First Supplement to Memorandum 94-50

Administrative Adjudication: Comments on Choice of Drafts

Since Memorandum 94-50 was written we have received the following letters commenting on the Commission's project on administrative adjudication by state agencies:

Commenter	**Exhibit Page**
Pothier & Associates	1-3
CALPERS	4-9
California Society of Professional Engineers	10
State Bar Committee on Administration of Justice	11-17

This supplemental memorandum highlights points from the letters. The staff intends to raise only bulleted [•] matters at the Commission meeting.

• **Choice of Drafts**

Pothier & Associates supports the comprehensive revision draft. Exhibit p. 1.

• **Application of Statute**

Pothier & Associates suggests that the adjudicative procedures ought to apply not only to state agencies but also to entities that make decisions under the jurisdiction of state agencies. Exhibit p. 2. They give the example of the Escrow Agents' Fidelity Corporation, a non-profit mutual benefit corporation organized pursuant to statute whose function is to indemnify licensed escrow companies against fidelity trust fund losses. It makes decisions in conjunction with the Department of Corporations, but it is not a "state agency" within the meaning of our draft and would not be subject to the administrative adjudication provisions of the draft. No statutory procedures are provided for decisions by the Escrow Agents' Fidelity Corporation; the statute does make the decisions reviewable by a court proceeding or by arbitration.

The staff believes it would not be a simple matter to extend the statute to apply to such quasi-public entities and public corporations. We do not know what their current decision-making structures are, or whether many of the statutory provisions are workable for them. **If the Commission is inclined to**

pursue this matter, the staff would do it as a separate project and not encumber the current effort at this stage in the proceedings.

Pothier & Associates also suggest that the sanction for the same or similar offenses be the same for both the Department of Corporations and the Escrow Agents' Fidelity Corporation, eliminating the need to incur the attorneys' fees and costs to proceed twice on the same issues. Exhibit p. 3. **The staff believes the matter of sanctions, and issue of enforcement by two different entities for the same offense, is beyond the scope of the project on adjudication procedures.**

• **Exemption Requests**

The State Bar Committee on Administration of Justice would exempt the Workers Compensation Appeals Board and the State Bar Court. Exhibit p. 12. The staff notes that **the State Bar Court would not be subject to the statute**. For the **exemption request of the Workers Compensation Appeals Board**, see Memorandum 94-50.

• **Central Panel of Hearing Officers**

The State Bar Committee on Administration of Justice would remove agency hearing officers to a central panel. Exhibit pp. 12-14. The staff notes that the Commission has devoted a substantial amount of time to this concept and concluded that **the major upheaval this proposal would cause in the operation of state agencies is unwarranted when the same goal can be obtained by other means such as separation of functions and limitation of ex parte communications**.

Agency Action on Application (Comp. Rev. § 642.120)

CALPERS is concerned that the draft may impose a duty to conduct a hearing where currently the statutes are clear that a hearing is optional. Exhibit pp. 4-5. The draft is not intended to impose such a duty, and we believe the draft is reasonably clear that a hearing is only required, on application of a person, in circumstances where a hearing is otherwise statutorily or constitutionally required. Nonetheless, if CALPERS is concerned about how the interaction of these statutes, **the staff will work with them to add clarifying language to the CALPERS statute**. The staff notes that if the comprehensive revision is abandoned in favor of the alternate draft, this will no longer be an issue.

Time for Agency Action (Comp. Rev. § 642.130)

CALPERS notes that the time allowed in the draft for an agency to respond to an application for agency action is too short, since the investigation period on matters takes longer than the time allowed. Exhibit pp. 5-6. CALPERS suggests that the deadlines be measured from an express request for hearing made after a staff determination of benefit rights, and not from receipt of an application for benefits or other determination of pension-related rights. **The staff has no problem with this and will work with them to add clarifying language to the CALPERS statute**. The staff notes that if the comprehensive revision is abandoned in favor of the alternate draft, this will no longer be an issue.

• **Venue (Comp. Rev. § 642.340; Alt. Draft § 11508)**

The State Bar Committee on Administration of Justice would allow venue in each place where the Court of Appeal sits, rather than the designated large cities. "It is less burdensome for the agency to go to those locations than to require the citizen to travel what in some cases could be a long distance. The issue is one of public access to the administrative process." Exhibit p. 15. The reason for the listing of specific locations for OAH cases is that **those are the locations where OAH maintains hearing facilities**.

