Study N-100 January 24, 1994

Memorandum 94-13

Administrative Adjudication: Comments on Tentative Recommendation (Sections 612.120-641.110)

The Commission began its review of comments received on the tentative recommendation on administrative adjudication in September 1993. However, the review of comments was interrupted by the priority task of reporting to the Legislature on SCA 3 (Lockyer), relating to trial court unification. The Commission has delivered its report and is now in a position to continue its review of comments on the administrative adjudication tentative recommendation.

Because of our suspension of work on this subject, we have given interested persons previously unable to comment additional time to comment. The informal extension of time is to January 31, 1994. We have received eight new letters not previously reproduced for the Commission, and anticipate more before the January 31 deadline.

We will reproduce the new letters, as well as additional copies of all previously reproduced correspondence, after January 31. Meanwhile copies of previously reproduced correspondence can be reviewed by examination of Memorandum 93-45 and its first supplement.

When the Commission last considered this matter in September, the Commission reviewed comments on the preliminary part of the tentative recommendation and on the draft statute through Section 610.940. This memorandum picks up where the Commission's review was interrupted, analyzing comments made concerning Sections 612.120 to 641.110 of the draft. The analysis is largely reproduced from former Memorandum 93-47. References in this memorandum to statutes are to the Government Code unless otherwise noted. References to Exhibit pages are to the previously reproduced correspondence attached to Memorandum 93-45 and its first supplement.

For the next Commission meeting we will prepare an analysis of comments on the next sequence of sections.

§ 612.120. Application of division to local agencies

The California School Employees Association would like to see the statute applied to local agencies as well as state agencies. Exhibit pp. 78-79. We have not attempted this because the difficulties we would encounter in trying to make one size fit all would become insurmountable due to the very different circumstances of local agency adjudication.

§ 612.150. Contrary express statute controls

The State Water Resources Control Board agrees with the concept that special statutory provisions should prevail over the general provisions of the administrative procedure act. Exhibit p. 81. However, they believe the emphasis of the Commission should not be to eliminate nonconforming statutes. "Extra emphasis should be given to allowing agencies to identify special and unique statutes which need to remain on the books. Otherwise, more rulemaking will be necessary to reenact a provision which has been voided by statute."

We have tried to address this problem by writing to agencies requesting them to identify statutes that should remain in place. We plan to write them again with a listing of proposed repeals when we have completed our search.

SWRCB identifies several specific provisions applicable to it that should be retained. Exhibit pp. 81-82. The staff will review those provisions and communicate further with SWRCB if we come to a different conclusion.

The State Personnel Board points out that under this provision a number of statutes applicable to it would remain intact notwithstanding contrary provisions in the administrative procedure act. Exhibit p. 109. The staff is reviewing the provisions identified by SPB.

The Department of Social Services approves this section, pointing out that it resolves an existing problem in the law and prevents important statutes from being inadvertently repealed by implication. Exhibit p. 134.

The California Energy Commission notes that the section preserves a contrary statute "expressly applicable to a particular agency". Exhibit pp. 122-123. Some statutes, such as the California Environmental Quality Act, are generally applicable to state agencies. Is it intended that the general statutes be preserved as well? The Commission has adopted the approach that general statutes such as this will be reviewed and either specifically conformed to the APA or specifically exempted. However, to the extent we miss one, what is the rule? The staff would

preserve the special rules of the general statute unless the special rules of the general statute have been specifically examined and superseded.

§ 612.160. Suspension of statute

This section would allow the Governor to suspend an APA provision if necessary to avoid loss of federal funds or services. The State Water Resources Control Board asks how a delay in the receipt of funds or services would be handled. Exhibit p. 82. The staff would include in this section delay as a ground for suspension of an APA provision.

The Department of Social Services suggests that the Secretary of the agency affected, rather than the Governor, suspend the APA when faced with a potential loss of federal funds. "This will avoid the problem of having the director of a department make this decision by removing it to a cabinet level decision, but will not overburden an already overburdened Governor." Exhibit p. 135. The staff is not concerned about this problem. As a practical matter, the Governor will not initiate this type of action but will respond to advice from the Governor's cabinet level appointees.

§ 613.110. Voting by agency member

This section allows voting by mail or other means, but apparently the State Water Board would prefer to retain its in person voting requirement. Exhibit p. 82. The staff has no problem leaving that special statutory requirement in place. It would override this section. It might be useful to refer to it in the Comment.

