#N-202

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04/30/93

Memorandum 93-31

Subject: Study N-202 - Judicial Review of Agency Action--Scope of Review (Draft of Initial Decisions)

The Commission has made initial policy decisions concerning scope of review issues in judicial review of agency action. Attached to this memorandum is a staff draft to implement the initial decisions. We will proceed through the draft at the Commission meeting on a section by section basis.

Also attached as an Exhibit is a letter from Joel S. Primes, Supervising Deputy Attorney General. Mr. Primes supports the substantial evidence standard for judicial review of agency factfinding and makes other proposals in this letter. His remarks are referred to in staff notes in appropriate places in the draft statute.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE

1515 K STREET, SUITE 511
P.O. Box 944255
SACRAMENTO, CA 94244-2550
(916) 445-9555

FACSIMILE: (916) 324-5340

April 20, 1993

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

RE: Scope of Judicial Review of Administrative Action

Dear Mr. Sterling:

On March 26, 1993, the undersigned attended the Law Revision Commission meeting at the State Capitol. During discussions of the "Scope of Judicial Review of Administrative Actions," the Commissioners asked for input from attorneys frequently involved with the judicial review of agency decisions. I outlined cases and experiences of members of the Licensing Section of the Attorney General on writ of mandate review in California Superior Courts. I explained the difficulty of defending a writ of mandate when the judge is unfamiliar with the law or the state agency. A major concern is local judges unfamiliar with writ of mandate procedures who often favor the hometown licensee or local attorney. The problem of the hometown judge leaning "over backwards for a hometown professional represented by a hometown lawyer" was explained at page 37 in memorandum 93-23 (fn. 79). To counter this unfair occurrence, it is proposed that a statute similar to that contained in the Medical Practice Act be included in your recommendations.

A.

JUDICIAL REVIEW LIMITED TO COUNTY WHERE ATTORNEY GENERAL HAS OFFICES

When the agency is represented by the Attorney General, mandate review should be limited to counties where the Attorney General has offices: Sacramento, Los Angeles, San Francisco, and San Diego. This would be consistent with Business and Professions Code section 2019 relating to review of decisions of the Medical Board and requiring suit to be brought in any one of

four cities. It is suggested that the statute provide that when the agency being sued is represented by the Attorney General, legal proceedings against the agency shall be brought in the county in which the Attorney General has an office.

This proposal minimizes travel expenses, creates judges experienced with judicial review of agency decisions (Los Angeles Superior Court has two departments in the system devoted solely to writ review) while providing for a more effective court review process. A statute similar to Business and Professions Code section 2019 should be included in your revision of judicial review of agency action. If judicial review of the disciplinary action against medical doctors is limited to where the Attorney General has offices, it should be appropriate for all licensees whose license has been disciplined where the Attorney General represents the agency.

B.

DISPENSE WITH INDEPENDENT JUDGMENT TEST

This office supports the proposal that "California dispense with the independent judgment test in all cases of judicial review of agency fact findings" and adopt "the substantial evidence on the whole record test for the review of such decisions." The substantial evidence test is clearly appropriate where the decisions are based on conflicting testimony resolved by the independent Administrative Law Judge (ALJ) who is in the best position to resolve credibility questions by observing witness demeanor and evaluating the persuasiveness of the testimony. The fact that the independent judgment test is not followed by any other state or the federal government, is an important point in concluding that the test should be repealed in California. Furthermore, independent ALJ's provide an important buffer against inappropriate agency action. All of the arguments for rejecting the independent judgment test: accuracy of result, acceptability, and efficiency reflect that a change is necessary (pages 34-45 Study N-202 Judicial Review of Agency Action, Scope of Review (Consultant's Background Study).

During the meeting of March 26, 1993, alternatives to totally dispensing with the independent judgment test were discussed and suggestions requested.

C.