• **Intervention Nonreviewable (Comp. Rev. § 644.140; Alt. Draft § 11507.2)**

The State Bar Committee on Administration of Justice would make intervention orders reviewable in court. Exhibit p. 16. The reason for this provision is to **avoid tying up a case over an intervention decision**. The alternative is simply **not to allow intervention**. But many have felt intervention would be useful, including CALPERS. See Exhibit p. 7.

Discovery

The State Bar Committee on Administration of Justice passes along a suggestion of one of its reporters that some sort of limited pre-hearing discovery be authorized. Exhibit p. 17. The staff notes that the Commission has looked into this and concluded that **the present scope of discovery outlined in the proposal is adequate for adjudicative proceedings**.

Motion to Compel Discovery (Comp. Rev. § 645.310; Alt. Draft § 11507.7)

CALPERS notes that under the draft a motion to compel discovery must be made within 15 days after a party's failure timely to respond to a discovery request. But their concern is that if the parties may stipulate to a longer time, a

motion to compel discovery should be permitted based on the stipulated time. Exhibit p. 7. **The staff agrees, and would add language to the Comment to clarify the point:**

> The reference in this section to the "time provided in Section 645.210" includes a time provided by stipulation of the parties pursuant to subdivision (b) of Section 645.210 (time and manner of discovery).

The staff notes that if the comprehensive revision is abandoned in favor of the alternate draft, we will need to add statutory language relating to the stipulation in the alternate draft.

Default (Comp. Rev. § 648.130)

CALPERS notes that the draft permits either the agency or the presiding officer to grant relief from a default, but does not deal with the situation of conflicting orders by the agency and officer. Exhibit p. 7. **They suggest that a provision be added paralleling the analogous situation of conflicting orders relating to consolidation and severance, and the staff agrees**:

> If the agency and presiding officer make conflicting orders under this subdivision, the agency's order controls.

The staff notes that if the comprehensive revision is abandoned in favor of the alternate draft, this will no longer be an issue.

• **Mandatory Settlement Conference (Comp. Rev. § 646.220; Alt. Draft 11511.7)**

The State Bar Committee on Administration of Justice opposes allowing a settlement conference to be conducted by the same presiding officer who conducts the hearing if no settlement occurs. Settlement should be encouraged but "a party may be reluctant to candidly discuss a compromise for fear that a compromise position might be viewed as a tacit concession which could predispose a decision on the merits against that party." Exhibit p. 16. The reason for this provision is that **some small agencies cannot afford to have separate hearing officers for settlement**. The staff notes that if the comprehensive revision is abandoned in favor of the alternate draft, this will no longer be an issue.

Privilege

The State Bar Committee on Administration of Justice passes along a suggestion of one of its reporters that if a witness testifies in an administrative proceeding to matters that would be privileged in a civil proceeding, the administrative testimony might be considered a waiver of the privilege for the civil proceeding. Exhibit p. 17. This is a matter the Commission has not previously considered. **The staff proposes to analyze the matter for Commission consideration at a future meeting.**

Burden of Proof (Comp. Rev. § 648.310)

CALPERS notes that the provision that the proponent of a matter bears the burden of proof does not clear up existing confusion in the law as to who has the burden of proof in a case involving voluntary reinstatement after disability retirement. Exhibit p. 8. **The staff thinks the matter will have to be resolved by case law.** The staff notes that if the comprehensive revision is abandoned in favor of the alternate draft, this issue will not be raised.

• **Disciplinary Guidelines**

Memorandum 94-50 suggests that the statute should make clear that a penalty may be based on agency guidelines if they have been adopted as regulations. The staff believes this merely repeats an existing provision of the Administrative Procedure Act governing underground regulations. The proposal is supported by the California Society of Professional Engineers. Exhibit p. 10.

The staff suggests a couple of modifications of the draft:

> The ~~penalty~~ decision may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule ~~if~~ unless it has been adopted as a regulation ~~and filed with the Secretary of State~~ pursuant to Chapter 3.5 (commencing with Section 11340).

• **Ex Parte Communications From Agency Personnel (Comp. Rev. § 643.430)**

The State Bar Committee on Administration of Justice would delete authority of an agency employee or representative to communicate with the presiding officer concerning a settlement proposal. "Such ex parte contacts may both dilute the other party's due process rights and foster a public impression of bias and inherent unfairness." Exhibit p. 15. The reason the Commission adopted this provision is **to maintain the confidentiality necessary to encourage settlements**.

