Study N-100 January 20, 1994

Memorandum 94-11

Administrative Adjudication: Exemptions from Adjudication Provisions of Administrative Procedure Act

BACKGROUND

A central feature of the Law Revision Commission's tentative recommendation on administrative adjudication is an effort to draw a statute that is sufficiently broad and flexible to enable its use in all on-the-record hearings conducted by state agencies.

The Commission asked affected agencies for their views on whether the tentative recommendation succeeds in that effort. The transmittal letter accompanying the tentative recommendation states:

> The main objective of the tentative recommendation is enactment of a single statute to govern all administrative adjudication by all state agencies. For this purpose, it is the intention of the Commission, when making its final recommendation to the Legislature and Governor, to propose the repeal of all conflicting statutes. The Commission's staff is in the process of compiling the necessary conforming revisions and repeals.
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> If a hearing conducted by your agency is governed by a special statute that provides a unique procedure, and the unique procedure is necessary because of the special nature of the hearing, please call this matter to the attention of the Commission by the August 31 response date. It would be helpful for the Commission to know the specific problem that needs to be addressed, why the proposed statute is insufficient for that purpose, and whether the specific problem could be dealt with by an appropriate revision of the proposed general statute rather than by retention of the special statute.

COMMENTS ON TENTATIVE RECOMMENDATION

A number of agencies have requested that some or all of their administrative hearings be exempt from the new statute, including:

- Alcoholic Beverage Control Appeals Board

- Coastal Commission
- Department of Corrections and related entities:
  - Board of Prison Terms
  - Youth Authority
  - Youthful Offender Parole Board
  - Narcotic Addict Evaluation Authority
- Department of General Services
- Department of Health Services
- Occupational Safety and Health Appeals Board
- Public Employment Relations Board
- Public Utilities Commission
- Department of Real Estate
- Department of Social Services
- Office of Statewide Health Planning and Development
- Unemployment Insurance Appeals Board

The exemption requests of these agencies are addressed individually in supplementary memoranda. We have invited each agency to the meeting when the exemption request will be discussed, and we have attempted to notify persons who may be affected by the agency's administrative process.

GENERAL POLICY CONSIDERATIONS

In determining the individual exemption requests, the Commission should keep in mind some of the general policy considerations bearing on the concept of a uniform administrative procedure act to govern all state agency adjudications. Major policy considerations are outlined below; the discussion is reproduced from Memorandum 91-4 (3/4/91).

Existing Situation

The existing California Administrative Procedure Act, while it applies to a great number of state agencies, largely covers licensing decisions which constitute in the vicinity of 5% of all state administrative adjudications. The vast majority of administrative adjudications are governed by special laws of the administering agencies, such as the Workers Compensation Appeals Board, the Unemployment Insurance Appeals Board, and the Public Utilities Commission.

Adjudication in agencies not covered by the Administrative Procedure Act is subject to procedural rules of some sort. In each case, there are statutes,

regulations, and unwritten practices that prescribe adjudicatory procedures. The procedures vary greatly from formal adversarial proceedings to informal meetings.

Arguments For Broad Scope

The Commission's decision to seek to expand the scope of the Administrative Procedure Act to govern the hearing procedures of all state agencies is based on a number of factors.

Procedural rules inaccessible. The Commission has felt that the existing scheme of having different rules of administrative procedure applicable to different agencies, or in some cases having different rules applicable to the same agency depending on the type of proceeding, makes it difficult for the public and for practitioners who must deal with administrative agencies. The situation is aggravated by the fact that although the Administrative Procedure Act is readily accessible, other applicable rules of administrative procedure may not be. It is often the case that the most important elements of an agency's procedural code are not written.

Disadvantages for outsiders. The present system may confer an advantage on agency staff and specialists who often deal with the agency or are former staff members or agency heads. They are familiar with the unwritten procedures and precedents and traditional ways of resolving issues; they know about the unwritten exceptions and ways of avoiding obstacles. Such a system disfavors inexperienced advocates and the clients they represent, particularly community or public interest organizations that do not have access to the few experts in the procedure of a particular agency.

Inconsistent application. Uncodified procedures may be arbitrarily or unevenly applied because staff members may adhere to them or make exceptions to them as they feel is proper. In many cases, staff members would like to improve agency procedure, but agency heads resist changes or ignore established procedure. Since no one is certain precisely what is expected or required, it is often difficult to decide what procedure or behavior is appropriate under the circumstances.