ALTERNATIVE TO TOTAL ELIMINATION OF INDEPENDENT JUDGMENT TEST

On all cases where an independent ALJ proposes a decision which is adopted without change, the "substantial evidence test" should be applied. However, in situations where the agency orders the record and decides the case on the record with or without taking additional evidence pursuant to Government Code section 11517, and makes new factual findings, the "independent judgment test" should be utilized to review the new findings. This is the primary area where agency abuse may occur. Where an agency makes new factual findings the "independent judgment test" is appropriate. In those unique situations, the independent judgment test provides for closer judicial scrutiny of the agency decision which has changed the factual findings in the ALJ's proposed decision.

The commission is directed to Code of Civil Procedure section 1094.5(h)(2) which covers the standard to be applied for the issuance of a stay order by a superior court. The California Legislature has developed two standards. One applies to any administrative order or decision of an agency which issues licenses pursuant to Division 2 (commencing with Section 500 of the Business and Professions Code or pursuant to the Osteopathic Initiative Act or the Chiropractic Initiative Act). The second standard is listed as follows: "With respect to orders or decisions of other state agencies, the standard in this subdivision shall apply only when the agency has adopted the proposed decision of the administrative law judge in its entirety or has adopted the proposed decision but reduced the proposed penalty pursuant to subdivision (b) of section 11517 of the Government Code; otherwise the standard in subdivision (g) shall apply."

I made reference to this second standard in offering an alternative proposal to elimination of the independent judgment test in all superior court review of agency decisions. In other words, in cases where the proposed decision of the ALJ is adopted in its entirety the substantial evidence test would apply. In cases where the proposed decision of the ALJ is not adopted in its entirety and the agency decides the case upon the record and makes new factual findings, the independent judgment test would apply to judicial review of the new findings of fact.

This would be an easy standard to apply. It makes sense. Only in those situations where the agency departs from the decision of the trier of fact can an argument be made that closer judicial review is necessary. However, where the agency adopts the independent ALJ's proposed decision, less judicial scrutiny

is necessary. The independent ALJ is a buffer against agency abuse. Accordingly, an alternative proposal is that the substantial evidence test be utilized in all cases where the agency has adopted the proposed decision of the ALJ in its entirety. When an agency adopts new findings of fact the independent judgment test would apply to those new findings only.

Thank you very much for considering my proposals. The opinions expressed herein are of the undersigned and do not constitute a formal position of this office. These recommendations are made to assist in a resolution of the important issues of judicial review of agency decisions.

Very truly yours,

DANIEL E. LUNGREN
Attorney General

JOEL S. PRIMES, Supervising
Deputy Attorney General

#N-202

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Outline

JUDICIAL REVIEW

Article 5. Scope of Review

CONFORMING REVISIONS

CHAPTER 11. RECORD

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JUDICIAL REVIEW

Article 5. Scope of Review

§ 652.520. Agency record for judicial review

652.520. (a) Except as provided in Section 652.530 or as otherwise provided by statute, the agency record is the exclusive basis for judicial review of agency action.

(b) The agency record for judicial review of agency action consists of the following:

(1) If the agency action is rulemaking under the Administrative Procedure Act, the file of the rulemaking proceeding under Section 11347.3.

(2) If the agency action is a decision under Part 4 (commencing with Section 641.110), the agency record of the adjudicative proceeding under Section 651.120 or, in case of an emergency decision, the agency record under Section 641.360.

(3) If the agency action is other than under paragraph (1) or (2), all of the following:

(A) Any agency documents expressing the agency action.

(B) Other documents identified by the agency as having been considered by it before its action and used as a basis for its action.

(C) Any other material described by statute as the agency record for the type of agency action at issue.

(D) A table of contents that identifies each item contained in the record and includes an affidavit of the agency official who has compiled the agency record for judicial review specifying the date on which the record was closed and that the record is complete.

(c) By stipulation of all parties to judicial review proceedings, the agency record for judicial review may be shortened, summarized, or organized.

(d) If an explanation of reasons is not otherwise included in the agency record, the court may require the agency to add to the agency record for judicial review a brief explanation of the reasons for the agency action to the extent necessary for proper judicial review.