CAJ would revise the provision allowing ex parte communications from nonprosecutorial agency personnel in technical cases, to give parties a right to cross-examine in addition to the right to make a written response. Exhibit p. 15. The staff is concerned about **the mechanics of this proposal and what it might do to the hearing process**.

• Ex Parte Communications Between Presiding Officer and Agency Head (Comp. Rev. § 649.260; Alt. Draft § 11430.80)

CALPERS would not prohibit ex parte communications between the presiding officer and agency head absolutely; an outright ban seems unnecessarily restrictive. Exhibit p. 9. They would allow communications to the same extent as communications are allowed with other agency personnel (advice and assistance by nonprosecutorial personnel, technical and land use advice). **The staff takes the position in Memorandum 94-50 that there should be no ex parte communications between presiding officer and agency head.**

Correction of Mistakes (Comp. Rev. § 649.170; Alt. Draft § 11518.5)

The draft provides that an application for correction of a mistake in the decision is deemed denied if not acted on within 15 days. This presents a problem for CALPERS (and perhaps other agencies), which only meets monthly. They suggest an agency be authorized to extend the 15-day period. Exhibit p. 8. **The staff agrees**: "The application is considered denied if the agency does not dispose of it within 15 days after it is made or such longer time as the agency provides by regulation ."

• Administrative Review of Decision (Comp. Rev. § 649.210; Alt. Draft § 11517)

CALPERS supports the provision granting the agency authority to review of portion only of the proposed decision. The staff notes that this provision is a feature of the comprehensive revision that is not carried over into the alternate draft. The reason is that in the alternative draft we have left intact basic hearing procedures, including administrative review procedures.

However, we have made improvements in the existing APA formal hearing procedure where the improvement is clear and not objected to. This particular provision may fall into this category. **If so, the staff suggests revision of Section 11517(c) to read**:

(c) If the proposed decision is not adopted as provided in subdivision (b), the agency itself may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same administrative law judge to take additional evidence. By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the case is assigned to an administrative law judge he or she shall prepare a proposed decision as provided in subdivision (b) upon the additional evidence and the transcript and other papers which are part of the record of the prior hearing. A copy of the proposed decision shall be furnished to each party and his or her attorney as prescribed in subdivision (b). The agency itself shall decide no case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence. The authority of the agency itself to decide the case under this subdivision includes authority to decide some but not all issues in the case.

• **Administrative Review as a Matter of Right**

The State Bar Committee on Administration of Justice would provide for review of the presiding officer's decision on request of a party as a matter of right. Exhibit p. 14. This goes the opposite direction of the Commission's recommendation, which is to **add flexibility to the decision-making process** and to encourage agency heads to **give greater weight to the presiding officer's decision, including the ability to make the presiding officer's decision final**.

Judicial Review (Comp. Rev. § 650; Alt. Draft § 11523)

The statute governing judicial review, as amended this year, provides:

> The complete record of the proceedings, or the parts thereof as are designated by the petitioner, shall be prepared by the Office of Administrative Hearings or the agency and shall be delivered to petitioner, within 30 days, which time shall be extended for good cause shown, after a request therefor by him or her, upon the payment of the fee specified in Section 69950 as now or hereinafter amended for the transcript, the cost of preparation of other portions of the record and for certification thereof.

CALPERS is concerned that the statute fails to indicate how long the agency must wait for the petitioner to designate a part of the record before it may proceed on the assumption that the complete record is required. A revision is needed to "reduce confusion and delay encountered in the appeal process." Exhibit p. 9.

The staff would address this matter by revising the provision to read:

> ~~The~~ On request of the petitioner for a record of the proceedings, the complete record of the proceedings, or the parts thereof as are designated by the petitioner in the request , shall be prepared by the Office of Administrative Hearings or the agency and shall be delivered to petitioner ~~,~~ within 30 days after the request , which time shall be extended for good cause shown, ~~after a request therefor by him or her~~, upon the payment of the fee specified in Section 69950 ~~as now or hereinafter amended~~ for the transcript, the cost of preparation of other portions of the record and for certification thereof.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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November 9, 1994

NOV 14 1994

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

Attention: Nathaniel Sterling,
Executive Secretary

Re: ***Administrative Adjudication By State Agencies - Draft Proposals***

Dear Mr. Sterling:

We received the California Law Revision Commission's Memorandum 94-50 dated November 3, 1994 concerning its recommendations for a comprehensive revision and alternative draft revision of California's administrative adjudication procedures. Our law firm's practice includes the area of Administrative Law. The opinions presented in this letter are solely those of this law firm whose interests are to achieve an equitable apportionment of administrative sanctions.

