
First Supplement to Memorandum 94-45

Administrative Adjudication: Additional Comments on Revised Tentative Recommendation

This supplemental memorandum analyzes late-arriving comments on the revised tentative recommendation on administrative adjudication. Comments are from:

| Commenter | Exhibit Pages |
|--------------------------------------|---------------|
| Fair Employment & Housing Commission | 1-3 |

Matters the staff intends to raise at the meeting are bulleted [•].

§ 610.460. Party

Steve Owyang of the Fair Employment and Housing Commission notes that where the agency hearing a case is different from the agency prosecuting the case, the statute should be clear that only the agency prosecuting the case is considered a “party” to the proceeding. Exhibit p. 1. The staff agrees that this is the intent of the draft, and **it should be clear in the statute:**

610.460. “Party,” in an adjudicative proceeding, includes the agency that is taking action, the person to which the agency action is directed, and any other person named as a party or allowed to intervene in the proceeding. If the agency that is taking action and the agency that is conducting the adjudicative proceeding are separate agencies, the agency that is taking action is a party and the agency that is conducting the adjudicative proceeding is not a party.

• § 613.110. Voting by agency member

Mr. Owyang raises an issue also discussed in the original memorandum — “If some agency members attend a meeting and vote during closed session deliberations, while other agency members do not attend the meeting but submit their votes by mail or telephonic means, only some of the votes will benefit from the exchange of ideas that occurs in closed session deliberations.” Exhibit p. 2.

As Mr. Owyang notes, this problem exists under the current APA as well. The staff has been unable to find any statutory or case law deliberation requirement,

and we would be reluctant to impose one. Deliberative bodies may adopt various methods of proceeding, including circulating drafts until a majority signs on, independently reviewing the record, or holding telephone conferences. The ability to vote by mail or telephone does not necessarily imply a defect in the decision-making process.

§ 643.120. Designation of presiding officer by agency head where exempt from OAH

Mr. Owyang asks whether the agency head may designate a panel of its members to act as presiding officer, even though some may not be qualified as administrative law judges; if the panel constitutes a quorum of the agency head, would the panel's decision be a final decision? Exhibit p. 2.

The statute allows delegation of decision-making authority by the agency head. Section 649.210 (availability and scope of review). It would permit a panel of agency head members to act as presiding officer; and if the agency has decided to preclude administrative review, the proposed decision of the panel would be the agency's decision. See Section 649.150 (time proposed decision becomes the decision). **The staff would elaborate this in the Comment to Section 643.120.**

§ 643.410. Ex parte communications prohibited

Mr. Owyang suggests that, where the agency conducting the hearing is not a party to the proceeding, the presiding officer employed by the agency conducting the hearing should be able to consult with the head of the agency conducting the hearing in the preparation of the proposed decision. Exhibit p. 3. The staff agrees that the ex parte communications prohibition only applies as between the presiding officer and parties and other interested persons, not as between the presiding officer and disinterested personnel of a non-party agency conducting the hearing. **The staff would note this in the Comment.**

Mr. Owyang also notes that the statute appears to allow the agency head making a decision to consult with the presiding officer in determining whether or not to adopt the proposed decision as the agency's decision. Exhibit p. 3. The staff agrees, and the Comment notes this. **It may be useful to add:** "This section does not preclude ex parte communications between the agency head making a decision and any person who presided at a previous stage of the proceeding , including communications between the agency head deciding whether to adopt a proposed decision and the presiding officer who made the proposed decision ."

• **§ 649.260. Communications between presiding officer and reviewing authority**

Mr. Owyang observes that the reviewing authority is precluded from consulting with the presiding officer in deciding whether to overturn a proposed decision, but the agency head is not precluded from consulting with the presiding officer in deciding whether to adopt a proposed decision. Exhibit p. 3.

The reason for this difference in treatment is to ensure that there is a realistic opportunity for independent review of the hearing record at the administrative level, if a party is dissatisfied with the agency's decision. As the Comment notes, "the presiding officer should not be an advocate for the proposed decision on administrative review." **The staff believes no action is required on this matter.**

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

FAIR EMPLOYMENT & HOUSING COMMISSION

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September 14, 1994

Law Revision Commission
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File: _____

California Law Revision
Commission
4000 Middlefield Rd, Ste D-2
Palo Alto, CA 94303-4739

Re: Revised Tentative Recommendation on Administrative
Adjudication by State Agencies

Dear Commissioners:

The Fair Employment and Housing Commission (FEHC) conducts administrative adjudication pursuant to the Fair Employment and Housing Act (Gov. Code, §12900 et seq.). The following comments are in response to the California Law Revision Commission's (CLRC) July 1994 Revised Tentative Recommendation on Administrative Adjudication by State Agencies.

While I have discussed your recommendation with my Commissioners, the following comments are my own, and do not necessarily represent the views of the FEHC. We may have additional comments in the future.

Under the Fair Employment and Housing Act, the Department of Fair Employment and Housing (DFEH) receives, investigates, and prosecutes complaints of unlawful discrimination. The FEHC, on the other hand, adjudicates cases prosecuted by DFEH against employers, landlords, and other respondents. FEHC and DFEH are separate entities in state government. FEHC has no part in DFEH's filing or investigation of complaints, or in DFEH's selection of cases for prosecution. DFEH has no part in the FEHC's deliberations on decisions.

COMMENTS

§610.460. Party

The definition of "party" should be revised to clarify that the agency which hears and decides the matter, as opposed to the agency that is taking action, is not a "party." I.e., under the Fair Employment and Housing Act, the Department of Fair Employment and Housing prosecutes accusations of unlawful discrimination, and would be a party. The FEHC, on the other hand, hears and decides those cases, but should not be deemed a party.

§613.110. Voting by agency member

This section allows an agency member qualified to vote on a matter to vote by mail or telephone without being present at a meeting of the agency. This section may be problematic for an agency head which is made up of multiple agency members. If some agency members attend a meeting and vote during closed session deliberations, while other agency members do not attend the meeting but submit their votes by mail or telephonic means, only some of the votes will benefit from the exchange of ideas that occurs in closed session deliberations. (This problem exists under the current APA as well.)

§643.120 Designation of presiding officer by agency head where exempt from OAH

If an agency head consists of seven agency members, can the agency head assign a panel of, say, four agency members to act as the presiding officer in a case? If so, and if under their statute four agency members constitutes a quorum, would that presiding officer issue a proposed decision or a decision? May the panel serve as the presiding officer if none of the four agency members meets the qualifications of an administrative law judge?

§643.410 Ex parte communications prohibited

§649.110 Decision

§649.260 Communications between presiding officer and reviewing authority

The Comment to §643.410 states, "This section does not preclude ex parte communications between the agency head making a decision and any person who presided at a previous stage of the proceeding."

The Comment to §649.110 states, "Nothing in [§649.110] subdivision (b) is intended to limit the authority of an agency to use its own internal procedures, including internal review processes, in the development of a proposed decision."

The Comment to §649.260 states the "general principle that the presiding officer should not be an advocate for the proposed decision on administrative review."

The Fair Employment and Housing Commission employs its own Hearing Officers. (And, as mentioned above, the Commission's adjudicatory functions and staff are separate from DFEH's investigatory and prosecutorial functions and staff.) In a case where the Hearing Officer alone is the presiding officer:

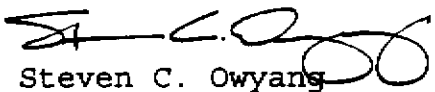
(1) May the Hearing Officer consult with Commission agency members and staff in the preparation of the proposed decision? Such consultation should be allowed.

(2) Once a proposed decision is issued, may the Hearing Officer communicate with agency members in their deliberations on whether or not to adopt the proposed decision? The Tentative Recommendation appears to allow this.

(3) Is the presiding officer barred from communicating with the reviewing authority only once administrative review is commenced? That appears to be the import of §649.260.

Thank you for the opportunity to comment. We will follow the progress of your proposal with great interest.

Sincerely,


Steven C. Owyang
Executive and Legal
Affairs Secretary