Study N-100 January 23, 1995

Second Supplement to Memorandum 95-8

Administrative Adjudication: Additional Comments on Draft of Recommendation

CALIFORNIA TRUCKING ASSOCIATION

The California Trucking Association (Exhibit pp. 1-2) **opposes** the proposed legislation because it fails to address problems as to "the citizen's right to procedural due process of law, substantive due process of law, and equal protection under the law." Exhibit p. 1. Some of the major problems they have with the proposal appear to be:

(1) The presiding officer should be independent, not an employee of the agency that is taking action. The separation of functions provisions proposed in the draft are inadequate.

(2) The informal hearing procedure erodes due process protections that should be available to persons to which agency action is directed.

(3) There is no justification of extension of the emergency decision procedure to all state agencies.

"The Constitution and laws of this country and this state exist for the benefit of the people, not the bureaucrats. The substantial costs incurred by stated agencies to guarantee constitutional protections to the people can easily be offset by Agency staff layoffs." Exhibit p.1.

The staff has the following observations about these points:

(1) The separation of functions proposals may not be adequate, but they are an improvement over existing law in helping to achieve neutrality of the presiding officer.

(2) The informal hearing procedure cannot be used if there are factual issues that require full formal hearings. The simplicity and inexpensiveness of informal hearings will benefit private citizens as well as public agencies.

(3) The emergency decision procedure may be used only in emergency situations for temporary relief, and must be followed immediately with a regular administrative adjudication.

ALBIN C. KOCH

Al Koch of Toluca Lake (Exhibit pp. 3-5) **supports** the proposal, particularly the separation of functions requirements and the ex parte communications prohibitions. He believes it is particularly important that State Board of Equalization tax hearings be covered by these provisions because of problems in resolution of tax matters, which he elaborates. "My view is that the single step of adopting the clear procedural changes which the Commission is now considering could lead to reforms either at the SBE or in some other structure which would begin the important process of reforming tax dispute resolution in California. There is no good reason for this State to have so much difficulty dealing efficiently and effectively with contested tax issues." Exhibit p. 4.

The staff notes that the separation of functions and ex parte communications provisions would apply to State Board of Equalization hearings under the proposed recommendation.

DEPARTMENT OF CONSUMER AFFAIRS

In response to the Commission's request for further commentary on the intervention provision, three boards in the Department of Consumer Affairs have written noting their **opposition to the provisions on intervention**. See Exhibit pp. 6-8 (Board of Registered Nursing, Board of Psychology, and Board of Examiners in Veterinary Medicine). Their concerns are the same — intervention will cause delays when swift action is needed to protect the public, and intervention will increase enforcement costs and disrupt hearings by injecting additional parties and issues. They do not believe the opportunity for an agency to opt out of the intervention provisions is an answer, since many agencies would be put to the time and expense of rulemaking procedures unnecessarily.

The staff suggests in the First Supplement to Memorandum 95-8 that we put a **sunset clause** on the intervention statute and review experience under, making recommendations for repeal or continuation thereafter.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

CALIFORNIA
TRUCKING
ASSOCIATION

January 18, 1995

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

Attention: Nathan Sterling, Executive Secretary

Re: Administrative Adjudication by State Agencies, Revised Tentative Recommendation (July, 1994)' and Staff Draft, Administrative Adjudications by State Agencies (December, 1994)

Dear Mr. Sterling:

In your letter to Richard W. Smith, General Counsel to California Trucking Association, dated December 6, 1994, you thank him for his "concerns" with the Commission's recommendations regarding administrative adjudication by state agencies. To make the record crystal clear on this point, the document Mr. Smith signed and forwarded to you was not his "concerns". They were the official comments of the California Trucking Association on the document entitled "Revised Tentative Recommendation, Administrative Adjudication by State Agencies, July, 1994".

In your letter, you state that the Commission "will recommend an alternate approach to the Legislature: existing agency procedures would be left in place, but would be made subject to fundamental due process and public policy limitations."

Upon review of your letter and the document you enclosed, titled "Staff Draft, Administrative Adjudication by State Agencies, December, 1994", it is apparent that the Commission staff has responded to none of the issues raised by California Trucking Association in its September 9, 1994 comments as to the citizen's right to procedural due process of law, substantive due process of law, and equal protection under the law. Instead, the Commission staff has recommended proposed legislation which will not impose substantial costs on state agencies.

Your Commission staff doesn't get it. The Constitutions and laws of this country and this state exist for the benefit of the people, not the bureaucrats. The substantial costs incurred by state agencies to guarantee constitutional protections to the people can easily be offset by Agency staff layoffs.

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California Trucking Association will actively oppose any piece of legislation which you sponsor on this issue or which is sponsored on your behalf.

Very truly yours,

Joel D. Anderson

Joel D. Anderson
Executive Vice-President

JDA:sd

cc: Pete Wilson, Governor
Bill Lockyer, President Pro Tem, Senate
Ken Maddy, Minority Leader, Senate
Jim Brulte, Republican Leader, Assembly
Willie Brown, Democractic Leader, Assembly

JAN 2 3 1995

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ALBIN C. KOCH
OF COUNSEL

January 19, 1995

California Law Revision Commission
4000 Middlefield Rd., Suite D-2
Palo Alto, CA 94303

Att'n.: Nat Sterling

Re: Applicability of Proposed Revisions In California's Administrative Procedure Act To The State Board of Equalization.

Dear Sirs:

The purpose of this letter is to support the proposals before the California Law Revision Commission which would require the quasi-judicial functions of California's administrative agencies to be carried on separately from its rule-making and other administrative functions and to prohibit the decision makers from engaging in any *ex parte* contacts, whatsoever, including, particularly agency staff as well as private individuals. I also urge that the State Board of Equalization (SBE) not be excluded from the scope of these proposals; the SBE's exercise of its quasi-judicial functions should be subject to the same prohibitions against *ex parte* contacts which are being proposed with respect to other California agencies.

I am a tax attorney in private practice who has specialized in California taxation of all types for the last twenty years while continuing to practice in several areas of federal taxation as well. For the last six years, I have participated in a series of efforts to reform California's system for adjudicating administrative tax disputes which have been conducted through the Taxation Sections of the Los Angeles County Bar Association and the State Bar of California. In 1992, the Taxation Section's sponsorship of an independent administrative tax tribunal to hear such disputes was endorsed by the State Bar Board of Governors for inclusion in its official legislative program, and bills to accomplish that goal have been considered in the last two sessions of the California Legislature.

The primary thrust of the recent bar proposals has been to adopt an independent administrative forum for the resolution of tax disputes in California whose procedures would follow those of the well-respected and authoritative United States Tax Court as closely as possible.

One of the primary objections to the SBE's conduct of its quasi-judicial functions is that they are carried out in a very inefficient manner, because all hearings are *en banc*, which means that no reviewable record is created and inadequate time and attention are paid to each matter under consideration. The hearing time for each side is usually limited to half an hour, and briefing can extend for long periods. No appeal from the SBE decision is possible for the Franchise Tax Board, if it is one of the interested parties, and the only usual recourse for the taxpayer is to pay the contested tax, file a claim for refund, wait for its denial or a minimum statutory period and then bring an action *de novo* in an overcrowded Superior Court.

Almost all SBE decisions regarding sales and certain miscellaneous taxes are issued in unpublished form, and many franchise and income tax decisions come out in summaries only which do not contain either detailed fact findings or the board's reasoning. In addition, although the SBE makes more tax law for California than any other single agency, the Board members are usually unqualified by background and experience to perform this function, because they are politicians elected in partisan races which, to win, require amassing a large campaign war chest.

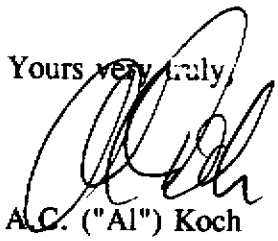
The ineffectiveness of the present SBE procedures causes many California tax issues to take much longer to be decided than should be necesary, because ten years or more can pass before the courts issue authoritative appellate decisions concerning them. The prime, but by no means the only, example of this systemic failure was the 20-or-more-year period it took for the so-called "diverse business" issue involving California's unitary doctrine to be settled, and there are those who may still question whether it is settled today.

Lurking underneath all these inadequacies of the present system, is the fact that there are unlimited *ex parte* contacts between the board members who decide the cases and the staff employees who present them on behalf of the State. Over the years, this has led taxpayers to fight back by retaining lobbyists to attempt to influence both staff (who usually draft the actual opinions) and board members *ex parte*, regarding the outcome of particular controversies. This situation provides SBE members with an unusual amount of discretion in deciding such cases, because it is also impossible for the public to know when such contacts have occurred or what effect they have had on the outcome.

There are a variety of reasons why the proposals to reform the SBE procedures have failed in the Legislature, but in recent years, simple legislative inertia coupled with political opposition from the SBE members seem to have been the principal roadblocks. My view is that the single step of adopting the clear procedural changes which the Commision is now considering could lead to reforms either at the SBE or in some other structure which would begin the important process of reforming tax dispute resolution in California. There is no good reason for this State to have so much difficulty dealing efficiently and effectively with contested tax issues.

I thank you in advance for your consideration of my views.

Yours very truly,



A.C. ("Al") Koch

State of California Department of Consumer Affairs

BOARD OF REGISTERED NURSING
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Ruth Ann Terry, MPH, RN
Executive Officer

January 18, 1995

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

RE: Commission's December 1994 Staff Draft:
Administrative Adjudication by State Agencies
INTERVENTION - Section 11507.2

Dear Commission Members:

The Commission is now considering a proposal which would create a right to intervene in hearings now covered by the California Administrative Procedure Act. This would be very costly, disruptive and is not in the public interest.

The Board of Registered Nursing reviewed proposed Section 11507.2 and opposes it. We oppose the intervention for the following reasons:

1. It would cause delays in completing administrative actions, thus delaying removal of an unsafe licensee from practice.

2. It increases cost of enforcement actions.

3. It would disrupt the administrative hearing by adding additional issues and parties, making the proceeding unmanageable and ill-focused.

The opt out provision is inadequate as it would require every agency to go through the entire regulatory process. This is a substantial and unnecessary agency expenditure.

The intervention proposal is not in the public interest. Current Board disciplinary actions are effective and are focused on comprehensive public protection through action against a professional license. To expand the issues by allowing intervention disrupts the intended purpose of the agency disciplinary action. It would increase the costs of the hearing and delay decisions as ALJ's resolve issues presented by intervenors.

Thank you for consideration of concerns related to this proposal.

Sincerely,

Ruth Terry

Ruth Ann Terry, MPH, RN
Executive Officer

cc Joel Primes, Supervising DAG, Sacramento
Derry Knight, Deputy Director, DCA Legal Affairs

State of California Department of Consumer Affairs

BOARD OF PSYCHOLOGY
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January 19, 1995

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

RE: Commission's December 1994 Staff Draft:
Administrative Adjudication By State Agencies
Intervention - Section 11507.2

Dear Commission Members:

I have been informed that the Commission is seriously considering a proposal which would create a right to intervene in hearings under the California Administrative Procedure Act. On behalf of the Board of Psychology, I object to this procedure as contrary to public interest. Such a procedure would be very costly, as well as disruptive.

The Board of Psychology has taken a very aggressive position in enforcement. It is driven by the sworn duty to protect the public in all administrative actions. Administrative hearings are now quite costly, as are all aspects of the enforcement process. The proposed change would increase the cost of enforcement actions as well as be disruptive to administrative hearings. Further, there would be significant delays in completing administrative actions. This is particularly problematic in light of the fact that it often takes up to two years for an administrative case to be completed.

We are particularly concerned that the control of the hearing may be whisked away by the intervening party. Further, there may be litigation over completely superfluous issues. We do not believe the opt out provision is adequate.

The Board of Psychology does not believe the current proposal is in the public interest. Please reconsider your policy on this matter. If you have any questions, please feel free to contact me.

Very truly yours,

Bruce W. Ebert, Ph.D., J.D.
Chair, Board of Psychology
Attorney at Law
Clinical and Forensic Psychologist

7

STATE OF CALIFORNIA - STATE AND CONSUMER SERVICES AGENCY PETE WILSON, Governor

Consumer Affairs

BOARD OF EXAMINERS IN VETERINARY MEDICINE
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Next Commission Meeting is January 26, 1995

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

RE: Commission's December 1994 Staff Draft:
Administrative Adjudication by State Agencies
INTERVENTION - Section 11507.2

Dear Commission Members:

The Commission is now considering a proposal which would create a right to intervene in hearings now covered by the California Administrative Procedure Act. This would be very costly, disruptive and is not in the public interest.

The Veterinary Medical Board has reviewed proposed Section 11507.2 and opposes it. We oppose the intervention as follows:

1. It would disrupt the administrative hearing by adding additional issues and parties.

2. Increases cost of enforcement actions.

3. Would cause delays in completing administrative actions.

4. An intervening party could commandeer the hearing. The agency thus loses control of its enforcement action which could be turned into an unmanageable ill-focused proceeding.

The opt out provision (Section 11507.2(a)) is inadequate as it would require every agency to go through the entire regulatory process. This is a substantial and unnecessary agency expenditure.

The current intervention proposal is not in the public interest. Current agency disciplinary actions are directed at specific unprofessional conduct. To expand the issues by allowing intervention disrupts the intended purpose of the agency and delay decisions as ALJ's resolve issues presented by intervenors.

Sincerely,

[redacted] K. HILL
EXECUTIVE OFFICER

Nancy L. Collins DVM

NANCY L. COLLINS, DVM
BOARD PRESIDENT

(BEH\INTERVEN)