Study N-100 January 20, 1995

First Supplement to Memorandum 95-8

Administrative Adjudication: Comments of Attorney General and OSH Appeals Board

Attached to this memorandum as Exhibit pp. 1-4 are comments of the Attorney General on the draft recommendation on administrative adjudication. Comments of the Occupational Safety and Health Appeals Board are attached as Exhibit pp. 5-8.

General Comments

The Attorney General believes the draft is a significant improvement over previous drafts. However, the Attorney General still has some concerns with the proposal; these are analyzed in this memorandum. Moreover, he cautions that additional concerns may arise as his office continues to study the impact of the proposal on agency proceedings and monitors the input of parties during the legislative process.

• § 11425.10. Administrative adjudication bill of rights

OSHAB is concerned that it will be required by the administrative adjudication bill of rights to review its current procedures (which are generally consistent with the bill of rights) for discrepancies and go through a rulemaking procedure to conform with the bill of rights. "[A]gencies like ours will be forced to expend scarce resources in the expensive and time consuming task of developing, adopting and implementing new regulations which do nothing more than allow them to continue doing business just [as] they have in the past." Exhibit p. 7.

The staff agrees that this is a concern. We note in Memorandum 95-8 that some agencies may think the statute requires them to go through a rulemaking procedure to conform to the bill of rights. **We propose revision of the statute and Comment to address this concern**, making clear that the bill of rights is self-executing and prevails over conflicting regulations without the need for an agency to adopt conforming regulations.

An alternate approach, which was proposed by the staff but rejected by the Commission at the last meeting, is raised here by OSHAB. The proposed "rule of substantial compliance" is a transitional provision for existing agency procedures. Existing procedures would be deemed to satisfy the bill of rights if the procedures serve the same functions as, and substantially protect the rights intended to be protected by, the bill of rights.

- **§ 11425.50. Decision**

Subdivision (a). The proposed law requires that:

> The decision shall be in writing and shall include a statement of the factual and legal basis for the decision as to each of the principal controverted issues.

It would supersede existing Section 11518:

> The decision shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any.

The reason for this change in phrasing is to pick up the case law requirement of *Topanga* that there must be an articulated nexus between the evidence and the ultimate decision in the proceeding. The Commission's Comment states that the changed language "more accurately reflects case law, and is not a substantive change."

The Attorney General prefers to retain the current requirement of findings of fact. "That language is effective, clearly understood, and has been interpreted by a settled body of case law. Unnecessary litigation, as well as an erosion of the analytical quality of administrative decisions, may result from the change." Exhibit p. 3.

In the staff's opinion, this is not a major issue. We prefer the language of the draft which is cleaner and is also used in other statutes, but we understand the Attorney General's point that this change (which is admittedly nonsubstantive) may unnecessarily inject new issues of interpretation into proceedings. The **staff wonders whether the marginal benefits of cleaner language are worth the uncertainty caused by change**, in light of the Attorney General's concern. A middle ground would be to leave existing language in the formal hearing procedure to which it now applies, and apply the new language to other proceedings under the bill of rights. This would not advance uniformity, which is one of the goals of the draft.

Subdivision (b). The Attorney General objects to the proposal to give "great weight" on judicial review to credibility determinations of the presiding officer. The policy objection is that this transfers authority from agency heads to presiding officers. The elected or appointed agency heads are accountable for agency decisions. "Given this accountability, their authority should not be eroded." Exhibit p. 2.

The Commission has heard the arguments pro and con on this issue on several occasions, including the arguments that the presiding officer may be in a better position to determine credibility than the agency head and that the proposal does not preclude the agency head from making its own determinations, so long as it gives great weight to the credibility determinations. **The staff can offer nothing further on this matter.**

§ 11430.30. Permissible ex parte communications from agency personnel

The draft allows ex parte assistance and advice to the presiding officer from a staff assistant, provided the assistant does not "furnish, augment, diminish, or modify the evidence in the record." The Attorney General wants to make clear that this only precludes an assistant from presenting new evidence; it does not preclude the assistant from helping the presiding officer analyze existing evidence in the record. Exhibit p. 3.

The Attorney General accurately identifies the purpose of the statute. The staff agrees that if the proposed language is unclear, it should be clarified. The **staff suggests the following revision**:

> An assistant or advisor may evaluate the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the record other than by a supplement to the record pursuant to subdivision (c) of Section 11425.50 .

• § 11430.80. Communications between presiding officer and agency head

The statute precludes ex parte communications between the presiding officer and the agency head "regarding any issue in the proceeding". The purpose of the provision is to prevent the presiding officer from becoming an advocate for the proposed decision — the agency head should make its decision based on the record in the proceeding.

OSHAB believes the section as drafted is overbroad. OSHAB gives the following examples of communications that are properly made off the record but that would be precluded by the statute:

(1) The agency head reviewing a damages issue finds that the presiding officer's discussion of it in the proposed decision is insufficient. The agency head wants to communicate that to the presiding officer, and that the damages issue should be more carefully addressed in the future.

(2) The agency head reviewing a proposed settlement receives a claim from a party that the terms of the settlement were not made clear to it. The agency head wants to find out from the presiding officer whether settlement discussions were taped and if so where in the tapes the discussions appear.

(3) The proposed decision contains an improper comment about a party, and the party appeals alleging bias. The agency head informs the presiding officer that it is initiating an investigation to decide whether disciplinary action should be taken.

OSHAB points out that situations such as these arise because the agency head not only reviews proposed decisions but also supervises the presiding officer.

It may help to narrow the standard in the proposed statute, e.g.:

> There shall be no communication, direct or indirect, regarding the merits of any issue in the proceeding, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.
>
> **Comment.** This section precludes only communications concerning of the merits of an issue in the proceeding. It does not preclude, for example, the agency head from directing the presiding officer to elaborate portions of the proposed decision in the proceeding, from requesting the presiding officer for tapes of settlement discussions in the proceeding, or from informing the presiding officer of an investigation concerning disciplinary action involving the presiding officer arising out of the proceeding.

§11445.20. When informal hearing may be used

Introductory Clause. The Attorney General reads this section as creating a right to an informal hearing, and argues that the decision to conduct an informal hearing should be explicitly committed to the agency's discretion. That is the intent of this provision. **We would recast the introductory language** thus: "An agency may use an informal hearing procedure ~~may be used~~ in any of the following proceedings .... "

Subdivision (a). The Attorney General finds ambiguity in the provision that permits an informal hearing where there is no disputed issue of material fact — "may the agency conduct an informal hearing and impose a disciplinary order?"

Exhibit p. 3. The staff believes it is clear from both the language of the statute and the Comment that each subdivision in Section 11445.20 provides a separate basis for conducting an informal hearing, regardless of whether one of the other subdivisions is not satisfied. **We could reinforce this concept with additional language in the Comment** — "Each subdivision in this section provides an independent basis for conducting an informal hearing. For example, if there is no issue of material fact, an agency may conduct an informal hearing under subdivision (a) whether or not a disciplinary sanction that exceeds the limits of subdivision (b) may result from the hearing."

Subdivision (b). An informal hearing may be conducted under subdivision (b) where a minor sanction is involved. The Attorney General asks whether a "stayed" disciplinary sanction may be imposed as the result of an informal hearing. That's an interesting question, and we might as well address it. The staff suggests that in the interest of broadly validating informal proceedings, suspended sanctions should be permitted. **We would add language to the Comment** that "Under subdivision (b), an informal hearing procedure may be used even though the sanction imposed on a party exceeds the limits of the provision, if the sanction never takes effect because it is stayed or suspended."

Comment. The Attorney General suggests that the California Tahoe Regional Planning Agency might be listed as an agency that conducts land use or environmental hearings, and therefore should be authorized to use the informal hearing procedure automatically. **The staff proposes to omit the listing of agencies entirely**, on the theory that the current draft leaves existing agency procedures unchanged. If an agency wishes to supplement its procedures by use of the informal hearing, it can do so by regulation.

§ 11445.30. Selection of informal hearing

The Attorney General observes that the agency's "pleading" must state the agency's selection of the informal hearing procedure, but that most agency hearings to not involve pleadings. **The staff believes the notice of hearing is more relevant here** in any case, and would revise this provision to require that "The ~~agency's pleading~~ notice of hearing shall state the agency's selection of the informal hearing procedure."

§11445.40. Procedure for informal hearing

The Attorney General believes the informal hearing procedure should not be the subject of a prehearing conference. **This matter is covered in Section 11445.40** (presiding officer may limit or entirely preclude prehearing conferences).

§ 11465.20. Declaratory decision permissive

The Attorney General thinks that the declaratory decision procedure is inappropriate regarding matters in litigation, and the statute should state this directly rather than by implication. The staff agrees; the deletion proposed in Memorandum 95-8 of the statutory reference to an "actual controversy" would help in this respect. If necessary, **we could also expand the statute** to preclude issuance of a declaratory decision where "The decision involves a matter that is the subject of pending administrative or judicial proceedings."

The Attorney General also suggests the following revision in subdivision (b):

> The agency shall not issue a declaratory decision if ~~the agency determines that~~ any of the following applies:

The staff agrees that this language is not necessary and could create an implication of agency discretion.

• § 11507.2. Intervention

Section 11507.2 provides procedures to allow a third party to intervene in an administrative adjudication under the formal hearing procedure. An intervention determination by the administrative law judge would not be administratively or judicially reviewable. An agency could by regulation preclude intervention in its proceedings.

The Commission has heard varying concerns about this provision. The State Bar Committee on Administration of Justice thought that intervention decisions should be reviewable. Professor Asimow thought the intervention provisions should be made applicable in all state administrative adjudication. The Attorney General thought that the intervention provisions should be omitted from the statute. We have solicited further comment on the intervention provision.

The State Bar Litigation Section believes an intervention determination not only should be reviewable, but should be reviewable on an interlocutory basis. The Commission has resisted this suggestion in the past because of the potential for delay. See discussion in Memorandum 95-8.

The Attorney General, on the other hand, opposes intervention in formal hearings entirely, stating that it can be costly and disruptive. In these hearings, the issues are generally framed in the pleadings by the agency. "Intervention will likely lead to attempts to introduce, or the actual introduction of, extraneous evidence and arguments, resulting in significant confusion and delay." Exhibit p. 2.

The staff has several observations about the intervention proposal. First, under the draft an agency need not follow the intervention provisions in its proceedings — it may adopt a regulation making the intervention provisions inapplicable. Second, whether or not an agency allows intervention, a person who suffers substantial deprivation of a property right as a result of an adjudicative proceeding is constitutionally entitled to notice and an opportunity to be heard. Horn v. County of Ventura, 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P. 2d 1134 (1979). If intervention is not allowed in this situation the courts will fashion another remedy. At least one agency has indicated to the Commission that clear intervention procedures would be helpful.

The staff agrees with the Attorney General that this provision potentially could complicate and slow adjudicative proceedings. But we suspect that in practice intervention will be relatively rare and this provision could prove helpful in those cases where there is a problem. **The staff suggests we put a sunset clause on this provision** and review experience under it after it has been in operation for a year or two. At that time, if it appears to be working well, a decision can be made whether it should be expanded to apply in other administrative adjudications besides the formal hearing procedure.

We would add language to Section 11507.2 along the following lines:

> (g) This section shall remain in effect until December 31, 1999, and as of that date is repealed unless legislation is enacted effective on or before January 1, 2000, repealing this subdivision. The California Law Revision Commission shall study the operation of this section and shall report to the Governor and Legislature by December 31, 1998, with recommendations concerning this section.

• § 11513. Evidence

A decision may not be based exclusively on hearsay evidence. The proposed law allows a party to raise this issue for the first time on judicial review, on the theory that the party may not be aware that a decision has been based exclusively on hearsay until after the decision is final.

The Attorney General objects to raising the hearsay defect for the first time on judicial review — it is unfair since the agency does not have an opportunity to rectify the defect. It is also costly, since instead of the matter being resolved administratively, court review is required as well as a new administrative hearing. Exhibit p. 2.