We support the comprehensive revision draft with the inclusion of the suggestions made by Ms. J. Anne Rawlins in her letter to you of September 27, 1994. Specifically, we support changes to insure prevailing licensees recoup their costs and attorneys' fees following administrative hearings, inclusion of statutes of limitation during which administrative actions may be filed against licensees and extend the time to 30-days for the Respondent to answer an administrative accusation.

Whether the comprehensive revision or alternative draft is finally adopted for recommendation to the State Legislature, we believe it should contain an additional provision. We believe the provisions of the Administrative Procedures Act ("APA") should be applicable not only to the state agencies falling within its jurisdiction, but also include entities the state agencies supervise.

For example, the Department of Corporations[1] supervises the Escrow Agents' Fidelity Corporation ("EAFC") under the Escrow Law[2]. The EAFC's purpose is to indemnify licensed escrow companies against fidelity trust fund losses suffered usually by embezzlements[3]. All licensed escrow companies must pay the EAFC's $3,000 membership fee, pay annual assessments as invoiced by the EAFC and otherwise remain as members as a condition of licensure by the Department of Corporations.[4]

The Department of Corporations acts pursuant to the APA in its disciplinary proceedings against individuals or licensed escrow companies subject to the Escrow Law. Additionally, and notwithstanding the fact or outcome of the Department of Corporation's actions, the EAFC is authorized to and does bring its own separate disciplinary proceedings[5] to deny, suspend or revoke its EAFC's certificates. EAFC certificates must be possessed by persons associated with licensed escrow companies.[6] In effect, the affected persons become twice subjects of disciplinary proceedings with the concomitant costs and attorneys' fees.

Only persons associated with licensed escrow companies are subject to the double disciplinary arrangement. Other escrow providers including title companies, banks, savings & loan associations, real estate brokers and attorneys are not subject to the dual administrative discipline. The financial hardship to many if not

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[1]The Escrow Agents' Fidelity Corporation is a non-profit, mutual benefit corporation authorized by statute at Financial Code §§17305 - 17350, inclusive.

[2]Financial Code §17000, et seq. and Title 10 Code of Regulations Chapter 3, Subchapter 9, Article 1, §1700, et seq.

[3]Financial Code §17310.

[4]Financial Code §17312.

[5]Financial Code §17331.2. All of the stated reasons are also basis for discipline under the Escrow Law by the Department of Corporations. While corporations are licensed as escrow agents by the Department of Corporations, individual persons employed or associated with licensed escrow companies as employees, officers, directors, shareholders or managers are subject to discipline.

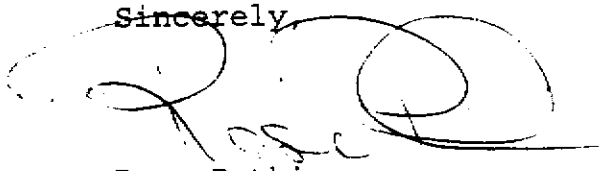
[6]Financial Code §17331.1.

most individuals who must pay for both proceedings if they wish to continue employment by licensed escrow companies is great.

We believe any revision made to the administrative procedures revision should include language requiring entities supervised by state agencies subject to the APA be also subject to the APA's provisions to achieve the comprehensive revision the California Law Revision Commission contemplates. Additionally, to assure a fair and consistent dispensement of administrative penalty, we suggest the sanction for the same or similar offenses be the same for both the Department of Corporations and the EAFC eliminating the need to incur the attorneys' fees and costs to proceed twice on the same issues.[7]

We trust the within information is helpful as representative response from the private sector which we note from Ms. Rawlins' letter you are seeking. For your convenient review of the EAFC's role and the Department of Corporation's supervision of its activities, we enclose a copy of Financial Code §17305 - 17350, inclusive. Please do not hesitate to call should you wish to discuss these matters further.

Sincerely,



Rose Pothier
Attorney At Law

Enclosure
RP/az

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[7]For example, we are aware of a situation where, following a 6-month suspension served following an administrative proceeding by the Department of Corporations, the EAFC refused to accept the same and concurrent sanction requiring the individual (now out of work with limited financial resources) to either file a lawsuit or agree to arbitrate their appeal of the EAFC's separate action to suspend or revoke the EAFC certificate. [Financial Code §17331.3]

RP1893

PERS

Memorandum

California Public Employees' Retirement System

Date: November 15, 1994

File No.:

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

NOV 15 1994

File

From: **Board of Administration**
Lincoln Plaza, 400 P Street
Sacramento, CA 95814

Subject: ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES; REVISED TENTATIVE RECOMMENDATIONS, JULY 1994

Please accept these comments, submitted on behalf of the Public Employees' Retirement System (PERS), regarding the above recommendations. While we regret that these comments have been delayed, we understand that Commission consideration of the recommendations has not yet been completed. We therefore request that the following comments be included in the Commission's deliberations.