Comment. Section 652.520 is drawn from 1981 Model State APA § 5-115(a), (d), (f), (g). For authority to augment the agency record for judicial review, see Section 652.530. The agency record for judicial review is related but not necessarily identical to the record of agency proceedings that is prepared and maintained by the agency. The agency record for judicial review specified in this section is subject to the provisions of this section on shortening, summarizing, or organizing the record.

The requirement of a table of contents in subdivision (b)(3) is drawn from Section 11347.3 (rulemaking). See also Section 651.120 (adjudicative proceeding). The affidavit requirement may be satisfied by a declaration under penalty of perjury. Code Civ. Proc. § 2015.5.

If there is an issue of completeness of the agency record, the court may wish to permit limited discovery of the agency file for the purpose of determining the accuracy of the affidavit of completeness. It should be noted that a party is not entitled to discovery of material in the agency file that is privileged. See, e.g., Section 6254 (exemptions from California Public Records Act). Moreover, the agency record reflects the actual documents that are the basis of the agency action. Except as provided in subdivision (d), the agency cannot be ordered to prepare a document that does not exist, such as a summary of an oral ex parte contact in a case where the contact is permissible and no other documentation requirement exists. If judicial review reveals that the agency action is not supported by the record, the remedy is to reverse or remand. Section [to be drafted].

Subdivision (d) supersedes the case law requirement of Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 113 Cal. Rptr. 836 (1974), that adjudicative decisions reviewed under former Code of Civil Procedure Section 1094.5 be explained, and extends it to other agency action such as rulemaking and discretionary action. The court should not require an explanation of the agency action if it is not necessary for proper judicial review, for example if the explanation is obvious. It should be noted that a decision in an adjudicative proceeding under Part 4 (commencing with Section 641.110) must include a statement of the factual and legal basis and reasons for the decision as to each of the principal controverted issues.

Staff Note. The Commission has not yet addressed issues concerning the preparation and cost of transcripts.

§ 652.530. New evidence on judicial review

652.530. (a) Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded in the agency proceedings, it may enter judgment remanding the case for reconsideration in the light of that evidence. Except as provided in subdivision (b), the court shall not admit the evidence on judicial review without remanding the case.

(b) The court may receive evidence, in addition to that contained in the agency record for judicial review, only if it relates to the validity of the agency action and is needed to decide any of the following disputed issues:

(1) Improper constitution as a decision making body, or improper motive or grounds for disqualification, of those taking the agency action.

(2) Unlawfulness of procedure or of decision making process.

Comment. Subdivision (a) of Section 652.530 supersedes former Code of Civil Procedure Section 1094.5(e), which permitted the court to admit evidence without remanding the case in cases in which the court was authorized by law to exercise its independent judgment on the evidence. Under this section and Section 652.520, the court is limited to evidence in the agency record except under subdivision (b).

Subdivision (b) is drawn from 1981 Model State APA § 5-114(a)(1)-(2). It permits the court to receive evidence, subject to a number of conditions. First, evidence may be received only if it is likely to contribute to the court's determination of the validity of agency action under one or more of the standards set forth in Sections 652.540-652.580. Second, subdivision (b) identifies some specific issues that may be addressed, if necessary, by new evidence. Since subdivision (b) permits the court to receive disputed evidence only if

needed to decide disputed "issues", this provision is applicable only with regard to "issues" that are properly before the court. See Section 652.510 on limitation of new issues.

§ 652.540. Standards of review of agency action

652.540. Except as otherwise provided by statute, the validity of agency action shall be determined on judicial review under the standards of review provided in this article, as applied to the agency action at the time it occurred.

Comment. Section 652.540 is drawn from 1981 Model State APA § 5-116(a)(2). This section emphasizes that the focus of the reviewing court's inquiry must be the agency action at the time it was taken, and not at the time of judicial review. The scope of judicial review provided in this article may be superseded by another statute that establishes review based on different standards than those in this article. See, e.g., [to be drafted].

Staff Note. The Comment to this section will be expanded to include references to any special standards for review that are preserved, for example review to determine whether Public Utilities Commission authority has been regularly exercised.

§ 652.550. Review of agency interpretation of law

652.550. (a) This section applies to a determination by the court of any of the following issues:

(1) The agency action, or the statute or regulation on which the agency action is based, is unconstitutional on its face or as applied.

