
Eleventh Supplement to Memorandum 94-11

Administrative Adjudication: Exemption Request of Office of Statewide Health Planning and Development

The Office of Statewide Health Planning and Development (OSHPD) notes three of its programs where the hearings are intended to be informal, providing due process for appellants while at the same time meeting their need for an accessible, expeditious, affordable, and understandable forum. Exhibit pp. 1-3. These are hearings under the Hospital Seismic Safety Program, the Cal-Mortgage Program, and the Health Data Collection Program. These hearings were not intended to be formal administrative procedure act type hearings—"The Office or the panels were given authority to adopt simplified hearing procedures to create an accessible forum while protecting due process concerns. Our current structures are working very well, with high constituent satisfaction. The Office believes that the imposition of additional, unnecessary procedural requirements would have the effect, not of enhancing due process, but of reducing access to fair hearings."

Hospital Seismic Safety Program

OSHPD has a Building Safety Board. The statute governing the board states simply that the board "shall act as a board of appeals" in all matters relating to the administration and enforcement of building standards relating to the design, construction, alteration, and seismic safety of hospital building projects submitted to the statewide office. Health & Saf. Code § 15080. There is no indication of the type of procedure to be followed by the Building Safety Board. We note, however, the general application of the administrative procedure act to OSHPD. Gov't Code §§ 11500-11501.

It is not clear to us what procedures the board uses and how they differ from the procedures provided in the tentative recommendation. OSHPD remarks that the board has lay members, uses simplified procedures, and is very accessible to the public. The staff sees no reason why the conference hearing procedure provided in the tentative recommendation cannot serve the same functions. The tentative recommendation provides that an agency may adopt the conference hearing procedure, and this appears appropriate for the board.

§ 647.110. When conference hearing may be used

647.110. A conference adjudicative hearing may be used in proceedings where:

- (a) There is no disputed issue of material fact.
- (b) There is a disputed issue of material fact, if the matter involves only:
 - (1) A monetary amount of not more than \$1,000.
 - (2) A disciplinary sanction against a prisoner.
 - (3) A disciplinary sanction against a student that does not involve expulsion from an academic institution or suspension for more than 10 days.
 - (4) A disciplinary sanction against an employee that does not involve discharge from employment, demotion, or suspension for more than 5 days.
 - (5) A disciplinary sanction against a licensee that does not involve revocation, suspension, annulment, withdrawal, or amendment of a license.
- (c) **By regulation the agency has authorized use of a conference hearing, if in the circumstances its use does not violate a statute or the federal or state constitution.**

Comment. Section 647.110 is new.

Subdivision (a) permits the conference hearing to be used, regardless of the type or amount at issue, if no disputed issue of material fact has appeared. An example might be a utility rate proceeding in which the utility company and the Public Utilities Commission have agreed on all material facts. If, however, consumers intervene and raise material fact disputes, the proceeding will be subject to conversion from the conference adjudicative hearing to the formal adjudicative hearing in accordance with Sections 614.110-614.150.

Subdivision (b) permits the conference adjudicative hearing to be used, even if a disputed issue of material fact has appeared, if the amount or other stake involved is relatively minor, or if the matter involves a disciplinary sanction against a prisoner. The reference to a “licensee” in subdivision (b)(5) includes a certificate holder. Section 610.360 (“license” defined).

Subdivision (c) imposes no limits on the authority of the agency to adopt the conference adjudicative hearing by regulation, other than statutory and constitutional due process limits. *Thus, for example, the Building Safety Board might adopt the conference procedure when it acts as a board of appeals under Health and Safety Code Section 15080.*

Cal-Mortgage Program

Health and Safety Code Section 436.10 provides that “Every applicant for insurance shall be afforded an opportunity for a fair hearing before the [California Health Policy and Data Advisory Commission] upon 10 days’ written notice to the applicant.” No other statutory procedures are provided.

The Advisory Commission is not now required to use hearing officers provided by the Office of Administrative Hearings, and pursuant to our general policy on this matter the staff would continue the exemption expressly:

Health & Saf. Code § 443.27 (added). Adjudicative proceedings

443.27. An adjudicative proceeding of the commission is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Section 443.27 preserves the effect of former Government Code Section 11501 to the extent that section required use of Office of Administrative Hearings hearing personnel under the adjudicative proceeding provisions of the Administrative Procedure Act. Adjudicative proceedings of the Health Policy and Data Advisory Commission are governed by the Administrative Procedure Act, but need not be conducted by the Office of Administrative Hearings. See Gov’t Code § 641.110 (when adjudicative proceeding required).

This would enable the Advisory Commission to tailor its hearings as it sees fit, if it finds particular administrative procedure act provisions inappropriate. The Advisory Commission also might wish to adopt the informal conference procedure for hearings under Section 436.10. See discussion of the hospital seismic safety program, above.

Health Data Collection Program

A health facility adversely affected by a determination under the health data collection program may request a hearing from OSHPD. Section 443.37 of the Health and Safety Code sets the parameters of the hearing—it must be commenced within 60 days and a final decision must be made within 60 days after conclusion of the hearing. The presiding officer may be an administrative law judge from the Office of Administrative Hearings (in which case the procedures of the administrative procedure act apply), or may be an employee of OSHPD or a committee of the Health Policy and Data Advisory Commission. If the presiding officer is an OSHPD employee or a committee of the Advisory

Commission, “the hearing shall be held in accordance with such procedures as the office, with the advice of the commission, shall prescribe.”

OSHPD points out that the intent of this provision is to allow for more informal hearings where appropriate. But it does not appear necessary to proliferate procedures in order to achieve informality. The provisions of the tentative recommendation allow the informality of the conference hearing, while still promoting some measure of uniformity in state administrative hearings.

We would revise Section 443.37 to read:

443.37. Administrative review of determination; Judicial review

Any health facility affected by any determination made under this part by the office may petition the office for review of the decision. This petition shall be filed with the office within 15 business days, or within such greater time as the office, with the advice of the commission, may allow, and shall specifically describe the matters which are disputed by the petitioner.

~~A hearing shall be commenced within 60 calendar days of the date on which the petition was filed. The hearing shall be held before an employee of the office, a hearing officer employed by the Office of Administrative Hearings, or a committee of the commission chosen by the chairperson for this purpose. If held before an employee of the office or a committee of the commission, the hearing shall be held in accordance with such procedures as the office, with the advice of the commission, shall prescribe. If held before a hearing officer employed by the Office of Administrative Hearings, the hearing shall be held in accordance with Chapter 5 (commencing with Section 11500) of Division 3 of the Government Code. The employee, hearing officer, or committee shall prepare a recommended decision including findings of fact and conclusions of law and present it to the office for its adoption. The decision of the office shall be in writing and shall be final. The decision of the office shall be made within 60 calendar days after the conclusion of the hearing and shall be effective upon filing and service upon the petitioner. Part 4 (commencing with Section 641.110) of Division 3.3 of the Government Code (Administrative Procedure Act) applies to the hearing.~~

Judicial review of any final action, determination, or decision may be had by any party to the proceedings as provided in Section 1094.5 of the Code of Civil Procedure. The decision of the office shall be upheld against a claim that its findings are not supported by the evidence unless the court determines that the findings are not supported by substantial evidence.

~~The employee of the office, the hearing officer employed by the Office of Administrative Hearings, the Office of Administrative~~

~~Hearings, or the committee of the commission, may issue subpoenas and subpoenas duces tecum in a manner and subject to the conditions established by Section 11510 of the Government Code.~~

Comment. Section 443.37 is amended to extend application of the adjudicative proceedings provisions of the Administrative Procedure Act to a hearing conducted by agency personnel as well as a hearing conducted by an administrative law judge of the Office of Administrative Hearings. Where a hearing is conducted by agency personnel, the agency may by regulation tailor the Administrative Procedure Act to suit its hearings as provided in the Act.

Under the Act, the hearing must be held within 90 days after the application. Gov't Code § 642.240. The agency head may select the appropriate presiding officer. Gov't Code § 643.110. The presiding officer must submit a proposed decision to the agency head within 30 days after the hearing, which must be written and include a statement of the factual and legal basis for the decision as to each of the principal controverted issues. Gov't Code §§ 649.110-649.120. The agency head must make a final written decision within 100 days. Gov't Code §§ 649.140, 649.120. The decision is effective 30 days after it becomes final or other date stated in the decision. Gov't Code § 650.110. The presiding officer may issue subpoenas and subpoenas duces tecum. Gov't Code § 645.420.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

OFFICE OF STATEWIDE HEALTH PLANNING AND DEVELOPMENT

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Law Revision Commission
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File: _____
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Nathaniel Sterling, Executive Secretary
California Law Revision Commission
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Dear Mr. Sterling:

Thank you for the opportunity to review and comment on the California Law Review Commission's tentative recommendation on administrative adjudication by state agencies. In general, the Office of Statewide Health Planning and Development supports the concepts embodied in the draft.

