

## Fourth Supplement to Memorandum 94-11

### **Administrative Adjudication: Exemption Request of Department of General Services**

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The Department of General Services has written that certain types of hearings should not be subject to the new administrative procedure act. See the Exhibit to this memorandum.

#### **Skelly Hearings**

The Department of General Services notes that hearings are held throughout state government pursuant to **Skelly v. State Personnel Board**, 15 Cal. 3d 194 (1975), as part of the process leading up to adverse action appeal hearings before the State Personnel Board. The Department points out that these are supposed to be speedy and informal, and should be exempted from the statute. Otherwise they will become complex or time consuming, or many agencies will have to adopt regulations to opt out of the administrative procedure act.

The court in **Skelly** notes that due process for adverse action by an agency against an employee must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline. 15 Cal. 3d at 215.

The conference hearing procedure offered in the tentative recommendation could be satisfactory for these purposes. The conference hearing procedure is set out at proposed Sections 647.110-647.140. The hearing is limited in scope but provides a forum for the employee being disciplined to offer written or oral comments on the issues. The staff would revise the conference hearing provisions to make them available for **Skelly** and similar hearings.

#### **§ 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.

(6) *An interim or preliminary action pending a hearing on a disciplinary sanction against a person.*

(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, or if the matter involves a preliminary action pending a hearing for imposition of a disciplinary sanction, as required by *Skelly v. State Personnel Board*, 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P. 2d 774 (1975). 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.

### **Bid Protest Hearings and Other Simple Governmental Review Proceedings**

The Department of General Services states that it is greatly concerned that "the availability of simple, swift, inexpensive, and flexible procedures for reviewing past or proposed governmental actions will be curtailed." Namely, they are worried that current inexpensive and expeditious governmental review proceedings, such as bid protest hearings, will be roped into the administrative procedure act and made complex and formal.

We would address this concern in two ways. First, we would make clear that the administrative procedure act is limited to statutorily or constitutionally required on-the-record hearings. See discussion of Section 641.110 in Memorandum 94-13. The specific language proposed is that the administrative procedure act would only apply where the constitution or a statute requires that a hearing be given, requires that evidence be taken, and vests responsibility for the determination of facts in an agency.

Second, we would make available the conference hearing procedure in the routine case where the administrative procedure act is invoked. We do note the \$1,000 limitation on use of the conference hearing. This limit may be too low: the State Board of Control also has written to the Commission that in the numerous claims it deals with, the amounts claimed often exceed \$1,000, thereby making the conference proceeding inapplicable.

**The staff suggests revision of the conference hearing to allow its use in cases up to \$10,000,** so as not to bog down the agencies in smaller cases.

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

## DEPARTMENT OF GENERAL SERVICES

OFFICE OF LEGAL SERVICES

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August 30, 1993

California Law Revision Commission  
4000 Middlefield Road  
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Palo Alto, CA 94303-4739

RE: COMMISSION'S MAY 1993 TENTATIVE RECOMMENDATION;  
ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

Dear Commission Members:

On behalf of the Department of General Services, Office of Legal Services, I wish to commend the thought and effort evidenced by the above-referenced recommendation. I hope the following comments made on behalf of the Office of Legal Services will be helpful as the process of refining your recommendation continues.

First, this Office believes that access is at least as important as procedural uniformity with respect to the public's dealings with State government. Broad application of the proposed adjudicative procedures will likely aid attorneys practicing administrative law. It is of great concern, however, that the availability of simple, swift, inexpensive and flexible procedures for reviewing past or proposed governmental actions will be curtailed.

Second, we believe the "customizing provisions" are very useful and are a creative means of addressing the need for flexibility. It is a significant concern, however, that at a time of budgetary limitation, a significant amount of time and money will be devoted to rulemaking.

Third, we wish to draw your attention to a particular type of proceeding: hearings held pursuant to Skelly v. State Personnel Board (1975) 15 Cal.3d 194. These hearings are held throughout State government as part of the process that leads up to State Personnel Board ("S.P.B.") adverse action appeal hearings. If it is determined that Skelly hearings are governed by the adjudicative procedures in your proposal, one of two results will occur: either Skelly hearings (which are supposed to be speedy and informal) will become as complex and time-consuming as the S.P.B. hearings they precede or numerous State agencies will undertake duplicative rulemaking in order to modify the adjudicative procedures with respect to Skelly hearings. These undesirable and no doubt unintended results would be avoided if your proposal specifically excluded Skelly hearings from the scope of the proposed adjudicative procedures.

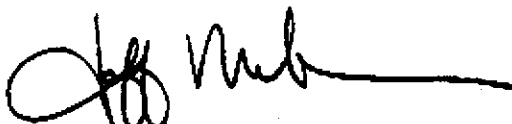
Commission Members

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August 30, 1993

Please feel free to contact me regarding these comments as well as any other matters pertaining to your proposal.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jeff Marschner", with a long horizontal flourish extending to the right.

JEFF MARSCHNER  
Chief Counsel

JM:DB:mh

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