

First Supplement to Memorandum 94-54

Judicial Review of Agency Action: Procedure

REVIEW IN COURT OF APPEAL

One of the proposals in Professor Asimow's background study on judicial review of agency action is to transfer review authority from the superior court to the court of appeal.

The staff notes a recent enactment that has done this for final decisions of administrative law judges in the medical quality area. Two Business and Professions Code Sections 2337 have been enacted, which provide (emphasis added):

2337. Notwithstanding any other provision of law, **superior court review** of a decision revoking, suspending, or restricting a license shall take preference over all other civil actions in the matter of setting the case for hearing or trial. The hearing or trial shall be set no later than 180 days from the filing of the action. Further continuance shall be granted only on a showing of good cause.

This section shall remain operative until January 1, 1996, shall be inoperative from January 1, 1996, to January 1, 1999, and shall become operative again on January 1, 1999.

2337. Notwithstanding any other provision of law, review of final decisions of an administrative law judge of the Medical Quality Hearing Panel, or the division of Medical Quality or the Board of Podiatric Medicine in the event a review is ordered pursuant to Section 2335, shall be by **writ of mandamus pursuant to Section 1904.5 of the Code of Civil Procedure before a district court of appeal**. The court of appeal shall exercise its **independent judgment** in review of the proceedings below, and, where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced, or that was improperly excluded at the hearing, it may admit the evidence without remanding the case.

The Judicial Council may adopt rules to allocate these cases to a particular panel or panels within each district for consistent and efficient consideration. Review shall be entitled to calendar priority,

and the hearing shall be set no later than 180 days from the filing of the action.

This section shall become operative on January 1, 1996, and shall be repealed as of January 1, 1999, unless a later enacted statute, which is enacted before January 1, 1999, deletes or extends that date.

The staff understands that this provision for court of appeal review came out of an effort to expedite the review process, seeking to bypass administrative review as well as judicial review at the trial court level. The Judicial Council informs us that they oppose provisions removing judicial review from the superior court to the court of appeal. The Judicial Council managed to get the operative date of Section 2337 deferred a year at the last legislative session, and the Council may mount an effort this session to further weaken the provision, for example by making review by the court of appeal discretionary rather than as of right.

We also know, from our study of trial court unification, that the Court of Appeal will strongly resist any measure that increases its workload.

COSTS AND ATTORNEY FEES

Senator Campbell has asked the Commission to consider whether a party that seeks judicial review of an agency decision but does not prevail should be required to pay the costs and attorney fees incurred by the agency for the judicial review. This suggestion is the reciprocal of existing statutes that in certain circumstances allow a party to recover limited costs and attorney fees (\$7,500 maximum) against the agency where the court determines that the action of the agency was undertaken without substantial justification (Code of Civil Procedure Section 1028.5) or was arbitrary and capricious (Government Code Section 800).

The staff does not have any information on the extent to which this is a problem. We do not know whether a large number of agency decisions are taken to court, or whether the percentage of agency decisions overturned by the court is high. We will try to have some statistics on this at the meeting.

Such a provision probably would have a dampening effect on appeals from administrative determinations, although there are other factors that may be more significant in determining whether there will be an appeal, including:

- (1) The amount at issue in the proceeding.
- (2) The perception of fairness or unfairness in the original agency action.

(3) The standard of judicial review. An independent judgment test would appear to encourage appeals more than a substantial evidence test.

Respectfully submitted,

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Executive Secretary