Study N-100 September 14, 1994

Memorandum 94-45

Administrative Adjudication: Comments on Revised Tentative Recommendation

INTRODUCTION

The Commission circulated its revised tentative recommendation on administrative adjudication for comment over the summer. This memorandum analyzes the comments we have received. Copies of the comments are attached as an Exhibit:

Commenter	**Exhibit Pages**
Professor Gregory L. Ogden	1-5
Agricultural Labor Relations Board	6-8
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We will supplement this memorandum with any late-arriving comments.

This memorandum analyzes the comments we have received. The staff intends to raise only the bulleted [•] matters at the meeting. If a commissioner or interested person believes the analysis of an unbulleted matter is inadequate, that should be raised at the meeting.

This memorandum has the following structure:

GENERAL COMMENTS ON PROPOSED LAW

• Support

Prof. Ogden strongly supports the tentative recommendation. Exhibit p. 1. He believes the broad purposes of the revision — to promote uniformity, fairness, and accessibility, and to modernize and add flexibility to administrative adjudication procedures — are important goals that the proposal helps achieve.

The **California Energy Commission** approves the tentative recommendation, concluding that "the draft succeeds in providing both (1) appropriate minimum standards of due process and public openness that should be applicable to all agency adjudications and (2) flexibility for agencies to develop or continue to use special hearing procedures that work in a wide variety of situations." Exhibit p. 33. CEC also believes the burden of adopting implementing regulations under the proposal will be minimal.

• Opposition

The **Agricultural Labor Relations Board** recognizes that the tentative recommendation provides the special hearing procedure option for agencies with unique needs such as ALRB, but does not believe that option is satisfactory because the special hearing procedure requirements conflict with ALRB needs in several respects. ALRB also has a broader concern that the elaboration of special hearing procedure criteria will lead to disputes over whether or not a particular agency that chooses to adopt a special hearing procedure has met the criteria. "Since we believe the Board's procedures satisfy the due process concerns underlying the Commission's Tentative Recommendation, the result of the Board's inclusion will only serve to create unnecessary delay and expense." Exhibit p. 6. ALRB renews its request for exemption from the proposed APA.

The **State Board of Equalization** is opposed to the proposal. The board believes that the current system is fundamentally sound and that the wholesale revision of the California administrative adjudication system "meets a need that does not exist. Further, as pointed out by the Attorney General, while change

may be necessary in specific areas, the creation of a whole new system would introduce legal uncertainties into the system which would take years to resolve through the litigation process." Exhibit p. 9.

The **Attorney General** believes that the revised tentative recommendation is an improvement over previous drafts. However, his basic concern remains. "I still feel that the recommendation will be costly to implement, and that the benefits which would justify those costs have yet to be identified." Exhibit p. 12. He notes that the special hearing option will help reduce costs for some agencies, but will not eliminate them; it will also make uniformity of procedure illusory. He sees added complexity and cost in the proposal, both for agencies and practitioners. "I therefore continue to believe that the need for a broad-based revision of California's administrative hearing law has not been demonstrated." Exhibit p. 13.

The **Public Employment Relations Board** likewise is opposed to the proposal. "We see this as an effort to try to create a limited uniformity among agency practices solely for the sake of having uniformity when there is no demonstrated problem in the present diversity." Exhibit p. 14. PERB would have to go through a lengthy process that in the end would leave in place a system that resembles very much the system already in effect. PERB renews its request that it be excluded from any proposed revision of the APA.

The **Occupational Safety and Health Appeals Board** recognizes the effort made in the draft to accommodate operations such as theirs through the special hearing procedure. OSHAB points out, however, that their existing procedures work well, afford due process, and are understood and accepted by all concerned. OSHAB details the time and expense necessary to adopt a special hearing procedure that would be essentially identical with its existing procedure. The implementation would involve OSHAB "in a time-consuming, expensive and unnecessary endeavor at a time when it can ill afford to expend its limited resources on projects bearing little relationship to its primary mission of providing fair and timely hearings." Exhibit p. 20. OSHAB agrees with the Attorney General that "the Commission has not carried its burden of demonstrating that a massive expansion and revision of California's APA is warranted in view of the costs involved. Certainly the cost to the Appeals Board, both in terms of actual expenditures and lost opportunities, far outweighs the small, if negligible, benefits which will accrue to our agency and the parties who appear before it." Exhibit p. 23.

The **California Trucking Association** objects to balancing constitutionally protected rights of citizens against imposition of costs on an agency, and believes the proposed law erodes constitutionally guaranteed protections of procedural and substantive due process. Exhibit pp. 26-32.

The legal office of the **State Teachers' Retirement System** believes the concept of the draft is seriously flawed. The reasons include "the impossibility of applying one act to all state agencies, the costs of changing the administrative practices of the various agencies, and the increased complexity of the proposed Act." Exhibit p. 34.

The **State Personnel Board** believes the proposed law will not function within its adjudicatory and hearing process, and that application of the provisions to SPB hearings would not achieve any of the objectives of the proposal. After detailing the uniqueness of the parties and proceedings before it, the accessibility of existing statutes, the fairness of its procedures, and the comprehensive coverage of supervening statutes, SPB concludes that, "application of the proposed revisions to the SPB adjudicatory process would conflict with existing statutes. It would further result in unnecessary duplication of required procedures as well as confusion over which laws apply to SPB hearings." Exhibit p. 37. SPB requests an exemption from the proposed statute.

The **California Unemployment Insurance Appeals Board** sees no substantial benefit in the proposed revision. It would adopt a special hearing procedure under the proposed law, but would be concerned that the special hearing procedure requirements conflict with federal mandates. Moreover:

> To the extent that other agencies also choose the special hearing procedure, the net result will [be] a continuation of a variety of different procedures rather than uniformity. However, in order to maintain this status quo, each agency will be required to expend precious resources reissuing regulations and no doubt adding to them. In addition, there will be litigation concerning whether an agency's special hearing procedure comports with the requirements set forth in sec. 633.030.
> Exhibit p. 39.

• Suggested Alternate Approaches

The Attorney General continues to suggest that the Commission focus on **remedying specific problems** in administrative procedure law, rather than to

attempt a comprehensive revision of the law. Exhibit pp. 11-13. This approach is detailed in his prior communication to the Commission.

The Association of California State Attorneys and Administrative Law Judges proposes that the **new APA provide for only two types of hearings — a formal hearing and an informal hearing.** "We recommend this not only for the conformity and consistency of process, but also to meet the express needs of the Commission to develop a user friendly hearing process." Exhibit p. 15. Under this proposal, the basic formal hearing procedure would be applicable to all agencies, except that some provisions could be modified to suit the needs of the particular agency, as detailed in the ACSA letter.

> If ACSA's recommendations are adopted by the CLRC, the entire formal hearing process would be outlined for practitioners and agencies as well. However, agencies could, by regulation, specify procedures unique to the respective agency and still retain consistency of the formal hearing procedure generally applicable to all administrative agencies.
> Exhibit p. 18.

The staff notes that we've been down that path before and abandoned it in favor of an invariable statute with the opportunity for an agency to adopt its own special hearing procedure.

OSHAB sees value in providing **the draft statute to govern hearings conducted under the APA but only as a model for agencies to adopt, in whole or in part, as the need arises by agencies whose hearings are not under the APA**. "That will allow agency procedures to be shaped, as they should, by the considerations which emanate from within the agency and its constituencies, while ensuring, at the same time, that agencies have the benefit of a current and thoughtful model in selecting new procedures." Exhibit p. 23. This is also the suggestion of the Unemployment Insurance Appeals Board — that "the current APA can be improved for those agencies subject to it and that non-APA agencies may wish to use it as a model." Exhibit p. 40.

The California Trucking Association "asserts that **all state agencies must be subject to the requirements of one Administrative Procedures Act**". This is where the Commission started on this project before it concluded that it is impractical to impose one procedure on all state agency hearings.

It is worthwhile at this point in the project to step back and review where we have come from and evaluate the current situation before deciding where we should be going. The staff's perspective is set out below.

A Little History

This project was assigned to the Commission by the Legislature as a result of two events. The Commission requested authority to study administrative procedure after the suggestion of the Los Angeles County Bar Association that an effort should be made to provide neutral (non-agency) hearing officers. Simultaneously former Assemblyman (now Mayor) Harris sponsored a resolution to have the Commission review administrative procedure with a view to modernization.

The first major segment of the study (1990) involved consideration of expansion of the central panel of hearing officers. The Commission concluded that this would be ill-advised, and proceeded to the second major segment of the study (1991-1993), development of a modern administrative procedure act.

As a key feature of a modern APA, the Commission decided an effort should be made to draft a single procedural statute to replace the many different administrative procedures currently found among state agencies. A uniform procedure is a characteristic of federal administrative procedure and of the administrative procedure of every state but California. A powerful public policy argument can be made for it.

In the course of developing a single governing statute, the Commission found substantial numbers of provisions that, while they might work well for many agencies, would not work for others. These included various matters, such as times during which actions needed to be taken, discovery procedures, prehearing activities, administrative review processes, and the like. It was not that a single procedure could not be made to work in most instances, it was just that the existing procedures, and existing personnel and budget allocations, had evolved and were entrenched to the point that it would be a major disruption to impose the changes.

So the Commission built in the opportunity for agencies to provide special rules as to many matters. In fact, so many matters became eligible for special treatment that only a few non-variable provisions — eight to be precise —

remained: (1) impartiality of presiding officer; (2) separation of functions; (3) limitation of ex parte communications; (4) open hearings; (5) language assistance; (6) right to present and rebut evidence; (7) decision based on record stating factual and legal basis; (8) precedent decision requirement.

Comment on this scheme convinced the Commission that there were substantial problems. Most major agency hearings would be governed by two or three bodies of law — the general administrative procedure act, special statutes applicable to the agency, and variant regulations adopted by the agency. Rather than simplifying and unifying administrative procedure, the scheme would make it more diverse and complex.

Concluding it would not be possible to apply one procedure to all agencies, even with the option for variation, the Commission reversed field, and during 1994 prepared a draft that would allow agencies not now governed by the APA to continue to provide their own special hearing procedures, subject only to the limitations of the eight previously identified fundamental provisions. Comment on this approach, which we have before us, indicates a fair amount of agency opposition even to that sort of minimal structure.

A Little Politics

The basis of agency opposition is that the agency's resources are limited, there will be substantial transitional costs in adopting a special hearing procedure, the special hearing procedure will be not much different from what they have right now, and it's just not worth it. We can argue with the agencies about the merits of this response, and point out the substantial long term savings that will result from a modern hearing procedure. However, our arguments have not, and will not, convince many of them.

But which arguments will convince the Legislature? And the Governor?

Between the time the Commission embarked on this project to modernize the Administrative Procedure Act and now, a major change in circumstances occurred — the economy went into recession, and the state budget went with it. The impact on state government has been severe, and agency budgets have been slashed by over 1/3 through the recession years. Personnel and operating expense reductions, coupled with increased hearing loads (some economy-related, some demography-related), have put state agency hearing operations under intense pressure.

Whereas a powerful public policy argument can be made for a modern administrative procedure act, an equally or more powerful public policy argument can be made against changes that could increase agency time or costs.

The Commission has an excellent record of enactment in the Legislature — exceeding 96%. But this record is not based on power politics — the Commission and staff cannot even advocate enactment of Commission recommendations. The record is based on working with the affected parties to address their concerns and obtain a consensus for improvement of the law. In this case we have not yet reached a consensus with a number of agencies.

The staff believes that an agency's assessment that the proposed law will impose a substantial burden on it is likely to prevail over the Commission's argument that it will not, or that the burden is worth the cost. To date we have seen very little private sector support for the revision and we know there will be strong opposition from some agencies.

The decrease in number of agency comments on the revised tentative recommendation may indicate that many public agencies are satisfied that the current draft is an improvement in the law and will not present problems for them. The California Energy Commission has taken this position, but most other agencies are relatively silent so far and are likely to remain so in the legislative process.

This assessment of the political prospects for the recommendation in its current form is based on the staff's experience with the legislative process, but we could be wrong. There will be a forum on the proposal at the State Bar Annual Meeting on September 24, moderated by Assemblywoman Bowen. Senator Campbell's office is investigating the possibility of interim hearings on the proposal. These events may provide an opportunity to get a realistic assessment of the prospects in the Legislature.

However, we cannot overlook the possibility of a gubernatorial veto, if the major executive branch agencies take an opposed position. On a technical matter such as administrative procedure that involves costs, the Governor will seek and most likely act on the advice of the heads of the major departments.

What Are the Options?

The Commission needs to consider whether to pursue this recommendation in its current form, or to follow some other approach. The staff's concern is that if we push the recommendation in its current form, the opposition of the agencies

that remain unhappy with it may kill the whole proposal, even for those agencies and private sector representatives that may welcome the reforms and believe the proposal would be a significant improvement in the law. On the other hand, if we can take care of the concerns of the agencies that remain opposed, we will have a useful product for the rest of the state that is enactable.

