Study N-100 June 16, 1995

# Memorandum 95-29

## Administrative Adjudication: Issues on SB 523 (Kopp)

We have received a substantial number of objections, both oral and written, to various provisions in SB 523 (Kopp), the Commission's administrative adjudication revision. In responding to these objections, we have consulted with Senator Kopp's legislative staff and Commission chairperson, as well as with the Commission's consultant, Professor Asimow, and other key participants in this project such as Karl Engeman of the Office of Administrative Hearings, Herb Bolz of the Office of Administrative Law, and Joel Primes of the Office of the Attorney General.

Our proposed amendments to SB 523 to deal with the objections received to date are attached to this memorandum (Exhibit pp. 1-3), along with revised Comments to reflect the amendments or for clarification (Exhibit pp. 4-9). We will supplement this memorandum with any additional objections received, including the extensive objections of the California Medical Association that we are working on as of the issue date of this memorandum.

In this memorandum we discuss only issues where the staff believes there is an arguable question, although on each issue the answer seems clear to the staff, and consistent with the Commission's basic recommendation. Concerns that have been expressed based on a misunderstanding of the recommendation, and disagreements with fundamental aspects of the recommendation that the Commission has firmly settled and we do not intend to change, are not raised in this memorandum.

The hearing in the Assembly policy committee (Consumer Protection, Governmental Efficiency & Economic Development) is scheduled to occur before the next Commission meeting, so the Commission will not have an opportunity to review these issues until after the Committee has acted on them, unless the hearing is postponed for some reason (e.g., budget impasse). We are butting up against legislative deadlines for bills that are to be enacted this session.

### Mediation

SB 523 encourages mediation in administrative decision making by stating explicitly the authority of an agency to refer an administrative adjudication

matter to mediation and by protecting the confidentiality of mediation communications.

We have received a request from a coalition of mediation professionals to include the following "model language" in the mediation provisions of bill:

> (d) A mediator shall not file, and a court shall not consider, any declaration or finding of any kind by the mediator, other than a required statement of agreement or nonagreement, unless all parties in the mediation expressly agree otherwise, in writing.
>
> (e) Sections 703.5 and 1152.5 of the Evidence Code shall apply to any mediation conducted pursuant to this chapter.

The reason for this request is an effort by the coalition to standardize mediation legislation with the basic concepts of a voluntary settlement process freely arrived at by the parties without fear that frank and open communications during mediation can be used against them later.

Of course, the Commission is well familiar with these concepts, being the original author of the Evidence Code mediation provisions. Unfortunately, the Evidence Code provisions are designed for mediation in the context of litigation, not in the context of administrative adjudication. That is why the Commission's administrative adjudication proposals, while keeping the substance of the Evidence Code confidentiality concepts, tailors the provisions for administrative adjudication:

> **§ 11420.30. Confidentiality and admissibility of ADR communications**
>
> 11420.30. Notwithstanding any other provision of law, a communication made in alternative dispute resolution under this article is protected to the following extent:
>
> (a) Anything said, any admission made, and any document prepared in the course of, or pursuant to, mediation under this article is a confidential communication, and a party to the mediation has a privilege to refuse to disclose and to prevent another from disclosing the communication, whether **in an adjudicative proceeding**, civil action, or other proceeding. This subdivision does not limit the admissibility of evidence if all parties to the proceedings consent.
>
> (b) No reference to nonbinding arbitration proceedings, a decision of the arbitrator that is rejected by a party's request for a de novo adjudicative proceeding, the evidence produced, or any other aspect of the arbitration may be made **in an adjudicative**

**proceeding** or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose.

(c) No mediator or arbitrator is competent to testify in a subsequent **administrative** or civil proceeding as to any statement, conduct, decision, or order occurring at, or in conjunction with, the alternative dispute resolution.

**Comment.** The policy of Section 11420.30 is not to restrict access to information but to encourage dispute resolution.

Subdivision (a) is analogous to Evidence Code Section 1152.5(a) (mediation).

Subdivision (b) is drawn from Code of Civil Procedure Section 1141.25 (arbitration) and California Rules of Court 1616(c) (arbitration). Subdivision (b) protects confidentiality of a proposed decision in nonbinding arbitration that is rejected by a party; it does not protect a decision accepted by the parties in a nonbinding arbitration, nor does it protect an award in a binding arbitration. See also Section 11425.20 (open hearings).

Subdivision (c) is drawn from Evidence Code Section 703.5.

Another factor in the Commission's decision to provide special mediation rules adapted for administrative adjudication is the fact that administrative proceedings are generally conducted informally, not in accordance with technical rules of evidence. To the extent mediation provisions can be made explicit for administrative adjudication, without reference to the Evidence Code, the provisions will be more useful for the parties.

The staff believes these considerations outweigh the effort of the mediators coalition to foster model language. **We recommend against incorporation of the suggested language in the bill.** We have sent this material to the mediators coalition, who agree with our position. They do note two potential problems, however:

(1) The protection applies to mediation communications, but it is not clear when mediation begins and ends. For example, is a document prepared for purposes of mediation protected if the mediation is never held?

(2) There is some concern whether the mediation protection should be cast as a privilege or as an absolute prohibition.

The staff is not inclined to deal with these issues in this bill, but **if the Commission is interested, we can prepare a separate analysis of the issues with the view to clarifying legislation for next session.** The first issue, at least is a general problem that goes beyond this particular bill. See, e.g., Ryan v. Garcia, 33 Cal. Rptr. 2d 158 (1994).

Both the Department of Corporations and the Department of Consumer Affairs would narrow the protection against disclosure of mediation communications. Their particular concern is mediation entered into in bad faith with the intent to expose damaging material that cannot thereafter be used in an administrative proceeding or in litigation. **The Evidence Code mediation provisions have been amended to deal with this "tainted fruit" issue, and the APA mediation provision should do the same:**

> Evidence otherwise admissible outside of alternative dispute resolution under this article is not inadmissible or protected from disclosure solely by reason of its introduction or use in alternative dispute resolution under this article.

**Informal Hearing**

The Department of Corporations thinks it should be made clear that the decision in an informal hearing is reviewable by administrative mandamus — if informal hearing decisions are reviewed under traditional mandamus procedures, agencies may not readily embrace the new procedures since the incentive to use it may not be strong.

It is intended that decisions made under the informal hearing procedure be reviewed in the same manner as decisions made under the formal hearing procedure. Administrative mandamus review applies to decisions "made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the [agency]." Code Civ. Proc. § 1094.5. These are the same decisions to which the informal procedure applies. See Section 11410.10 ("This chapter applies to a decision by an agency if, under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision.")