§ 613.120. Oaths, affirmations, and certification of official acts

Robert E. Hughes of Long Beach finds this section objectionable because it gives to people who may not be "sworn" and even perhaps newly hired clerical staff wide authority to administer oaths and certify acts. Exhibit p. 77. This continues an existing provision of the Administrative Procedure Act, and the staff has not heard of any abuses or other problems with it.

§ 613.210. Service

The Department of Insurance notes that this section refers to service on a party's attorney "or authorized representative", and suggests that the term be defined. Exhibit p. 94. The term is defined in Section 613.310 et seq. We would add a reference to these provisions in the Comment.

The Department of Social Services is concerned that this section eliminates the ability of an agency to effectuate service by registered mail. Exhibit p. 135. The staff does not understand this concern, since Section 613.220 makes clear that service by mail includes registered mail.

§ 613.220. Mail or other delivery

The Department of Health Services suggests that faxed or electronic service or notice be followed up with hard copy. Exhibit p. 14. The staff agrees that this is sound practice. However, the statute should make clear that the electronic service or notice is *the* service or notice and failure of a person to receive the hard copy does not invalidate the service or notice.

§ 613.230. Extension of time

The Department of Health Services points out that the time extension for mailed notice should not apply to faxed notice if receipt of a complete and legible copy is confirmed telephonically. Exhibit p. 14. The staff would make this revision.

The Unemployment Insurance Appeals Board points out that the extension of time for mailed notice would cause problems in complying with federal time mandates. Exhibit p. 36. The staff would revise the section to make clear that it is only the times provided in this statute that are extended by five days. If an agency has adopted its own time periods by regulation or if a special statute is applicable to it, the agency may specify whether the times are to be extended for mailed notices.

The State Board of Control and the State Water Resources Control Board have concerns similar to that of UIAB, relating to processing claims and acting in urgency situations. Exhibit pp. 46, 82. The staff would handle this concern the same way--by making clear that the five day extension is a rule of construction applicable to the time provisions of this division and not to other statutes or regulations.

§ 613.310. Self representation

The Department of Health Services notes that it would be useful to clear up the issue of *in pro per* representation in the case of a non-natural person. Exhibit p. 14. The Commission has considered this matter. The Comment states that "In the case of a party that is an entity, the entity may select any of its members to

represent it, and is bound by the acts of its authorized representative." Perhaps this should go in statute text rather than Comment.

§ 613.320. Representation by attorney

The State Water Resources Control Board believes the agency should be able to regulate representation by an attorney. Specifically, it should be able to preclude an attorney from practice before the agency in appropriate cases, such as intentional misrepresentations to the agency. Exhibit p. 82. The Commission has considered this matter and concluded that disciplinary regulation of this sort is the province of the State Bar and not of administrative agencies; as long as the attorney is authorized to practice law, that should include agency practice.

§ 614.110. Conversion authorized

The Department of Insurance is concerned that the conversion provisions are predicated on absence of "substantial prejudice" to a party, and the definition of substantial prejudice is left to the courts. Exhibit p. 94. "Once the courts become involved, the administrative process grinds to a halt (unless the court would be reviewing the proceeding for prejudice after it was concluded)." In fact, they answer their own concern, since court involvement would only occur later, at least under the judicial review provisions presently being considered by the Commission. This would be an argument for combining adjudication and judicial review in one package, as initially determined by the Commission.

The Unemployment Insurance Appeals Board says that the conversion provisions have no application to it, but it is unclear whether the agency should just ignore them or what. Exhibit p. 37. The provisions are not intended as mandatory, and if they are irrelevant they should be ignored. The staff will add explanatory language to this effect in the Comment.

§ 614.120. Presiding officer

The State Water Resources Control Board points out that it may be more appropriate for the agency head than the presiding officer to obtain a successor presiding officer for a converted proceeding. Exhibit p. 83. This is a good point in the staff's opinion, and we would make the change.

§ 614.150. Agency regulations

The Department of Insurance indicates that adoption of regulations governing conversion will be difficult since a determination whether a person is

prejudiced is made on a case by case basis. Exhibit p. 94. "Nevertheless, regulations may at least provide some guidance as to when conversion is appropriate." The staff agrees with these observations, and can suggest no improvements in this section.

§ 641.110. When adjudicative proceeding required

Section 641.110 is a critical provision defining the scope of the administrative adjudication statute—it applies to agency decision "for which a hearing or other adjudicative proceeding is required by the federal or state constitution or by statute." At the September 1993 meeting the Commission reviewed this provision and decided that the statute should be limited to on-the-record hearings. In addition, the Commission will seek to the extent possible to specify in individual statutes providing hearings which ones are required to be conducted under the Administrative Procedure Act.

Professor Asimow offers the following redraft of the provision and Comment.

