First Supplement to Memorandum 95-21

Judicial Review of Agency Action: Unresolved Issues

Attached is a letter from Thomas M. Sobel, Chief Administrative Law Judge of the Agricultural Labor Relations Board. We took care of his first two points in the revised staff draft. His third point concerns the lack of a clear standard for determining when a statute delegates power to the agency to construe its statute, thus invoking the more deferential abuse of discretion review.

Delegation to Agency of Power to Construe Statute

The draft statute continues existing independent judgment review, with appropriate deference, for agency determinations of questions of law: whether agency action or the statute or regulation on which it is based is unconstitutional, whether the agency acted in excess of jurisdiction, and whether the agency erroneously interpreted the law. Section 1123.420. The draft statute continues existing abuse of discretion review for an agency determination that a regulation is reasonably necessary to effectuate the purpose of the statute (Gov't Code § 11350), and for agency determination of a question of law where a statute delegates determination of the question to the agency (Section 1123.420). Judge Sobel says there is no clear standard in Section 1123.420 for determining when a statute has delegated to the agency the power to determine a question of law. But existing law is no less vague.

Professor Asimow's study points out that delegation of legislative rulemaking authority is not the same as saying that the legislature delegated to an agency the power to interpret all the words in a statute. Something more than mere regulatory authority must be required to show a delegation of interpretive authority, but how much more?

Professor Asimow's study says delegation typically occurs where a statute empowers an agency to adopt a rule defining language in the statute, citing Moore v. California State Board of Accountancy, 2 Cal. 4th 999, 1013-14, 831 P.2d 798, 9 Cal. Rptr. 2d 358, 366 (1992). The *Moore* case construed an "apparent" legislative delegation in Section 5058 of the Business and Professions Code. Section 5058 forbids use by an unlicensed person of the title "licensed

accountant" or "any other title or designation likely to be confused" with "certified public accountant" or similar designations. The court in *Moore* found in this language an implied delegation of power to identify by regulation terms that are likely to be confused with "certified public account" or similar designations. When delegation is not express, but must be implied from the context, we are left with a vague standard that, as Judge Sobel notes, can only be clarified by litigation, agency by agency, with each decision having little precedential value.

The staff would not require a statutory delegation of interpretive power to be express. This would be a significant departure from existing law by applying independent judgment review of questions of law to agencies such as the ALRB where by case law they now have delegated interpretive authority. And there appears to be no satisfactory way to clarify Section 1123.420 to provide a clear standard for determining whether or not there has been a statutory delegation. Perhaps the best we can do is to preserve case law by adding language in the Comment:

> Subdivision (c) codifies the rule that where the legislature has delegated authority to the agency to interpret the law, the court must accept a reasonable agency interpretation under the abuse of discretion standard. See, e.g., Henning v. Division of Occupational Safety & Health, 219 Cal. App. 3d 747, 268 Cal. Rptr. 476 (1990). Laws the Legislature has delegated power to interpret include:
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> Lab. Code § 1144 (Agricultural Labor Relations Board). See Agricultural Labor Relations Board v. Superior Court, 16 Cal. 3d 392, 400, 411, 546 P.2d 687, 128 Cal. Rptr. 183 (1976).
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> Gov't Code §§ 3541.3, 3541.5 (Public Employment Relations Board). See Banning Teachers Association v. Public Employment Relations Board, 44 Cal. 3d 799, 804, 750 P.2d 313, 244 Cal. Rptr. 671 (1988); San Mateo City School District v. Public Employment Relations Board, 33 Cal. 3d 850, 856, 663 P.2d 523, 191 Cal. Rptr. 800 (1983); San Lorenzo Education Association v. Wilson, 32 Cal. 3d 841, 850, 654 P.2d 202, 187 Cal. Rptr. 432 (1982).

Including PERB in this Comment as an agency to which the legislature has delegated interpretive authority should solve PERB's problem discussed in the basic Memorandum, without having to weaken the independent review standard in Section 1123.420(b) for questions of law where there has been no delegation of interpretive authority.

Court Discretion to Decline to Review

Under existing law, judicial review of administrative adjudication by writ of administrative mandamus is discretionary with the court, not a matter of right. Professor Asimow recommended continuing existing authority for the superior court and Court of Appeal to decline to grant relief. Asimow, *A Modern Judicial Review Statute to Replace Administrative Mandamus* 20 (Nov. 1993).

The Model Act provides a right to judicial review of administrative action if prescribed requirements such as exhaustion of administrative remedies and time limits are satisfied. Our draft statute (Section 1123.110) is essentially the same as the Model Act. We are concerned that if we do not give courts discretionary authority to decline to grant review, the workload of the courts may be impacted, with significant fiscal implications. The staff would follow Professor Asimow's recommendation by revising Section 1123.110 as follows:

> 1123.110. ~~A~~ Subject to subdivision (b), a person who qualifies under this chapter regarding standing and who satisfies other applicable provisions of law regarding exhaustion of administrative remedies, ripeness, time for filing, advancement of costs, and other pre-conditions is entitled to judicial review of final agency action.
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> (b) The court may in its discretion summarily decline to grant judicial review if the notice of review does not present a substantial issue for resolution by the court.
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> **Comment.** . . . Subdivision (b) continues the former discretion of the courts to decline to grant a writ of administrative mandamus. California Administrative Mandamus § 1.3, at 5 (Cal. Cont. Ed. Bar, 2d ed. 1989). *Cf.* Code Civ. Proc. § 437c (summary judgment in civil action on ground that action has no merit).

Respectfully submitted,

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STATE OF CALIFORNIA PETE WILSON, *Governor*

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April 11, 1995

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Re: Draft Statute on Judicial Review

Dear Mr. Sterling,

I have just reviewed the Commission's draft statute concerning judicial review of agency actions. As a general matter, the thrust of the proposal is unobjectionable: our decisions are already reviewed in the courts of appeal, and the substantial evidence test applies to our findings of fact. However, there are some difficulties in the details.

1. Section 1123.340 permits judicial review of prehearing determinations in adjudicative proceedings "by the appropriate writ under Title I (commencing with Section 1063)." This agency holds prehearing conferences in all unfair labor practice cases in the course of which a variety of rulings are made. Board regulations now provide that, with the exception of the dismissal of a complaint in its entirety, such rulings are not subject to automatic appeal, but may be reviewed at the discretion of the Board. The regulations were written in this way because, in the Board's early experience with review as of right, litigants almost always appealed prehearing or trial rulings, the inevitable effect of which was to retard the progress of cases.

While we appreciate that review of prehearing decisions by writ is discretionary, the creation of an extrinsic avenue of appeal of prehearing decisions will operate as an invitation to seek such review. The attendant possibility of stays which flow from writ proceedings will inject unnecessary levels of complexity and delay into our proceedings.

Moreover, we cannot see that any great public interest will be served by providing such an avenue. Whether our Law Judges have erred in prehearing rulings can be fully reviewed by both the Board and by the appellate courts. It has been our experience that matters which appear to be of great consequence at the start of litigation become of no great moment in the light of a full record. Consequently, we question both the wisdom and the necessity of explicitly providing such a mechanism for reviewing prehearing determinations.

2. Section 1123.30(c) provides that the standard for judicial review of agency fact-finding will generally be substantial evidence in light of the whole record "unless the agency has changed a finding of fact", in which case, "the standard for review is the independent judgment of the court whether the decision is supported by the weight of the evidence."

Under the Agricultural Labor Relations Act, as under the National Labor Relations Act, the mere fact that the Board and an administrative law judge disagree does not change the standard for review. As the Court put the matter in NLRB v Pacific Grinding Wheel Co. Inc. 572 F 2d 1343, 1347: "The standard of review does not change simply because the Board has disagreed with the Administrative Law Judge. [Citation.] We must still start with the finding made by the Board and accept it if it is supported by substantial evidence. [Citation.]"

3. Section 1123.420(b) provides that the standard for judicial review of agency determinations of questions of law is the "independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action." Sub.(c) further provides that if a statute delegates determination of an issue to the agency, the standard for judicial review shall be abuse of discretion.

Since no definition is provided for the degree of deference due an agency under (b), and no clear standard is provided for determining when a statute has delegated determination of a question of law to an agency, it appears that 1123.420 invites litigation over whether (b) or (c) applies with respect to any given determination.

This is a matter of some importance to this agency since we believe our statute delegates determination of questions of law to this Board acting in four different capacities: 1) the promulgation of regulations interpreting the ALRA; 2) certification of representatives; 3) the adjudication of unfair labor practices; and 4) the determination of appropriate remedies. In each of these capacities, our Board has been historically accorded a great degree of deference. As we understand the draft statute, the greatest degree of deference applies to determinations falling under (c) and we believe that our decisions are entitled to the maximum deference available under the statute. However, it is not clear from the language of section (b), and particularly the standards incorporated in the comment to that section, how (b) and (c) relate, and, therefore, whether we shall continue to be accorded that high degree of deference.

To show how the problem arises, let us take the case of promulgating regulations. The power of an agency to promulgate regulations, when the legislature has not directly addressed a

precise issue, has long been treated as reviewable only for "reasonableness", Skidmore v Swift & Co. 323 US 134 (1944), and, indeed, this is the standard used by the Supreme Court in reviewing this Board's so-called "Access Rule." Agricultural Labor Relations Board v Superior Court (1976) 16 Cal. 3d 392. See also, Chevron U.S.A. v Natural Resources Defense Council (1984) 467 U.S. 837.

Review of Board regulations ought to come under (c). However, when one looks at the criteria for determining how much deference is to be accorded an agency's determination, one encounters both "whether the agency is interpreting a statute" and the degree to which "the legal text is technical, obscure, or complex and the agency has interpretive qualifications superior to the courts . . . " In other words, it appears under the interpretive guidelines of (b) that, depending upon the particular statutory language being given concrete construction through rulemaking, the "reasonableness" test might apply or it might not. This not only does little to clarify existing law, but, so far as this agency is concerned, may change it.

Similarly, it is a truism of labor law that the Legislature could not possibly catalog all the practices which might unfairly infringe on the rights of workers and so defined prohibited activities in the most general way, leaving to the labor board the discretion to breathe life into the broad language of the Act. Theoretically, therefore, (c) should apply to govern the standard of review since this Board has received such a broad delegation. Again, because (b) opens up the question of the degree of deference by impliedly treating the scope of delegation as but one of the factors to be considered in determining the standard of review, the scope of review of Board decisions might well change under the draft statute.

Thank you for the opportunity to comment on your draft proposal and we look forward to hearing from you.

Very truly yours

Thomas M. Sobel
Chief Administrative Law Judge