**The staff would spell this out in a Comment to the informal hearing procedure:**

> It should be noted that a decision made pursuant to the informal hearing procedure is subject to judicial review to the same extent and in the same manner as a decision made pursuant to a formal hearing procedure. See, e.g., Code Civ. Proc. § 1094.5(a) (administrative mandamus for decisions "made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the

determination of facts is vested in the [agency]"; see also Sections 11445.40 (procedure for informal hearing) and 11410.10 ("This chapter applies to a decision by an agency if, under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision.")

**Discovery**

The provisions governing a motion to compel discovery allow the party resisting discovery to file a response before or *at the hearing* The Department of Corporations is concerned that this does not allow time for the moving party to file points and authorities addressed to the response — this should be changed to allow an adequate briefing schedule on the motion. Their specific suggestion is that a response be required five days before the hearing.

The reason for allowing the response to be filed at the hearing is that if the motion is filed 15 days before the hearing, which the bill allows, the respondent may not have sufficient time to engage a lawyer and file a response before the hearing. The administrative law judge may continue the proceeding if necessary to allow for points and authorities to be filed on the issues. **The staff would make this clear in the Comment to Section 11507.7 (motion to compel discovery):**

> The administrative law judge may continue the proceeding if necessary to allow adequate briefing of the motion. Cf. Section 11524(a) (continuances granted by administrative law judge for good cause)

**Subpoenas**

The subpoena provisions have been relocated from the formal hearing procedure and made applicable to all hearings of all agencies, on the theory that this will be optional authority will be useful for the agencies. However, we have now heard from two agencies — Insurance Department and Coastal Commission — that subpoenas would be inappropriate in some of their hearings. Since the bill allows the respondent as well as the agency to initiate a subpoena, the subpoena procedure needs to be limited to appropriate cases by some triggering mechanism. Presumably other agencies would have the same concern as well.

The staff agrees. We have worked out the following language with the Coastal Commission, to be **added at the beginning of the subpoena provisions:**

**Gov't Code § 11450.05 (added) . Application of article**

11450.05. (a) This article applies in an adjudicative proceeding required to be conducted under Chapter 5 (commencing with Section 11500).

(b) An agency may use the subpoena procedure provided in this article in an adjudicative proceeding not required to be conducted under Chapter 5 (commencing with Section 11500), in which case all the provisions of this article apply, including but not limited to issuance of a subpoena at the request of a party or by the attorney of record for a party under Section 11450.20.

**Comment.** Subdivision (a) of Section 11450.05 makes clear that the subpoena provisions of this article apply automatically in hearings required to be conducted under Chapter 5. Under subdivision (b), application of the subpoena provisions in other hearings is discretionary with the agency. But if the agency uses the subpoena procedure in other hearings, all provisions of this article apply, including the service and protective provisions, as well as the requirement for issuance of a subpoena on request of a party or by the attorney of record for a party. See Section 11450.20(a) (issuance of subpoena).

The Department of Corporations notes that a subpoena in a judicial proceeding need not be issued to a party; a written request to attend may be served on the party's attorney pursuant to Code of Civil Procedure Section 1987(b)-(c). They suggest that a comparable provision be adopted for administrative adjudication. **The staff believes this is a good suggestion and would add a provision to the bill**:

**§ 11450.50. Written notice to attend**

11450.50. (a) In the case of the production of a party to the record of a proceeding or of a person for whose immediate benefit a proceeding is prosecuted or defended, the service of a subpoena on the witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the attorney of the party or person.

(b) Service of written notice to attend under this section shall be made in the manner and is subject to the conditions provided in Section 1987 of the Code of Civil Procedure for service of written notice to attend in a civil action or proceeding.

**Comment.** Section 11450.50 is drawn from Code of Civil Procedure Section 1987 and adapted for administrative adjudication proceedings.

In this connection it should be noted that the bill continues existing law requiring personal service of a subpoena in the manner provided in Code of Civil Procedure Section 1987 or, under legislation enacted in 1994, by certified mail or messenger. **A closer examination of the 1994 legislation reveals some technical defects, which should be corrected in the bill:**

> The process extends to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and driver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section has the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear ~~in court~~ at the time and place required for the appearance or testimony pursuant to a subpoena, shall prove ~~to the court~~ that the party has complied with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law.

**Hearsay**

The residuum rule in administrative adjudication states that hearsay evidence is admissible in administrative proceedings but is not alone sufficient to support a finding. The Commission's recommendation is that a party be allowed to object to a finding based exclusively on hearsay evidence during administrative review, since it may not be clear until after the proposed decision is issued that a finding has been based exclusively on hearsay.

The Department of Corporations and Department of Insurance not wish to allow the objection to be raised for the first time on administrative review. The Commission on several occasions has considered the mechanical problems presented by requiring the objection to be raised at the hearing. **The staff proposes no change in the Commission's recommendation on this matter.**

**Ex Parte Communications**

The bill would preclude ex parte communications on the merits of a proceeding between the agency head and presiding officer. The Director of Industrial Relations is concerned that under this provision the only means by which the Director could control policy in some of these proceedings would be by communicating on the record with the presiding officer or by overruling the decision of the presiding officer.

Of course, the reason for the ex parte communications prohibition is to ensure a fair hearing for the person whose legal rights are being adjudicated. The trier of fact — the presiding officer in the proceeding — should not receive evidence or legal arguments off the record that the person whose rights are being adjudicated cannot respond to. This is a due process issue.

What other means are available to the Director of Industrial Relations to ensure that the decision in the proceeding is consistent with departmental policy? To begin with, the ex parte limitation of Section 11430.80 only applies in quasi-judicial proceedings, where the legal rights of a person are being determined; it does not apply in quasi-legislative hearings. See Sections 11405.50 ("decision" defined) and 11410.10 (application to constitutionally and statutorily required hearings).

The Director is concerned with quasi-judicial determinations that may also involve policy elements — mixed questions of law and fact. Thus they suggest that Section 11430.80 could be limited so as to preclude only ex parte communications regarding the merits of an *evidentiary* issue in the proceeding. But this suggestion does not resolve the problem that the party whose rights are being adjudicated in the proceeding should have the opportunity to address any issues that may have been raised concerning application of the law to the facts in the party's case.