(2) The agency acted beyond the jurisdiction conferred by the constitution, a statute, or a regulation.

(3) The agency has not decided all issues requiring resolution.

(4) The agency has erroneously interpreted the law. This section does not apply, and Section 652.560 applies, to a determination by the court of a mixed issue of law and fact or of application of law to fact.

(b) Except as provided in subdivision (c), the standard for judicial review under this section is the independent judgment of the court whether the agency action is supported by the weight of the evidence, giving deference to the determination of the agency appropriate to the circumstances of the agency action.

(c) If a statute delegates determination of an issue under this section to an agency, the standard of judicial review of the agency's determination is abuse of discretion.

Comment. Section 652.550 clarifies and codifies existing case law on judicial review of agency interpretation of law.

Subdivision (a)(2) continues a portion of former Code of Civil Procedure Section 1094.5(b) (respondent has proceeded without or in excess of jurisdiction).

Subdivision (a)(3), providing for judicial relief if the agency has not decided all issues requiring resolution, deals with the possibility that the reviewing court may dispose of the case on the basis of issues that were not considered by the agency. An example would arise if the court had to decide on the facial constitutionality of the agency's enabling statute where an agency is precluded from passing on the question. This provision is not intended to authorize the reviewing court initially to decide issues that are within the agency's primary jurisdiction--such issues should first be decided by the agency, subject to the scope of judicial review provided in this article.

Subdivision (a)(4) applies only to interpretation and not to application of the law. Issues of application of law involve ultimate or mixed questions of law and fact, which are reviewed as questions of fact, rather than law, under Section 652.560.

Subdivision (b) codifies the case law rule that the final responsibility to decide legal questions belongs to the courts, not to administrative agencies. See, e.g., Ass'n of Psychology Providers v. Rank, 51 Cal. 3d 1, 270 Cal. Rptr. 796 (1990). This rule is qualified by the requirement that the courts give deference to the agency's interpretation appropriate to the circumstances. Factors in determining the deference appropriate include such matters as (1) whether the agency is interpreting a statute or its own regulation, (2) whether the agency's interpretation was contemporaneous with enactment of the law, (3) whether the agency has been consistent in its interpretation and the interpretation is longstanding, (4) whether there has been a reenactment with knowledge of the existing interpretation, (5) the degree to which the legal text is technical, obscure, or complex and the agency has interpretive qualifications superior to the court's, and (6) the degree to which the interpretation appears to have been carefully considered by responsible agency officials. See discussion in Asimow, The Scope of Review of Administrative Action 54-55 (1993). The deference due the agency's determination does not, however, override the ultimate authority of the court to substitute its own judgment for that of the agency under the standard of subdivision (b).

Subdivision (c) codifies the rule that where the legislature has delegated authority to the agency to interpret the law, the court must accept a reasonable agency interpretation under the abuse of discretion standard. See, e.g., Henning v. Div. of Occupational Safety & Health, 219 Cal. App. 3d 747, 268 Cal. Rptr. 476 (1990).

Staff Note. This section states an "abuse of discretion" standard in subdivision (c), but this appears really to be a shorthand for an inquiry whether the agency action has a rational basis (as determined by substantial evidence in light of the whole record). See discussion in the Staff Note to Section 652.570. We will conform here to whatever standard is settled upon there.

§ 652.560. Review of agency fact finding

652.560. (a) This section applies to a determination by the court of any of the following issues:

(1) The agency action is based on a determination of fact, made or implied by the agency.

(2) The agency action is based on a determination of a mixed issue of law and fact or of application of law to fact, made or implied by the agency.

(b) The standard for judicial review under this section is [see Staff Note below].

(c) In making a determination under this section involving review of a decision under Part 4 (commencing with Section 641.110), the court shall give great weight to a determination of the presiding officer in the adjudicative proceeding based substantially on credibility of a witness to the extent the determination of the presiding officer identifies the observed demeanor, manner, or attitude of the witness that supports the determination.