Let us run through some of the obvious options:

(1) **Proceed with the current approach.** The staff's reading of the politics of this may be wrong. Feedback from the State Bar Annual Meeting and interim hearings may demonstrate the feasibility of obtaining enactment of the current approach.

(2) **Eliminate necessity for regulation adopting special hearing procedure.** One of the main objections to the current draft is the time and expense required to adopt a regulation that provides a special hearing procedure that is the same as the agency's existing procedure. This could be addressed directly by eliminating the requirement that an agency adopt a special hearing procedure by regulation. The special hearing procedure would simply be defined as the applicable statutes and regulations that govern a particular proceeding.

The staff notes that, while this would eliminate some of the concern with the current proposal, it would not necessarily eliminate all concern. The special hearing procedure is subject to eight fundamental due process and public policy elements identified by the Commission. Some agencies have pointed to specific problems they would have with one or more of those elements. We would need to examine the specific problems to see whether special circumstances warranted and exception.

(3) **Liberalize exemptions from the statute.** The argument here is that the special hearing procedure may create problems for some agencies without adding any substantial benefits. The major agencies that would adopt the special hearing procedure probably already satisfy most if not all of the special hearing procedure requirements. It would be simpler just to allow those agencies to go their own way and not try to rope them minimally into the APA framework. We would eliminate their opposition and achieve the real reforms we seek simply by removing those agencies from the hearing provisions of the APA.

To implement this option we would need to review the statutes and regulations of the agencies not now subject to the APA that do not wish to be covered by it. Any agency that has a clearly articulated procedure that satisfies basic fairness criteria would be exempted.

(4) **Eliminate special hearing procedure; statute would apply only to agencies currently subject to APA and agencies that elect to be governed by it.** The comprehensive revision of the APA would be maintained so it could be applied to agencies that elect to go under it. Agencies could also be allowed to adopt relevant portions of the general procedure statute for their hearings, as may be appropriate.

(5) **Limit the revision to agencies currently subject to APA.** The theory here is that it is worth modernizing the statute even for a limited number of cases. In this situation we might not want to do a comprehensive revision of the existing statute — why shake up terminology, procedures, etc., when we are not trying to expand the scope of the statute? We could implement the Attorney General's suggestion to leave the structure of the existing APA as is and make improvements in it. On the other hand, comprehensive revision of the existing APA would provide a sound structure for future development of the law, and most of the agencies under it appear satisfied with the current draft.

To convert the comprehensive revision proposal into a more narrow revision of the APA would take a fair amount of staff time, but could be done without intense Commission involvement since the policy decisions have already been made. We can preserve most of the important changes proposed by the Commission in the context of such a revision.

(6) **Do limited revision of existing APA but apply major public policy changes to all agencies.** The concept here is that the existing APA could be modernized in place, without substantial disruption of its present structure, as suggested by the Attorney General. The major public policy changes, such as precedent decision requirements, separation of functions, and ex parte communications limitations, could be applied to all agencies. This would be a manageable endeavor.

COMMENTS ON SPECIFIC PROVISIONS

§ 612.110. Application of division to state

Prof. Ogden supports the policy of limiting exemptions from the APA. Exhibit pp. 1-2. He questions the exemptions for the Public Utilities Commission and the Department of Corrections, noting that both could use special hearing procedures, but concludes that the exemptions may be supportable. **The staff recommends no change on this matter.**

• § 612.140. Contrary express statute controls

Prof. Ogden notes that federal mandates on state agencies may include procedural requirements. An agency may be able to conform to such requirements by adopting a special hearing procedure that follows the federally-mandated requirements. Exhibit pp. 2-3. This problem is also noted by the Unemployment Insurance Appeals Board in connection with the contents of the decision. See discussion under Section 649.120, below.

The staff would address this issue by revising Section 612.140 to read, "Notwithstanding any other provision of this division, a state statute or a federal statute or regulation applicable to a particular agency or decision prevails over a contrary provision of this division." The staff also notes that if a conflict arises that could cause the loss or delay of federal funds, the Governor may suspend the conflicting state statute. Section 612.150.

§ 612.160. Waiver of provisions

Prof. Ogden suggests that the Comment to Section 612.160 make clear that, while a written waiver is preferable, this may not be relevant to a procedural waiver that results from a default or failure to act timely. Exhibit p. 3. This may be a useful clarification, and **the staff would revise the Comment** to read:

> Although a right may be waived by inaction, a written waiver is ordinarily preferable. A waiver by inaction may be the procedural result of a failure to act. See, e.g., Sections 642.250(c)(3) (failure to object in response to form of notice of commencement waives further objections to form); 648.130 (failure to respond or appear a default that waives right to hearing).

§ 613.110. Voting by agency member

Section 613.110 permits voting by mail. Prof. Ogden raises the issue whether the open meeting law would preclude voting by mail or otherwise when a agency member has not deliberated on a matter before the agency. Exhibit p. 3. The staff has found no statutory or case law deliberation requirement. **We would not address this matter in the statute.**

• § 631.010. Application to constitutionally and statutorily required hearings

The proposed law does not clearly resolve the question whether the APA applies when a federal statute requires a state agency to conduct a hearing. The staff believes that it makes sense to apply the standard statutory procedures in

such a situation. **We would revise Section 631.010 to apply where a hearing is required "under the federal or state constitution or a federal or state statute".**

• § 631.040. When adjudicative proceeding required to be conducted by administrative law judge employed by OAH

The legal office of the State Teachers' Retirement System opposes requiring use of OAH ALJs for an informal hearing procedure. Exhibit p. 35. Since the procedure is intended as an informal process for cases where there is no disputed issue of fact or a small monetary amount, it should be unnecessary to go through OAH — they urge that an agency be allowed the option of conducting its own informal hearings.

The staff believes that the single greatest assurance of fairness in a hearing is the neutrality of the hearing officer, which is ensured in the case of OAH-conducted hearings but suspect in the case of a hearing conducted by an agency employee. The staff anticipates that the informal hearing procedure will be quite popular among agencies. If the informal hearing procedure is left to agency rather than OAH control, there will be a substantial erosion of the neutrality found in existing law. While the Commission has decided that it cannot expand the role of the central panel of hearing officers, the staff believes it would be poor public policy to remove existing hearings from OAH control. **We therefore disagree with the proposal to allow agency personnel to conduct an informal hearing procedure in a case otherwise subject to conduct by OAH.**

• § 632.010. Purpose of informal hearing procedure

The California Trucking Association objects to the informal hearing procedure. It would allow the presiding officer to limit witnesses, testimony, evidence, rebuttal, argument, and cross-examination, thereby stripping citizens of the rudiments of due process. Exhibit p. 31. **The staff notes that many proceedings are now conducted informally, and it would be a practical impossibility to require them all to be conducted by formal proceedings.**

§ 632.020. When informal hearing may be used

• ACSA recommends deletion of the provision allowing an informal hearing on a disciplinary sanction against an employee that does not involve discharge, demotion, or suspension for more than 5 days. They note that changes currently taking place at the State Personnel Board are increasing its capacity to handle disciplinary cases. They state that "there is no need to reduce or diminish the due

process protections for employees being disciplined." Exhibit p. 19. **The staff notes that case law indicates there is not a due process problem for informal proceedings in cases that involve a sanction less than discharge, demotion, or suspension for more than 5 days.**

The Department of Conservation (Exhibit p. 25) wonders whether the specific listing of types of cases where an informal hearing procedure may be used limits the ability of an agency to select the informal hearing procedure in other cases. The staff notes that the specific listing is not intended to limit the general authority of the agency, the only limitation being due process of law. **The staff would add an additional clarifying sentence to the Comment**: "Thus, an agency by regulation may authorize use of the informal hearing procedure in a case where the amount in issue or sanction exceeds the amount provided in subdivision (b), so long as use of the informal hearing procedure would not contravene other statutes or due process of law."

• § 633.010. Special hearing procedure authorized

The California Trucking Association objects to the special hearing procedure. The tentative recommendation does not adequately justify the need for special procedures. Exhibit p. 31. **The staff would add to the discussion in the preliminary part of the tentative recommendation** specific examples of procedures that cannot be governed by the general provisions and that caused the Commission to propose the special hearing procedure option.

• § 633.040. Regulations governing special hearing procedure

The Occupation Safety and Health Appeals Board notes that Section 633.040(c) requires an agency to provide a copy of its special hearing procedure to the person to which the agency action is directed. This may be an unwarranted expense in cases where a party or the party's attorney regularly appears before the agency, and the agency might merely be required to make the pamphlet available. **The staff agrees, and will implement this change** by revising the provision to require that "an agency shall ~~provide~~ make available a copy of the special hearing procedure". This should also take care of the similar concern expressed by the Agricultural Labor Relations Board (Exhibit p. 8) and the Unemployment Insurance Appeals Board (Exhibit p. 40).

An agency's special hearing procedure may be somewhat sketchy, and may leave unanswered many questions. May an agency that proceeds under a special

hearing procedure issue a subpoena, for example, or may that only be done by an agency using the formal hearing procedure, which provides for subpoenas. There are many serious questions of this type confronting an agency that elects a special hearing procedure. The staff suggests that a court should be able to look to the formal hearing procedure for guidance in a case where an agency's special hearing procedure fails to answer a particular question. **We would add a provision along the following lines**:

> 633.010. (a) If an agency decision is required to be formulated and issued under this division, the agency may provide a special hearing procedure to govern the adjudicative proceeding, subject to the limitations in this chapter.
>
> (b) Part 4 (commencing with Section 641.110) does not apply to a special hearing procedure except to the extent provided in this chapter or in the special hearing procedure. Nothing in this section precludes a court from drawing upon a principle or procedure in Part 4 to resolve an issue in a proceeding governed by a special hearing procedure, to the extent the principle or procedure is consistent with the purposes of the special hearing procedure.

• § 634.010. Emergency decision

The California Trucking Association objects to extension of emergency decision authority to all agencies, absent substantiation that all agencies need it. Exhibit p. 31. **The staff would expand the preliminary part of the recommendation** by adding a reference to the discussion in the background study of the need for the emergency procedure.

§ 636.170. Cost of operation

AB 2980, which is pending before the Governor, would add the following language:

> The Department of General Services shall be reimbursed for the entire cost of conducting hearings for the State Personnel Board pursuant to Section 19852 by the state department or agency initiating the action that is the subject of the hearing. The Department of General Services may bill the appropriate state department or agency for these costs. For purposes of this subdivision, "action" includes adverse actions; rejection during probation; medical termination, demotion, or transfer; demotion or transfer for failure to meet requirements for continuing employment; and discrimination complaints.

If the bill is enacted, the staff will make an appropriate disposition of this language.

§ 636.210. Establishment and qualifications of panel

SB 1775, which is pending before the Governor, would delete the requirement of publication of any court decisions relevant to medical adjudications, and would extend the repeal date of this section to January 1, 1999. **If the bill is enacted, the staff will implement these changes.**

§ 642.260. Amended and supplemental pleadings

The Occupation Safety and Health Appeals Board is concerned that Section 642.260 may not permit amendment of pleadings after the case is submitted for decision, which existing law does permit. This section is intended to permit such amendments, although it doesn't state it explicitly. Since there is concern about the meaning of the provision, **the staff would clarify it by addition of express language** that "after commencement of the hearing or submission of the case for decision a party may amend or supplement a pleading in the discretion of the presiding officer".

Prof. Ogden believes this section should address the question of relation back of amendments — "This could be important in many agency enforcement actions." Exhibit p. 4. He suggests that Federal Rules of Civil Procedure 15(c) could provide a basis for a statute governing the matter.

Existing law is that an amendment that does not state a new cause of action relates back to the date of the filing of the original pleading, whereas if a new cause of action is stated, it dates only from the filing of the amendment. The staff does not think it is fruitful to attempt to codify the complexities of the doctrine of relation back in the context of administrative adjudication when it its not codified in California civil procedure generally. **However, it may be useful to note in the Comment that existing law incorporates the doctrine**:

> Section 642.260 supersedes former Sections 11507 and 11516. It is broadened to permit amendment of responses as well as notices of commencement of proceeding, but is narrowed so that an amendment is subject to the presiding officer's discretion after commencement of the hearing. *Cf.* Code Civ. Proc. § 464 (supplemental pleading alleges facts material to case occurring after former pleading). An amendment that does not state a new cause of action relates back to the date of the filing of the original pleading.

See discussion in California Administrative Hearing Practice § 3.71 (Cal. Cont. Ed. Bar 1984).

§ 642.330. Judicial review of denial of continuance

This provision, and a few others in the statute, make reference to different rules for named agencies. Prof. Ogden believes the statute should contain only general procedural rules. Exhibit p. 2. Special rules applicable to a particular agency should be located in the statutes relating to the agency. Thus, for example, the provision authorizing ex parte communications to the presiding officer in nonprosecutorial proceedings of the California Coastal Commission, San Francisco Bay Conservation and Development Commission, etc., should not appear in the Administrative Procedure Act but in the statutes relating to the named agencies.