Judicial review. When each agency has its own procedural law, the quality of judicial review is degraded. For example, when a court engages in judicial review of agency action and a procedural issue is drawn into question, the court has recourse only to precedents relating to that agency, if there are any. Even

though the same problem is clearly dealt with by the Administrative Procedure Act and there is a well developed scheme of precedents relating to that problem, the court must reinvent an appropriate independent result.

Problems

The Law Revision Commission has recognized that in order to have an Administrative Procedure Act adequate to govern the hearing procedures of all state agencies, it is necessary that the act be sufficiently flexible to accommodate all the variant types of proceedings engaged in by the agencies. Of course, there may be special cases where a limited exception is warranted or a special procedure is necessary. These should constitute the exception rather than the rule.

This concept is fine in theory, and the staff endorses it wholeheartedly. In practice, however, achieving both flexibility and uniformity appears to the staff to be a difficult task indeed.

When the Commission first decided to draw a single administrative procedure act, we were warned by a number of major agencies that their proceedings were so different in kind from other administrative agencies that it would be impossible to extend the administrative procedure act to them without crippling their operations. The Commission sought to reassure the doubters by pointing out that we would be adapting the administrative procedure act to better suit the needs of all agencies. Moreover, if we are unable to make a particular provision work for a specific agency, we can adopt a limited exception for that agency. Or, if an agency's needs are so different that most of the general act is inapplicable, we could except that agency completely. But these would be rare exceptions, since we would build enough flexibility into the statute, in terms of variety of available formal and informal procedures, that most agencies would find a suitable manner of operation under it.

Complexity. We have now begun the hard work of drafting actual statutory procedures for the agencies to live under, and it is already apparent to the staff that this approach will yield a very complex combination of statutory and regulatory provisions. For even such simple matters as the times within which agency actions must be taken, we've had to build in variations to recognize the special demands of different agencies, either because of the need for quick action or because of the demands of lengthy, complex, multi-party administrative determinations.

This concern is expressed well in the letter from the Fair Employment & Housing Commission:

> We have a general observation to make about the process to date. As we understand it from the discussion at the November 30th meeting, the goal of the CLRC in undertaking a revision of the current APA system is to provide greater uniformity in the procedural rules governing administrative adjudication by the various state agencies. This would give the private practitioner more of an "even playing field" with the Departments in that the rules would not be so esoteric.
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> There appears to be a basic contradiction, however, between this goal and Professor Asimow's recommendations. In his attempt to create one model APA which all administrative agencies-including the current non-APA ones — would use, he has had to build in much flexibility in order to cover all situations. In doing so, he has created a system which is potentially more complex and varied than the current one.
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> Currently, all APA agencies must follow — without deviation — the procedures set forth in the APA. Non-APA agencies have, of course, their own procedures. But under Asimow's recommendations, even APA agencies — such as ourselves — would have more discretion than we currently have to choose the procedure which fits our situation best. And, presumably, each agency would spell out in its regulations which variation of the theme it has chosen.
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> Our agency, for one, would appreciate having more discretion than we do now and we applaud Professor Asimow's efforts to create a more flexible system. But these efforts seem counter to the goal which led to the CLRC study in the first place. Under the Asimow APA, the private practitioner would not only have to go to the Government Code to look at the APA, but he/she would then have to find the regulations of each particular agency in order to find which of the discretionary models that agency has adopted. This seems potentially more confusing to the private practitioner and would continue to give Department prosecutors a significant advantage.

Of course, the tendency towards too much variability can be combated by a provision limiting the discretion of agencies that work through the Office of Administrative Hearings (governed by the current Administrative Procedure Act). But this makes for a complex statutory system, witness the current draft of Section 649.110 (proposed and final decisions):

> (a) If the presiding officer is the agency head, the presiding officer shall issue a final decision within 100 days after the case is submitted, or other time provided by agency regulation in a proceeding that by statute is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Cumbersome procedures. A more serious concern is that unnecessary features and complications may be added to the administrative adjudication process for all agencies in order to respond to or deal with special problems or needs of a few agencies. The Public Utilities Commission has written to us that the task the Law Revision Commission has undertaken is a daunting one. "As our comments demonstrate, it is extraordinarily difficult to craft uniform procedures which fit the needs and responsibilities of every state agency which conducts administrative hearings. More importantly, some of the changes suggested would have an extremely disruptive and unfair impact on the current procedures of the CPUC." The Fair Employment & Housing Commission likewise questions the wisdom of crafting general rules to address special problems, pointing out that "FEHC may be in a unique position as an APA agency which really does not belong within the current structure. The solution may be to figure out what to do with the FEHC rather than create new rules which all of the other agencies feel are unnecessary." And the Occupational Safety and Health Appeals Board has noted that if it were forced under the general administrative procedure act, that "would carry with it danger of future change, based on perceived problems or needs of other, dissimilar agencies, without sufficient concern for how the change may impact our particular OSHAB proceedings."