Comment. Section 652.560 supersedes former Code of Civil Procedure Section 1094.5(b)-(c) (abuse of discretion if finding not supported by evidence).

Subdivision (a) treats mixed questions of law and fact and ultimate questions of application of law to fact as questions of fact rather than questions of law. This avoids the need to categorize and apply a different standard of review to each facet of the decision making process with respect to these issues.

Subdivision (c) adopts the rule of Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951), for adjudicative proceedings under the Administrative Procedure Act, requiring that the reviewing court weigh more heavily findings by the trier of fact (the presiding officer in an administrative adjudication) based on observation of witnesses than findings based on other evidence. This generalizes the standard of review used by a number of California agencies. See, e.g., Lamb v. W.C.A.B., 11 Cal. 3d 274, 281, 520 P.2d 978, 113 Cal. Rptr. 162 (1974) (Workers' Compensation Appeals Board); Millen v. Swoap, 58 Cal. App. 3d 943, 947, 130 Cal. Rptr. 387 (1976) (Department of Social Services); Apte v. Regents of Univ. of Calif., 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312 (1988) (University of California); Precedent Decisions P-B-10, P-T-13, P-B-57 (Unemployment Insurance Appeals Board); Labor Code § 1148 (Agricultural Labor Relations Board). It reverses the existing practice under the administrative procedure act and other California administrative procedures that gives no weight to the findings of the presiding officer at the hearing. See Asimow, Toward a New California Administrative Procedure Act: Adjudication Fundamentals, 39 UCLA L. Rev. 1067, 1114 (1992).

Findings based substantially on credibility of a witness must be identified by the presiding officer in the decision made in the adjudicative proceeding. Gov't Code § 649.120(b) (form and contents of decision). However, the presiding officer's identification of such findings is not binding on the agency or the courts, which may make their own determinations whether a particular finding is based substantially on credibility of a witness.

Under subdivision (c), even though the presiding officer's determination is based substantially on credibility of a witness, the determination is entitled to great weight only to the extent the determination derives from the presiding officer's observation of the demeanor, manner, or attitude of the witness. Nothing in subdivision (c) precludes the agency head or court from overturning a credibility determination of the presiding officer, after giving the observational elements of the credibility determination great weight, whether on the basis of nonobservational elements of credibility or otherwise. See Evid. Code § 780. Nor does it preclude the agency head from overturning a factual finding based on the presiding officer's assessment of expert witness testimony.

Staff Note. Subdivision (a) of this draft dodges the "mixed question of law and fact" problem by treating mixed issues as fact issues for purposes of judicial review.

Subdivision (c) incorporates the "great weight" standard for presiding officer credibility determinations. As drafted it would apply mainly to credibility determinations by state agencies. It would not be limited to Office of Administrative Hearing credibility determinations.

The Commission asked to see drafts of different alternatives for the standard of review of agency factfinding. A number of leading options are set out below.

Independent Judgment Review

> (b) The standard for judicial review under this section for a determination of an adjudicative fact is the independent judgment of the court whether the agency action is supported by the weight of the evidence, and for a determination of a legislative fact is whether there is a rational basis for the agency action as determined by substantial evidence in the light of the whole record.

Comments. This version is set out to demonstrate what the independent judgment standard would look like if it were applied to all agency adjudicative factfinding. This would be a substantial expansion of the scope of existing Code of Civil Procedure Section 1094.5, without justification, and would be a practical and political disaster. Nonetheless, the draft does illustrate several principles:

(1) If independent judgment review is preserved at all, it would be logically consistent to extend it uniformly. As Professor Asimow's study notes, it makes no sense to distinguish factfinding in constitutional and nonconstitutional agencies, or between factfinding affecting "fundamental vested rights" and factfinding affecting

non-fundamental or non-vested rights. This draft would achieve uniformity and logical consistency by applying the independent judgment standard to all agency findings of adjudicative fact.

(2) The draft excepts legislative fact-findings from the independent judgment standard, since this is a matter peculiarly within the competence of the administrative agency.

(3) It would be appropriate, under this standard of review, to require judicial review in Sacramento, Los Angeles, San Francisco, or San Diego County, as suggested by Mr. Primes. Since the court will be exercising independent judgment, this will help neutralize the "hometown bias". Mr. Primes points out that this will create judges experienced with judicial review of agency decisions, whereas a major concern under existing practice is local judges unfamiliar with writ procedures who often favor the hometown licensee or local attorney.

Independent Judgment Review of OAH Hearings

(b) The standard for judicial review under this section in an adjudicative proceeding conducted by an administrative law judge employed by the Office of Administrative Hearings is the independent judgment of the court whether the agency action is supported by the weight of the evidence, and in all other cases is whether there is a rational basis for the agency action, as determined by substantial evidence in the light of the whole record.

Comments. This version is a fall-back position or political compromise offered in Professor Asimow's background study. It is not too far from existing law, and isolates the independent judgment rule to those cases where there appears to be most concern about it--professional licensing cases. The logical inconsistency of this section is, as Professor Asimow points out, that it ensures the most intense type of judicial review in the one type of case where neutrality and freedom from bias is most assured (proceeding conducted by OAH rather than prosecuting agency), and where arguably intense judicial review is least necessary! Under this regimen, again, we might consider the suggestion that review be limited to courts in four key counties.

Independent Judgment Review Where Agency Head Changes Fact Finding of Presiding Officer

(b) The standard for judicial review under this section is whether there is a rational basis for the agency action, as determined by substantial evidence in the light of the whole record, except that where the agency has changed a finding of fact by the presiding officer the standard of review of the changed finding is the independent judgment of the court whether the finding is supported by the weight of the evidence.

Comments. This approach was suggested by Mr. Primes at the March Commission meeting and elaborated in his letter attached to Memorandum 93-31. Mr. Primes notes that this sort of dual approach is currently in place in Code of Civil Procedure Section 1094.5(h)(2), where a second standard applies only where the agency has adopted a proposed

decision in its entirety or has adopted it but reduced the proposed penalty. He points out that this would be an easy standard to apply and addresses the primary area where agency abuse may occur. "Only in those situations where the agency departs from the decision of the trier of fact can an argument be made that closer judicial review is necessary. However, where the agency adopts the independent ALJ's proposed decision, less judicial scrutiny is necessary. The independent ALJ is a buffer against agency abuse." The staff notes that this draft would apply to agency hearing officers as well as OAH hearing personnel, but the same argument could still be made, since the presiding officer is required to be free of bias and have functional separation from agency prosecutorial staff, at least under the state Administrative Procedure Act.

Independent Judgment Review Giving Great Weight to Agency Determination

(b) The standard for judicial review under this section is the independent judgment of the court whether the finding is supported by the weight of the evidence, giving deference to the determination of the agency.

Comments. Professor Asimow raises this as a possible compromise approach, noting that it is analogous to what the Supreme Court does on attorney discipline cases. He does not recommend it because it seems internally contradictory and would likely cause confusion in the courts.

We note, however, that this is the same standard we propose for judicial review of agency interpretation of law as well as of agency procedure. We would take this standard to mean that the court must use its independent judgment on the evidence, but in a close case it would affirm the agency determination.

Substantial Evidence

(b) The standard for judicial review under this section is whether there is a rational basis for the agency action, as determined by substantial evidence in the light of the whole record.

Comments. Substantial evidence review is proposed by Professor Asimow and supported by Professors Ogden and Andersen and by Mr. Primes of the Attorney General's Office. The substantial evidence rule currently governs judicial review of agency factfinding under Code of Civil Procedure Section 1094.5 in cases where independent judgment review is inapplicable. Professor Asimow has suggested that the law make clear that substantial evidence review is not a mere rubber stamp but is an active review of the record and real judicial consideration--review "with bite". We believe this concept is adequately captured in the draft as "whether there is a rational basis for the agency action, as determined by substantial evidence in the light of the whole record." The staff believes this is a clear statement of the substantial evidence standard, but could be elaborated in the Comment along the following lines as explained in Professor Asimow's study: "The standard of review under this section requires the court to start with the agency's findings of fact. The judge then considers the evidence on both sides--the evidence supporting and the evidence opposing the agency's conclusions--and affirms the decision if

a reasonable person could have arrived at the same findings based on the evidence as did the agency. Even though the court may disagree the agency's findings, it must sustain them if a reasonable person could have come out the same way the agency did." A comparable description is quoted in the Comment to the 1981 Model State APA: "Substantial evidence is such evidence as might lead a reasonable person to make a finding. The evidence in support of a fact-finding is substantial when from it an inference of existence of the fact may be drawn reasonably. In such a case, the reviewing court must uphold the finding, even if it would have drawn a contrary inference from the evidence."

Clearly Erroneous

(b) The standard for judicial review under this section is whether the agency determination is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record.

Comments. States (other than California) that do not use a substantial evidence test use a clearly erroneous test for judicial review of agency action. It is not clear whether this test is asking the court to be more or less deferential to the agency determination than it is under substantial evidence review, or whether the two standards are the same. It can go either way, depending on how it is elaborated. Professor Asimow reports there was adverse experience with this test in Washington. If offers no real advantages over the substantial evidence test which is familiar in California. The 1981 Model State APA also abandons the clearly erroneous standard of former model acts in favor of substantial evidence.

§ 652.570. Review of agency exercise of discretion

652.570. (a) This section applies to a determination by the court of any of the following issues:

(1) The agency action is outside the range of discretion delegated to the agency by the constitution, a statute, or a regulation.

(2) The agency action, other than a regulation, is inconsistent with a regulation of the agency or with the agency's prior practice.

(3) The agency action is otherwise an abuse of discretion.

(b) Except as provided in subdivision (c), the standard for judicial review under this section is whether there is a rational basis for the agency action, as determined by substantial evidence in the light of the whole record.

(c) To the extent the agency action is based on a determination of fact, made or implied by the agency, the standard of review is that provided in Section 652.560.

Comment. Section 652.570 codifies the existing authority of the court to review agency action that constitutes an exercise of agency discretion. A court may decline to exercise review of discretionary action in circumstances where there Legislature so intended or where there are no standards by which a court can conduct review. Cf. federal APA § 701(a)(2).

Subdivision (a) is drawn from 1981 Model State APA § 5-116(c)(8). The agency may justify an inconsistency under subdivision (a)(2) by stating facts and reasons to demonstrate a fair and rational basis for the inconsistency. See subdivision (b) and Comment. Subdivision (a)(3) continues a portion of former Code of Civil Procedure Section 1094.5(b) (prejudicial abuse of discretion).

Subdivision (b) restates the existing standard for court determination of abuse of discretion. See Code Civ. Proc. § 1094.5(c) (administrative mandamus); Gov't Code § 11350(b) (review of regulations). The rational basis standard requires a court determination of whether there is substantial evidence to support a reasonable or rational basis for the agency's action. The court may not substitute its judgment for that of the agency, but the agency action must be rational. See discussion in Asimow, The Scope of Review of Administrative Action 75-78 (1993). Abuse of discretion is established if it appears from the record viewed as a whole that the agency action is unreasonable, arbitrary, or capricious. Cf. ABA Section on Administrative Law, Restatement of Scope of Review Doctrine, 38 Admin. L. Rev. 235 (1986) (grounds for reversal include policy judgment so unacceptable or reasoning so illogical as to make agency action arbitrary, or agency's failure in other respects to used reasoned decisionmaking).

Staff Note. Professor Asimow suggests that review for abuse of discretion be limited to action that substantially prejudices a person seeking judicial relief. Cf. Code Civ. Proc. § 1094.5(b) (judicial review of prejudicial abuse of discretion). We have not included that requirement in this draft in light of the general standing provisions that permit public interest as well as private interest challenges to agency action.

There seems to be some confusion in terminology concerning the standard for review of discretionary agency action. "Abuse of discretion", "rational basis", and "substantial evidence" have been used interchangeably to mean the same thing. We have tried to sort out the terminology, perhaps unsuccessfully, in this section. Thus "abuse of discretion" is the ultimate conclusion that the agency has exercised its authority improperly; the standard for determining whether abuse of discretion has occurred is whether there is a "rational basis" for the agency's action; the existence of a rational basis may be found by looking to see whether there is substantial supporting evidence in the record taken as a whole. This approach may mix various concepts and terms found in existing law, but it seems to the staff to have a rational basis.

§ 652.580. Review of agency procedure

652.580. (a) This section applies to a determination by the court of any of the following issues:

(1) The agency has engaged in an unlawful procedure or decision making process, or has failed to follow prescribed procedure.

(2) The persons taking the agency action were improperly constituted as a decision making body, motivated by an improper purpose, or subject to disqualification.

(b) The standard for judicial review under this section is the independent judgment of the court, giving deference to the agency's determination of appropriate procedures.

Comment. Section 652.580 codifies existing law concerning the independent judgment of the court and the deference due agency determination of procedures. Cf. federal APA § 706(2)(D); Mathews v. Eldridge, 424 U.S. 319 (1976).

Subdivision (a) is drawn from 1981 Model State APA § 5-116(5)-(6). It continues a portion of former Code of Civil Procedure Section 1094.5(b) (inquiry of the court extends to questions whether there has been a fair trial or the agency has not proceeded in the manner required by law). One example of an agency's failure to follow prescribed procedure is the agency's failure to act within the prescribed time upon a matter submitted to the agency. Relief in such cases is available under Section [to be drafted].

§ 652.590. Burden of persuasion

652.590. Except as otherwise provided by statute, the burden of demonstrating the invalidity of agency action is on the party asserting the invalidity.

Comment. Section 652.590 codifies existing law. See California Administrative Mandamus §§ 4.157, 12.7 (Cal. Cont. Ed. Bar 2d ed. 1989). It is drawn from 1981 Model State APA § 5-116(a)(1).

CONFORMING REVISIONS

CHAPTER 11. RECORD

§ 651.110. Record as exclusive basis for decision

651.110. The agency record of an adjudicative proceeding is the exclusive basis for decision.

Comment. Section 651.110 is drawn from 1981 Model State APA § 4-221(c). The agency record is the exclusive basis for judicial review as well as for decision in the adjudicative proceeding. See Section 652.520 (agency record for judicial review). This principle also underlies Section 649.120 (form and contents of decision) which requires findings of fact to be based exclusively on evidence of record and matters officially noticed. The statement of matters officially noticed also becomes part of the agency record under Section 651.120(e) (record of adjudicative proceeding).

§ 651.120. Record of adjudicative proceeding

651.120. Except as provided in Section 641.360 (agency record of emergency decision), the agency record of an adjudicative proceeding under this part includes all of the following:

(a) Notices of all proceedings.

(b) Any prehearing order.

(c) Any motions, pleadings, briefs, petitions, requests, and intermediate rulings.

(d) Evidence received or considered.

(e) A statement of matters officially noticed.

(f) Proffers of proof and objections and rulings thereon.

(g) Proposed findings, requested orders, and exceptions.

(h) The record prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding.

(i) Any final decision, proposed decision, or decision on reconsideration.

(j) Staff memoranda or data submitted to the presiding officer, unless prepared and submitted by personal assistants and not inconsistent with Section 643.340.

(k) Matters placed on the record after an ex parte communication.

(1) A table of contents that identifies each item contained in the record and includes an affidavit of the agency official who has compiled the agency record that specifies the date on which the record was closed and that the record is complete.

Comment. Section 651.120 supersedes a portion of former Section 11523. It is drawn from 1981 Model State APA § 4-221. It should be noted that the agency record for judicial review may in limited circumstances include new evidence in addition to that contained in the agency record under this section. See Section 652.530.

The requirement of a table of contents in subdivision (1) is drawn from Section 11347.3 (rulemaking). See also Section 652.520 (agency record for judicial review). The affidavit requirement may be satisfied by a declaration under penalty of perjury. Code Civ. Proc. § 2015.5.

Staff Note. The Commission has not yet addressed issues concerning the preparation and cost of transcripts.