Alternative hearing formats

PERS supports the concepts of informal hearing procedures, declaratory decision procedures, and precedential decision procedures. PERS also supports the concept of voluntary alternative dispute resolution in administrative adjudication.

Initiating hearings

Pre-existing Government Code section 20133 of the Public Employees' Retirement Law (PERL) provides that PERS may in its discretion, determine any PERS benefit matter by holding a hearing. However, when PERS decides to hold a hearing, it must conduct the hearing under the Administrative Procedures Act (APA).[1] This requirement raises several questions in light of the new APA proposal.

[1] Note that Section 20133 specifically refers to the inapplicability of existing Government Code section 11508; the APA proposal, if adopted, would change that number, so section 20133 would need a conforming amendment to insert the proper reference under the new law.

Proposed section 642.120 provides that an agency "shall", with certain exceptions, initiate an adjudicative proceeding "on application of a person for an agency decision" for which hearing is required by section 631.010, unless an exception applies. The requirements for initiating adjudicatory proceedings appear to be ambiguous when applied to PERS benefit processing (summarized below). Specifically, it is unclear whether the time limits and other requirements for initiating hearing proceedings would apply to all applications for PERS benefits, or only to those dissatisfied with PERS' staff's decision regarding that application and who specifically file an appeal requesting a hearing. If it is the former, PERS would oppose the proposal.

PERS routinely receives great numbers of applications for various kinds of statutory retirement and death benefits. (For example, PERS receives over 175 applications per month for disability retirement alone.) Appropriate operating staff review the applications, receive additional data from the applicant as well as other groups (such as the applicant's employer, examining doctors and rival applicants for the same death benefits, for example), and determine whether to grant or deny the application. When the staff determines to deny an application, it routinely grants administrative appeal rights by which an applicant may request an administrative hearing. If no appeal is filed within the period prescribed by PERS' regulations (i.e. 30 days, unless PERS extends an additional 30 days), the determination becomes final and the case is closed without a hearing.

In these circumstances, it is unclear whether under the proposed legislation PERS must automatically initiate hearing proceedings in all cases of denied benefit applications even absent a specific hearing request. Proposed section 631.030, defining when a hearing is not required, apparently would not apply, since in the above circumstances of a benefit denial PERS is not necessarily issuing a "decision to initiate or not to initiate an investigation, prosecution, or other proceeding" within the meaning of section 631.030.

Hearing deadlines

Additional difficulties arise relative to time required for agency hearing action under the proposal. Proposed section 642.130 requires an agency to make certain responses within 30 days "after receipt of an application for an agency decision", including sending out requests for additional

information if needed. Additionally, within 90 days of the later of the receipt of the application or of the response to the agency's timely request for additional information, the agency must either (1) approve or deny the application or (2) commence an adjudicative proceeding.

This section would appear to govern all applications for statutory PERS benefits, since proposed section 610.310 defines "decision" to mean "agency action of specific application that determines a legal right . . . or other legal interest of a particular person."

However, in practice, it can take PERS many months to evaluate benefit applications, particularly for various medical-related benefits, because it often occurs that information PERS receives generates the need for additional information. For example, after PERS requests and receives existing medical reports from multiple sources relevant to an employees' disability retirement application, review of the reports may disclose that PERS must obtain its own medical examination and report. This portion of the process alone can take many months to schedule and to receive PERS' own report.

Thus, if the deadlines found in proposed section 642.130 are measured from the initial application for benefits, PERS will undoubtedly find it impossible to comply with the time frames in most disability retirement applications. In addition, applying such deadlines to PERS may well be unconstitutional if they impair PERS' ability to meet its fiduciary duties as imposed by California Constitution Article XVI, section 17.

Thus, in PERS matters, if time deadlines for initiating hearings are to be enacted for the first time in the revised APA, PERS recommends that the deadlines be measured from an express request for hearing made after PERS' staff determination of benefit rights, and not from receipt of application for benefits or other determination of pension-related rights.

Continuances

PERS supports provisions of proposed Section 642.320 which provide restrictions on the granting of continuances. PERS has long practiced a policy disfavoring continuances due to the disruption of work schedules and undue delay in cases that continuances can produce.

Intervention

PERS supports the provisions of proposed Section 644.110 et seq. permitting intervention by interested third parties under specified conditions.

Discovery

Proposed section 645.310 requires that a motion to compel discovery, if any, be filed in most cases within 15 days of the expiration of the discovery response period. However, it may happen that a responding party is unable to obtain the requested discovery within the allowed time and the party may suggest to the requestor that it is still searching for the discovery, inducing the requestor not to file a motion to compel. If the responding party thereafter fails to respond to the discovery request, the requestor will not be eligible to file a motion to compel within the time limit. Such a circumstance may cause requestors to file motions to compel out of an abundance of caution that may not eventually be required to be heard. However, proposed section 648.510(e) provides contempt sanctions for motions to compel discovery made "without substantial justification".

To conserve resources and to clarify the sanction provision, we recommend that either (1) the period for filing a motion to compel be expressly made modifiable by stipulation of the requestor and responding party, and/or that (2) the period for filing motions to compel be measured backwards a reasonable amount of time before the hearing rather than forward from the date of discovery request.

PERS **strongly** supports the proposal in sections 645.310 and 645.430 to place authority for resolving discovery disputes and objections to subpenas with the presiding officer.

Default

Proposed section 648.130(c) permits "the agency or the presiding officer in its discretion" to grant a hearing after a respondent's default. However, it does not provide for resolution of conflicting orders on the issue between the agency and the presiding officer. We recommend that the resolution method in proposed section 648.120(c) [agency's order prevails] be adopted on the issue of granting hearings after default under proposed section 648.130(c).

Burden of proof

Proposed section 648.310 places the burden of proof on the "proponent of a matter". This provision is unclear as applied to "voluntary reinstatement" cases; that is, cases in which a disability retiree wishes to reinstate from disability retirement to active employment. State agencies are required by the PERL (Government Code section 21029) to re-employ their former state employee upon a PERS determination of lack of continued disability. Under proposed section 648.310, it is unclear whether the burden in a voluntary reinstatement case would be on the retiree to prove he or she is currently ineligible for disability retirement and therefore has a mandatory right to reinstatement to employment, or whether the burden would be on the employer to prove that the former employee is still entitled to disability retirement and is therefore ineligible for reinstatement to employment. Existing case law is unclear, and the proposal does not clarify it.

Correction of mistakes

PERS supports provisions of proposed Section 649.140(a)(4) permitting the agency to change the legal basis of the proposed decision and to adopt the proposed decision with that change. PERS further supports the provisions of proposed Section 649.170(d) permitting the agency to correct mistakes in the decision.

Proposed Section 649.170(c) deems applications for correction of mistake denied if not "disposed of" within 15 days after the application is made. PERS' governing Board meets only once a month, and advance time is necessary to prepare agenda items for presentation to the Board. Other state boards may follow a similar schedule. For these circumstances, it is recommended that the agency be given authority to extend the time for acting on an application for correction of mistake at the discretion of the agency, for some reasonable period such as 30 days.

Administrative Review of Decision

PERS supports proposed Section 649.210(a)(1), granting the agency authority to review a portion of the proposed decision.

Communication between presiding officer and reviewing authority

PERS supports Alternative B of proposed Section 649.260(a); an outright ban seems unnecessarily restrictive.

Judicial Review

PERS recommends that proposed section 650 be amended (at lines 10 - 15 of the July 1994 draft) to provide that, if no record or portion thereof is designated, that the entire record is deemed designated. It is believed that this arrangement would reduce confusion and delay encountered in the appeal process.

Thank you for considering our views. If you have any questions, or require additional information, please contact Richard B. Maness, Senior Staff Counsel, at (916) 326-3670.

Kayla J. Gillan

KAYLA J. GILLAN
Assistant General Counsel

KJG:RBM:dam

CALIFORNIA SOCIETY OF PROFESSIONAL ENGINEERS

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November 15, 1994

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision
Commission

Re: Commission Hearing on November 17, 1994

Dear Mr. Sterling:

It was recently brought to my attention that the California Law Revision Commission will be considering language to correct the apparent violations of the Administrative Procedures Act by the Board of Registration for Professional Engineers and Land Surveyors and others.

It is my understanding that on November 17, 1994 at 1:30pm at the State Capitol, Room 2040, the Commission will be open to accept testimony from the professions regulated by these boards. CSPE would like to present testimony relative to support for amendments that would explicitly state that penalties, such as restitution may be based upon guidelines only if "it has been adopted as a regulation and filed with the Secretary of State pursuant to Chapter 3.5 (commencing with Section 11340) of the Government Code.

We will have a representative, Russ Greenlaw, P.E. present at that time who would appreciate an opportunity to testify in support on behalf of our membership.

Please feel free to contact me in event you have any questions.

Sincerely,

Marti Kramer

MARTI KRAMER
Executive Director

THE COMMITTEE ON ADMINISTRATION OF JUSTICE
THE STATE BAR OF CALIFORNIA
[illegible] FRANKLIN [illegible]
SAN FRANCISCO, CA [illegible]

TO: California Law Revision Commission

FROM: Charles W. Willey, Chair, CAJ

DATE: November 15, 1994

RE: **California Law Revision Commission Proposal to Materially Rewrite the Administrative Procedure Act**

The present Administrative Procedure Act was adopted in 1945. It was designed to provide a uniform procedure for adjudications by state administrative agencies. Over the years, however, more and more exceptions have been carved out so that the Act now applies to only about 5% of the administrative adjudications. The other 95% are governed by the rules of the various agencies. Each state agency has its own set of rules of procedure for such adjudications, which vary widely from agency to agency.

Among this 95% of the adjudications, the hearing officer (Admnistrative Law Judge) is employed by the agency involved, and in many instances has previously worked for the enforcement or prosecutorial arm of the agency.

The Law Revision Commission, with Prof. Mike Asimow of the UCLA Law School acting as Reporter, last year proposed a complete overhaul of the Act, upon which CAJ commented, The Legislature did not adopt the revision, largely because of opposition by the affected agencies. The Commission has now revised its recommendation further, and this report addresses the revision. At

the recent Anaheim meeting of the State Bar, the Executive Secretary of the Law Revision Commission spoke to CAJ. He solicited our comments, and indicated that if the independent Bar did not elect to support amendment of the Act, the Commission would consider either scaling back the proposed rewrite to a minimal level, or perhaps abandon the project entirely.

The Committee on Administration of Justice (CAJ) believes that the Commission's proposed rewrite of the Act merits firm support by the Bar, and that if such support is not forthcoming, the voices of the special interests (here the agencies themselves and some practitioners) will prevail. No one but the Bar is speaking for the public interest.

CAJ's recommendations on this matter do not apply to the Workers Compensation Appeals Board, or to the State Bar Court, because the former functions in a way that avoids the problems this legislation is designed to address and because the latter is not an executive branch tribunal. The adjudications of both of these tribunals are conducted in a judicial setting, and each party appearing is granted full due process rights. That is <u>not</u> the case with the other agencies as to which the APA revisions discussed herein are proposed to apply.

CAJ has focused its attention on the following major areas, in an effort to provide constructive input on the subsidiary issues which we believe to be most important regarding the APA:

1. <u>Independence of Administrative Law Judges.</u> The Committee

strongly supports the need for complete independence of Administrative Law Judges (ALJ's). ALJ's should be assigned from a neutral central panel, such as that now maintained by the Office of Administrative Hearings. An ALJ who hears a case from a state agency should not be an employee of, or answerable to, the agency. The present system is widely perceived as inherently unfair. As noted in CAJ's 1993 report on the earlier draft of this proposal:

> "Our collective experience indicates that there is an appearance of unfairness, under the current structure, particularly to the average citizen who is the responding party. To the extent the public perceives that the administrative agency is acting as accuser, judge, jury and executioner, its faith in the process may be eroded.
>
> "Creating large-scale exemptions to the central panel concept is also not excused by the second reason cited by the Commission, namely that 'the various agencies are generally satisfied with their present in-house hearing personnel.' Respondents may not be satisfied with those same personnel and the existence or even appearance of unfairness is one of the causes of increasing alienation of members of our society from government and its adjudicatory structures.
>
> "The rationale that the agency charged with administering the area of state regulation needs to be able to control the enforcement process is a succinct expression of the very reason why hearing officers should be as independent of the administrative agency as reasonably possible if respondents are to receive the appearance of a fair hearing. Citizen-respondents will understandably question a hearing before an administrative hearing officer not clearly separated from the prosecuting agency."

The Committee wishes to withdraw a portion of the language submitted by CAJ last year with respect to a standard for an agency to opt out of the central panel. It recommends retaining this language:

> "exemptions from the central panel process should be sparingly created, and only by statute."

