

Third Supplement to Memorandum 94-11 (Part 2)

**Administrative Adjudication: Exemption Request of Department of
Corrections and Related Entities (Letter from Prison Law Office)**

Attached is a letter from the Prison Law Office urging the Commission to deny the request of the Department of Corrections for an exemption from the proposed new Administrative Procedure Act. The letter points out the benefits of having uniform procedures for agency adjudications, and argues that prisoners' disciplinary proceedings would be fairer if conducted by an impartial outside hearing officer rather than by a correctional employee.

Also attached is another copy of Professor Asimow's letter referred to in the Prison Law Office letter. Professor Asimow's letter was previously distributed with the First Supplement to Memorandum 93-45.

In Part 1 of this Supplement, the staff recommended granting the department's exemption request. The staff was particularly concerned about granting a right to counsel in parole hearings where such a right does not now exist. The staff thought this would result in longer hearings, more extensive records, and increased financial costs to the state, all of which would likely be unacceptable to the Legislature.

If the Department of Corrections is to be made subject to the new APA, the staff believes a statute should provide that the APA right to counsel does not apply to parole hearings, and a statute should preserve the existing system for issuing and reviewing parole decisions.

Respectfully submitted,

Robert J. Murphy
Staff Counsel



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February 1, 1994

Law Revision Commission
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Dear Commissioners:

I write on behalf of the Prison Law Office, a public interest law firm that advocates for prisoners incarcerated in the California Department of Corrections. I write to comment on the Department of Corrections' request to be exempted from the revised administrative adjudications procedures proposed by the Law Revision Commission.

According to the Department of Corrections, they have requested an exemption because the adjudicative actions of the Department are so unique that few of the proposed provisions would be appropriate, and the cost of designing and implementing exempting regulations would be very great. Staff Counsel for the Commission, Robert Murphy, has recommended that such an exemption be granted.

In a letter to the Department of Corrections dated September 10, the consultant to the Commission, Professor Michael Asimow, stated that although some modifying regulations might need to be enacted, the Department of Corrections should not be wholly exempted from the revised APA adjudication provisions. The Prison Law Office agrees with Professor Asimow, and we urge the Commission not to exempt the Department of Corrections from the requirements of the APA adjudicatory hearing provisions.

In recommending that the Department of Corrections not be granted an exemption, Professor Asimow stressed the value of having uniform procedures for all agency adjudications in which a statute or the constitution require a hearing. In particular, Professor Asimow noted that under a uniform procedure, there will be far less litigation over the details of state and federal constitutional due process requirements applied to numerous varying types of circumstances. Instead, the APA will provide a constitutionally acceptable framework of easily accessible, comprehensive ground rules for quasi-adjudicative hearings.

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Such uniformity would greatly benefit Department of Corrections, the prisoners, and their advocates. Exempting the Department of Corrections from the APA procedures would only continue the status quo, whereby the Department's quasi-adjudicatory proceedings are governed by an assortment of court cases that leave unanswered questions as to what is and is not constitutionally acceptable.

In addition, the grave importance of the liberty interests at stake in correctional adjudications makes it especially appropriate to include the Department of Corrections in the new APA requirements. Currently, the CDC conducts a variety of administrative adjudications that can have drastic effects on prisoners and parolees, including prolonging the amount of time spent in prison, returning a prisoner to incarceration, and various imposing various types of punishment for wrongdoing. In such sensitive areas, where the freedom of citizens is at stake, well-defined and comprehensive adjudicatory hearing procedures, developed by a neutral outside commission, are very desirable.

For example, current Department of Corrections disciplinary adjudication procedures put a prisoner's fate entirely in the hands of correctional officers in the prison. Disciplinary actions begin when a prisoner is issued a notice of a rule violation by a correctional officer. The prisoner is rarely allowed a staff assistant or investigating employee. When a prisoner is allowed assistance in gathering information for the hearing, the assistant is generally an employee of the prison. At the informal disciplinary hearing, the charge is heard by a correctional officer from the same institution who is often closely affiliated with the officer who wrote up the charge. Although officially a preponderance of the evidence is required to find a prisoner guilty, often the standard is very loosely applied, and administrative appeals of the decision are generally futile. Despite such a loose and biased process, a prisoner may be denied of up to 360 days of work or behavior credits, and is likely to suffer other effects such as increased level of supervision and decreased ability to earn future work credits.

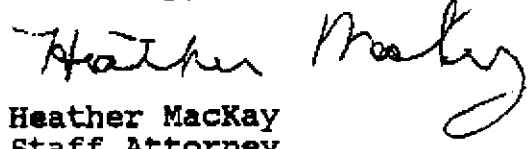
Including the Department of Corrections in the proposed APA administrative adjudications provisions would likely increase the degree of objectivity and neutrality in the Department's administrative adjudications. The most important change would be that administrative law judges would act as decision makers.

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Finally, inclusion in the proposed APA will not unduly burden the Department of Corrections. As Professor Asimow has pointed out, the Department would be required to provide only streamlined "conference" hearings for most of its adjudications. Furthermore, like all other agencies, the Department would be allowed to modify time deadlines, hearing locations, and other particulars to suit its needs and to conform to additional legal requirements. Most of these modifications could be drawn from existing regulations, thus requiring little time or effort.

Thank you for your consideration of these comments.

Sincerely,


Heather MacKay
Staff Attorney

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September 10, 1993

Jerold A. Prod
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Dear Mr. Prod,

I enjoyed speaking with you this afternoon about the impact of the proposed new California Administrative Procedure Act, currently under consideration by the Law Revision Commission. The letter written to the Commission by Melissa Meath suggests that the Act's adjudication provisions should omit completely the adjudication conducted by your Department, including parole revocation hearings. I agree with Ms. Meath's reading of the proposed Act--all constitutionally required hearings provided by your department would be covered.

As promised, I have enclosed a copy of my article published in the UCLA Law Review that explains the reasons for trying to enact a California APA that covers all adjudications in which a statute or the constitution requires a hearing. Pp. 1071-79 give the argument for having a single adjudicatory Code. Pp. 1084-90 give the argument for having such a Code where the Act covers all adjudications required by statute or the constitution. One major advantage is that it will not be necessary to constantly litigate about what the state and federal constitutions require; the APA and accompanying regulations will set forth a constitutionally acceptable framework. The ground rules will then be readily available to anyone (lawyer or otherwise) who is engaged in dispute settlement with your Department.

Please take a look at the provisions for conference hearings at §647.110 of the draft statute (discussed at pp. 1096-1100 of the article). These hearings are sharply stripped down procedures that call for limiting or abolishing both direct and cross examination. Under §647.110(a)(2), these provisions apply to prison discipline and to any other area that the agency designates by regulation (provided that it would be constitutional to do so). Conference hearings would be most appropriate, I think, for the hearings your department conducts. Most other provisions (notice, venue, pleadings, discovery, timing, open hearings, etc.) that might pose a problem for your department can be varied by regulation. It might be necessary to provide explicit exceptions for your department from some otherwise non-alterable provisions such as right to counsel (§613.320) or ex parte contact (§648.520). I would be supportive of any suggestions you would have in this regard.

I would oppose, however, Ms. Meath's suggestions for entirely omitting Department of Corrections hearings from the APA. Many agencies have asked to be excluded; so far, at least, the Commission has stood firm against this suggestion. It has, however, been willing to make appropriate exceptions to provisions in the Act to accommodate special problems that agencies have drawn to our attention. I hope the same will be possible in the case of your agency.

Ms. Meath says that the cost of adopting regulations that vary the default provisions in the Act would outweigh any overall benefit to the process. I would respectfully disagree with this argument. There is great benefit to a rulemaking procedure, in which the public will be involved, that assesses the legitimate needs of the agency as compared to the legitimate interests of those who have disputes with the agency. Those regulations will then be an easily accessible source of information on precisely what procedures an agency will employ for the different sorts of disputes it resolves. While rulemaking can be time-consuming, the Act will provide ample time for the agency to study the problem, propose rules, conduct hearings on the rules, and have them adopted and approved by OAL long before the Act goes into effect. I really think the effort is well worth the cost.

The Commission and I greatly appreciate your letter calling to our attention the problems your Department might encounter under the new APA and I assure you we will try to solve those problems within the confines of the Act.

As I mentioned to you, the Commission will meet in Sacramento on September 24, probably in Room 3191 of the State Capitol. If you will check with Nat Sterling at the Commission (415-494-1335) he can tell you when on the agenda it's likely that your issues will come up. Also, I'd appreciate hearing

from you prior to the 24th what position you have decided to take on the issues discussed in this letter.

Sincerely,

Michael Asimow
Michael Asimow