

Sixth Supplement to Memorandum 94-11

Administrative Adjudication: Exemption Request of Occupational Safety and Health Appeals Board

Attached to this Supplement is a letter from the Occupational Safety and Health Appeals Board requesting exemption from the proposed new Administrative Procedure Act. OSHAB is now exempt from the existing APA. See Gov't Code § 11510.

OSHAB is concerned about the provision in the proposed new APA permitting a party to amend or supplement a pleading at any time before the hearing, but notes that this provision may be modified by agency regulation. See proposed Section 642.110. OSHAB mentions the provisions for discovery and prehearing conferences which may be modified or made inapplicable by agency regulations. See proposed Sections 654.110 (discovery) and 646.110 (prehearing conference). OSHAB also mentions decision-making and declaratory relief, not subject to agency regulations.

OSHAB's main concern is the need to adopt new regulations under the proposed APA, especially since it recently revised its regulations on administrative procedure. But this objection is not unique to OSHAB. The need to adopt regulations will affect every agency subject to the new APA where its hearings need not be conducted by an administrative law judge from the Office of Administrative Hearings. OSHAB's objection is less a justification to exempt it from the new APA than it is a criticism of the proposed statute as a whole.

The provision for regulations to modify the APA or make it inapplicable is needed to permit one statute to govern the many diverse kinds of adjudication made by state agencies. The problem is somewhat ameliorated by the provision permitting agencies to adopt interim regulations, valid until June 30, 1997, without the notice, hearing, and review by the Office of Administrative Law that would otherwise be required by rule-making provisions of the APA. See proposed Section 610.940.

The staff believes OSHAB has not made a compelling case for exemption from the new APA. The following section should be adopted to exempt OSHAB from the requirement that its hearings be conducted by an ALJ from OAH:

Lab. Code § 6308.7 (added). Adjudicative proceeding

6308.7. An adjudicative proceeding of the appeals board is exempt from the requirement that it be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Comment. Section 6308.7 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 Occupational Safety and Health Appeals Board 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).

Respectfully submitted,

Robert J. Murphy
Staff Counsel

STATE OF CALIFORNIA

PETE WILSON, Governor

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Law Revision Commission

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August 26, 1993

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Subject: Comments on Tentative Recommendation:
Administrative Adjudication by State Agencies

Dear Mr. Sterling:

We appreciate this renewed opportunity to comment upon the recommendation to create a uniform state administrative procedure act. Having followed the course of the Commission's deliberations and drafting efforts, the OSHA Appeals Board lauds this effort to seek improvement in state administrative processes. Clearly, the latest recommendation addressing such concerns as exclusivity of the record, ex parte communications, separation of functions, and command influence, is significantly superior to earlier drafts.

However, it is our feeling, and one which we have expressed on numerous occasions during the past three years, that the "model" APA is not necessarily an improvement over current regulations that are applicable to our hearings and review procedures. Indeed, OSHAB has recently completed a two-year effort to revise existing regulations culminating in the publication of our updated booklet "Appeal Information" which has been enclosed for your consideration. This guide is available to all parties that appear before us. While we view these regulation revisions as part of an evolutionary process, one in which OSHAB is continually seeking to streamline its procedures, so that the represented and nonrepresented alike may exercise their rights under the OSHA program, costs associated with these revisions cannot be understated.

We are a small agency, with one legal advisor and a statewide unit of eight ALJs. Our caseload has increased over 120% during the past twelve months, exceeding 3,000 appeals per year. We are simply not in a position to undergo another extensive regulation review merely because a more uniform administrative procedure act has been promulgated.

One example of this predicament should highlight our position: Following a great deal of internal discussion among legal staff, ALJs, and public input, the Board revised its regulations pertaining to prehearing and post submission amendments (Sections 371.2 and 386, Title 8, California Code of Regulations) which allow for amendments to correct clerical errors in pleadings, to conform to proof or statutory requirement, but only when timely filed, no prejudice has been shown, and all parties are given appropriate notice. These provisions have been adjusted to maintain the basic informality of our proceedings, yet assure efficiency in scheduling, and protect parties from late hour surprise. They reflect the nature of the issues litigated at our hearings, the extent to which parties may or may not be represented by counsel, as well as the diverse geographical locations covered by the program. While these changes may not be our last thoughts in this area, they would appear to be far superior to the Commission's tentative recommendation in Section 642.360, allowing a party to amend or supplement a pleading "[a]t any time before commencement of the hearing".

Under this provision, the Division, the enforcement arm of the OSHA program, could theoretically change the nature of the alleged violation one day before a hearing. The amendment would be akin to a prosecutor refileing a criminal complaint, and then alleging a different offense on the day before the trial has been set. An unprepared Employer under the OSHA program would arguably be entitled to a continuance to prepare its defense, and the case would have to be reset, at great cost to the state, since the ALJ, witnesses, and parties would, more likely than not, have had to travel significant distances to the hearing location.


While the tentative recommendation provides that agency modification would be permitted, this could only be accomplished by rulemaking, thus forcing OSHAB to return to OAL for review of the same regulation most recently approved. Apart from being a waste of resources, it is not clear whether OAL review would then require additional agency justification for any divergence from the "model code."

This example can be repeated in any number of areas, including discovery, prehearing conferences, decision making, declaratory relief, etc. The point is, agencies such as OSHAB which have been created expressly for adjudication, and are statutorily separated from their prosecutorial analogues, more likely than not have developed regulations better geared to the constituencies that appear before them, than the lowest common denominator obtainable from any uniform code.

We therefore respectfully urge that the tentative recommendation be limited to the APA-designated agencies presently listed in the Government Code, or that the Commission consider an alternative approach suggested in prior years, which would permit variations in procedural requirements, so long as fundamental due process concerns are assured.

Thank you again for this opportunity to share our views on the Commission's administrative adjudication project.

Yours very truly,

A handwritten signature in cursive script, reading "Elaine W. Donaldson".

Elaine W. Donaldson,
Chairman California OSHA Appeals Board