But it would delete this language:

> "in situations where the agency regulates a specialized and sophisticated constituency."

The Committee felt that virtually any agency could assert the claim that it regulates a "specialized and sophisticated constituency," and that if such an exception were created it could end up swallowing the rule requiring an independent ALJ. The Committee feels it is not appropriate for the APA to apply to only about 5% of the adjudications. Informal proceedings are undoubtedly both permissible and desirable for small matters which are analogous to Small Claims Court jurisdiction, but any larger case adjudication should require an independent ALJ.

2. Areas of Subspecialty for ALJ's. The Committee supports the creation, within the independent central panel, of broad areas of subspecialties, such as that which the Office of Administrative Hearings has previously established for medical matters.

3. Reconsideration by the Agency Head. The Committee voted to provide that:

> The non-agency party to an administrative proceeding shall, as a matter of right, be entitled to seek reconsideration of an ALJ's decision by the head of the agency; but seeking reconsideration shall not be required as a prerequisite to such non-agency party's seeking a writ of mandate.

It is the Committee's view that such a request for reconsideration should be available, but should not be a required administrative remedy which would have to be exhausted before seeking mandate.

4. Procedural Limitations on Agency Technical Advice. The Committee voted to support a modification of Section 643.430(c)(1) so that if an agency investigator in a non-prosecutorial proceeding wishes to give the adjudicator advice on a technical issue, the adjudicator must give notice to the non-agency party and afford that party a right to cross-examine oral testimony and submit a written response to the agency's written advice.

5. Prohibiting Ex Parte Communications. The CAJ voted to delete proposed Section 643.430(b) which would allow an agency representative to communicate with the adjudicator on a settlement proposal by that person. The Committee believes that any ex parte communications by an agency to the adjudicator are inappropriate. Such ex parte contacts may both dilute the other party's due process rights and foster a public impression of bias and inherent unfairness.

6. Venue. Venue should be proper in each place where the Court of Appeal sits, rather than in only the designated large cities. It is less burdensome for the agency to go to those locations than to require the citizen to travel what in some cases could be a long distance. The issue is one of public access to the administrative process.

7. Alternative Dispute Resolution. The Committee supports the Law Revision Commission proposal to allow an agency to unilaterally opt out of participation in ADR. The members do not feel comfortable in telling an agency that it has to adopt yet another adjudication procedure; i.e., ADR. If, however, both

parties do elect to utilize alternative dispute resolution, any form of ADR they agree upon should be available.

8. Intervention. The Committee believes that any order of the ALJ on intervention should be reviewable by a court. One member who works with an appellate court indicated that whenever a statute recites that a particular action is "nonreviewable," a serious question arises in the appellate court as to whether even an extraordinary writ is available. The Committee (CAJ) recommends amending Section 644.140, which appears on page 56 of the California Law Revision Commission's Revised Tentative Recommendation, at lines 26-32, to read as follows:

"§644.140.Intervention determination ~~nonreviewable~~

644.140. Whether the interests of justice and the orderly and prompt conduct of the proceedings will be impaired by allowing intervention is a determination to be made under this chapter by the presiding officer in the presiding officer's ~~sole~~ discretion based on the knowledge and judgment of the presiding officer at that time. ~~and the presiding officer's determination is not subject to administrative or judicial review.~~"

9. Settlement Conference. The Committee opposes the concept that a settlement conference could be conducted by the same ALJ as would conduct the hearing if no settlement occurred. The feeling is that settlement should be encouraged, but that a party may be reluctant to candidly discuss a compromise for fear that a compromise position might be viewed as a tacit concession which could predispose a decision on the merits against that party.

10. Discovery and Privilege. The Committee did not vote on this issue, but Ms. Renfrew, who was one of the reporters, expressed concerns that:

a. Under present procedure a party apparently has no right to receive any information about what the opponent intends to present as evidence. This member was not advocating the full-blown sort of discovery which now exists in civil litigation, since that is both expensive and time-consuming; but rather the member suggested some very limited sort of pre-hearing inquiry;

b. She also expressed concern that if a person (particularly a third party witness) testified in an administrative proceeding, he or she may under the present procedure be deemed to have waived a privilege entirely, so that the privilege would not be available in any later civil litigation. (The example given was with respect to the privacy issues involved in the prior sexual history of a witness, who testifies in an administrative proceeding involving some aspect of sexual harassment, and then has that same issue arise in later civil litigation.) This member felt that a witness should not be compelled to totally relinquish her or his evidentiary privileges merely because he or she testified in an administrative proceeding.