The staff agrees with this observation in theory and will attempt to implement it to the extent practical. This we will do by moving provisions unique to a particular agency into conforming revisions relating to that agency.

However, some of the statutes creating exceptions for named agencies appear in elaborate context in the APA, and it may be unduly circuitous to reproduce that context elsewhere for the sole purpose of creating an exception to it. Also, for some agencies the APA may be the best single location to put a special provision applicable to all the agency's hearings.

• **§ 643.110. OAH administrative law judge as presiding officer**

ACSA suggests that all hearings be conducted by an administrative law judge, either from OAH or the agency conducting the hearing. Exhibit p. 17. **The staff does not believe such a change is politically feasible** — it would divest the agency head of control of agency proceedings, and it would impose substantial costs on agencies that use non-attorney hearing officers.

• **§ 643.210. Grounds for disqualification of presiding officer**

Prof. Ogden notes that subdivision (a) provides for disqualification for bias, prejudice, or interest, whereas judicial disqualification provisions in Code of Civil Procedure Section 170.1 are more detailed. He suggests that the guidance offered by the more detailed Code of Civil Procedure or comparable section would be useful; if we are relying on case law interpretation of the bias, prejudice, or interest standards, we should note the case law in the Comment.

The development of the standard in the statute was an evolutionary process. The existing APA disqualifies a judge who cannot by "fair and impartial". This was replaced with the more concrete "bias, prejudice, interest" standard drawn from the 1981 Model State APA. Incorporation of Code of Civil Procedure Section 170.1 would have the effect of adding, with some elaboration:

(1) Personal knowledge of disputed facts.
(2) Service as a lawyer in the proceeding.
(3) Financial interest.
(4) Relative of a party.
(5) Relative of a lawyer in the proceeding.
(6) Lack of impartiality.
(7) Physical impairment.

We have previously rejected this suggestion because many of these items have marginal relevance to administrative adjudication. Item (2) is eclipsed by the separation of functions provisions. Item (3) adds nothing. Item (6), as elaborated in Section 170.1, includes as a ground for disqualification the appearance of bias, which the Commission has rejected. On balance, **the staff does not see a significant advantage to picking up the Code of Civil Procedure detail here**.

§ 643.240. Provisions applicable to reviewing authority

ACSA notes that this section is redundant in light of Section 643.230(d). Exhibit p. 17. The staff believes ACSA misreads this provision, and **we would recast it for clarity:**

> The provisions of this article governing qualifications of the presiding officer also govern qualifications of the reviewing authority.

Parallel revisions should be made in Sections 643.330 (separation of functions), 643.470 (ex parte communications) and 643.130 (substitution of presiding officer).

A more straightforward approach, in the staff's opinion, would be simply to add a general section to the statute governing the reviewing authority: The provisions governing qualifications, separation of functions, ex parte communications, and substitution, of presiding officers also govern the reviewing authority. However, the Commission has previously rejected this drafting approach.

• § 643.310. Limitation on service as presiding officer

The California Trucking Association would not make an exception from separation of functions requirements for drivers license proceedings. CTA points out that government exists for the protection of the people; people do not exist for the convenience of government; citizens should not be denied their constitutional rights to substantive and procedural due process merely because it would cost too much to provide separation of functions in drivers license cases. Exhibit p. 29. **The staff believes this is a political issue, not a due process of law issue.**

CTA does not believe the command influence prohibition is meaningful (a person my not act as presiding officer who is subject to control of a prosecutor, advocate, etc.). They would oppose any conduct of a hearing by an agency employee — "An agency hearing officer will support the position of the agency if the hearing officer is instructed to and wishes to advance." Exhibit p. 29. Again, in a ideal world there would be absolute neutrality by requiring use of a non-agency a hearing officer. **But the staff believes this is a practical impossibility, absent much broader mobilization of the private sector on this issue**.

• § 643.410. Ex parte communications prohibited

The Unemployment Insurance Appeals Board notes that on occasion EDD, in addition to forwarding the record in the case to the presiding officer on appeal, will also provide supplemental information to the presiding officer. Normally the presiding officer will give the claimant or other party at the hearing a copy of the document and solicit comment. "We do not believe that activity of this kind should be prohibited as ex parte communication. We are not talking about advocacy outside the presence of parties." Exhibit p. 40. The proposed law treats information of this character not as an ex parte communication but as a supplement to the record, which may be a basis for a decision if all parties are given an opportunity to comment on it. Section 649.120 (form and contents of decision). **The staff would add a sentence to that effect to the Comment to Section 643.410.**

Under this section a party may not communicate to the presiding officer but the presiding officer may communicate to a party. The Commission solicited comments on whether the presiding officer should be precluded from communicating to a party. We received no comments on this point, which the staff takes to mean there are no objections to allowing communications from the

presiding officer to a party. This would change a provision of the existing APA, and **we will note the change in the Comment**.

§ 643.420. Permissible ex parte communications generally

Section 643.420 expressly permits ex parte communications that involve "a matter of procedure or practice that is not in controversy." ALRB is concerned that this may not allow their informal calendaring or status discussions by conference call, which are essential to their caseload management.

The Comment notes that this would allow discussions concerning the format of pleadings, number of copies required, or manner of service. **The staff would add to this listing, "calendaring or status discussions".**

• **§ 643.430. Permissible ex parte communications form agency personnel**

The Department of Conservation is concerned that the ex parte communications limitations may impair the hearing operations of a small agency. Subdivision (a) of Section 643.430 allows communications to the presiding officer by the agency counsel, but only if the counsel has not had a prosecutorial role and has not received ex parte communications; this may not work for a small agency, where the chief counsel must make prosecution decisions, may receive ex parte communications, and must also supervise the presiding officer. "While this proposal probably reflects the current state of the law on separation of powers, the courts have recognized administrative necessity in cases where separation is extremely difficult." Exhibit p. 24.

The staff notes that ex parte communications are prohibited only where they concern substantive issues in the proceeding; the ability of the chief counsel to supervise hearing staff is not affected. The department's problem really is more with Section 643.310 (limitations on service as presiding officer), which precludes service as presiding officer by a person who is subject to the authority of someone who has served as investigator, prosecutor, or advocate. **The Commission may wish to consider elimination of this "command influence" prohibition in reliance on the ex parte communications prohibition.**

Subdivision (c) of this section allows ex parte communications from agency personnel in limited circumstances in nonprosecutorial proceedings. Subdivision (c) of the preceding section allows ex parte communications from any person in nonprosecutorial proceedings generally. We solicited but received no comments

on this conflict. **The staff would delete the special provision of Section 643.430(c) in reliance on the general provision of Section 643.420(c).**

• § 645.210. Time and manner of discovery

The Department of Conservation is concerned about reduction of the time to respond to a discovery request from 30 to 20 days. "This Department has had to respond to voluminous discovery requests in the past, and telescoping down the discovery process may create a huge administrative burden." Exhibit p. 24. **The staff would change the 20-day requirement to 30 days**; the informal hearing procedure remains available for cases where expedited discovery is appropriate.

§ 645.420. Issuance of subpoena

SB 1775, which is pending before the Governor, would allow service of a subpoena by certified mail or by messenger. **If the bill is enacted, the staff will implement this change.**

The Department of Conservation recommends that there be a mechanism by which a *pro per* respondent may obtain issuance of a subpoena. Exhibit p. 24. **The staff agrees that this concept has been lost in the current draft, and would revise the provision to read**:

> Subpoenas and subpoenas duces tecum ~~may~~ shall be issued by the agency , or presiding officer at the request of a party , or by the attorney of record for a party, in accordance with Sections 1985 to 1985.4, inclusive, of the Code of Civil Procedure.

• § 647.010. Alternative dispute resolution

ACSA would delete alternative dispute resolution provisions in their entirety. "All hearings should be conducted or presided over by an administrative law judge." Exhibit p. 17. **The staff disagrees**; the whole point of mediation is to use a neutral person to facilitate communications between the parties in order to avoid the necessity for administrative adjudication proceedings.

§ 648.140. Open hearings

This section requires that a hearing be open to public observation, which as applied to a telephone hearing, means that the public may inspect the record of the hearing and be physically present where the presiding officer is conducting the hearing.

The Unemployment Insurance Appeals Board (Exhibit p. 40) wonders whether the right to inspect is meaningful for a member of the public located hundreds of miles away. Also, does a member of the public have the right to participate in a conference call? **The staff would add language to the Comment** emphasizing that the right to be present where a hearing is being conducted telephonically does not include the right to participate, and the right to inspect the record does not impose an duty on the agency independent of the public records act to provide a copy.

• ALRB points out the logistical problem of applying the right to be present rule to prehearing conferences which may be conducted in the presiding officer's cramped office. They also do not see the public policy achieved by allowing both inspection of the record *and* the right to be present at a telephonic prehearing conference. The staff does not believe the open hearing requirements were intended to apply to a prehearing conference. **We would make that clear** by adding to the statute a provision that the open hearing requirement "does not apply to a prehearing conference or settlement conference [, or proceedings for alternative dispute resolution]".

§ 648.230. Application of article

The application of language assistance requirements was revised by 1994 Cal. Stats. ch. 26 as follows:

> Agricultural Labor Relations Board
> State Department of Alcohol and Drug Abuse
> Athletic Commission
> California Unemployment Insurance Appeals Board
> Board of Prison Terms
> State Board of Barbering and Cosmetology
> State Department of Developmental Services
> Public Employment Relations Board
> Franchise Tax Board
> State Department of Health Services
> Department of Housing and Community Development
> Department of Industrial Relations
> State Department of Mental Health
> Department of Motor Vehicles
> Notary Public Section, Office of the Secretary of State
> Public Utilities Commission
> Office of Statewide Health Planning and Development
> State Department of Social Services
> Workers' Compensation Appeals Board

Department of the Youth Authority
Youthful Offender Parole Board
Bureau of Employment Agencies
~~Board of Barber Examiners~~
Department of Insurance
State Personnel Board
Board of Podiatric Medicine
Board of Psychology

We will revise this section accordingly.

• ACSA would apply the language assistance requirement to all state agencies. "There is no logical or legal basis for providing this assistance to some agencies and not to others." Exhibit p. 17. There may be no logical or legal basis, but there is a political basis, which relates to the cost of providing language assistance. **The staff is opposed to expanding this provision beyond existing law**, which represents a current legislative compromise.

• § 648.310. Burden of proof

Two comments are addressed to the provision requiring proof by clear and convincing evidence in license suspension or revocation cases. ACSA suggests that "the clear and convincing burden of proof may be too difficult to attain while ignoring the impact to the public. The burden of proof should be a policy decision which is developed either by the Legislature or by each department individually." Exhibit pp. 17-18. The California Trucking Association objects that the draft provides no justification of a greater burden other than an undefined potential severity of sanction. Exhibit p. 30

The staff believes the draft captures the general effect of existing case law. Moreover, the clear and convincing standard may have a due process basis in professional licensing cases. See, e.g., Ettinger v. Board of Medical Quality Assurance, 135 Cal. App. 3d 853, 185 Cal. Rptr. 601 (1982). **The staff would add a reference to the *Ettinger* case in the Comment to Section 648.310.**

§ 648.340. Affidavits

The California Trucking Association asks whether the 15 days requirement for service of notice of affidavit evidence is subject to 5 days extension in the case of mailed notice. Exhibit p. 30. It is, and the Comment so notes. **The staff believes no change is required in this section.**

• § 648.420. Discretion of presiding officer to exclude evidence

This section allows the presiding officer to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of confusing the issues. The California Trucking Association objects to discretion in the presiding officer, many of whom are not lawyers, to exclude evidence based on whim and caprice. "Such a provision would undermine the due process rights of citizens called to answer before an agency because they will not know that they have to make an offer of proof to protect the record." Exhibit p. 30.

The staff thinks CTA has a point. Existing law does allow the presiding officer to exclude irrelevant and unduly repetitious evidence, but this is under the Administrative Procedure Act in a hearing conducted by an ALJ from OAH. **The staff would add a provision that:** "The presiding officer shall not exclude evidence under this section, unless the presiding officer has informed the party offering the evidence that the party may make an offer of proof."

§ 648.460. Admissibility of scientific evidence

• The proposed law would allow scientific evidence if it satisfies either state or federal standards; this would have the effect of picking up the liberal *Daubert* standard of federal law. The California Trucking Association thinks it is premature to adopt *Daubert*, since the California Supreme Court is preparing to address this issue. Exhibit p. 30. The Commission's position has been that evidence in administrative proceedings should be liberally allowed, and tying it to federal or state court standards is adequate protection. **The staff would make no change in this provision.**

CTA also raises the issue whether the validity of a test procedure imposed by regulation may be challenged in the context of an adjudicative proceeding under it. The staff believes the question of the procedure for a challenge to the validity of a regulation should be reviewed in the context of the study of administrative rulemaking or judicial review, rather than in the study of administrative adjudication. **The staff would not address the issue here.**

§ 649.120. Form and contents of decision

This section requires the decision to identify specific evidence that supports a determination based substantially on credibility of a witness. The Unemployment Insurance Appeals Board notes that the Department of Labor, in

attempting to obtain uniformity among state decisions, recommends (but has not yet required) that credibility determinations not be discussed in the statement of facts. **The staff would address this problem with the revision proposed in Section 612.140, above.**

• § 649.210. Availability and scope of review

Subdivision (b) allows an agency to preclude or limit administrative review of a proposed decision. The California Trucking Association opposes this provision. "Any such procedure would remove the agency head(s) from the chain of responsibility for its employees' actions. Agency heads must be held to account for the actions of their employees." Exhibit p. 29. The staff notes that existing law varies from agency to agency, but does not generally preclude delegation or require an agency head to act on every case; a proposed decision may become the agency's decision by inaction of the agency head. The tentative recommendation would preserve any special statutes that require action by the agency head. **However, the staff would oppose addition of a general provision that would require an agency head to review a proposed decision on demand or to require administrative review of a decision adopted by the agency**; this would be impractical for many agencies.

• § 649.260. Communications between presiding officer and reviewing authority

The Commission solicited comments on two different approaches: (A) absolute prohibition of communications between the presiding officer and reviewing authority, and (B) prohibition subject to exceptions for procedural issues and communications in nonprosecutorial proceedings.

Prof. Ogden agrees (B) — a broader ban could create difficulties for an agency with a small staff in performing its duties. Exhibit p. 4. **The staff agrees with this analysis and would implement (B).**

§ 649.320. Designation of precedent decision

The Office of Administrative Law has provided us material indicating that under existing law precedent decisions are considered invalid "underground regulations". **The staff believes the commentary on precedent decisions should make clear that the proposed law reverses this rule**:

> Section 649.320 recognizes the need of agencies to be able to make law and policy through adjudication as well as through

rulemaking. It codifies the practice of a number of agencies to designate important decisions as precedential. See *also* Section 12935(h) (Fair Employment and Housing Commission); Unemp. Ins. Code § 409 (Unemployment Insurance Appeals Board). Section 649.320 is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision.

Under subdivision (b), this section applies notwithstanding ~~any contrary implication in~~ Section 11347.5 ("underground regulations"). See 1993 OAL Det. No. 1 (determination by Office of Administrative Law that agency designation of decision as precedential violates Government Code Section 11347.5 unless made pursuant to rulemaking procedures). Subdivision (b) is drawn from Government Code Section 19582.5 (express exemption of precedent decision designation by State Personnel Board from rulemaking procedures). Nonetheless, agencies are encouraged to express precedent decisions in the form of regulations, to the extent practicable.

We would also augment the preliminary part of the recommendation:

Agencies that routinely publish all their decisions include the Agricultural Labor Relations Board, Public Utilities Commission, Public Employment Relations Board, and Workers Compensation Appeals Board.

The Office of Administrative Law ~~takes the position that precedent decisions violate~~ has determined that an agency's designation of a decision as precedential violates Government Code Section 11347.5 unless the designation is made pursuant to rulemaking procedures, except where pursuant to Section 11346 the ~~decisions are~~ designation is expressly exempted by statute. 1993 OAL Det. No. 1. The Fair Employment and Housing Commission (Gov't Code § 12935(h)), the Unemployment Insurance Appeals Board (Unemp. Ins. Code § 409), and the State Personnel Board (Gov't Code § 19582.5) designate and publish precedent decisions pursuant to express ~~statutes~~ statutory authority, but only a designation by the State Personnel Board is expressly exempted by statute from rulemaking procedures. The Law Revision Commission is aware of at least one superior court ruling that precedent decisions designated by the Unemployment Insurance Appeals Board without compliance with rulemaking procedures are invalid. Bacon v. CUIAB, Butte County No. 114071 (June 29, 1994) (ruling on respondent's motion for summary judgment and summary adjudication). The proposed law expressly exempts agency designation of precedent decisions from rulemaking procedures .

§ 650. Judicial review

SB 1775, which is pending before the Governor, would require complete records to be prepared by OAH or the agency, and would require extension of the 30-day time period for preparation and delivery of the record for good cause. **If the bill is enacted, the staff will implement these changes.**

• **Code Civ. Proc. § 1094.5 (amended). Administrative mandamus**

The legal office of the State Teachers' Retirement System opposes the requirement that credibility determinations of the presiding officer be given great weight on judicial review. The administrative law judge is acting as an agent of STRS, which opposes "ascribing to the determination of the agent greater reliability or importance than the determination of the Board itself." Exhibit p. 35. STRS sees no reason to change present law in this way, which weakens the authority of the agency.

The staff notes that **the Commission has considered this matter on several occasions** and come to the conclusion that the proposal preserves an appropriate balance between the authority of the agency head and the mechanics of the fact-finding process.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

PEPPERDINE UNIVERSITY

SCHOOL OF LAW

August 31, 1994

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
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Re: Revised Tentative Recommendation governing Administrative Adjudication by State Agencies

Dear Nat:

Thank you for sending me a copy of the revised tentative recommendation. I have read the materials including the summary, background, and recommended statute. I will divide my comments into two categories, my response to the recommendation as a whole, and then comments on specific provisions.

I strongly support the revised tentative recommendation as a substantial improvement over the existing law governing administrative adjudication in California. The broad purposes of the revision, to promote greater uniformity and fairness in state agency hearing procedures, to increase public accessibility to those procedures, and to modernize and add greater flexibility to those procedures, are worthy goals in a democratic society in which government is accountable to the public. As one who has previously supported a uniform hearing procedure for all state agencies, I find the multiple hearing procedures recommendation to be a positive step forward in procedural flexibility. The one size fits all philosophy doesn't work very well when there are so many diverse agencies with different functions and missions. The multiple hearing approach achieves the goals of accessibility and fairness while also accommodating different agencies needs. I prefer this approach to the alternative of one hearing procedure with many agencies being exempted from the APA.

AGENCY EXEMPTIONS: I also strongly support the policy of very limited exemptions from the APA. Most state agencies can accommodate their own particular needs through the multiple hearing procedures approach. The few that can not should probably be exempt but exemption claims should be scrutinized very

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carefully. The exemptions for ALRB and PERB election certification provisions are sensible to me because those agencies follow procedures used in federal labor law and certification issues are resolved in fundamentally different ways from most other issues that arise in administrative hearings. Similarly, the exemptions for military department hearings and Commission on State Mandates proceedings is justified by the unique nature of the issues resolved by these agencies. The exemption for ABC Appeals Board decisions is also supportable because of the appellate functions performed by that agency and by the constitutional requirements for their procedures. The only two exemptions that I wonder about are the corrections agencies and the Public Utilities Commission. Both could utilize the special hearing procedure option by adopting special hearing regulations. However, I recognize that the P.U.C.'s constitutional status and its long history of specific hearing procedures under its enabling legislation may justify an exemption. Similarly, the corrections hearing process is substantially governed by due process case law that is adapted to the corrections environment. The corrections environment is sufficiently different from other adjudicatory processes that an exemption is probably supportable.

PROCEDURAL EXEMPTIONS: While narrower in effect than agency exemptions, procedural exemptions that permit a particular agency to depart from an otherwise mandatory APA procedure should be sparingly granted. These exemptions tend to balkanize otherwise uniform procedural requirements. I would prefer that most such exemptions either be contained in a special hearing regulation or, if the APA procedural requirements are fundamental, like the separation of functions section, that such an exemption be codified in a statute that is applicable to that specific agency itself. Thus, I support the concept of codifying an exemption as to separation of functions for the Energy Commission, but that exemption should be contained in the Public Resources Code legislation that governs that agency rather than in the APA. Thus, I support the commissions recommendation as to the Energy Commission. For the same reason, I do not support the current language of Section 643.330(a)(5) which adopts a broader advice exemption for investigators or advocates for five specified state agencies. Assuming that a broader advice exemption is justifiable for these agencies because of staff restrictions or the nature of their caseload, the exemptions should be added to the statute governing those agencies.

HEARINGS REQUIRED BY FEDERAL STATUTE: Federal statutory law may require state agency hearings in several contexts. I am familiar with two. First, State agencies that administer federal entitlement programs, such as the AFDC welfare entitlement program, are required to meet federal statutory requirements as a condition of receiving federal funds. Practically, those agencies

have no choice but to satisfy federal requirements, or risk losing substantial amounts of federal money. To the extent that federal statutory law mandates specific hearing procedures, those would have to be followed by the state agency. One solution would be for those agencies to adopt special hearing procedure regulations that would satisfy the APA flexible hearing procedure requirements and would also conform to federal statutory requirements. A less desirable solution would be for those agencies to seek an exemption from the APA. Second, state agencies that enforce federal environmental law mandates (either through state plans or otherwise) may have similar problems that are caused by federal regulatory requirements rather then federal moneys. While, these agencies could also use the special hearing procedures, or could seek exemptions, it is not clear to me whether environmental legislation or other federal statutes that are enforced by state agencies contain administrative procedural mandates. It may be useful to survey the general counsel's office for major state agencies to determine to what extent this is a serious issue or not.

WAIVER OF PROVISIONS: Section 612.160 governing waiver of rights is a good provision to include in the APA. However, the comment should also indicate that the preference for written waivers does not apply to procedural waivers such as defaults under Section 648.130, or failure to timely raise issues or objections under the timing requirements for responses under Section 642.250. This is because procedural or timing waivers are almost always defined by a failure to make a timely response. (See, e.g., FRCP Rule 12(h), or Code of Civil Procedure Sections 471.5, 585, and 586). While written waivers are a good idea for waiver of substantive rights, written waivers are not used for procedural or timing waivers. An alternative to adding language to the comment would be a cross reference to Sections 642.250, and 648.130 in the Comment to Section 612.160. The cross reference could explain the distinction between procedural and substantive waivers.

VOTING BY AGENCY MEMBER: Section 613.110 authorizes agency members that are qualified to vote on a matter to vote by mail or otherwise, without being present at a meeting of the agency. This statute is subject to limitations in other sections of the APA, or other statutes. The broad issue that I wish to raise is whether this section is consistent with the public meeting and deliberation requirements of the Bagley-Keene state agency open meetings legislation (Gov. Code Sections 11120-11132). The narrow issue I want to raise is whether the Bagley-Keene Act precludes voting by mail or other method when an agency member has not publicly or privately deliberated on a matter before the agency. Is it sufficient that an agency member deliberated in closed session to allow voting by mail or telephone? I am not certain as to the answer to this question. If the two statutes do not conflict, it may be helpful to indicate that in the comment.

AMENDED AND SUPPLEMENTAL PLEADINGS: Section 642.260 is a good codification of typical circumstances under which a party may wish to amend or supplement a pleading. However, there is one type of amendment that is usually codified in procedural statutes that is absent from this section. The language of the statute does not directly address amendments made after a statute of limitations has expired. Under FRCP Rule 15(c), amendments relate back when the same conduct, transaction, or occurrence test is satisfied. Since Section 642.260 has language addressing all of the other types of amendments or supplemental pleadings that are authorized under FRCP Rule 15, as well as amendments authorized under CCP 464, and 473, it would be desirable in my opinion to add language allowing amendments that relate back to the date of filing an original pleading when that would be proper under the governing statute of limitations. This could be important in many agency enforcement actions.

DISQUALIFICATION: Section 643.210 provides grounds for disqualification of presiding officers. While this section adopts the exceptions from CCP Section 170.2, which governs state trial court judges in California, this section does not adopt the standards for disqualification contained in CCP Section 170.1, either directly or by cross reference in the comments. Rather, it adopts broad language in subsection (a), without any definitions of what bias, prejudice, or interest means. Since this is an area in which there has been recent legislative codification of standards for disqualification of trial court judges, both at the federal (See 28 U.S.C. Section 455) and state court levels, I find that omission to be puzzling. If the intent is to develop standards solely by case law, why not take advantage of the experience with trial judges at the state court or federal court level. That experience is codified in CCP Section 170.1, at least as to state judges. If CCP Section 170.1 is not directly applicable, then modify its language to apply to ALJ's as was done with subsection (b). If the intent is to codify only case law standards, then there should be references in the comments to the appropriate case law.

COMMUNICATIONS BETWEEN PRESIDING OFFICER AND REVIEWING AUTHORITY I favor alternative B because I believe that the exceptions for procedural issues and communications in nonprosecutorial proceedings are not likely to significantly weaken the fairness policies that the ban on ex parte communications is designed to protect. Those policies are most likely to be at risk in agency proceedings that are adversarial in character. While there may be some concern about enforceability if a broad ban is not adopted, I do not believe that the risks of improper influence are the same in all agencies, nor as to all types of communications. In agencies with very small staffs, a broader ban could create difficulties for the agency in performing its responsibilities.

Thank you for the opportunity to comment on the revised tentative recommendations. I look forward to hearing from the Commission as it makes decisions in response to comments.

Very Truly Yours,

Gregory L. Ogden
Professor of Law

STATE OF CALIFORNIA PETE WILSON, Governor

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September 1, 1994

California Law Revision Commission
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Re: Comment on Tentative Recommendation
(Administrative Adjudication by State Agencies)

Dear Mr. Sterling,

The Board wishes to take the opportunity to comment again on the Commission's Tentative Recommendation on Administrative Adjudication by State Agencies. At the risk of immediately forfeiting your attention, we continue to insist that there is no need to include this agency in the proposed restructuring and that to do so will only create additional grounds for contesting long-settled procedures.

We appreciate that the "special hearing procedure" approach is an attempt to reconcile our -- and a number of other agencies' -- repeated interest in stability with the Commission's interest in reforming the process of administrative adjudication by state agencies. However, the balance struck by the Commission in the tentative recommendation still wrongly favors uniformity at the expense of settled agency procedures. Specifically, we believe that the elaboration of criteria for special hearing procedures will only lead to disputes over whether or not a particular agency which chooses to adopt a special hearing procedure has met the requirements of the tentative recommendation. Since we believe the Board's procedures satisfy the due process concerns underlying the Commission's Tentative Recommendation, the result of the Board's inclusion will only serve to create unnecessary delay and expense.

In our comments regarding the preceding draft, we pointed out a particular problem for our injunction procedures created by the criteria concerning separation of functions and freedom from bias. Had we not recently considered a request for injunctive relief, we might not have been alert to the potential impact of the draft criteria upon our procedure. While we appreciate the Commission's responsiveness to the particular problem we raised, our more pressing concern was that the special hearing procedure was likely to generate a great many such problems. We speak from experience.

When we promulgated the so-called "Access Regulation", which permitted union organizers to take access to employer's property for organizational purposes, we were challenged for issuing a regulation because the National Labor Relations Board considers the appropriateness of organizational access on a case-by-case basis. However, when we issued our decision in Bruce Church, 7 ALRB No. 20, which held that an employer might commit an unfair labor practice by denying access to labor organizations during a strike,

and that we would decide such matters on a case-by-case basis, we were challenged on the grounds that we did not promulgate a regulation.

When we issued a regulation promulgating special rules to permit the Board to make unit determinations in the citrus industry, we were challenged; it took several years before an appellate court upheld the validity of that regulation. When we issued a regulation requiring employers to provide the names and addresses of employees prior to the filing of a petition for an election, we were challenged; it took several years before the Supreme Court upheld our regulation. These experiences teach us that there is little change that does not become an opportunity for litigation. The opportunities likely to be provided by adoption of the special hearing procedure as presently conceived can only prove to be a major distraction.

In addition to the general concerns expressed above, we would like to bring certain specific problems raised by the criteria to the Commission's attention. While we have rules for setting and continuing cases, as a matter of practice, calendaring decisions often necessitate informal discussion between Board representatives and various parties. Such "status" discussions are not prohibited by our regulations, so long as they do not concern the disposition of actions or otherwise affect a parties' interest in a case. It is not clear to us that such discussions, which form a vital part of caseload management in an understaffed agency such as ours, could continue to take place under Section 643.420(b).

In speaking of the importance of this level of informality, we wish to emphasize that it is not simply "old hands" familiar with agency practices who resort to such means. While most parties who appear before us are represented by experienced practitioners who understand what the regulations permit, we consistently deal with unrepresented individuals who are even more likely to informally press their concerns over scheduling. While we do not rule on disputed questions concerning calendaring in the absence of an appropriate motion, agreement between the parties is often facilitated by the fact that such informal discussions have taken place.

Similarly, the requirement that hearings be open to the public in Section 648.140 permits telephone hearings provided that members of the public can inspect the agency's record and have the opportunity to be physically present at the place where the presiding officer conducts the hearing. Our agency regularly conducts prehearing conference calls which, more often than not, result in the issuance of orders of various kinds. To the extent these prehearing conferences are construed as part of the hearing procedures governed by the criteria, this section appears to create a "right" for members of the public to attend them. Furthermore, the public may be able to claim a right to be included in the conference call at agency expense.

As we do not have hearing rooms, these conferences are

conducted in the offices of our administrative law judges, which are quite cramped. While we have no objection to doing what we can to facilitate observation of our prehearing conferences, we see no "due process" reasons for the creation of an apparently enforceable "public" right to attend such conferences in addition to the opportunity to inspect the record otherwise provided by section 648.140.

Finally, we would like to express our concern over section 633.040(3)(c) which requires agencies to provide a copy of the special hearing procedure to any person to which an agency action is directed. We are not certain that the Commission appreciates the potential expense of such a requirement for this agency. It is not unusual for this agency to issue unfair labor practice complaints against a number of entities on the theory that they are jointly liable for the commission of an unfair practice. The expense of providing copies of our regulations to every party listed on a complaint would be considerable.

In conclusion, we again express our concern that the proposed reform of administrative adjudication, as applied to this agency, is unnecessary and expensive.

Very truly yours,

Thomas Sobel,
Chief Administrative Law Judge

STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION
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September 2, 1994

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94303

Dear Mr. Sterling:

This is in response to your request of July 21, 1994 for comments on administrative adjudication review, as reflected in your document number N-100 dated July 1994. The State Board of Equalization reiterates its opposition to the proposal, consistent with our submission to you of February 28, 1994 and prior written and oral comment of this agency.

Generally, we concur with the views of the Attorney General as expressed before the Commission in Sacramento on May 12, 1994, that the current system is fundamentally sound and that the wholesale revision of the California administrative adjudication system meets a need that does not exist. Further, as pointed out by the Attorney General, while change may be necessary in specific areas, the creation of a whole new system would introduce legal uncertainties into the system which would take years to resolve through the litigation process.

Specifically with respect to this agency, we remain of the opinion, for reasons previously expressed to you, that the present system, which recognizes the difference between rulemaking for regulatory purposes and rulemaking for taxation purposes and, concomitantly, the difference between judicial review on-the-record and judicial review de novo, is sound from a constitutional and jurisprudential point of view.

Sincerely,

Burton W. Oliver
Executive Director

BWO:sr

cc: Honorable Brad Sherman
Honorable Matthew K. Fong
Member, First District
Honorable Ernest J. Dronenburg, Jr.
Honorable Gray Davis

State of California

Office of the Attorney General

Daniel E. Lungren
Attorney General

September 6, 1994

California Law Revision Commission
4000 Middlefield Road
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RE: Commission's July 1994 Tentative Recommendation:
Administrative Adjudication by State Agencies

Dear Commission Members:

On May 11, 1994, I submitted a letter to the Commission commenting on its previous recommendation for revising California's Administrative Procedure Act (APA). The letter expressed serious concerns about the proposed massive expansion and revision of the APA. I felt that given their magnitude, the changes would be very costly, and that sufficient benefits had not been identified which would justify those costs. Instead, I suggested a more focused approach: that APA modifications be limited to rectifying specific problems identified by the Commission. The May 11th letter included a list of problems which I believed could be constructively addressed through solutions contained in the Commission's recommendation. The letter also suggested that if the Commission decided to pursue a broad approach, a number of modifications be made to its recommendation.

Since that time, the Commission has held several meetings, which my staff have attended. At those meetings, the Commission thoughtfully reviewed the suggestions contained in my letter, as well as the input of numerous others. It also engaged in cordial and highly productive discussions with my staff regarding our overall concern with the Commission's approach, as well as our concerns about specific proposals.

The Commission is now seeking comments on the July 1994 version of its tentative recommendation. Commission staff indicated (in Memorandum 94-33) that while a focused approach

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would be acceptable, at this point it would be more profitable to seek comment on the comprehensive revision. The July 1994 draft therefore continues the previous broad-based approach. The most significant change from the prior draft is the addition of a "special hearing procedure" which will allow some agencies to continue to use their current procedures. (Both drafts contain four other hearing options: formal, informal, emergency and declaratory.) In addition, the latest draft modifies various specific proposals. Since I addressed specific details of the recommendation in my previous letter, this letter focuses on the more fundamental question of whether an overhaul of the APA is appropriate.

Although I believe that the July 1994 draft is an improvement over the prior proposal, my basic concern remains. I still feel that the recommendation will be costly to implement, and that the benefits which would justify those costs have yet to be identified.

The special hearing procedure option will probably reduce costs, since some agencies will be permitted to continue to use some or all of their current procedures. This is a positive step. Nevertheless, even those agencies will still incur noticeable costs. They will need to analyze various procedures to determine whether they meet the recommendation's "to the extent provided" test.[1/] Agencies will be required to draft regulations adopting existing procedures, hold public hearings, and obtain review by the Office of Administrative Law for consistency. Finally, litigation can be anticipated by parties claiming that they were prejudiced by a lack of consistency between the new APA and the agency's regulations.

Moreover, agencies currently covered by the Administrative Procedure Act will not benefit from the special hearing procedure option. Their personnel will need to learn new procedures. (Private practitioners will likewise need to learn these procedures.) Litigation will no doubt be generated as 45 years of judicial and legislative determinations are replaced by untested provisions.

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1. The recommendation's special hearing procedure generally allows certain agencies (those whose hearings need not be conducted by an administrative law judge employed by the Office of Administrative Hearings) to continue to use current procedures if they contain separation of functions, ex parte contact, and other specified protections "to the extent provided" elsewhere in the recommendation.

On the benefit side, I do not believe that significant advantages have been identified since I submitted my prior comments. Indeed, one purported benefit of the prior recommendation - a tendency towards uniformity - is even less likely to occur under the current proposal. This is due to the availability of the special hearing option. While the new special hearing option will help reduce costs, and is therefore an improvement, it will also reduce any tendency towards uniformity.

Further, I believe that instead of making procedural law more accessible, the recommendation makes it more difficult to understand. While practitioners in hearings not currently under the APA can now go to the same statutory sections to learn an agency's procedural and substantive law, under the recommendation practitioners will have to review both the APA (in the Government Code) and the code in which the agency's substantive law appears. In addition, because the proposed APA is designed to cover many disparate types of hearings, it is by necessity quite complex. Practitioners will generally be required to spend more time under the proposal than they currently spend learning agency procedures.

I therefore continue to believe that the need for a broad-based revision of California's administrative hearing law has not been demonstrated. Instead, I suggest that the Commission focus on remedying specific problems.

Thank you for considering these views. As in the past, my staff and I remain more than pleased to provide further input regarding this important undertaking.

Sincerely,

DANIEL E. LUNGREN
Attorney General

PUBLIC EMPLOYMENT RELATIONS BOARD

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September 8, 1994

Sanford Skaggs, Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Skaggs:

The Public Employment Relations Board (PERB) continues to request that it be exempt from the revision of the Administrative Procedure Act (APA). In previous communications of August 23, September 23, 1993, and February 7, 1994, we have set forth our reasons for seeking a continued exemption from the administrative adjudication provisions of the APA. We appreciate the fact that the Law Revision Commission has recognized part of our request related to our representation proceedings; however, we continue to believe we should be exempt in toto for the reasons outlined in our previous communications.

In summary, as presently proposed we would be required to go through a lengthy process which, at the end result, would have in place a system that resembles very much the system already in effect. We see this as an effort to try to create a limited uniformity among agency practices solely for the sake of having uniformity when there is no demonstrated problem in the present diversity.

We therefore ask again that PERB be excluded from any proposed revision in the APA.

Sincerely,

Sue Blair

Sue Blair, Chair

cc: Nathaniel Sterling
Executive Secretary

ASSOCIATION OF CALIFORNIA STATE ATTORNEYS
AND ADMINISTRATIVE LAW JUDGES

September 8, 1994

TRANSMITTED BY FACSIMILE

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

RE: Administrative Adjudication Comments

Dear Mr. Sterling:

ACSA represents the administrative law judges who conduct hearings for the state of California, except those at the Public Employment Relations Board. As such, these comments are intended to reflect the position of the rank-and-file administrative law judges, hearing officers and deputy commissioners as they relate to the proposed new Administrative Procedures Act (APA).

In summary, ACSA proposes that the new APA provide for only two types of hearings, a formal hearing and an informal hearing. We recommend this, not only for the conformity and consistency of process, but also to meet the express needs of the Commission to develop a user friendly hearing process. The following sections of the new APA would need to be modified in order to comply with the expressed intent of our comments. These corrections should include using the singular title of "administrative law judges" for those who conduct the hearings. The new APA makes reference to a presiding officer, administrative law judge and a hearing officer all in the same context.

FORMAL HEARING

In order to develop only two types of hearings, Part 3, Chapter 1, Section 631.020 should be modified to eliminate subsections (a3), (a4) and (a5). In this manner, only the formal and informal hearing procedures would remain.

ACSA recommends that a formal hearing include mandatory elements or criteria, as well as criteria which may be used or modified at the option of the respective agency. The formal hearing, as

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noted in the proposed new APA starting at Part 4, Chapter 1 could read as drafted, with exception to the following sections. Section 641.120 (b) should read:

> "Some provisions of this part may specifically authorize an agency to modify that provision of this part or make that provision of this part inapplicable by regulation."

In other words, all provisions of Part 4 would be applicable to all agencies conducting administrative hearings, except, where noted, the agency may, by regulation, opt out of that particular section or substitute another provision as necessitated by the respective agency.

In Chapter 2, Article 1, Section 642.130, Subsections a,b, and c should be optional for administrative hearings because of the different time lines currently applied by various agencies.

Article 2, Section 642.220 (a), (b) should be optional to all agencies; however, the notice of Commencement of Proceeding must be in writing, while the subsequent provisions should be optional because of the lack of formality in the hearing process.

Section 642.230 should be optional in form for all agencies due to the differences in types of hearings conducted. Some agencies require no response to be filed, while others accept a less formal notice.

Article 3, Section 642.330 should be optional for all agencies conducting hearings, except as noted for the Office of Administrative Hearings (OAH). Other agencies can, by regulation, adopt a less formal appeal process without congesting the court calendars with formal appeals.

Section 642.360 (a) should be amended to add to the existing language after the last word "hearing," "unless a period of not less than ten (10) days is established by agency regulation. This time period may be waived by the parties." This would allow for a shorter time frame which would comply with the existing procedures currently in practice in each agency other than OAH. If a hearing is continued, the agency could, by regulation, adopt a time period of not less than five (5) days to schedule the continued hearing, unless time is waived by both parties. The balance of this section should be modified for consistency with agency regulations.

In Chapter 3, the title Presiding Officer should be changed to read Administrative Law Judge. Section 643.110 should be modified to include all administrative law judges who would conduct hearings, including those employed by the Office of Administrative Hearings. If this is changed, Section 643.120 should be eliminated in its entirety and the balance of the article should be renumbered.

In Article 2, Section 643.240 should be eliminated because it is redundant. This Section duplicates the intent of the previous Section at 643.230 (d).

In Chapter 4, Sections 644.110 through 644.150, should be optional for agencies which conduct administrative hearings, other than OAH. Based upon the different types of hearings and the issues contested at these hearings, the parties involved, and the need for flexibility as previously expressed by agency comments, this entire chapter should be optional to agencies other than OAH.

Chapter 5, Articles 1, 2, and 3, should all be optional for agencies conducting administrative hearings, other than OAH. Article 4 should remain as drafted. Many hearings are informal enough to allow evidence to be produced at the hearing. By doing so, the hearing process is expedited and all parties have participated in a fair hearing.

Chapter 6, Article 2, Sections 646.210 through 646.230 should be modified to include language stating in substance:

> "unless waived, the settlement conference administrative law judge must be someone different from the administrative law judge hearing the matter."

Chapter 7 deals with Alternative Dispute Resolution. ACSA recommends that the entire Chapter 7, Sections 647.010 through 647.040 be eliminated in its entirety. The information contained in this Chapter could be reduced to a footnote or a comment in the preface to the new APA. All hearings should be conducted or presided over by an administrative law judge.

In Chapter 8, Article 2, Section 648.230 should apply to <u>all</u> state agencies conducting hearings or other proceedings conducted pursuant to this part. There is no logical or legal basis for providing this assistance to some agencies and not to others.

Article 3, Section 648.310 (b) should be optional for all agencies including OAH. There is concern that the clear and

convincing burden of proof may be too difficult to attain while ignoring the impact to the public. The burden of proof should be a policy decision which is developed either by the Legislature or by each department individually.

Chapter 9, Article 1, Section 649.110 should be optional for all agencies because of the different timelines each agency practices, either through statute, regulation or case law. The same rationale would apply to Sections 649.140 and 649.150 and should also be optional for all agencies. Section 649.170 (a) should read:

> "within thirty days after service of a copy of a decision on a party, the party may apply...."

This section should delete the language "but not later than the effective date of the decision" and have this section optional for all agencies so that departmental regulations could be developed consistent with agency practices.

Article 2, Sections 649.240 and 649.250 should both be optional for each agency so that each agency may provide, through regulation, its existing practices.

Article 4, Sections 649.410 through 649.450 should be optional for all agencies conducting hearings because of its inapplicability to all agencies and because of the diverse needs of other agencies.

Part 5, Section 650, dealing with Judicial Review should provide for a variety of timelines to be developed by each agency other than OAH. The timeline for OAH is specified under the proposed Section 650; however, language should be added to allow each agency, other than OAH, to develop through regulation, specific timelines for judicial review.

If ACSA's recommendations are adopted by the CLRC, the entire formal hearing process would be outlined for practitioners and agencies as well. However, agencies could, by regulation, specify procedures unique to the respective agency and still retain consistency of the formal hearing procedure generally applicable to all administrative hearings.

INFORMAL HEARING

ACSA recommends that Part 3, Chapter 1, Section 631.020 be modified to eliminate Subsections (a3), (a4), and (a5). In this

manner, there would be an informal hearing which retains the elements listed in the proposed regulations.

Additionally, ACSA recommends that Article 2, Section 632.020 (b) (4) be eliminated in its entirety. With the changes currently taking place at the State Personnel Board (SPB), there is no need to reduce or diminish the due process protections for employees being disciplined. Subsection 5 should be renumbered to 4.

These comments are recommended to be incorporated in the new Administrative Procedure Act. ACSA's suggestions will allow agencies to develop, by regulation, specific modifications to address unique elements within each agency's hearing process. The process suggested will provide a more uniform hearing process applicable to all agencies conducting administrative hearings.

Sincerely,

John E. Sikora
Labor Relations Consultant

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September 8, 1994

Sanford Skaggs, Chairman
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Commission's Revised Tentative Recommendation (July 1994)
Concerning Administrative Adjudication by State Agencies

Dear Chairman Skaggs and Members of the Commission:

We appreciate your invitation to present our views on the feasibility of bringing all state administrative tribunals within the ambit of a single administrative procedure act. During the five years that the Commission has been at work on this project, it has come to recognize the overwhelming difficulties inherent in assimilating, into one statute, the wide-ranging diversity of administrative adjudication in California. This recognition eventually led the Commission to scale back its efforts to fashion a single, detailed statutory procedure applicable to every agency. Under the current draft, agencies are given an alternative: So long as they match or exceed certain specified "due process" criteria, they are free to utilize whatever detailed procedures they like.

While this is an improvement over earlier proposals, it would still involve the Occupational Safety and Health Appeals Board (Appeals Board) in a time-consuming, expensive and unnecessary endeavor at a time when it can ill afford to expend its limited resources on projects bearing little relationship to its primary mission of providing fair and timely hearings.

The Appeals Board is a small agency with eight ALJs and two Board attorneys. Right now, appeals are pouring in at the rate of 3000 a year. It takes approximately one year for a case to come to hearing and another year and a half, should the Board grant reconsideration of an ALJ Decision. It is obvious from those numbers that our entire efforts must be devoted to the task at hand — cutting the backlog by hearing, deciding and reviewing cases as expeditiously as possible.

A new APA would be welcome if it would help us solve that problem. But it will not. We have already developed and put into place the procedures needed to reduce the backlog, and they are beginning to work.

A new APA would be essential if there were any indication that worker or employer rights were being thwarted or sacrificed. But they are not. The constituencies whom we serve — employers, employees and their organizations —

may at times be unhappy with the results of particular cases, but they have expressed no dissatisfaction with the overall fairness of our procedural rules. Our existing procedures conform to the specific Labor Code authority under which we operate and have been honed, by amendment, over years of experience, to fairly and efficiently carry out our legislative mandate and address the problems which have confronted the Appeals Board. In a previous letter, I provided you with a copy of the booklet which we make available to the parties who appear before us. Once you have had the opportunity to look it over, I think you will agree that it provides even the reader who has not previously appeared before us with a clear and comprehensive guide to the Appeals Board practice.

Further study of the booklet should also convince you that the Appeals Board has already in place the basic elements of the due process protections called for under the Special Hearing Procedure. Moreover, I am certain that our procedures would easily withstand scrutiny under the procedural due process standards of both the federal and the state Constitutions.

If I may paraphrase the "bullets" in your letter of July 22, 1994: Our hearing procedures are accessible to the public. Our constituencies are satisfied with the fairness of our hearing procedures. Those procedures are modern and contain the flexibility needed to timely hear appeals.

You also speak of the revised APA as promoting greater uniformity among agencies. However, in view of the anticipated widespread use of the Special Hearing Procedure, that objective has been relegated to a secondary role, and properly so, when one considers the diversity of administrative adjudication in California.

In the current revised draft, the Commission has attempted to make it easier for agencies to adopt the Special Hearing Procedure, either by transitional regulations or by a more relaxed version of formal rule-making. The fact remains, however, that under the pending proposal the Appeals Board must, within the next two or three years, go through some kind of formal OAL procedure to establish the consistency of its existing regulations with the "due process" requirements of the Special Hearing Procedure. Additionally, it will have to go through a full-fledged OAL proceeding to invoke the Special Hearing Procedure and to adopt any new regulations needed to bring it into full compliance with due process standards set forth in Section 633.030 [with the sole exception of OAL review for necessity; but see OAL's letter to the Commission of June 15, 1994].

We will have to develop new regulations for at least two of Section 633.030's due process requirements: open hearings and *ex parte* contacts. An open hearing regulation is needed, not because the Appeals Board's hearings are closed, but because the open hearing notion is so fundamental that we, like many agencies, have never felt the need to embody it in a regulation. A new regulation on *ex parte* contacts will be required, not because *ex parte* contacts are permitted, but because our present regulation does not go on to spell out

exactly what an ALJ must do if s/he receives such a contact (even though our ALJs would, as a matter of policy, follow those procedures even in the absence of a regulation). Additionally, should OAL interpret the precedential decision requirement of Section 633.030(a)(8) to necessitate enabling regulations, those, too, would have to be formulated.

Writing those new regulations is not just a matter of copying out the appropriate statutory language. The open hearing regulation, for example, touches on public rights with respect to telephone conference hearings. Since we do resolve some matters by telephone, it will be necessary to determine whether those resolutions constitute "hearings." Similar policy and drafting considerations apply to the adoption of a revised *ex parte* regulation and a new regulation for precedential decisions and their indexing.

Then we must justify our existing regulations to OAL as consistent with the remaining requirements of the Special Hearing Procedure. That, too, is no simple task. There is room for debate over what is included in the right to present and rebut evidence [Section 633.030(a)(6)] and the proper form and content of a decision [Section 633.030(a)(7)].

OAL regulatory procedures, even the slightly abbreviated ones provided for in Sections 633.050 and 610.940, are detailed and time consuming. New regulations must be created; some existing regulations must be modified; and others must be explained and justified as meeting the requirements of the Special Hearing Procedure. While the primary responsibility for formulating, drafting and re-drafting the new and modified regulations and for complying with OAL requirements for submissions and responses to public comment will fall to our Presiding Administrative Law Judge, the rest of the agency will also be involved. Our Chief Counsel, our Executive Officer, myself and the other two members of the Board will be involved in reviewing language, discussing significant issues, overseeing submissions, and receiving public comment. All totaled, I would expect that the Presiding ALJ would expend upwards of a month of work time on these matters and that an equivalent amount of time would be expended collectively by other agency officials.

It will also be necessary to rewrite and reprint our Appeal Information booklet. It is difficult to estimate the amount of agency work time which that will entail, but it will be significant. Printing costs alone may well amount to $10,000 or more.

Therefore, the question must be asked: What will the Appeals Board have accomplished after expending all of this time, effort and money?

The answer, I am sorry to say, is that we will have gone through the entire exercise in order to continue doing business just as we are right now. Our procedures will basically be the same as those now in place because those are the procedures which work best. Meanwhile, we will have lost all the time and effort which could have been used to hear, decide and review cases.

At this point, I can only echo Attorney General Lungren's conclusion that the Commission has not carried its burden of demonstrating that a massive expansion and revision of California's APA is warranted in view of the costs involved. Certainly the cost to the Appeals Board, both in terms of actual expenditures and lost opportunities, far outweighs the small, if negligible, benefits which will accrue to our agency and the parties who appear before it.

I recognize that the Commission has expended an enormous amount of energy on this project and, in doing so, has created a draft statute which could be useful as a *model* for agencies to adopt, in whole or part, as the need arises. I see no reason why your legislative efforts should not proceed in that vein. Agencies, other than those whose hearings are conducted by OAH, should be exempted. However, any agency should be allowed to avail itself of specific provisions of the model statute, as provided in Section 612.130 of your present draft:

> [A]n agency may adopt this division or any of its provisions for the formulation and issuance of a decision, even though the agency or decision is exempt from application of this division.

That will allow agency procedures to be shaped, as they should, by the considerations which emanate from within the agency and its constituencies, while ensuring, at the same time, that agencies have the benefit of a current and thoughtful model in selecting new procedures.

Thank you once again for the opportunity you have afforded the Appeals Board to respond to your proposal.

Very truly yours,

Elaine W. Donaldson

Elaine W. Donaldson
Chairman

cc: Daniel E. Lungren
Attorney General of the
State of California

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September 9, 1994

California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Subject: The California Law Revision Commission's Recommendations on Administrative Adjudication

The staff of this office have reviewed the Tentative Recommendation for Administrative Adjudication. As a prefatory note, we want to acknowledge the considerable efforts made by the Commission in preparing its proposal to overhaul this important and intricate statutory framework.

We offer the following comments or questions on the proposed revisions to the APA:

1. We are concerned about the impact of the proposed reduction in time for responding to discovery requests in proposed section 645.210(b). This Department has had to respond to voluminous discovery requests in the past, and telescoping down the discovery process may create a huge administrative burden.

2. We are also concerned about the intent and effect of the ex parte communication provisions in proposed section 643.430. The provisions may seriously impair the ability of the Chief Counsel of a small legal office (such as this one) to provide supervision and guidance to her staff regarding cases being heard in informal or special hearing proceedings: the second sentence raises logistical questions for small legal offices regarding supervision of staff. As advisor to the hearing officer, counsel is limited to receiving certain communications. As the supervisor of the legal staff, a supervising attorney or Chief Counsel is involved in the initial determinations of taking cases and early decisions on prosecutions. A supervising attorney or Chief Counsel is also involved in the supervision of staff after assignment. While this proposal probably reflects the current state of the law on separation of powers, the courts have recognized administrative necessity in cases where separation is extremely difficult.

3. We recommend that proposed section 645.420 be amended to provide that an in pro per respondent may also have some means to request (e.g., from OAH) that subpoenas issue, not just the "attorney of record" (because there frequently is none).

4. Can the informal hearing procedures authorized by regulation under proposed section 632.020(d) conflict with the parameters of proposed section 632.020(b)(1)-(5)? For example, can a Department, by regulation, establish an informal hearing process to hear accusations calling for restitution and/or penalties of up to $10,000?

Although we may have other concerns, time limitations have prevented more detailed review of the Recommendation. We anticipate providing such comments through normal Executive Branch methods as the proposal is considered by the Legislature. We also wish to commend the Commission for recognizing and responding to the wide variety of adjudicatory functions and processes currently encompassed by state agencies.

Sincerely,

Stephen E. Oliva
Staff Counsel

BEFORE THE

CALIFORNIA LAW REVISION COMMISSION

SEPTEMBER 9, 1994
PALO ALTO, CALIFORNIA

COMMENTS OF

CALIFORNIA TRUCKING ASSOCIATION

ON

THE TENTATIVE RECOMMENDATION REGARDING ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

INTRODUCTION

California Trucking Association (CTA) respectfully files these comments on the tentative recommendation regarding Administrative Adjudication by State Agencies (Draft):

CTA is a non-profit trade association representing nearly 2,500 for-hire trucking companies, private carriers and suppliers operating into and within California. Our members range from the one-truck owner/operator to large international companies.

CTA has actively represented its members in judicial and quasi-judicial administrative proceedings, both state and federal, for 60 years. CTA has participated in such proceedings before the California Public Utilities Commission, the Division of Labor Standards Enforcement, the Employment Development Department, the Cal-OSHA Appeals Board, the California Air Resources Board, the Department of Motor Vehicles, and others--some of which still exist, some of which do not.

CTA has reviewed the draft and notes that it must be the work product of bureaucrats and college professors. It is not reflective of the real world. The greatest flaw of the draft is that--while it pontificates on the importance on the constitutionally guaranteed protections of procedural and substantive due process of law--it erodes these protections where they may cause any inconvenience to state agencies.

During the last five years, the Legislature has demonstrated an alarming affinity for changing crimes to "civil wrongs", thereby shifting criminal cases to state agencies and depriving the citizens of their constitutional protections inherent in a criminal proceeding. The Commission now proposes to further lessen these protections in state agency proceedings.

CTA asserts that all state agencies must be subject to the requirements of one Administrative Procedures Act and that this Act must protect the procedural and substantive due process rights of each citizen required to appear before his/her government in an administrative forum.

In the CTA comments which follow, we will detail the erroneous assumptions contained in the draft and how the draft proposes to deprive citizens of their constitutionally-guaranteed rights.

Due to the facts that the tentative recommendations (1) set out only "selected conforming revisions and repeals" and that (2) "the entire text of conforming revisions and repeals is in preparation and will be available for review and comment on request", CTA will submit cursory comments to the "selected text" page-by-page at

this time. CTA has requested the entire text and will submit its complete comments in an appropriate time frame to be set by the Commission.

Communications regarding these comments should be addressed to Richard W. Smith, General Counsel, California Trucking Association, 1251 Beacon Blvd., West Sacramento, CA 95691.

COMMENTS OF CALIFORNIA TRUCKING ASSOCIATION

Page 1: CTA questions the bases for the assertion that a "single procedure approach has substantial problems and that a variety of procedures is necessary".

Pages 2-4: Recites political rhetoric, not justification for the proposed changes.

Page 4: CTA questions the basis for the assertion that "a less formal procedure [than the APA] is needed for many types of Agency decisions".

Page 5: CTA agrees that all persons brought before an administrative agency in a proceeding where their procedural or substantive due process rights are affected are entitled to the hearing procedures of the Administrative Procedures Act.

Page 6: CTA questions the bases for the assertion that there must be exceptions to the APA for "special cases where a limited exception is warranted or where a special procedure is necessary".

Pages 10-11: CTA objects to any hearing procedure which does not provide the right to due process, substantive and procedural and to equal protection under the law.

Pages 15-18: CTA agrees with the "exclusivity of record"; "bias"; and "ex parte communications" portions of the "Impartiality of Decisionmaker" sections of the tentative recommendation.

CTA strongly disagrees with the "separation of functions" and the "command influence" sections of the tentative recommendation (pgs. 17-18).

The "Separation of Functions" Section states that the law is "unclear". Despite the assertions of the Draft's author, the law is clear. Though an agency may have quasi-legislative, quasi-judicial and executive functions, these functions are still subject to constitutional restraints.

The Draft's author asserts that "the separation of functions requirement could cripple an agency in a number of situations, due to staffing limitations". To bolster this argument, the Draft's author references footnote 64 in which he states: "the most recent annual statistics (1993) show 325,000 DMV actions against drivers resulting in 157,716 hearings, including 4,259 hearings involving commercial drivers". The Draft's author suggests that citizens of California who must commute by automobile to their jobs and that citizens of California who depend upon commercial licenses to perform their jobs be denied their constitutional rights to substantive and procedural due process because "Drivers' licensing cases are so voluminous that to require separation of prosecution and hearing functions by the Department of Motor Vehicles would gridlock the system". The Draft's author misses the point. The government exists for the protection of the people. <u>The people do not exist for the convenience of the government.</u>

The "Command Influence" Section poses the theory that an intra-agency hearing procedure is proper unless the finder of fact is a "subordinate of an investigatory, prosecutory, or advocate in case". This theory cannot be rationalized to the facts as they exist in a real world. All employees of an agency are rewarded for loyalty to their agency. An agency hearing officer will support the position of the agency if the hearing officer is instructed to and wishes to advance. The Command Influence Section is not rational.

Page 19: As set forth for the reasons stated above, CTA objects to agencies being allowed to use their employees as "independent" hearing officers.

Page 20: CTA objects to any hearing procedure where review by the elected or appointed agency head(s) is not available as a matter of right. Any such procedure would remove that agency head(s) from the chain of responsibility for its employees' actions. Agency heads must be held to account for the actions of their employees. As the Draft's author points out at page 26:

> "the adjudicatory authority is vested in the agency head, and the agency head should be the ultimate administrative decisionmaker."

Page 21: CTA agrees that discovery disputes should be resolved by the hearing officer if the same rights are preserved to the parties as are preserved in civil litigation.

Page 23: CTA agrees that all hearings should be open to the public subject to the same in-camera and in-chambers procedures which exist under current laws for criminal and civil trials.

Page 25: CTA objects to any hearing procedure where the hearing officer is given discretion to allow hearsay evidence, yet is given the discretion to exclude evidence in the manner the same as a court under Evidence Code Section 352. Such a provision would give hearing officers--many of whom are not required to be lawyers--power to exclude evidence based on whim and caprice. More importantly, such a provision would undermine the due process rights of citizens called to answer before an agency because they will not know that they have to make an offer of proof to protect the record. The average citizen does not know what "an offer of proof" is, let alone what its legal requirements and effects are.

CTA objects to the change regarding the admissibility of "scientific evidence". The California Supreme Court heard oral argument on this issue in People v. Leahy on August 31, 1994. Any change based on Daubert v. Merrell Dow Pharmeceuticals is premature until the Leahy case is decided.

CTA also requests that the Commission propose a statute which covers the issue of a test procedure which an agency adopts by regulation. CTA has recent experience with such a test procedure. The agency--in this case, the California Air Resources Board--has asserted in its administrative procedures and in the civil litigation which followed that a test procedure, once adopted in regulation by an administrative agency, is impervious to challenge on the basis of the validity of its adopted test procedure. CTA asserts that any proposed changes must address this issue of whether the quasi-legislative action can possibly preclude quasi-judicial review be it under Kelly or Daubert.

CTA asks whether the extension from 10 to 15 days is from date of mailing, constructive service, or actual service?

Page 26: CTA objects to the proposed distinction in burdens of proof. The Draft sets forth no rational distinction other than an undefined "potential severity of the sanction". If the distinction turns on "occupational license", it is incongruous with the Draft's proposal, at page 17, that commercial drivers be deprived of their "occupational licenses" without even rudimentary due process guarantees.

Pages 28-29: CTA objects to the proposed "Informal Hearing Procedure". The Informal Hearing Procedure allows the hearing officer to limit witnesses, testimony, evidence, rebuttal and argument. Cross-examination is not ordinarily permitted. The Draft states that due process rights would continue to apply. CTA asks how is this possible with the rudiments of due process stripped from the citizen? The Draft's rationale for its proposal is that "without it, many agencies will either adopt or attain enactment of special hearing procedures, or will proceed "informally' in a manner not spelled out by any statute or regulation." The answer to this rationale is to adopt a law which requires that the provisions of the Administrative Procedures Act apply to all state agencies.

CTA objects to the proposed "Special Hearing Procedure". The Draft states that "there are situations where it is clear that the provisions of the statute will not work for the circumstances of a particular agency or type of hearing. In these situations, the statute permits the agency by regulation to adopt a special hearing procedure to govern the matter." The Draft presents no evidence to support its premise, analysis or conclusion.

Page 31: CTA objects to the unsubstantiated assertion that all state agencies "should have the same power to act" as those agencies set forth in Footnote 120.

CTA reserves its right to comment on the Draft's Declaratory Decision Procedure.

Page 32: CTA reserves its right to comment on the Draft's Conversion of Proceedings Procedure.

CTA's above set forth reservations are based on the Draft's acknowledgment that it contains "selected" provisions and is incomplete.

Page 33: CTA objects to a regulatory program which balances the constitutionally protected rights of California citizens against the "imposition of costs on an agency".

Page 34: CTA agrees that "If the public believes it has received a fair administrative hearing, it is likely to abide by the decision in the case rather than seek judicial review". Here is the crux of the public disservice done by the Draft. If it becomes law, the public will believe that they have been treated fairly by their government when they have not.

CTA requests that these comments be incorporated into the record and responded to in the record. CTA requests that the record remain open pending further comments on all provisions of the Draft by all parties which have heretofore responded. Under separate cover, CTA will submit a data request underlying all assertions set forth in the Draft as fact.

Respectfully submitted,

Richard W. Smith
General Counsel

RWS:sd

STATE OF CALIFORNIA—THE RESOURCES AGENCY PETE WILSON, *Governor*

CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET
SACRAMENTO, CA 95814-5512

September 9, 1994

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

Dear Mr. Sterling:

On behalf of the California Energy Resources Conservation and Development Commission ("California Energy Commission" or "CEC"), I am pleased to present our favorable comments on the July 1994 "Revised Tentative Recommendation" for legislation to update the adjudication portion of the California Administrative Procedure Act. After careful review of this draft, my Office has concluded that the draft succeeds in providing both (1) appropriate minimum standards of due process and public openness that should be applicable to all agency adjudications and (2) flexibility for agencies to develop or continue to use special hearing procedures that work in a wide variety of situations. The new Act would also provide clear authority for agencies to conduct a variety of adjudicative proceedings according to procedures that will be used by the Office of Administrative Hearings if those procedures are workable. This model will thus encourage uniformity of hearing procedures even though, in the interest of flexibility, you are not requiring it. We have also considered the extent to which the CEC will be required to adopt implementing regulations under the new Act, and we have concluded that the burden of adopting these regulations will be minimal. I will therefore recommend that the CEC support the enactment of the new APA if it is introduced in the form now proposed for your consideration.

As you are aware, the CEC has monitored this project carefully since its inception over two years ago. We did so because the CEC's power facility licensing proceedings are unique and challenging adjudicative processes, and we were concerned that changes in the APA that would bring these proceedings under a "one size fits all" umbrella could render our substantive mission difficult or impossible. However, as a result of the hard work and open-minded attitude of the members of the Law Revision Commission, its consultant, Professor Asimov, and its staff, all of our substantive concerns have been fully addressed. We very much appreciate both the difficulty of the task you have undertaken and the professional way in which you have performed that task.

Sincerely,

William M. Chamberlain

WILLIAM M. CHAMBERLAIN
Chief Counsel

STATE OF CALIFORNIA PETE WILSON, Governor

STRS

P.O. BOX 15275-C
SACRAMENTO, CA 95851

September 2, 1994

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

Re: Administrative Adjudication by State Agencies:
Revised Tentative Recommendation

Dear Mr. Sterling:

This is to express the comments of this office on the above referenced Revised Tentative Recommendation of the Law Revision Commission. The position of the Teachers' Retirement Board on this revision has not yet been requested, so the opinions expressed herein are those of the legal office of the State Teachers' Retirement System (STRS). A representative of our office has attended most of the Commission meetings at which the revision of the California Administrative Procedure Act (APA) has been discussed and has reviewed the various rewrites of the Act. We appreciate the opportunity to comment on this revised recommendation.

It remains the opinion of this office that the concept of a universal APA is a seriously flawed one, for the reasons discussed again and again at the Commission meetings. These reasons include the impossibility of applying one act to all state agencies, the costs of changing the administrative practices of the various agencies, and the increased complexity of the proposed Act.

However, recognizing the likelihood that the Commission will proceed with this project, we would like to comment on three specific points in the July, 1994, draft. We had previously objected to the provision in former section 649.210 (now 649.230) which stated that, when acting as a reviewing authority, the State Teachers' Retirement Board (Board) would be limited to a review of the record. No additional evidence could have been heard, except for newly-discovered evidence or evidence that was otherwise unavailable at the time of the hearing. Under present law, if STRS does not adopt a proposed decision, it may "decide the case upon the record, including the transcript, with or without taking additional evidence...." (Govt. Code, § 11517 (c).) In its revised form, the Act now would permit the reviewing authority to take additional evidence, an amendment which satisfies our objections on that point.

We had also objected to the proposed amendment to the Code of Civil Procedure, section 1094.5, stating that credibility determinations of the presiding officer (ALJ) based on observation of demeanor and the like would be entitled to great weight upon judicial review of the administrative decision. The Administrative Law Judge, in hearing a case and issuing a proposed decision, is acting as an agent of the State Teachers' Retirement System. We are opposed to an amendment ascribing to the determination of the agent greater reliability or importance than the determination of the Board itself. The comments of the Attorney General cited "substantial empirical evidence indicating that credibility determinations based upon transcripts are at least as effective as those based upon observing witnesses." We see no reason to change the present law, and are opposed to this change, which weakens the authority of this Board.

Finally, we now object to the requirement that informal hearings be held by an Administrative Law Judge. (Proposed § 631.040 (b).) If informal hearings are to be used in cases such as those where there is no disputed issue of material fact, or in cases involving monetary amounts of not more than $1,000 (Proposed § 632.020), and if the process is to be, as the name states, informal, we question why it is necessary to go through the Office of Administrative Law. The Law Revision comment to proposed section 632.010 states that "Reference in this article to the 'presiding officer' is not intended to imply unnecessary formality in the proceeding. The presiding officer may be the agency head, an agency member, an administrative law judge, or another person who presides over the hearing." The scheme set up in this chapter seems inconsistent with the notion of an "informal" proceeding, and inconsistent with your own comment. We urge that an agency be allowed the option of conducting its own informal hearings.

We hope the foregoing comments are helpful to the Commission in its study of the Administrative Procedure Act. Again, we thank you for the opportunity to provide input.

Sincerely,

Lawrence P. Boulger
Chief Counsel

STATE OF CALIFORNIA PETE WILSON, Governor

CALIFORNIA STATE PERSONNEL BOARD
801 CAPITOL MALL • P.O. BOX 944201 • SACRAMENTO 94244-2010

September 7, 1994

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

Dear Mr. Sterling:

The State Personnel Board (SPB) hereby submits its comments regarding the revised July 1994 tentative recommendations concerning administrative adjudication by state agencies.

In August 1993, SPB reviewed the first proposal and sent you the Board's comments. You wrote in July 1994, and described major revisions to the original recommendation. You encouraged SPB to review the five newly proposed procedures to determine if selection of any of the new procedures would address SPB's concerns.

The Chief Counsel's Office and the Hearing Office have reviewed the procedures. The new proposal will absolutely not function within the SPB adjudicatory and hearing process. Moreover, application of these proposed statutes to SPB would not achieve any of the objectives you have defined in proposing the revised Administrative Procedures Act (APA).

The stated objectives of the revision are to promote uniformity in agency hearing procedures; make agency procedures more accessible to the public; improve fairness of agency hearings procedures; and modernize and add flexibility to agency hearing procedures.

Inclusion of SPB in the proposed statute would not address any of these objectives. Uniformity among various agencies is a laudable goal. The SPB's position in adjudicatory proceedings is, however, fundamentally different than other agencies in conducting hearings. Unlike most state agencies, SPB is not a party to the adjudicatory action. The issues of maintaining separate prosecutorial and decision-making functions do not arise in SPB hearings, except for the extremely rare instances where SPB, a relatively small agency, deals with an administrative appeal of one of its own employees. By contrast, SPB acts as a reviewing or appellate authority, overseeing the

adjudication of various agencies' personnel decisions. Thus, uniformity of the SPB decision-making process with other departments' decision-making processes is neither essential nor particularly useful. Furthermore, uniformity in SPB decisions is already accomplished by its precedential decisions. (Govt. Code § 19582.5).

SPB hearing procedures, particularly the adverse action procedures, are already easily accessible to the public. Board procedures are clearly set forth in the Government Code. (Govt. Code secs. 18670 - 18683, 19574 - 19589).

From a due process standpoint, the SPB hearing process has been rigorously litigated and validated in both state and federal court. See e.g. Skelly v. State Personnel Board (1975) 15 Cal.3d 194; Negrete v. State Personnel Board (1989) 213 Cal. App. 3d 1160. Thus, the fairness of SPB hearing procedures is not in question.

Finally, and most important, attempting to place SPB hearing processes and procedures into the new APA statutory scheme would not add flexibility to SPB proceedings. Although the tentative recommendations provide five separate selections for rule enactment, SPB hearing procedures cannot be easily addressed through rulemaking. SPB hearings are controlled by statutes rather than rules. Almost all of SPB's hearing functions are set forth in the Government Code, not in administrative regulations (compare Govt. Code secs. 19574 - 19589, 18670 - 18683 with tit. 2, Cal. Code Regs., secs. 51 - 54.2). Thus, the new procedures which might be used to re-enact existing rules as special rules or to expedite rulemaking would not be relevant to the SPB hearing process.

In sum, application of the proposed revisions to the SPB adjudicatory process would conflict with existing statutes. It would further result in unnecessary duplication of required procedures as well as confusion over which laws apply to SPB hearings. For good cause and the foregoing reasons, SPB therefore requests an exemption from the proposed APA.

Nathaniel Sterling
September 7, 1994

Thank you for the opportunity to submit comments.

Sincerely yours,

Christine A. Bologna

CHRISTINE A. BOLOGNA
Chief Administrative Law Judge
(916) 653-0544

cc: Richard Carpenter, President
Gloria Harmon, Executive Officer

State of California - Health and Welfare Agency

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September 8, 1994

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

Re: Comments July 1994 Tentative Recommendation

Dear Mr. Sterling:

The CUIAB appreciates the opportunity to comment on the commission's latest tentative recommendation concerning administrative adjudication. The Law Revision Commission has tried reconcile opposites, it has tried both to provide uniformity in the administrative adjudicative process and at the same time to permit agencies to design hearing processes to meet their particular needs. The effort to accomplish two ends ironically undermines the rationale for comprehensive restructuring.

This agency, which alone is responsible for most administrative adjudications conducted by state agencies, will likely avail itself of the special hearing procedure offered in this tentative recommendation. One reason we will do this is our need to comply with federal Department of Labor standards. The special hearing procedure option lessens but does not eliminate our concerns that new APA mandates do not conflict with federal demands.

To the extent that other agencies also choose the special hearing procedure, the net result will a continuation of a variety of different procedures rather than uniformity. However, in order to maintain this status quo, each agency will be required to expend precious resources reissuing regulations and no doubt adding to them. In addition, there will be litigation concerning whether an agency's special hearing procedure comports with the requirements set forth in sec. 633.030. Finally, while the tentative recommendation sensibly eases the burden of complying with the existing rule making process administered by the Office of Administrative Law, it is not clear that OAL entirely agrees with the CLRC's approach (see OAL letter of June 15 to the Commission) or whether OAL will conclude that proposed regulations do not comply with their understanding of the special hearing procedure standards.

Against an obvious burden imposed on various state agencies, the commission has articulated two reasons in support of requiring agencies to go through this exercise. One is that other states and the federal government have a single APA which includes all or most agencies and California should have this also. Having already abandoned uniformity as a goal, this reason does not seem to be very strong. A second reason is that "secret" agency rules disadvantage ordinary citizens appearing before an agency. A new APA would clear away the accumulated underbrush of hidden procedures. We respectfully suggest that the remedy for underground rules does not require a new APA but can be dealt with on a case by case basis. We do not disagree that the current APA can be improved for those agencies subject to it and that non-APA agencies may wish to use it as a model.

In addition to these general concerns there are some specific problems we would like to bring to the attention of the Commission.

Section 633.030(a)(3) prohibits ex parte communications to the extent provided in section 643.410. Unemployment Insurance Code section 1330 provides that the director of EDD is an interested party to any appeal. EDD forwards its file to our office of administrative appeal. On occasion after the file has been forwarded but before the hearing EDD will provide other documents to the ALJ. EDD has such documents in its possession because it is the agency that makes the determination from which an appeal is taken. Frequently claimants or employers have an ongoing relationship with EDD and EDD obtains new information as a result. Other times EDD conducts audits and forwards the information to us. It may simply be a copy of a claims statement or some other form one party or another has filled out which is relevant to the issue being heard. Normally, the ALJ would give the claimant or other party at the hearing a copy of the document and solicit comment. EDD frequently does not appear at hearings. Sometimes, prior to a hearing, the ALJ may ask EDD whether it has additional information. We do not believe that activity of this kind should be prohibited as ex parte communication. We are not talking about advocacy outside the presence of parties.

Section 633.030(a)(4) requires that hearings be open to public observation. The CUIAB conducts many hearings over the telephone. In interstate appeals this is usually the only practical way to conduct hearings. Exhibits are generally mailed to the parties before the hearing date. Section 648.140 (b) requires that for telephone hearings members of the public have an opportunity to inspect the agency record and be physically present at the place where the presiding officer is conducting the hearing. It is not clear how this would work logistically. Those interested members of the public would probably be in the same communities as the parties. How is the CUIAB to provide for inspection of records? Will simply giving a member of the public the right to inspect documents at a hearing conducted

hundreds of miles away satisfy the public hearing requirement? Do members of the public have a right to be included in a phone hearing which is normally done as a conference call?

Section 633.030(a)(7) requires a decision in writing to be based on the record and include a statement of the factual and legal basis of the decision to the extent provided in section 649.120. That section in turn requires that the factual basis of the decision identify the demeanor relied that supports a credibility finding. CUIAB decisions are divided into statement of facts, reasons for decision, and decision. This is required by Unemployment insurance code section 409. The Department of Labor has been attempting to bring about uniformity in state decisions and at this point strongly recommends (but may require) that issues of credibility not be discussed in the statement of facts. Rather, DOL would prefer the facts be stated as findings of fact without reference why they were found to be that way. We bring this up not because it cannot be solved but only to demonstrate that even the most noncontroversial and sensible rule may cause conflict with the demands of another agency that has something to say about our procedures.

Section 633.040(c) requires that the agency provide a copy of the agency's special hearing procedure to the person to which the agency action is directed. As the CUIAB heard over 220,000 appeals last year and unemployment projections suggest pretty much the same for this year, this would amount to an enormous expense if it is the meaning of this section that every party get his or her own copy. We currently have available booklets describing our hearing process, summary handouts describing it and more specialized material for anyone who is interested. Further, our ALJ's are instructed to discuss the hearing procedures with the parties prior to opening the hearing. Our hearings are rather informal and its rare that we hear complaints that a copy of the rules would have been helpful. We do hear complaints that had the parties known better how to present evidence the result would have been different.

Again we wish to thank you for an opportunity to respond.

Very truly yours,

M. JEFFREY FINE, Acting Chief Counsel
MJF:kh\memos\clrc.994
cc: Dan Segal, Sacramento AG's Office