Specialization. The staff also believes we need critically to examine one of the major assumptions of a uniform administrative procedure act. We believe that uniformity is desirable so that a practitioner can represent the public before any agency without having to be a specialist in the procedure of that agency and so that the agency and specialists will not have an insider advantage over the public and general practitioners. But is specialization a consequence of nonuniform rules? Are there liable to be general practitioners appearing before the Workers Compensation Appeals Board or the Public Employment Relations Board?

Specialization probably results to some extent from the economics of law practice itself, which precludes an occasional foray into a field that demands a

high volume on a low margin in order to be profitable. This may be particularly true in specialty practices such as workers compensation, which is recognized by the State Bar as such.

Specialization probably also results from the nature of the substantive law involved, more than from the intricacies of the particular administrative procedure used. This point has been made to the Commission in correspondence from the Agricultural Labor Relations Board:

> The underlying aim of making administrative adjudication less confusing and more accessible to parties and practitioners would be frustrated by placing the ALRB under the APA.
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> The Agricultural Labor Relations Act came into being in 1975 and extended to agricultural employees the collective bargaining rights which industrial workers had enjoyed under the National Labor Relations Act since 1935. The Legislature believed that the best way to do that was to pattern the ALRA—both substantively and procedurally—on the NLRA. That was a wise and deliberate decision: The parties and participants who appear before us are labor organizations, employers, and attorneys whose background and experience is with labor law, not with general administrative law. As such, they are much more at home with a statutory structure based on the NLRA and with procedures drawn from the NLRB. Furthermore, that structure and those procedures are rooted in, and have evolved out of, the substantive law of collective bargaining. Not so with the APA. Its origin and focus ... is with proceedings arising out of proposed license revocations and petitions for licenses.
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> Since our procedures are clear and accessible to our constituencies and since they bear a logical and organic relationship to the substantive provisions of our Act, nothing would be gained and much would be lost by demolishing them and substituting procedures designed for different constituencies with different problems.

The Commission has received extensive correspondence from the State Bar Taxation Section, which also is involved in a specialty area. The Section has long taken the position that taxation differs in a unique way from other areas of administrative procedure, and that taxation issues should be adjudicated in a judicial tax court, rather than the current Franchise Tax Board/State Board of Equalization setup. After many unsuccessful efforts to move taxation dispute resolution further away from the administrative process, the Executive Committee of the State Bar Section is now taking the attitude that "if you can't

lick 'em, join 'em", and is urging that taxation administrative adjudication be brought more in line with general administrative procedures in a number of respects. But even with this new direction, both the state taxation agencies and the tax specialists would have major concerns with adoption of many of the standard administrative procedures for taxation disputes. We have previously received a copy of a 30-page critique of the 1981 Model State APA prepared by the American Bar Association Taxation Section, along with their own 30-page draft of a Model State Tax Procedure Act as an alternative.

Other factors. Other factors also suggest further Commission consideration of the concept of drafting an administrative procedure act that can be applied to all state agencies. The effort to include all agencies under the umbrella of the administrative procedure act will slow the project substantially, with problems needing to be ironed out for one agency after another. The entire act may be skewed to accommodate special concerns of an agency, only to have that agency at the end of the process opt out of the act, leaving only uninvolved agencies subject to the limitations built into the act.

Cost. To the extent new requirements are imposed on agencies, there will be a state cost involved that may make it difficult if not impossible to obtain enactment. The Association of California State Attorneys and Administrative Law Judges has brought the cost factor to our attention with respect to administrative adjudication personnel:

> If timelines are in place, language needs to be included in the new APA to require departments to hire sufficient administrative law judges to conduct the hearings in a timely manner in a normal workday. As has been the case with some agencies, the workload far exceeds the staffing of ALJ's to meet all the timelines. This not only creates problems, but also develops a statute which is ripe for violation.

The Department of Consumer Affairs is similarly concerned:

> It appears from those portions of the proposed statute which have already been drafted that the length, cost and complexity of agency adjudicative proceedings will be greatly increased. We would urge the commission to consider the cost impact of the proposed procedures, particularly in these times of serious fiscal constraint.

CONCLUSION

After reviewing the general policy considerations outlined above, the Commission decided to proceed with the effort to draft a uniform administrative procedure statute applicable to all state agencies, and to revisit the question once a draft had been completed and affected agencies had an opportunity to review it. We are now at the point of revisitation in light of the new and renewed exemption requests of a number of state agencies.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary