

CALIFORNIA LAW REVISION COMMISSION

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July 1, 1994

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|--|---------------------------|---|
| <i>Date:</i> July 14-15, 1994 | | <i>Place:</i> Sacramento |
| July 14 (Thursday) | 10:00 am – 5:00 pm | State Capitol Room 113 |
| July 15 (Friday) | 9:00 am – 4:00 pm | |
| <p>Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.</p> <p>Individual items on this agenda are available for purchase at the prices indicated or to be determined. Prices include handling, shipping, and sales tax. Orders must be accompanied by a check in the correct amount made out to the “California Law Revision Commission”.</p> | | |

FINAL AGENDA

for meeting of the

CALIFORNIA LAW REVISION COMMISSION

1. MINUTES OF MAY 12-13, 1994, MEETING
(sent 6/2/94)
2. MINUTES OF JUNE 17, 1994, MEETING
(sent 6/22/94)
3. ADMINISTRATIVE MATTERS

Ratification of Actions Taken at June 17, 1994, Meeting**Election of Officers**

Memorandum 94-29 (NS) (sent 6/20/94)

Revised Distribution Policy

Memorandum 94-36 (NS) (sent 6/20/94)

Meeting Schedule

Report by Executive Secretary

Communications from Interested Persons

4. 1994 LEGISLATIVE PROGRAM

Status of Bills

Memorandum 94-30 (NS) (to be sent)

5. ADMINISTRATIVE ADJUDICATION (Study N-100)

Draft of Revised Tentative Recommendation

Memorandum 94-33 (NS) (sent 6/27/94) (\$25)

Preliminary Part of Revised Tentative Recommendation

Memorandum 94-39 (NS) (sent 6/30/94) (\$8.50)

Comments on Tentative Recommendation

Memorandum 94-34 (RJM) (sent 6/27/94) (\$8.50)

Exemptions From APA

Memorandum 94-35 (RJM) (to be sent)

Conforming Revisions

Memorandum 94-37 (NS) (enclosed)

DHS Issues

Memorandum 94-38 (RJM) (to be sent)

6. DEBTOR-CREDITOR RELATIONS

**Exemptions from Enforcement of Money Judgments: Decennial Review
(Study D-351)**

Memorandum 94-31 (SU) (to be sent)

Miscellaneous Debtor-Creditor Issues (Study D-1002)

Memorandum 94-32 (SU) (to be sent)

MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
JULY 14-15, 1994
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on July 14-15, 1994.

Commission:

Present: Sanford Skaggs, Chairperson
Daniel M. Kolkey, Vice Chairperson
Arthur K. Marshall
Edwin K. Marzec
Colin Wied

Absent: Christine W.S. Byrd
Tom Campbell, Senate Member
Allan L. Fink
Terry B. Friedman, Assembly Member
Bion M. Gregory, Legislative Counsel

Staff:

Present: Nathaniel Sterling, Executive Secretary
Stan Ulrich, Assistant Executive Secretary
Robert J. Murphy, Staff Counsel

Absent: Barbara S. Gaal, Staff Counsel

Consultants:

Michael Asimow, Administrative Law

Other Persons:

Herb Bolz, Office of Administrative Law, Sacramento
James Browning, Parole Hearings, Department of Corrections, Sacramento (July 14)
Dorothy Dickey, Coastal Commission, San Francisco (July 14)
Karl Engeman, Office of Administrative Hearings, Sacramento
Bill Heath, California School Employees' Association, San Jose (July 14)
Gary Hori, Commission on State Mandates, Sacramento (July 14)
Charlene Mathias, Office of Administrative Law, Sacramento (July 14)
Melanie McClure, State Teachers' Retirement System, Sacramento
Bernard McMonigle, Public Employment Relations Board, Sacramento
Trudy Mohr, Student Aid Commission, Sacramento (July 14)
Julie A. Montryn, Department of Motor Vehicles, Sacramento
Robert L. Mukai, Office of the Attorney General, Sacramento
Ted O'Toole, California Student Aid Commission, Sacramento (July 14)

Madeline Rule, Department of Motor Vehicles, Sacramento
Erik Saltmarsh, California Energy Commission, Sacramento
Daniel Siegel, Office of the Attorney General, Sacramento
Lt. Col. William Weir, California National Guard, Sacramento (July 15)
James Wolpman, Occupational Safety and Health Appeals Board, Sacramento

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MINUTES OF MAY 12-13, 1994, COMMISSION MEETING

The Minutes of the May 12-13, 1994, Commission meeting were approved as submitted by the staff.

MINUTES OF JUNE 17, 1994, COMMISSION MEETING

The Minutes of the June 17, 1994, Commission meeting were approved as submitted by the staff.

ADMINISTRATIVE MATTERS

Ratification of Actions Taken at June 17, 1994, Commission Meeting

The Commission ratified the actions taken by the Commission as a committee at the June 17, 1994, Commission meeting, a quorum not being present at that meeting.

Election of Officers

The Commission considered Memorandum 94-29, relating to election of Commission officers for 1994-95. The Commission elected Daniel M. Kolkey to be

Chairperson and Colin W. Wied to be Vice Chairperson for the term commencing September 1, 1994.

Revised Distribution Policy

The Commission considered Memorandum 94-36, containing the staff's proposal to revise the Commission's policy on distribution of materials to eliminate the charge for tentative recommendations on which the Commission is requesting comments. The Commission approved the proposal. Under the revised policy, a charge would not be imposed for tentative recommendations on which the Commission is soliciting comments, but would be imposed for other materials such as meeting materials and printed reports.

The staff will monitor experience under the revised policy and report back if problems arise.

Meeting Schedule

The Executive Secretary reported that the Commission's September meeting will conflict with the State Bar Annual Meeting in Anaheim. However, it is possible to schedule matters at the Commission's meeting so as to minimize the conflict for interested persons. The Commission decided not to reschedule or relocate the September meeting.

The Commission directed the staff to take the following actions in connection with future meetings:

(1) Chairs of local bar association sections that might have an interest in material on the Commission's agenda should be notified when the Commission is meeting in their area.

(2) Stronger ties should be forged with the State Bar, perhaps by having staff meet with sections and committees that might have an interest in Commission projects, such as the Committee on Administration of Justice.

(3) Future meetings in conjunction with the State Bar Annual Meeting were not ruled out. However, the accessibility that would provide to the Bar must be balanced against the possibility that Commission members would be drawn into other activities to the detriment of the Commission meeting.

(4) The staff should investigate the possibility of scheduling a meeting next year in Sacramento at the time of the State Fair.

1994 LEGISLATIVE PROGRAM

The Commission considered Memorandum 94-30 and the attached chart showing the status of measures in the Commission's 1994 legislative program. No action was taken in connection with this report.

STUDY N-100 – ADMINISTRATIVE ADJUDICATION

The Commission approved a revised tentative recommendation on administrative adjudication to be distributed for comment. The revised tentative recommendation should consist of the preliminary part, draft statute, exemptions, and other conforming revisions set out in Memoranda 94-33 through 94-39, revised as described below.

PRELIMINARY PART OF REVISED TENTATIVE RECOMMENDATION

The Commission considered Memorandum 94-39 and the attached draft of the preliminary part of the revised tentative recommendation. The Commission approved the draft for inclusion in the revised tentative recommendation, authorizing the staff to correct typos and other inaccuracies and to make necessary revisions to conform to the substantive decisions recorded in these Minutes.

On page 12, in the discussion concerning the Commission on Judicial Appointments, the words "and are political in nature" were deleted.

The preliminary part should point out that the provisions on judicial review are merely continued from existing law, without Commission review as to substance. The Commission intends to consider provisions relating to judicial review as the next phase of the administrative procedure study.

DRAFT STATUTE

The Commission considered Memoranda 94-33 and 94-34 and its First Supplement, containing the draft statute and comments on the tentative recommendation. The Commission commended Mr. Murphy of the Commission's staff for his work in analyzing the comments.

The Commission approved the draft statute for inclusion in the revised tentative recommendation with the following revisions.

Staff-Recommended Comment Revisions

The Commission approved the staff-recommended revisions to the Comments to Sections 645.230, 645.350, 645.420, 646.130, 646.210, 646.230, 647.210, 648.120, 648.140, 648.330, 648.340, 648.450, 648.630, 649.120, and 649.320.

§ 631.010. Application to constitutionally and statutorily required hearings

The Commission discussed, but did not resolve, the issue whether the Administrative Procedure Act should apply where a state agency hearing is required by federal statute.

The Comment should note that the Administrative Procedure Act does not apply to CEQA. The Comment should cross-refer to the definition of "decision".

§ 631.040. When adjudicative proceeding required to be conducted by administrative law judge employed by OAH

Subdivision (b) was revised to provide that where an OAH administrative law judge is required, the ALJ must be used in emergency decision proceedings but not in declaratory decision proceedings.

§ 632.040. Cross-examination

The Comment to this section should be expanded to elaborate the reason that an agency is permitted to specify categories of informal hearings in which cross-examination is not necessary, subject to override by the presiding officers in the circumstances of the particular case.

§ 642.310. Proceeding commenced by agency pleading

The Commission approved the staff recommendation not to codify the rule that an agency may dismiss a proceeding without prejudice at any time.

§ 642.420. Continuances

The Commission decided to keep immediate judicial review of a denial of a request for a continuance in all proceedings conducted by an administrative law judge from the Office of Administrative Hearings, both formal and informal, by adding a new Section 642.425:

§ 642.425. Judicial review of denial of continuance

642.425. (a) If an application for a continuance by a party is denied by an administrative law judge employed by the Office of Administrative Hearings, within 10 calendar days after the denial that party shall apply to the superior court for appropriate judicial

relief or be barred from judicial relief from the denial as a matter of jurisdiction.

(b) 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 either be oral at the time of the denial or written at the same time application is made in court for judicial relief.

(c) This section does not apply to the Department of Alcoholic Beverage Control.

Comment. Section 642.425 continues the substance of former Section 11524(c).

§ 642.430. Venue and change of venue

This section should be revised to provide that the agency may designate the place of hearing, except that in the case of a hearing conducted by an employee of the Office of Administrative Hearings, the venue provisions of the section govern.

§ 643.320. When separation required

The Commission thought it should be made clearer that the separation of functions prohibition does not preclude testimony or advice, whether on policy or technical matters, given at the hearing openly and on the record.

The requirement that schoolbus and ambulance driver certificate proceedings maintain separation of functions should be subject to a three-year study of experience under the requirement by the Department of Motor Vehicles.

§ 643.330. When separation not required

The Commission revised Section 643.330 substantially as follows:

643.330. (a) Unless a party demonstrates other statutory grounds for disqualification:

(1) A person who has participated *as decisionmaker* in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or assist or advise the presiding officer in the same proceeding.

(2) A person may serve as presiding officer at successive stages of the same adjudicative proceeding.

(3) A person who has served as investigator, prosecutor, or advocate in an adjudicative proceeding may advise the presiding officer concerning a settlement proposal advocated by the person in the same proceeding.

~~(4) A person who has served as investigator or advocate in an adjudicative proceeding may serve as a supervisor of the presiding officer or assist or advise the presiding officer in the same proceeding if the proceeding is nonprosecutorial in character and the service, assistance, or advice occurs more than one year after the time the person served as investigator or advocate, provided the content of any advice is disclosed on the record and all parties have an opportunity to comment on the advice.~~

(5) (4) A person who has served as investigator or advocate in an adjudicative proceeding may give advice to the presiding officer concerning a technical issue involved in the same proceeding if the proceeding is nonprosecutorial in character and the advice concerning the technical issue is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record and all parties have an opportunity to comment on the advice, *in the same manner as provided in Section 648.540 for an ex parte communication.*

(5) *A person who has served as investigator or advocate in an adjudicative proceeding of the California Coastal Commission, San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board may give advice to the presiding officer in the same proceeding if the proceeding is nonprosecutorial in character, provided the content of the advice is disclosed on the record and all parties have an opportunity to comment on the advice.*

(b) Nothing in this section authorizes a communication between the presiding officer and another person to the extent the communication is otherwise prohibited by Section 648.520.

The Commission asked the staff to flag subdivision (a)(5) for special attention when the revised Tentative Recommendation goes out for comment.

The Commission decided to replace deleted subdivision (a)(4) with a similar provision in the Energy Commission statute applicable to that agency only:

Pub. Res. Code § 25513.3 (added). When separation of functions not required

25513.3. Notwithstanding Article 3 (commencing with Section 643.310) of Chapter 3 of Part 4 of Division 3.3 of the Government Code, unless a party demonstrates other statutory grounds for disqualification, a person who has served as investigator or advocate in an adjudicative proceeding of the commission under this code may serve as a supervisor of the presiding officer or assist or advise the presiding officer in the same proceeding if the service, assistance, or advice occurs more than one year after the time the

person served as investigator or advocate, provided the content of any advice is disclosed on the record and all parties have an opportunity to comment on the advice.

§ 644.110. Intervention

The Commission approved changing "may" to "will" in Section 644.110:

644.110. The presiding officer shall grant a motion for intervention if all of the following conditions are satisfied:

...
(c) The motion states facts demonstrating that the applicant's legal rights, duties, privileges, or immunities ~~may~~ *will* be substantially affected by the proceeding or that the applicant qualifies as an intervenor under a statute or regulation.

§ 644.150. Participation short of intervention

The Commission approved the staff recommendation to permit agencies to modify the intervention provisions by regulation:

635.030. (a) The provisions of Part 4 (commencing with Section 641.110) do not apply to an agency proceeding for a declaratory decision except to the extent provided in this chapter or to the extent the agency so provides by regulation or order.

~~(b) Notwithstanding subdivision (a), a person who qualifies under Chapter 4 (commencing with Section 641.110) of Part 4 (intervention) and files a timely motion for intervention in accordance with agency regulations may intervene in a proceeding for a declaratory decision.~~

644.150. (a) Nothing in this chapter precludes an agency from adopting a regulation that permits participation by a person short of intervention as a party, subject to Article 5 (commencing with Section 648.510) of Chapter 8 (ex parte communications).

(b) By regulation an agency may modify the provisions of this chapter or make the provisions of this chapter inapplicable.

§ 645.210. Time and manner of discovery

The Commission approved adding a new subdivision (b) to Section 645.210 (redesignating existing subdivision (b) as subdivision (c)):

(b) If a party seeks judicial review of an emergency decision, a party, on written request to another party, before the proceedings for review and within 10 days after issuance of the emergency decision, is entitled to discovery to the extent provided in this article.

The Commission decided not to provide in the statute for continuing discovery. The Commission noted that Section 646.130 permits the prehearing conference to deal with exchange of witness lists and exhibits or documents to be offered in evidence at the hearing.

§ 645.310. Time for response to discovery request

The Commission approved the staff recommendation to revise Section 645.310 as follows:

645.310. A party shall respond to a request for discovery within 20 days after service of the request , *or within such other time as may be provided by stipulation.*

The Comment should note that, although other time periods may be varied by stipulation, an express provision is included here because under Section 645.320 the time within which a motion must be made to compel discovery commences to run from expiration of the time provided in this section. The Commission thought Section 645.310 is out of place in the article on compelling discovery, and should more appropriately go in the preceding article on discovery generally.

§ 645.410. Subpoena authority

The Commission decided not to delete the language permitting a subpoena duces tecum to require production of a document "at any reasonable time and place." The Commission asked the staff to revise this section to be consistent with Code of Civil Procedure Section 2020(d) and Evidence Code Section 1560 relating to production of documents where a deposition is not taken and the custodian of records may deliver them without a personal appearance. An uncooperative custodian would have to appear at the hearing and produce the subpoenaed documents.

§ 646.120. Conduct of prehearing conference

The Commission approved the staff recommendation to revise Section 646.120 as follows:

646.120. (a) On motion of a party or by order of the presiding officer, the presiding officer *or a different presiding officer designated by the agency head* may conduct a prehearing conference.

(b) The presiding officer shall set the time and place for the prehearing conference, and the agency shall give reasonable written

notice to all parties. The notice shall inform the parties that at the prehearing conference the proceeding may be converted into an informal hearing for disposition of the matter.

(c) The presiding officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in and to hear the entire proceeding while it is taking place.

(d) At the prehearing conference the proceeding may be converted into *an either of the following*:

(1) *An informal hearing for disposition of the matter as provided in this part. The notice of the informal hearing shall state the date of the hearing.*

(2) *A proceeding for dispute resolution provided in Chapter 7 (commencing with Section 647.210).*

(e) A party who fails to attend or participate in a conference may be held in default under this part. The notice of the prehearing conference shall so inform the parties.

§ 646.130. Subject of prehearing conference

The Commission approved the staff recommendation to add a new subdivision to Section 646.130:

646.130. A prehearing conference may deal with one or more of the following matters:

....

() *Exploration of the possibility of using dispute resolution provided in Chapter 7 (commencing with Section 647.210).*

§ 646.210. Settlement

The Commission approved the staff recommendation to revise Section 646.210 as follows:

646.210. (a) *The Subject to subdivision (b), the parties to an adjudicative proceeding may settle the matter on any terms the parties determine are appropriate. . . .*

(b) *The terms of a settlement may not be contrary to statute or regulation, except that the settlement may include sanctions the agency would otherwise lack power to impose.*

(c) *This section is subject to any necessary agency approval required by statute or regulation. An agency head may delegate the power to approve a settlement.*

The Commission approved the staff recommendation to preserve the authority of the State Personnel Board to approve settlements under Government Code Section 18681.

§ 647.220. ADR authorized

The Commission thought a section should be added to say an award in binding arbitration under subdivision (b) is subject to court confirmation under Sections 1285-1288.8 of the Code of Civil Procedure.

§ 647.240. Confidentiality and admissibility of ADR communications

The Commission rejected the staff proposal to add "or other person" to the list in subdivision (c) of those who may not testify in a later proceeding as to statements made in alternative dispute resolution. The Commission asked the staff to recheck to make sure subdivision (b) on confidentiality of nonbinding arbitration is consistent with superior court rules for nonbinding arbitration (cited in the Comment).

§ 648.130. Default

The Commission revised Section 648.130 as follows:

648.130. (a) Failure of the person to which the agency action is directed to serve a response or to appear at a ~~prehearing conference or settlement conference or at the hearing~~ is a default.

(b) If the person to which the agency action is directed defaults:

(1) The default is a waiver of the person's right to a hearing.

(2) The agency may take action based on the person's express admissions or on other evidence. Affidavits may be used as evidence without notice to the respondent.

(3) Where the burden of proof is on the person to establish that the person is entitled to the agency action sought, the agency may act without taking evidence.

(c) Notwithstanding the default of the person to which the agency action is directed, the agency or the presiding officer in its discretion may, before a proposed decision is issued, grant a hearing on reasonable notice to the parties. *The presiding officer may order the defaulting party, or the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of the defaulting party's failure to appear at a prehearing conference or settlement conference or at the hearing.*

(d) Within 7 days after service on the person to which the agency action is directed of a decision based on the person's

default, the person may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause, including a hearing on the remedy based on a showing by way of mitigation. As used in this subdivision, good cause includes but is not limited to:

(1) Failure of the person to receive notice sent pursuant to Section 613.220. *If the person is required by statute or regulation to maintain an address with the agency and failure to receive the notice is because the person did not comply with that requirement, the agency may consider that fact in determining whether there has been a showing of good cause under this subdivision.*

(2) Mistake, inadvertence, surprise, or excusable neglect.

§ 648.140. Open hearings

The Commission approved the staff recommendation to add a section drawn from Evidence Code Section 777:

648.355. (a) Subject to subdivisions (b) and (c), the presiding officer may exclude from the hearing any witness not at the time under examination so that the witness cannot hear the testimony of other witnesses.

(b) A party to the proceeding cannot be excluded under this section.

(c) If a person other than a natural person is a party to the action, an officer or employee designated by its attorney is entitled to be present.

The Commission thought the Comment should make clear that subdivision (b) says a party cannot be excluded under this section, but a party might be excluded under Section 648.350 (protection of child witness or developmentally disabled witness).

§ 648.310. Burden of proof

The Commission asked the staff to revise Section 648.310 to preserve case law on when the burden of proof is by a preponderance of the evidence and when it is by clear and convincing evidence. See citations in Memorandum 94-19 at pp. 51-52. These rules should not be subject to variation by agency regulation. Madeline Rule of the Department of Motor Vehicles agreed to provide citations on the burden of proof in DMV drivers' license cases.

Whether a section is needed to define "occupational license" depends on whether that term will be used in Section 648.310 as redrafted. If the staff

includes a definition of "occupational license," it should not impose a higher standard of proof in DMV drivers' license cases than under existing law.

§ 648.320. Presentation of testimony

The Commission rejected the staff proposal to make the provision for calling a party as an adverse witness expressly subject to the presiding officer's discretion to regulate the order of proof. The Commission decided to preserve the substance of the second sentence of Government Code Section 11513(b) that a party may be called and examined as if under cross-examination if the party "does not testify in his or her own behalf."

§ 648.330. Oral and written testimony

The Commission approved the staff recommendation to revise subdivision (c) of Section 648.330 as follows:

(c) Documentary evidence may be received in the form of a copy or excerpt. On request, parties shall be given an opportunity to compare the copy with the original *if available*, and to compare an excerpt with the complete text if available.

§ 648.340. Affidavits

The Commission approved the staff recommendation to delete subdivision (d), and to say in the Comment that "affidavit" includes a declaration under penalty of perjury, citing Code of Civil Procedure Section 2015.5.

§ 648.350. Protection of child witness

The Commission approved the staff recommendation to revise Section 648.350 as follows:

648.350. Notwithstanding any other provision of this part, the presiding officer may conduct the hearing, including the manner of examining witnesses and closing the hearing, in a way that is appropriate to protect a child *minor* witness, or a witness with a developmental disability as defined in Section 4512 of the Welfare and Institutions Code, from intimidation or other harm, taking into account the rights of all persons.

The Commission thought it was important to keep the citation to the *Seering* case in the Comment.

§ 648.450. Hearsay evidence and the residuum rule

The Commission rejected the staff proposal to permit a party to object on judicial review to a finding supported only by hearsay only if the objection was previously raised on administrative review.

§ 648.460. Unreliable scientific evidence

This section should be revised to provide that scientific evidence is admissible in an administrative proceeding if it would be admissible in either state or federal court proceedings.

§ 648.520. Ex parte communications prohibited

Section 648.520(a) was revised to provide:

648.520. (a) Except as provided in subdivision (b), while the proceeding is pending there shall be no communication, direct or indirect, *regarding any issue in the proceeding*, between the following persons without notice an opportunity for all parties to participate in the communication:

Subdivision (b)(1) was revised to permit communications if "The communication is for the purpose of assistance and advice to the presiding officer by an employee ~~of the agency that is a party or the attorney~~ or other authorized representative of the agency *that is a party*, provided the assistance or advice does not violate Section 643.220 (separation of functions)."

A new subdivision (c) was added to the section:

(c) For the purpose of this article, a proceeding is pending from the issuance of a notice of commencement of proceeding, or from the application for an agency decision, whichever is earlier.

This section, and the other provisions governing ex parte communications, should be reviewed for clarity and consistency with the provisions governing separation of functions. The two sets of provisions might be combined. The operation of the provisions should be explained clearly in the preliminary part of the revised tentative recommendation.

§ 648.630. Monetary sanctions for bad faith actions or tactics

Subdivision (a) of Section 648.630 was revised to read:

648.630. (a) The presiding officer ~~or agency~~ may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by

another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.

§ 649.120. Form and contents of decision

The Commission deleted from this section the reference to facts known to the presiding officer:

(c) The statement of the factual basis for the proposed or final decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. Evidence of record may include ~~facts known to the presiding officer~~ and supplements to the record that are made after the hearing, provided the evidence is made a part of the record and that all parties are given an opportunity to comment on it. The presiding officer's experience, technical competence, and specialized knowledge may be ~~utilized~~ *used* in evaluating evidence.

The provisions on official notice are sufficient for this purpose.

§ 649.140. Adoption of proposed decision

The Commission rejected the suggestion that the agency head be authorized summarily to adopt a proposed decision with a disclaimer disagreeing with erroneous reasoning. Instead, a quasi-summary procedure should be drafted that would allow the agency head to prepare a revised decision that differs in legal basis from the proposed decision without a review of the transcript. The parties should be allowed an opportunity to comment on the revised decision before it becomes final. The time periods for this procedure should be coordinated with the other time periods in the statute.

§ 649.230. Review procedure

Subdivision (a) was revised as follows:

649.230. (a) The reviewing authority shall decide the case on the record, including a transcript ~~or summary of evidence~~, a recording of proceedings, or other record used by the agency, of the portions of the proceeding under review that the reviewing authority considers necessary. A copy of the record shall be made available to the parties. *The agency may require payment of fees covering direct costs of making the copy.* The reviewing authority may take additional evidence ~~that, in the exercise of reasonable diligence, could not have been produced at the hearing.~~

A provision should be added to allow review based on a stipulation of facts by the parties, perhaps drawn from similar provisions in the California Rules of Court.

For purposes of comment, the revised tentative recommendation should solicit comments on two approaches to the issue of allowing the presiding officer to communicate with the agency head. One alternative would prohibit such communications, the other would allow them in nonprosecutorial cases (e.g., Energy Commission hearings). The attention of the Commission's private practitioner consultants should be drawn to this matter.

§ 649.250. Procedure on remand

Subdivision (b) was revised to refer to preparation of a revised decision on remand based on the additional evidence "if any".

EXEMPTIONS FROM ADMINISTRATIVE PROCEDURE ACT

The Commission considered Memorandum 94-35 and First Supplement. The Commission approved for inclusion in the revised tentative recommendation the draft sections in the Exhibit to effectuate Commission decisions at earlier meetings exempting certain agencies.

The Commission decided not to exempt either the California Coastal Commission or the San Francisco Bay Conservation and Development Commission from the new Administrative Procedure Act. The Commission asked the staff to add language to the Comment to Section 633.030 (requirements of special hearing procedure) to say that, although the parties have a right to present and rebut evidence, the manner in which this is done is determined by the character of the proceeding.

The Student Aid Commission withdrew its request for an exemption in light of the availability of the special hearing procedure.

The Commission decided a special separation of powers rule should be provided for the Agricultural Labor Relations Board along the following lines:

(a) Unless a party demonstrates other statutory grounds for disqualification:

(1) A person who has participated in a determination of probable cause, *injunctive or other pre-hearing relief*, or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or *as a supervisor of the*

presiding officer or may assist or advise the presiding officer in the same proceeding.

....

Based on an oral presentation by Lt. Col. William Weir on behalf of the California Military Department, the Commission determined that hearings of the Military Department under the Military and Veterans Code or pursuant to federal regulation should be exempt from the Administrative Procedure Act.

CONFORMING REVISIONS

The Commission considered the approach to conforming revisions outlined in Memorandum 94-37, by which the staff would circulate proposed conforming revisions for comment and bring to the Commission's attention those revisions concerning which a question is raised. The Commission directed the staff to follow that approach.

Bus. & Prof. Code § 494.5. Reinstatement of license or reduction of penalty

Section 494.5 should be relocated to the Administrative Procedure Act:

650.140. Reinstatement of license or reduction of penalty

650.140. (a) A person whose license has been revoked or suspended may petition the agency for reinstatement or reduction of penalty after a period of not less than one year has elapsed from the effective date of the decision or from the date of the denial of a similar petition.

(b) The agency shall give notice to the Attorney General of the filing of the petition. The Attorney General and the petitioner shall be afforded an opportunity to present written argument, or if the agency permits, oral argument, before the agency itself.

(c) The agency itself shall decide the petition. The decision shall include the reasons therefor.

Comment. Section 650.140 supersedes the first three sentences of former Section 11522. The last sentence of former Section 11522 is continued in substance in Section 612.150 (contrary express statute controls).

- ☐ APPROVED AS SUBMITTED
☐ APPROVED AS CORRECTED
(for corrections, see Minutes of next meeting)

Date

Chairperson

Executive Secretary