The Commission developed this provision because under the administrative review provisions in the draft at that time, there was a possibility that an opportunity for administrative challenge to a decision based on hearsay would be unavailable. Now that we have limited this provision to the formal hearing procedure, there is a clear opportunity for a party to seek administrative review. See Section 11521 (reconsideration). In light of this evolution of the statute, the staff believes the provision allowing the hearsay objection to be raised for the first time on judicial review is no longer necessary, and **we would delete it from the draft**.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

State of California

Office of the Attorney General

Daniel E. Lungren
Attorney General

January 18, 1995

California Law Revision Commission
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RE: Commission's December 1994 Staff Draft:
Administrative Adjudication by State Agencies

Dear Commission Members:

As you know, I have expressed serious concerns about earlier proposals of the California Law Revision Commission to rewrite California's Administrative Procedure Act (APA). I felt that the changes would be very costly to implement, and that there was insufficient reason to change the entire APA. I previously suggested that revisions be limited to remedying specific problems identified by the Commission.

The Commission is now considering a more focused approach, reflected in the staff's December 1994 proposal (December 1994 "Staff Draft: Administrative Adjudication by State Agencies.") It is a significant improvement over the prior comprehensive approach. The proposal reduces some of the costs of earlier drafts, while still seeking to meet the Commission's fundamental objective of promoting fair administrative proceedings.

I am not, however, able to support the proposal for two reasons. The first is due to specific provisions in the proposal as currently constituted. Those provisions are outlined below. The second reason involves process. In developing this proposal, the Commission has frequently modified its positions. That was not merely proper, it was highly responsible. The impact of even minor changes in administrative procedure can be very difficult to predict, since they affect approximately five hundred different types of administrative hearings. The Commission therefore altered its recommendations as it received new

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information or studied issues further. In this connection, the very significant potential impact of the Commission's proposal for judicial review of administrative adjudication - which is as yet unknown - cannot be ignored in further assessment of the current proposal. Likewise, if the Commission submits a proposal to the Legislature, my office will continue to study its impacts, and monitor the input of various parties throughout the legislative process. At this stage it is therefore premature to take a final position on the proposal even though currently identified concerns can and should be addressed.

Specific provisions embodied in the current proposal which raise serious concerns are as follows:

Intervention. The proposal would create a right to intervene in hearings now covered by the APA. (See section 11502.2.) This can be very costly and disruptive. In these hearings, the issues are generally framed in the pleadings by the agency. Intervention will likely lead to attempts to introduce, or the actual introduction of, extraneous evidence and arguments, resulting in significant confusion and delay.

`Great Weight' to Credibility Decisions on Review. The proposal maintains the recommendation that courts are to give "great weight" to certain credibility decisions of presiding officers. (See section 11425.50(b).) As outlined in my May 11, 1994 letter to the Commission, this provision imprudently transfers authority from agency heads to Administrative Law Judges. Since agency heads are either elected or appointed by elected officials, they are accountable. Given this accountability, their authority should not be eroded.

Hearsay Evidence. The proposal provides that, for hearings now covered by the APA, a party would be able to challenge a decision in court on the ground that a finding is only supported by hearsay evidence even where the party failed to raise a hearsay objection at the hearing. (See section 11513(d).) This is unfair, since the opposing party is not given an opportunity to rectify any defect. It can also be costly. Instead of resolving the matter at the administrative level, court review, as well as a new administrative hearing, would be required.

Any concern that requiring contemporaneous hearsay objections would be cumbersome can be addressed by only requiring that the objection be raised during the hearing process.

Staff Input. The proposal continues to prohibit staff advisor input which could "furnish, augment, diminish, or modify the evidence in the record." (See section 11430.30(a).) This could be construed as prohibiting the type of communication which law clerks regularly have with judges. A clerk's favorable or unfavorable analysis of evidence in the record could be deemed to "augment" or "diminish" the evidence. These communications, however, are not only proper; they are desirable. The quoted language should therefore be replaced with a phrase which only prohibits the presentation of evidence to the presiding officer on which the parties have never had an opportunity to comment.

Form and Content of Decision. The proposal changes the current Government Code section 11518 requirement that decisions include "findings of fact and a determination of the issues presented," to a requirement that decisions include "the factual and legal basis for the decision as to each of the principal controverted issues." (See section 11425.50(a).) Retention of the current requirement of findings of fact is preferable. That language is effective, clearly understood, and has been interpreted by a settled body of case law. Unnecessary litigation, as well as an erosion of the analytical quality of administrative decisions, may result from the change.

Informal Hearings. The proposal would create a right to an informal hearing. (See section 11445.20) The decision to conduct an informal hearing should be explictedly committed to the agency's discretion. It should not be the subject of a prehearing conference. (See section 11511.5 - Prehearing Conference). In addition, the informal hearing section contains ambiguities which will lead to confusion and multiple litigation. For example, under section 11445.20(a), may the agency conduct an informal hearing and impose a disciplinary order? Under section 11445.20(b), the disciplinary sanction cannot "involve revocation, suspension, etc." May a stayed disciplinary sanction be imposed as a result of an informal hearing?

On a technical level, the California Tahoe Regional Planning Agency should be added to the list of agencies which might conduct land use or environmental hearings. (See section 11445.20 (c)). In addition, the section 11445.30(a) requirement that the "pleading" note the selection of the informal hearing process is awkward, since this provision applies to all hearings, most of which do not involve pleadings.

Declaratory Decisions Declaratory decisions regarding matters in litigation are inappropriate. Section 11465.20 (b)(2) apparently addresses this problem by barring decisions which "would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing." To avoid any question, however, the issue of pending litigation should be explicitly addressed.

In addition, the agency determination language in section 114465.20(b) makes the subsequent prohibitions appear to be subject to agency discretion, which, presumably, they are not. The phrase "the agency determines that any of the following applies" should therefore be deleted.

Once again, thank you for considering these views and for engaging in this important undertaking.

Sincerely,

DANIEL E. LUNGREN
Attorney General

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January 20, 1995

Colin Weid, Acting Chairman
California law Revision Commission
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Re: Commission's Revised Recommendation (Nov. 1994)
Proposing an "Administrative Bill of Rights"

Dear Chairman Weid and Members of the Commission:

Thank you for affording the Occupational Safety and Health Appeals Board (Appeals Board) an opportunity to comment on the recent modifications to the Administrative Procedure Act which the Commission plans to recommend to the Legislature.

Your recommendation raises two very serious concerns: one, broad and general in scope; the other, quite specific. Let me first address the general problem.

I

In its recent modification, the Commission has taken the Special Hearing Procedure which it had created for non-APA agencies, modified it slightly, and christened it an "Administrative Adjudication Bill of Rights". At the same time, it eliminated from its proposal any requirement that conforming regulations be adopted to implement the procedural guarantees of the Bill of Rights. The Commission evidently believes that, by doing so, it has relieved those administrative agencies whose procedures already provide fundamental due process guarantees, from the expensive and time consuming task of drafting and adopting new regulations.

Unfortunately, the Bill of Rights proposal as presently conceived, will have just the opposite effect. Let me explain.

In my letter to you of September 8, 1994, a copy of which is enclosed, I pointed out that the Appeals Board has long recognized and provided for each of the basic due process rights enumerated in the Special Hearing Procedure. In his letter to us of December 6, 1994, your Executive Secretary recognized this when he said that, under the Bill of Rights, it would not be necessary for us to adopt new regulations because our procedures "generally comply with [its due process guarantees] already."

However, when the Commission adopted its new approach, it chose

to override the recommendations of its Staff[1] and import into the Bill of Rights most, if not all, of the detailed and specific requirements referenced and incorporated into former §633.030 ("Requirements of special hearing procedure") One example is the provision in §11425.20(b) concerning hearings conducted by telephone (See former §648.150); another is the detailed procedure which must be followed if a presiding officer receives an impermissible *ex parte* communication (See §11430.50, formerly, §643.450).

The inclusion of those provisions reawakens the concern expressed in my earlier letter that the Appeals Board would be put through expensive and time consuming OAL regulatory procedures to augment the basic protections, which we already provide, by requiring additional detailed rules for their implementation.

In his letter, Mr. Sterling assures us that our fears are unfounded; he tells us that "[N]ew agency regulations would not be required", presumably, because the regulatory requirements found in former §633.040 have been eliminated from the Bill of Rights.

Unfortunately, OAL regulatory requirements are not so easily dispensed with. Section 11425.10(a) now reads:

> "The *governing procedure* by which an agency conducts an adjudicative proceeding is subject to all of the following requirements...." (Emphasis supplied.)