However, the Office is concerned about the potential impact of the proposed new Administrative Procedures Act on several of our programs. The Office administers three programs in which some type of appeal to an advisory board or commission is allowed, and in each case the Office or the hearing body currently has authority to establish specific procedures. These hearings are not intended to be full APA - type hearings, and the somewhat less formal procedures that have been developed are providing due process for appellants while at the same time meeting their need for an accessible, expeditious, affordable, and understandable forum.

In summary, the hearings requirements are as follows:

Hospital Seismic Safety Program Health and Safety Code §15080 establishes a Building Safety Board to advise the Office and to "... act as a board of appeals ..." in matters relating to building standards with regard to seismic safety of hospitals. The Board consists of 17 members (appointed by the Director of the Office) with expertise in various areas relating to construction, design, seismic safety, and the hospital industry. Appeals may be filed by any person disputing the administration and enforcement of hospital building standards.

Cal-Mortgage Program Certain non-profit health facilities are eligible to apply for construction loan insurance through the Office's Cal-Mortgage program. Health and Safety Code §436.10 provides that "Every applicant for insurance shall

be afforded an opportunity for a fair hearing before the council . . . " Council" refers to the California Health Policy and Data Advisory Commission (per Health and Safety Code §443.22), an advisory commission of 11 members (appointed by the Legislature and the Governor) established to advise the Office on health data and health policy matters (Health and Safety Code §443.20 and §443.26).

Health Data Collection Program Pursuant to the Health Data and Advisory Council Consolidation Act (Health and Safety Code §443 et. seq.), all health facilities (as defined) are required to regularly file certain data with the Office within specified time frames. Penalties of \$100.00 per day accrue when reports are not filed by the due dates. A health facility affected by a determination under the act (almost always a penalty assessment), " . . . may petition the Office for review of the decision . . . The hearing shall be held before an employee of the office, a hearing officer employed by the Office of Administrative Hearings, or a committee of the commission [California Health Policy and Data Advisory Commission; see above] chosen by the chairperson for this purpose. If held before an employee of the office or a committee of the commission, the hearing shall be held in accordance with such procedures as the Office, with the advice of the Commission, shall prescribe." The Office's policy is to have these penalty appeals heard by a committee of the commission.

In each of these situations, the hearings currently provided are fairly simple in structure and the appeals are heard by a panel of lay people - the members have no formal legal training, but they have industry experience and expertise. Because of their backgrounds, they have credibility with appellants, they can deal knowledgeably with technical issues, and their judgement is respected. The fact that the hearings are not complex or highly technical allows the officials of the facility involved to represent themselves, to present their own case in their own way. In our experience, the result of these factors is that people really feel they have had a "fair hearing", and at low cost.

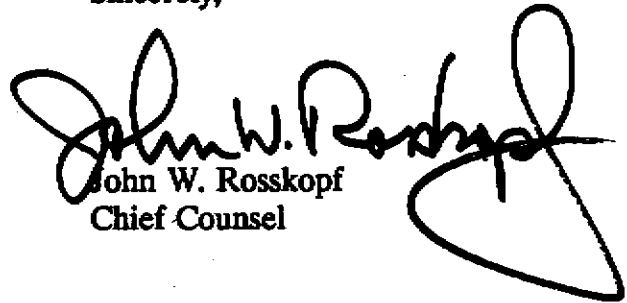
The Office is concerned that imposing additional procedural requirements would in-fact-reduce-access-to-the-hearing process. ----- Program participants would be less likely to use these hearing processes, which were designed for their benefit, if they were subject to more complex and technical procedural requirements. They would be more likely to feel it necessary to be represented by counsel, which could impose a significant financial barrier.

Again, these hearings were not intended to be full APA-type hearings. The Office or the panels were given authority to adopt simplified hearing procedures to create an accessible forum while protecting due process concerns. Our current structures are working very well, with high constituent satisfaction. The Office believes that the imposition of additional, unnecessary procedural requirements would have the effect, not of enhancing due process, but of reducing access to fair hearings. This would be counter to the intent of the proposal.

For the reasons described above, the Office believes that the best statutory approach would be to maintain our authority to adopt procedures for these three types of informal hearings.

Thank you again for the opportunity to comment on this proposal. If you have any questions, please call me at (916) 654-1488.

Sincerely,



John W. Rosskopf
Chief Counsel