ("General Provisions"). Possibly, no agency would have rulemaking power vis a vis these new statutory provisions. This could pose problems. As we discussed, these new statutory provisions will very likely require interpretation when first implemented. For instance, it might be necessary to adopt regulations implementing section 601.010; however, it appears that no agency has been granted pertinent rulemaking power.

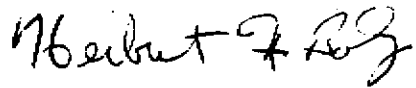
OAL also has a second concern about Chapter 1 ("Preliminary Provisions"). As the second article in Part 1 ("General Provisions"), Chapter 1 is clearly designed to contain provisions that will apply to both the adjudicative and rulemaking portions of the new APA. However, this may not work out in practice. For instance, the definition of "agency" in section 610.190 may nicely meet the needs of adjudication, but not of rulemaking law. From OAL's perspective, it is critical to know whether a particular entity is a "state agency" for purposes of determining whether or not it is subject to APA rulemaking requirements. For instance, questions have recently been raised as to whether or not regional air quality boards are "state agencies" for APA rulemaking compliance purposes.

Another key OAL concern is whether or not a particular entity possesses independent rulemaking power. (OAL is required to review all proposed regulations to determine whether or not the promulgating agency has statutory "authority" to adopt the regulation in question. (Government section 11349.1(a).) For instance, the Labor Commissioner is "in" the Department of Industrial Relations, but appears to have independent rulemaking power. The reference to "authority" in the second sentence of section 610.090 appears to be helpful in the adjudication context, but may prove confusing in the rulemaking context. It may well be that administrative entity X should "be treated as a separate agency even if the unit is located within or subordinate to another agency" *for adjudication purposes*, while administrative entity X would be determined not to possess independent authority *for rulemaking purposes*, i.e., could not independently adopt regulations.

Karl Engeman, OAH, May 6, 1993, p. 4

Thank you for your assistance and cooperation in this matter. I look forward to working with you, not only in further refining the CLRC proposal but also in implementing the resulting statute.

Sincerely,



Herbert F. Bolz
Supervising Attorney

✓ cc: Nathaniel Sterling, Executive Secretary
California Law Revision Commission