> **(a) An agency shall conduct a proceeding under this part as the process for formulating and issuing a decision where the federal or state 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.**
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> (b) Nothing in this section precludes an agency from formulating and issuing a decision by settlement, pursuant to an agreement of the parties, without conducting a proceeding under this part.
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> (c) Nothing in this section limits the authority of an agency to provide any appropriate procedure for a decision that is not required to be conducted under this part.
>
> (d) Nothing in this section requires a proceeding under this part for informal factfinding or informal investigatory hearing.
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> **Comment.** Section 641.110(a) states the general principle that an agency must conduct an appropriate adjudicative proceeding before issuing a decision, where a statute or the due process clause of the federal or state constitutions requires an on-the-record hearing. An "on-the-record hearing" means a procedure in which a person has an opportunity to offer evidence and a trier of fact must make a decision based exclusively on evidence in the record and on matters officially noticed. See Section 649.120(c).
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> The cases to which Section 641.110 applies are the same as covered by the existing provision for administrative mandamus under Code of Civil Procedure Section 1094.5(a). That section applies only where an agency has issued a final order "as the result

of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer." Numerous cases have applied Section 1094.5(a) broadly to administrative proceedings in which a statute requires an "administrative appeal" or some other functional equivalent of an on-the-record hearing. See, e.g., Eureka Teachers Ass'n v. Bd. of Educ., 199 Cal. App. 3d 353, 244 Cal. Rptr. 240 (1988) (teacher's right to appeal a grade change was a right to hearing—§ 1094.5 applies); Chavez v. Civil Serv. Comm'n, 86 Cal. App. 3d 324, 150 Cal. Rptr. 197 (right of "appeal" means required hearing—§ 1094.5 available).

In many cases, statutes or the constitution call for administrative proceedings that do not rise to the level of an on-the-record hearing as defined in this section. For example, the constitution or a statute might require only an informal consultation or a purely written procedure or an opportunity for the general public to make statements. In some cases, the agency has discretion to provide or not provide the procedure. Section 641.110(a) does not apply in such cases. See Goss v. Lopez, 419 U.S. 565 (1975) (informal consultation between student and disciplinarian before brief suspension from school); Hewitt v. Helms, 459 U.S. 460 (1983) (informal nonadversary review of decision to place prisoner in administrative segregation—prisoner has right to file written statement); Skelly v. State Personnel Bd., 15 Cal. 3d 194, 124 Cal. Rptr. 14 (1975) (informal opportunity for employee to respond to charges of misconduct before being removed from government job); Wasko v. Dep't of Corrections, 211 Cal. App. 3d 996, 1001-02, 259 Cal. Rptr. 764 (1989) (prisoner's right to appeal decision does not require a hearing—§ 1094.5 inapplicable); Marina County Water Dist. v. State Water Res. Control Bd., 163 Cal. App. 3d 132, 209 Cal. Rptr. 212 (1984) (hearing discretionary, not mandatory—§ 1094.5 inapplicable).

This section does not specify what type of administrative proceeding should be conducted. If an adjudicative proceeding is required by this section, the proceeding may be a formal hearing, a conference hearing, or an emergency decision, in accordance with other provisions of this part.

This section applies only to proceedings for issuing a "decision." The word "decision" is defined in Section 610.310(a) as an agency action of specific application that determines a legal right, duty, privilege, immunity or other legal interest of a particular person. Therefore this section does not apply to agency actions that do not determine a person's legal interests nor to rulemaking which is agency action of general applicability. In

addition, no adjudicative proceeding is required where a case is settled pursuant to Section 646.210.

Under this part, the formal hearing procedure is standard unless circumstances permit the conference hearing or emergency decision. The formal hearing is analogous to the "adjudicatory hearing" under the former Administrative Procedure Act. Former Section 11500(f). The other procedures are new.

This section does not preclude the waiver of any procedure, or the settlement of any case without use of all available proceedings, under the general waiver and settlement provisions of Sections 612.170 (waiver of provisions) and 646.210 (settlement). However, a person who requests agency action without expressly requesting the agency to conduct appropriate proceedings will not be regarded, on that account, as having waived the appropriate procedures; see Section 642.220 and Comment (application for decision).

The statute is not intended to apply where agency regulations, rather than a statute or the constitution, calls for a hearing. Agencies should be encouraged to provide procedural protections by regulation even though not required to do so by statute or the constitution. Causing the Act to apply in such situations might discourage agencies from adopting such regulations. However, an agency might elect to have the hearing governed by this part. See Section 612.140 (election to apply division).

Respectfully submitted,

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Executive Secretary