It then goes on to spell out, in great detail, the nine due process and public policy requirements of the Bill of Rights.

To have a "governing procedure", as specified in the Section, an

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[1]Staff had proposed that subparagraph (c) be added to §11425.10, as follows:

> "The governing procedure by which an agency conducts an adjudicative proceeding may include provisions less protective of the rights of the parties than the requirements of this section if the provisions (i) are in effect on the operative date of this section, (ii) serve the same functions as the requirements of this section, and (iii) substantially protect the rights of the parties intended to be protected by the requirements of this section."

The Commission rejected this proposal at its November meeting.

Agency must have in place rules of general application dealing with each and every requirement found in those nine provisions. But a rule of general application which is not embodied in a formally adopted regulation is an illegal "underground" regulation.[2] *Ergo*, we are back where we started – or worse: Our agency would have to adopt formal regulations covering every detail in the Bill of Rights, and it would have to do so without benefit of the more relaxed rule-making procedures found in former §§633.050 and 610.940. As I explained in my earlier letter, that would require the Appeals Board to adopt additional regulations for open hearings, for *ex parte* contacts and, quite possibly, for precedent decisions.

Thus, so long as the Commission adheres to a Bill of Rights which contains detailed rules for carrying out its basic guarantees, agencies like ours will be forced to expend scarce resources in the expensive and time consuming task of developing, adopting and implementing new regulations which do nothing more than allow them to continue doing business just has they have in the past.

II

Let me turn now to a more specific problem created by the your new proposal: §11430.80 dealing with communications between presiding officer and agency head.

Our Board, like almost every other administrative agency engaged in adjudication, wears two hats: It reviews the decisions prepared by its ALJs *and* it exercises supervisory authority over them. As drafted, §11430.80 fails to take into account the fact that those two functions cannot be neatly compartmentalized. At times, they overlap. Situations inevitably arise where the Board, in its supervisory capacity, must be able to communicate with an ALJ concerning an issue which also happens to be before it on review. Let me give you a few examples:

> 1. The Board asks its Presiding ALJ to explain to the ALJ whose decision regarding damages is on review that it found his or her discussion of the damage issue to be too sketchy. In the future, the Board would like to see that issue addressed more carefully.
>
> 2. The Board is reviewing an order by an ALJ in which a settlement was approved. One of the parties has appealed, claiming that the terms of the settlement

[2]See Gov't Code §§11342(b) and 11347.5; *Ligon v. State Personnel Board* (1981) 123 Cal.App.3d 583; *State Water Resources Control Board v. Office of Administrative Law* (1993) 12 Cal.App.4th 697.

were never made clear to him. The Board asks the Presiding ALJ to find out from the ALJ who issued the Order whether the settlement discussions were taped; and, if so, where in the hearing tapes they are to be found.

3. An ALJ makes an improper comment about a party in his or her decision. The party appeals asserting bias on the part of the ALJ. The Board is upset by the comment and informs the ALJ that it is initiating an investigation to decide whether disciplinary action should be taken.

Each of those examples involves direct or indirect communication between the Agency Head (the Board) and the Presiding Officer (the ALJ) regarding an issue in the proceeding: In Example #1, the damage issue; in Example #2, information which would help determine whether the settlement was voluntary; and in Example #3, the issue of bias. Yet, there is no good reason in any of these cases for the communication to be placed on the record. Indeed, Example #1 and, especially, Example #3 involve considerations of privacy between supervisor and employee which ought not to be breached.

Notice, too, that none of the examples involve communications which in any way jeopardize the announced policy behind §11430.80; namely, "...the general principle that the presiding officer should not be an advocate for the proposed decision to the agency heard." (Comment, ¶2.)

The Appeals Board, of course, has no objection to that principle. What it objects to is a prohibition which goes far beyond the principle and forbids communications which are essential to the exercise of supervisory functions which have been entrusted to the Board by the Legislature and the Governor.

Thank you once again for affording the Appeals Board an opportunity to respond to your proposed recommendation.

Very truly yours,

Elaine W. Donaldson

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Chairman

cc: Daniel Siegel
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