There are other means available to the Director to coordinate policy, without having to directly reverse the presiding officer. While the regulation process is intended for this purpose, SB 523 also creates a precedent decision framework to facilitate designation of decisions as precedential by agency heads. Precedent decisions have the effect of law and may be relied on by the parties and the hearing officer in determining the rights of an individual. See Section 11425.60 (precedent decisions).

The bill would also broaden the types of review that the Director could exercise over the presiding officer's proposed decision, enabling the Director to

review as to policy matters without necessarily having to reverse the decision. See Section 11440.10 (agency head may determine to review some but not all issues). The Director might want to use the review model, for example, provided by SB 523 for modification of the presiding officer's decision in a formal hearing under Government Code Section 11517:

> The agency itself may do any of the following:
> (1) Adopt the proposed decision in its entirety.
> (2) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision.
> (3) Make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the agency under this paragraph is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.
> (4) Change the legal basis of the proposed decision and adopt the proposed decision with that change as the decision. Before acting under this paragraph the agency shall provide the parties an opportunity to comment on the proposed change in legal basis.

**It would be possible to provide this type of authority for the Director expressly**, avoiding the need to adopt regulations to implement it.

**Decision of Administrative Law Judge**

Under the existing formal hearing procedure, an administrative law judge of the Office of Administrative Hearings presides over the hearing and makes a proposed decision. The agency head may adopt or modify the decision, or make its own decision based on the record, or may simply allow the proposed decision to become the agency's decision by inaction. The agency may also order reconsideration of the decision at any time before it becomes effective.

The Commission's recommendation accepts this basic scheme, making some clarifying revisions in the procedure, and adding flexibility for the agency head to correct errors or modify decisions using simplified procedures. The Commission's recommendation also gives somewhat greater effect to the proposed decision of the administrative law judge by requiring that factual determinations of the administrative law judge based on credibility be accorded "great weight" on judicial review.

Legislation currently pending would completely overhaul this scheme. AB 1069 (Hauser) would provide that a decision of an administrative law judge of the Office of Administrative Hearings is the decision in the case. The agency

head may not change it; the only review available is judicial review. A copy of the bill is attached as Exhibit pp. 10-15. The bill passed the Assembly without a dissenting vote, and is now pending in the Senate.

This legislation is inconsistent with the Commission's proposals, which are based on the theory that the agency head has been delegated decision-making authority, not the administrative law judge. The administrative law judge's function is to act as a neutral fact-finder. The bill, if enacted, would be a revolutionary change in administrative adjudication, entrusting decision-making authority to the presiding officer rather than the agency head.

We think it is unlikely that AB 1069 will be enacted, but we can't be sure of this. **If it is enacted, we will need to make adjustments in SB 523 to recognize the change in basic approach.** The issue is clearly presented by AB 1069 and its enactment would have to be read as an express decision on the point.

One issue the Commission needs to consider in this connection is the residuum rule: hearsay evidence is admissible in administrative proceedings but is not alone sufficient to support a finding. The Commission's recommendation is that a party be allowed to object to a finding based exclusively on hearsay evidence during administrative review. **If administrative review is eliminated by AB 1069, the staff recommends that the Commission revise its recommendation to allow the residuum rule to be raised for the first time on judicial review:**

> Hearsay evidence may be sued for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on ~~reconsideration~~ *judicial review*.

Another issue the Commission needs to consider is whether a special rule should be enacted to provide for review of ALJ decisions by the Insurance Commissioner. The Commission's proposal would allow the Insurance Commissioner to mandate review of all ALJ decisions, but the Insurance Commissioner would like to see it mandated by statute. **The staff has no problem with this, so long as AB 1069 is not enacted:**

> **Ins. Code § 12921.7 (added). Insurance Commissioner review of decisions**

12921.7. Notwithstanding Section 11440.10 of the Government Code, the Insurance Commissioner shall review the proposed decision of a presiding officer before issuing a final decision in an adjudicative proceeding under this code.

**Sec. ** (uncodified). Supervening effect of AB 1069**

Section 12921.7 of the Insurance Code, as added by Section ** of this act, shall not become operative if Assembly Bill No. 1069 of the 1995-96 regular session is enacted and becomes operative.

**Emergency Decision Procedure**

The emergency decision procedure is intended as an optional procedure that an agency may use in appropriate circumstances. It is not intended to replace any existing procedures an agency has that serve the same function. The Department of Consumer Affairs notes that some of its agencies have authority to issue interim suspension orders, and that the statute should make clear that this authority is not superseded by the emergency decision procedure. **The staff agrees that this should be clearly stated:**

This article does not apply to an emergency decision, including a cease and desist order or an interim or temporary suspension order, issued pursuant to other express statutory authority.

**Solemnization of Marriage by Administrative Law Judge**

We have received a request from the Association of California State Attorneys and Administrative Law Judges, and Senator Kopp has received a request from administrative law judge Ralph B. Dash of the Office of Administrative Hearings, to authorize administrative law judges to solemnize marriages. Family Code Section 400 would be amended along the following lines:

400. Marriage may be solemnized by any of the following who is of the age of 18 years or older:

(a) A priest, minister, or rabbi of any religious denomination.

(b) A judge or retired judge, commissioner of civil marriages or retired commissioner of civil marriages, administrative law judge on the staff of the Office of Administrative Hearings, commissioner or retired commissioner, or assistant commissioner of a court of record or justice court in this state.

(c) A judge or magistrate who has resigned from office.

(d) Any of the following judges or magistrates of the United States:

(1) A justice or retired justice of the United States Supreme Court.

(2) A judge or retired judge of a court of appeals, a district court, or a court created by an act of Congress the judges of which are entitled to hold office during good behavior.
(3) A judge or retired judge of a bankruptcy court or a tax court.
(4) A United States magistrate or retired magistrate.

Administrative law judges now can perform marriages by being deputized by the county in which they will perform the marriage as a commissioner of civil marriages. They point out that the qualifications to be an administrative law judge on the staff of the Office of Administrative Hearings are the same as the qualifications to be a judge of the municipal court. (Admitted to bar for a period of five years immediately preceding appointment).

This is a matter beyond the scope of our study of administrative adjudication. Generally, if a legislative author requests to add an unrelated matter to a Commission bill, we are agreeable, provided the unrelated matter is noncontroversial and will not create problems for the bill.

In this case, the suggested provision has a checkered past, including a gubernatorial veto in 1991. **The staff is apprehensive about this provision and would recommend against adding it to SB 523.**

**Exemptions From Statute**

The Franchise Tax Board issues 35,000 deficiency and jeopardy assessments annually. If the taxpayer disagrees, or is unable to work it out with FTB, the taxpayer may request an "oral hearing" from FTB or may go directly to a hearing before the State Board of Equalization, which is an independent hearing agency for FTB disputes. A taxpayer who requests an oral FTB hearing and who is not satisfied with the outcome may still obtain an independent hearing before the State Board of Equalization.

Annually 2,400 oral FTB hearings are requested and are conducted informally by an FTB auditor. The procedure appears to be fairly efficacious, and is analogous to a "Skelly" hearing, in which an employee has an opportunity to respond to agency disciplinary action before going to an evidentiary before the State Personnel Board. FTB is concerned that SB 523 will hinder resolution of cases under this procedure by unnecessarily formalizing it. The procedure is optional, and a full hearing before the State Board of Equalization is available to the taxpayer providing full due process. The Commission did not intend the new law to cover these types of optional, dispute-resolving conferences. After

consulting with Professor Asimow and private practitioners in this field, and with Senator Kopp's office (Senator Kopp has been legislatively active in the area of resolution of tax disputes), **we have agreed to add the following language to SB 523 to make clear that FTB protest and jeopardy hearings are not covered by the statute**:

> **Rev. & Tax Code § 19044 (amended). Deficiency assessment protest**
>
> 19044. (a) If a protest is filed, the Franchise Tax Board shall reconsider the assessment of the deficiency and, if the taxpayer has so requested in his or her protest, shall grant the taxpayer or his or her authorized representatives an oral hearing. Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a hearing under this subdivision.
>
> (b) The Franchise Tax Board may act on the protest in whole or in part. In the event the Franchise Tax Board acts on the protest in part only, the remaining part of the protest shall continue to be under protest until the Franchise Tax Board acts on that part.
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> **Comment.** Section 19044 is amended to make clear that the general provisions of the Administrative Procedure Act do not apply to an oral deficiency assessment protest hearing, which is investigative and informal in nature. *Cf.* Government Code Section 11415.40 (when adjudicative proceeding not required). A taxpayer that is unable to resolve the issue at the Franchise Tax Board level has available an administrative hearing remedy before the State Board of Equalization, to which the general provisions of the Administrative Procedure Act apply. See Section 19045-19048.
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> **Rev. & Tax Code § 19084 (amended). Jeopardy assessment review**
>
> 19084. .....
>
> (a)(4) After a petition for review is filed under paragraph (2), the Franchise Tax Board shall determine whether or not the issuance of notice and demand under Section 19081 and 19082 is reasonable under the circumstances. In making this determination, the Franchise Tax Board shall grant the taxpayer or authorized representative an oral hearing if the tax payer has so requested in the petition. Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a hearing under this paragraph. The burden of proof with respect to whether a jeopardy exists as to collection or an assessment is upon the Franchise Tax Board.
>
> .....
>
> **Comment.** Paragraph (4) of Section 19084(a) is amended to make clear that the general provisions of the Administrative

Procedure Act do not apply to an oral jeopardy assessment review hearing, which is investigative and informal in nature. *Cf.* Government Code Section 11415.40 (when adjudicative proceeding not required). A taxpayer that is unable to resolve the issue at the Franchise Tax Board level has available an administrative hearing remedy before the State Board of Equalization, to which the general provisions of the Administrative Procedure Act apply. See subdivision (b).

We are also adding language to the Comment to the Section 11410.10 to make the basis of this exemption clear:

In many cases, statutes or the constitution call for administrative proceedings that do not rise to the level of an evidentiary hearing as defined in this section. For example, the constitution or a statute might require only a consultation or a decision that is not based on an exclusive record or a purely written procedure or an opportunity for the general public to make statements. In some cases, the agency has discretion to provide or not provide the procedure. In other cases, the hearing called for by the statute is informal and investigative in nature, and any decision that results is not final but is subject to a full administrative hearing at a higher agency level. See, e.g., Rev. & Tax Code §§ 19044, 19084 (statutory oral hearing available, with opportunity for full administrative hearing before State Board of Equalization). This chapter does not apply in such cases. Examples of cases in which the required procedure does not meet the standard of an evidentiary hearing for determination of facts are: Goss v. Lopez, 419 U.S. 565 (1975) (informal consultation between student and disciplinarian before brief suspension from school); Hewitt v. Helms, 459 U.S. 460 (1983) (informal nonadversary review of decision to place prisoner in administrative segregation — prisoner has right to file written statement); Skelly v. State Personnel Bd., 15 Cal. 3d 194, 539 P. 2d 774, 124 Cal. Rptr. 14 (1975) (informal opportunity for employee to respond orally or in writing to charges of misconduct prior to removal from government job); Wasko v. Department of Corrections, 211 Cal. App. 3d 996, 1001-02, 259 Cal. Rptr. 764 (1989) (prisoner's right to appeal decision does not require a hearing — Code Civ. Proc. § 1094.5 inapplicable); Marina County Water Dist. v. State Water Resources Control Bd., 163 Cal. App. 3d 132, 209 Cal.

Rptr. 212 (1984) (hearing discretionary, not mandatory — Code Civ. Proc. § 1094.5 inapplicable).

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

June 16, 1995

# Proposed Author's Amendments to Senate Bill 523 as amended in Senate, May 3, 1995

Bill Title Amendment 1

In the title of the bill, on page 2, line 1, strike out "663.1, 40412, and 40413" and insert:
663.1 and 40412

Bill Title Amendment 2

In the title of the bill, on page 2, line 4, strike out "Section 1636" and insert:
Sections 1636, 19044, and 19084

Gov 11420.30 Amendment 3

On page 28, after line 38, insert:

(d) Evidence otherwise admissible outside of alternative dispute resolution under this article is not inadmissible or protected from disclosure solely by reason of its introduction or use in alternative dispute resolution under this article.

Gov 11450.05 Amendment 4

On page 47, before line 2, insert:

11450.05. (a) This article applies in an adjudicative proceeding required to be conducted under Chapter 5 (commencing with Section 11500).

(b) An agency may use the subpoena procedure provided in this article in an adjudicative proceeding not required to be conducted under Chapter 5 (commencing with Section 11500), in which case all the provisions of this article apply, including but not limited to issuance of a subpoena at the request of a party or by the attorney of record for a party under Section 11450.20.

Gov 11450.20 Amendment 5

On page 47, line 38, strike out "in court"

Gov 11450.20 Amendment 6

On page 47, line 40, strike out "to the court"

Gov 11450.50 Amendment 7

On page 48, after line 29, insert:

11450.50. (a) In the case of the production of a party to the record of a proceeding or of a person for whose immediate benefit a proceeding is prosecuted or defended, the service of a subpoena on the witness is not required if written notice requesting the witness to attend, with the time and place of the hearing, is served on the attorney of the party or person.

(b) Service of written notice to attend under this section shall be made in the manner and is subject to the conditions provided in Section 1987 of the Code of Civil Procedure for service of written notice to attend in a civil action or proceeding.

Gov 11460.20 Amendment 8

On page 50, line 32, after "order" insert:

or an interim

Gov 11508 Amendment 9

On page 65, line 2, strike out "San Francisco" and insert:

Oakland

Gov 11511.5 Amendment 10

On page 68, line 1, strike out "presiding officer" and insert:

administrative law judge

Pub Res 40413 Amendment 11

On page 103, strike out lines 9 to 23, inclusive

Rev & Tax 19044, 19084 Amendment 12

On page 104, between lines 13 and 14, insert:

SEC. 88.5. Section 19044 of the Revenue and Taxation Code is amended to read:

19044. *(a)* If a protest is filed, the Franchise Tax Board shall reconsider the assessment of the deficiency and, if the taxpayer has so requested in his or her protest, shall grant the taxpayer or his or her authorized representatives an oral hearing. *Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a hearing under this subdivision.*

*(b)* The Franchise Tax Board may act on the protest in whole or in part. In the event the Franchise Tax Board acts on the protest in part only, the remaining part of the protest shall continue to be under protest until the Franchise Tax Board acts on that part.

SEC. 88.7. Section 19084 of the Revenue and Taxation Code is amended to read:

19084. .....

(a)(4) After a petition for review is filed under paragraph (2), the Franchise Tax Board shall determine whether or not the issuance of notice and demand under Section 19081 and 19082 is reasonable under the circumstances. In making this determination, the Franchise Tax Board shall grant the taxpayer or authorized representative an oral hearing if the tax payer has so requested in the petition. *Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a hearing under this paragraph.* The burden of proof with respect to whether a jeopardy exists as to collection or an assessment is upon the Franchise Tax Board.

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[REMAINDER OF SECTION UNCHANGED]

NEW AND REVISED COMMENTS FOR
SB 523 (KOPP), AS AMENDED

**Bus. & Prof. Code § 124 (amended). Notice**

**Comment.** Section 124 is amended to correct cross references. It should be noted that a notice, order, or document given or served pursuant to Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code is governed by Government Code Section 11440.20. In addition to notice by personal delivery or regular mail to the person's last known address, Government Code Section 11440.20 permits service or notice by mail delivery service, facsimile transmission, or by such other electronic means as is provided by agency regulation. The procedures to which Government Code Section 11440.20 applies include alternative dispute resolution, informal hearing, emergency decision, declaratory decision, and conversion of the proceeding to another type of proceeding. See Gov't Code § 11440.20 (introductory clause).

**Gov't Code § 11410.10. Application to constitutionally and statutorily required hearings**

**Comment.** Section 11410.10 limits application of this chapter to constitutionally and statutorily required hearings of state agencies. See Section 11410.20 (application to state). The provisions do not govern local agency hearings except to the extent expressly made applicable by another statute. Section 11410.30 (application to local agencies).

Section 11410.10 states the general principle that an agency must conduct an appropriate adjudicative proceeding before issuing a decision where a statute or the due process clause of the federal or state constitutions necessitates an evidentiary hearing for determination of facts. Such a hearing is a process in which a neutral decision maker makes a decision based exclusively on evidence contained in a record made at the hearing or on matters officially noticed. The hearing must at least permit a party to introduce evidence, make an argument to the presiding officer, and rebut opposing evidence.

The coverage of this chapter is the same as coverage by the existing provision for administrative mandamus under Code of Civil Procedure Section 1094.5(a). That section applies only where an agency has issued a final decision "as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the [agency]." Numerous cases have applied Code of Civil Procedure Section 1094.5(a) broadly to administrative proceedings in which a statute requires an "administrative appeal" or some other functional equivalent of an evidentiary hearing for determination of facts — an on-the-record or trial-type hearing. See, e.g., Eureka Teachers Ass'n v. Board of Educ. of Eureka City Schools, 199 Cal. App. 3d 353, 244 Cal. Rptr. 240 (1988) (teacher's right to appeal grade change was right to hearing — Code Civ. Proc. § 1094.5 applies); Chavez v. Civil Serv. Comm'n of Sacramento County, 86 Cal. App. 3d 324, 150 Cal. Rptr. 197 (1978) (right of "appeal" means hearing required — Code Civ. Proc. § 1094.5 available).

In many cases, statutes or the constitution call for administrative proceedings that do not rise to the level of an evidentiary hearing as defined in this section. For example, the constitution or a statute might require only a consultation or a decision that is not based on an exclusive record or a purely written procedure or an opportunity for the general public to make statements. In some cases, the agency has discretion to provide or not provide the procedure. In other cases, the hearing called for by the statute is informal and investigative in nature, and any decision that results is not final but is subject to a full administrative hearing at a higher agency level. See, e.g., Rev. & Tax Code §§ 19044, 19084 (statutory oral hearing available, with opportunity for full administrative hearing before State Board of Equalization). This chapter does not apply in such cases. Examples of cases in which the required procedure does not meet the standard of an evidentiary hearing for determination of facts are: Goss v. Lopez, 419 U.S. 565 (1975) (informal consultation between student and disciplinarian before brief suspension from school); Hewitt v. Helms, 459 U.S. 460 (1983) (informal nonadversary review of decision to place prisoner in

administrative segregation — prisoner has right to file written statement); Skelly v. State Personnel Bd., 15 Cal. 3d 194, 539 P. 2d 774, 124 Cal. Rptr. 14 (1975) (informal opportunity for employee to respond orally or in writing to charges of misconduct prior to removal from government job); Wasko v. Department of Corrections, 211 Cal. App. 3d 996, 1001-02, 259 Cal. Rptr. 764 (1989) (prisoner's right to appeal decision does not require a hearing — Code Civ. Proc. § 1094.5 inapplicable); Marina County Water Dist. v. State Water Resources Control Bd., 163 Cal. App. 3d 132, 209 Cal. Rptr. 212 (1984) (hearing discretionary, not mandatory — Code Civ. Proc. § 1094.5 inapplicable).

Agency action pursuant to statutes that do not require evidentiary hearings are not subject to this chapter. Such statutes include the California Environmental Quality Act (Pub. Res. Code §§ 21000-21178.1), the Bagley-Keene Open Meeting Act (Gov't Code §§ 11120-11132), and the California Public Records Act (Gov't Code §§ 6250-6268).

This chapter applies only to proceedings for issuing a "decision." A decision is an agency action of specific application that determines a legal right, duty, privilege, immunity or other legal interest of a particular person. Section 11405.50(a) ("decision" defined). Therefore this chapter does not apply to agency actions that do not determine a person's legal interests and does not apply to rulemaking, which is agency action of general applicability.

This chapter does not apply where agency regulations, rather than a statute or the constitution, call for a hearing. Agencies are encouraged to provide procedural protections by regulation even though not required to do so by statute or the constitution. An agency may provide any appropriate procedure for a decision for which an adjudicative proceeding is not required. Section 11415.50 (when adjudicative proceeding not required).

This section does not specify what type of adjudicative proceeding should be conducted. If an adjudicative proceeding is required by this section, the proceeding may be a formal hearing procedure under Chapter 5 (commencing with Section 11500), or may be a special hearing procedure provided by a statute applicable to the particular proceeding. This chapter also makes available the alternatives of an informal hearing, an emergency decision, or a declaratory decision, where appropriate under the circumstances. See Articles 10 (commencing with Section 11445.10), 13 (commencing with Section 11460.10), and 14 (commencing with Section 11465.10).

This section does not preclude the waiver of any procedure, or the settlement of any case without use of all available proceedings, under the general waiver and settlement provisions of Sections 11415.40 (waiver of provisions) and 11415.60 (settlement).

**Gov't Code § 11420.30 (amended). Confidentiality and admissibility of ADR communications**

**Comment.** The policy of Section 11420.30 is not to restrict access to information but to encourage dispute resolution.

Subdivision (a) is analogous to Evidence Code Section 1152.5(a) (mediation).

Subdivision (b) is drawn from Code of Civil Procedure Section 1141.25 (arbitration) and California Rules of Court 1616(c) (arbitration). Subdivision (b) protects confidentiality of a proposed decision in nonbinding arbitration that is rejected by a party; it does not protect a decision accepted by the parties in a nonbinding arbitration, nor does it protect an award in a binding arbitration. See also Section 11425.20 (open hearings).

Subdivision (c) is drawn from Evidence Code Section 703.5.

Subdivision (d) is drawn from Evidence Code Section 1152.5(a)(6).

**Gov't Code § 11425.10 (added). Administrative adjudication bill of rights**

**Comment.** Section 11425.10 specifies the minimum due process and public interest requirements that must be satisfied in a hearing that is subject to this chapter, including a hearing under Chapter 5 (formal hearing). See Sections 11410.50 (application where formal hearing procedure required) and 11501 (application of chapter).

Under subdivision (b), this section is self-executing — it is part of the governing procedure by which an agency conducts an adjudicative proceeding whether or not regulations address the matter. The section does not, however, override conflicting or inconsistent state statutes, or federal statutes or regulations. Section 11415.20 (conflicting or inconsistent statute controls). If the governing procedure includes regulations that are at variance with the requirements of this section, it is desirable, but not necessary, that the agency revise the regulations; the requirements of this section apply regardless of the regulations. Conforming regulations may be adopted by a simplified procedure under the rulemaking provisions of the Administrative Procedure Act pursuant to 1 California Code of Regulations Section 100. Nothing in this section precludes the agency from adopting additional or more extensive requirements than those prescribed by this section.

Subdivision (a)(1), providing a person the opportunity to present and reubut evidence, is subject to reasonable control and limitation by the agency conducting the hearing, including the manner of presentation of evidence, whether oral, written, or electronic, limitation on lengthy or repetitious testimony or other evidence, and other controls or limitations appropriate to the character of the hearing.

Subdivision (a)(2) requires only that the agency "make available" a copy of the applicable hearing procedure. This requirement is subject to a rule of reasonableness in the circumstances and does not necessarily require the agency routinely to provide a copy to a person each time agency action is directed to the person. The requirement may be satisfied, for example, by the agency's offer to provide a copy on request.

Subdivision (a)(9), relating to language assistance, is limited to agencies listed in Sections 11018 (state agency not subject to Chapter 5) and 11435.15 (application of language assistance provisions).

**[Gov't Code § 11425.30 (added). Neutrality of presiding officer**

**Comment.** Subdivision (a) of Section 11425.30 is drawn from 1981 Model State APA § 4-214(a)-(b). See also Veh. Code § 14112 (exemption for drivers' licensing proceedings).

Under this provision, a person has "served" in any of the capacities mentioned if the person has personally carried out the function, and not merely supervised or been organizationally connected with a person who has personally carried out the function. The separation of functions requirements are intended to apply to substantial involvement in a case by a person, and not merely marginal or trivial participation. The sort of participation intended to be disqualifying is meaningful participation that is likely to affect an individual with a commitment to a particular result in the case.

Thus, for example, subdivision (a) does not preclude a Franchise Tax Board auditor from acting as presiding officer in a protest hearing requested by a taxpayer under Revenue and Taxation Code Section 19044, provided the auditor was neither involved in the preparation of the deficiency assessment against the taxpayer nor subject to supervision by a person who was. In such a situation, subdivision (a) would allow the auditor to both consider the Franchise Tax Board's case for a deficiency assesment and hear the taxpayer's case, even though the auditor may be involved in preparation of deficiency assessments against other taxpayers.

Subdivision (b) is drawn from 1981 Model State APA § 4-214(c)-(d). It allows a person to be involved *as a decisionmaker* in both a probable cause determination and in the subsequent hearing; it does not allow a person to serve as a presiding officer at the hearing if the person was involved in a probable cause determination as an investigator, prosecutor, or advocate.

This provision, dealing with the extent to which a person may serve as presiding officer at different stages of the same proceeding, should be distinguished from Section 11430.10, which prohibits certain ex parte communications. The policy issues in Section 11430.10 regarding ex parte communication between two persons differ from the policy issues in subdivision (b) regarding the participation by one individual in two stages of the same proceeding. There may be other grounds for disqualification, however, in the event of improper ex parte communications.

See Sections 11430.60 (disqualification of presiding officer), 11425.40 (disqualification of presiding officer for bias, prejudice, or interest).]

**Gov't Code § 11425.40 (added). Disqualification of presiding officer for bias, prejudice, or interest**

**Comment.** Section 11425.40 applies in all administrative adjudications subject to this chapter, including a hearing under Chapter 5 (formal hearing). See Sections 11410.50 (application where formal hearing procedure required) and 11501 (application of chapter). It supersedes a provision formerly found in Section 11512(c) (formal hearing). Section 11425.40 applies whether the presiding officer serves alone or with others. For separation of functions requirements, see Section 11425.30.

Subdivision (a) is drawn from 1981 Model State APA § 4-202(b).

Subdivision (b) is drawn from Code of Civil Procedure Section 170.2 (disqualification of judges). Although subdivision (b)(2) provides that expression of a view on a legal, factual, or policy issue in the proceeding is not in itself bias, prejudice, or interest under Section 11425.40, disqualification in such a situation might occur under Section 11425.30 (neutrality of presiding officer).

Subdivision (d) adds authority for an agency to allow peremptory challenge of the presiding officer. This is consistent with existing practice in some agencies. See, e.g., 8 Cal. Code Reg. § 10453 (Workers' Compensation Appeals Board). In the case of a proceeding conducted under Chapter 5 (formal hearing procedure) by an administrative law judge employed by the Office of Administrative Hearings, this provision authorizes the Office of Administrative Hearings, and not the agency for which the Office of Administrative Hearings is conducting the proceeding, to provide for peremptory challenge of the administrative law judge.

**Gov't Code § 11445.10 (added). Purpose of informal hearing procedure**

**Comment.** Section 11445.10 states the policy that underlies the informal hearing procedure. The circumstances where the simplified procedure is appropriate are provided in Section 11445.20 (when informal hearing may be used). The simplified procedures are outlined in Section 11445.40 (procedure for informal hearing).

Basic due process and public policy protections of the administrative adjudication bill of rights are preserved in the informal hearing. Sections 11445.40(a) (procedure for informal hearing), 11425.10 (administrative adjudication bill of rights). Thus, for example, the presiding officer must be free of bias, prejudice, and interest; the presiding officer must be neutral, the adjudicative function being separated from the investigative, prosecutorial, and advocacy functions within the agency; the hearing must be open to public observation; the agency must make available language assistance; ex parte communications are restricted; the decision must be in writing, be based on the record, and include a statement of the factual and legal basis of the decision; and the agency must designate and index significant decisions as precedent.

Reference in this article to the "presiding officer" is not intended to imply unnecessary formality in the proceeding. The presiding officer may be the agency head, an agency member, an administrative law judge, or another person who presides over the hearing. Section 11405.80 ("presiding officer" defined).

It should be noted that a decision made pursuant to the informal hearing procedure is subject to judicial review to the same extent and in the same manner as a decision made pursuant to a formal hearing procedure. See, e.g., Code Civ. Proc. § 1094.5(a) (administrative mandamus for decisions "made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the [agency]"; see also Sections 11445.40 (procedure for informal hearing) and 11410.10 ("This chapter applies to a decision by an agency if, under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision.")

**Gov't Code § 11450.05 (added) . Application of article**

**Comment.** Subdivision (a) of Section 11450.05 makes clear that the subpoena provisions of this article apply automatically in hearings required to be conducted under Chapter 5. Under subdivision (b), application of the subpoena provisions in other hearings is discretionary with the agency. But if the agency uses the subpoena procedure in other hearings, all provisions of this article apply, including the service and protective provisions, as well as the requirement for issuance of a subpoena on request of a party or by the attorney of record for a party. See Section 11450.20(a) (issuance of subpoena).

**Gov't Code § 11450.50 (added) . Written notice to attend**

**Comment.** Section 11450.50 is drawn from Code of Civil Procedure Section 1987 and adapted for administrative adjudication proceedings.

**§ 11460.20. Agency regulation required**

**Comment.** Section 11460.20 requires specificity in agency regulations that adopt an emergency decision procedure. Notwithstanding this article, a statute on emergency decisions, including cease and desist orders and interim and temporary suspension orders, applicable to a particular agency or proceeding prevails over the provisions of this article. Section 11415.20 (conflicting or inconsistent statute controls).

**Gov't Code § 11507.7 (amended). Motion to compel discovery**

**Comment.** Section 11507.7 is amended to provide for proceedings to compel discovery before the administrative law judge rather than the superior court. The administrative law judge may continue the proceeding if necessary to allow adequate briefing of the motion. Cf. Section 11524(a) (continuances granted by administrative law judge for good cause).

An order of the administrative law judge compelling discovery is enforceable by certification to the superior court of facts to justify the contempt sanction. Sections 11455.10-11455.20. A court judgment of contempt is not appealable. Code Civ. Proc. §§ 1222, 904.1(a). The administrative law judge may also impose monetary sanctions for bad faith tactics, which are reviewable in the same manner as the decision in the proceeding. Section 11455.30.

**Gov't Code § 11508 (amended). Time and place of hearing**

**Comment.** Subdivision (a) of Section 11508 is amended to reflect relocation of the San Francisco branch of the Office of Administrative Hearings to Oakland and to recognize creation of a branch of the Office of Administrative Hearings in San Diego.

Subdivision (c) codifies practice authorizing a motion for change of venue. See 1 G. Ogden, California Public Agency Practice § 33.02[4][d] (1994). Grounds for change of venue include selection of an improper county and promotion of the convenience of witnesses and ends of justice. *Cf.* Code Civ. Proc. § 397. In making a change of venue determination the administrative law judge may weigh the detriment to the moving party of the initial location against the cost to the agency and other parties of relocating the site. Failure to move for a change in the place of the hearing within the 10 day period waives the right to object to the place of the hearing.

**Gov't Code § 11512 (amended). Presiding officer**

**Comment.** Subdivision (b) of Section 11512 is amended to overrule any contrary implication that might be drawn from the language of subdivision (b).

Grounds for disqualification under subdivision (c) include bias, prejudice, or interest of presiding officer (Section 11425.40) and receipt of ex parte communications (Section 11430.60). A waiver of disqualification is a voluntary relinquishment of rights by the parties. The administrative law judge need not accept a waiver; the waiver is effective only if accepted by the

administrative law judge. The provision for appointment of a substitute for an agency member is drawn from 1981 Model State APA § 4-202(e). In cases where there is no appointing authority, e.g., the agency member is an elected official, the "rule of necessity" still applies and the agency member shall not withdraw or be disqualified. See 1 G. Ogden, California Public Agency Practice § 36.14 (1994).

**Pub. Res. Code § 40412 (amended). Ex parte communication**

**Comment.** Section 40412 is amended to apply the ex parte communications provisions of the Administrative Procedure Act to matters under the jurisdiction of the California Integrated Waste Management Board which are subject to a rollcall vote under Section 40510. The penalty provided in Section 40413 for violating Section 40412 is in addition to the sanctions provided by the ex parte communications provisions of the Administrative Procedure Act.

~~**Pub. Res. Code § 40413 (amended). Penalties for violations**~~

~~**Comment.** Section 40413 is amended to make clear that the penalty for violating Section 40412 is in addition to the sanctions provided by the ex parte communications provisions of the Administrative Procedure Act.~~

**Rev. & Tax Code § 19044 (amended). Deficiency assessment protest**

**Comment.** Section 19044 is amended to make clear that the general provisions of the Administrative Procedure Act do not apply to an oral deficiency assessment protest hearing, which is investigative and informal in nature. *Cf.* Government Code Section 11415.40 (when adjudicative proceeding not required). A taxpayer that is unable to resolve the issue at the Franchise Tax Board level has available an administrative hearing remedy before the State Board of Equalization, to which the general provisions of the Administrative Procedure Act apply. See Section 19045-19048.

**Rev. & Tax Code § 19084 (amended). Jeopardy assessment review**

**Comment.** Paragraph (4) of Section 19084(a) is amended to make clear that the general provisions of the Administrative Procedure Act do not apply to an oral jeopardy assessment review hearing, which is investigative and informal in nature. *Cf.* Government Code Section 11415.40 (when adjudicative proceeding not required). A taxpayer that is unable to resolve the issue at the Franchise Tax Board level has available an administrative hearing remedy before the State Board of Equalization, to which the general provisions of the Administrative Procedure Act apply. See subdivision (b).

**Welf. & Inst. Code § 11350.6 (technical amendment). Compliance with support order**

**Comment.** Section 11350.6 is amended to correct references to the Administrative Procedure Act.

# ASSEMBLY BILL No. 1069

Introduced by Assembly Member Hauser

February 23, 1995

An act to amend Sections 11517, 11519, and 11523 of, and to repeal Section 11521 of, the Government Code, relating to administrative hearings.

LEGISLATIVE COUNSEL'S DIGEST

AB 1069, as introduced, Hauser. Administrative hearings.

The Administrative Procedure Act contains provisions relating to the preparation of decisions by administrative law judges in contested cases, the adoption of these decisions by agencies, and procedures relating to reconsideration of these decisions. The act requires an administrative law judge to submit to an agency a proposed decision for review and possible adoption by the agency in accordance with specified procedures.

This bill would require that a decision by an administrative law judge be deemed to be adopted by an agency unless the agency files a petition for judicial review within a specified period of time, and would eliminate procedures for reconsideration of a decision by an administrative law judge or an agency.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

*The people of the State of California do enact as follows:*

SECTION 1. Section 11517 of the Government Code is amended to read:

11517. (a) If a contested case is heard before an agency itself, the administrative law judge who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency. Where a contested case is heard before an agency itself, no member thereof who did not hear the evidence shall vote on the decision.

(b) If a contested case is heard by an administrative law judge alone, he or she shall prepare within 30 days after the case is submitted a ~~proposed~~ decision in ~~such~~ *a* form that it may be adopted as the decision in the case. ~~The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision.~~

~~Thirty days after~~ *Upon* receipt of the ~~proposed~~ decision, a copy of the ~~proposed~~ decision shall be filed by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

~~(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.~~

~~(d)~~

*(c)* The proposed decision shall be deemed adopted by the agency 100 days after delivery to the agency by the Office of Administrative Hearings, unless within that time the agency commences proceedings ~~to decide the case upon the record, including the transcript, or without the transcript where the parties have so stipulated, or the agency refers the case to the administrative law judge to take additional evidence~~ *for judicial review pursuant to Section 11523*. In a case where the agency itself hears the case, the agency shall issue its decision within 100 days of submission of the case. In a case where the agency has ordered a transcript of the proceedings, the 100-day period shall begin upon delivery of the transcript. If the agency finds that a further delay is required by special circumstances, it shall issue an order delaying the decision for no more than 30 days and specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section 11523.

(e) The decision of the agency shall be filed immediately by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

SEC. 2. Section 11519 of the Government Code is amended to read:

11519. (a) The decision shall become effective 30 days after it is delivered or mailed to respondent unless ~~a reconsideration is ordered within that time, or~~ the agency itself orders that the decision shall become effective sooner, or a stay of execution is granted.

(b) A stay of execution may be included in the decision or if not included therein may be granted by the agency at any time before the decision becomes effective. The stay of execution provided herein may be accompanied by an express condition that respondent comply with specified terms of probation; ~~provided, however, that~~ *if* the terms of probation ~~shall be~~ *are* just and reasonable in the light of the findings and decision.

(c) If respondent was required to register with any public officer, a notification of any suspension or revocation shall be sent to ~~such~~ *the* officer after the decision has become effective.

(d) As used in subdivision (b), specified terms of probation may include an order of restitution which requires the party or parties to a contract against whom the decision is rendered to compensate the other party or parties to a contract damaged as a result of a breach of contract by the party against whom the decision is rendered. In ~~such~~ *this* case, the decision shall include findings that a breach of contract has occurred and shall specify the amount of actual damages sustained as a result of ~~such~~ *the* breach. Where restitution is ordered and paid pursuant to ~~the provisions of~~ this subdivision, ~~such~~ *the* amount paid shall be credited to any subsequent judgment in a civil action based on the same breach of contract.

SEC. 3. Section 11521 of the Government Code is repealed.

~~11521. (a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30/day period or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of any of the applicable periods, an agency may grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.~~

~~(b) The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted,~~

~~or may be assigned to an administrative law judge. A reconsideration assigned to an administrative law judge shall be subject to the procedure provided in Section 11517. If oral evidence is introduced before the agency itself, no agency member may vote unless he or she heard the evidence.~~

SEC. 4. Section 11523 of the Government Code is amended to read:

11523. Judicial review may be had by filing a petition for a writ of mandate in accordance with ~~the provisions of~~ the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section, the petition shall be filed within 30 days after ~~the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency~~ *the decision is adopted by the agency, or within 100 days after the decision is delivered to the agency by the Office of Administrative Hearings or served by the agency on each party and his or her attorney, in accordance with Section 11513*. 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. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which is collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. The complete record includes the pleadings, all notices and orders issued by the

agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until 30 days after its delivery to him or her. The agency may file with the court the original of any document in the record in lieu of a copy thereof. In the event that the petitioner prevails in overturning the administrative decision following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification.