Study N-200 June 23, 1995

Second Supplement to Memorandum 95-30

Judicial Review of Agency Action: Letter From State Bar Committee on Administration of Justice

Attached are copies of the following letters relating to issues in the judicial review study:

State Bar Committee on Administration of Justice (responding to policy questions put by staff)

Public Employment Relations Board (arguing for keeping the "clearly erroneous" standard for review of interpretations of law by PERB)

Department of Justice (providing data on judicial review of APA decisions)

Replacing Existing Methods of Review With a Single, Straightforward Statute

CAJ supports the concept of the draft statute to replace existing methods of judicial review with a single, straightforward statute for reviewing all forms of state and local agency action. CAJ, of course, needs to see the details of the draft statute.

Standard of Review for Questions of Law

Mr. McMonigle argues for keeping the "clearly erroneous" standard for judicial review of interpretations of law by PERB. The draft statute (Section 1123.420) requires the court to use its independent judgment with appropriate deference to the agency interpretation depending on the circumstances. The Comment to Section 1123.420 notes that the section

> is consistent with cases saying courts must accept statutory interpretation by an agency within its expertise unless "clearly erroneous" as that standard was applied in Nipper v. California Automobile Assigned Risk Plan, 19 Cal. 3d 35, 45, 560 P.2d 743, 136 Cal. Rptr. 854 (1977) (courts respect "administrative interpretations of a law and, unless clearly erroneous, have deemed them significant factors in ascertaining statutory meaning and purpose"). The old "clearly erroneous" standard was another way of requiring the courts in exercising independent judgment to give appropriate deference to the agency's interpretation of law. See Bodinson Mfg.

Co. v. California Employment Comm'n, 17 Cal. 2d 321, 325-26, 109 P.2d 935 (1941).

The staff believes this portion of the Comment preserves the essence of existing law for PERB, without having to write a special statutory standard for PERB which the staff opposes.

Replacing Independent Judgment Review With Substantial Evidence Review of Agency Fact-Finding

On constitutional grounds, CAJ opposes eliminating independent judgment review of agency fact-finding. But, as Professor Asimow's study points out, there is no longer any constitutional basis for independent judgment review. See Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd., 24 Cal. 3d 335, 156 Cal. Rptr. 1 (1979).

CAJ opposes singling out proceedings heard by an administrative law judge from OAH for our proposed exception providing independent judgment review if the agency head changes a finding of fact or increases the penalty. In the basic Memorandum, the staff recommends narrowing this exception to apply only to a proceeding involving an occupational license under the Business and Professions Code, all of which are heard by an ALJ from OAH. The staff prefers to have no exception at all, but recognizes that without it, this proposal will be hard to enact.

Independent Judgment Review With Appropriate Deference for Review of Application of Law to Facts

CAJ supports the proposal in the draft statute to treat questions of application of law to fact (mixed questions of law and fact) the same as pure questions of law (independent judgment with appropriate deference to the agency determination). CAJ has reservations about "appropriate deference" because of its vagueness. But this is no more vague than existing law under which courts give deference to agency determinations depending on the circumstances. We cite relevant cases in the Comment, so existing case law standards should continue to apply.

Shifting Review From Superior Court to Court of Appeal

CAJ opposes shifting judicial review from superior court to the court of appeal. This question is discussed in the basic Memorandum at pages 9-12.

The Department of Justice provides some data concerning the possible magnitude of a shift from the superior court to the court of appeal. Based on the past five years experience with occupational licensing decisions, their data shows

approximately 70 licensing cases annually going to the superior court, of which approximately 20 cases annually are appealed to the court of appeal.

The Department notes that these numbers may not be representative of the rate of judicial review of agency action generally. For example, during the past five years an average of 600 cases annually went to the superior court under the "administrative per se" provisions of the Vehicle Code, with an annual average of 55 of these being appealed to the court of appeal.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

Law Offices Of

HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN

A Professional Corporation

THREE EMBARCADERO CENTER
SEVENTH FLOOR
SAN FRANCISCO, CA 94111-4065
TELEPHONE 415/434-1600
FACSIMILE 415/399-3041

June 20, 1995

California Law Revision Commission
Attention: Nat Sterling, Executive Secretary
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Dear Ladies and Gentlemen:

On behalf of the State Bar Committee on Administration of Justice, I am responding to the "Policy Issues in Judicial Review of Agency Action" (Memorandum from Staff of California Law Revision Commission dated May 18, 1995), which was submitted for comment. CAJ reviewed the matter in a joint North-South televideo conference held on June 9, 1995.

There were four questions posed in the Memorandum. CAJ's views on each are described below immediately after each respective question below.

1. Should the existing methods of judicial review of agency action - administrative mandamus, ordinarily mandamus, certiorari, prohibition, declaratory relief and injunctive relief - be replaced with a single, straightforward statute for judicial review of all forms of state and local agency action, adjudicative and non-adjudicative?

RESPONSE:

CAJ answered "yes" as to the concept. More details are needed as to what the statute would actually include before a more meaningful response can be generated. While simplification in the abstract is good, more data is needed.

2. Should the existing standard of review which allows the Court to use its independent judgment in many cases of agency fact-finding be restricted to require the Court to uphold agency findings of fact if supported by substantial evidence in the record as a whole, except that independent judgment review would continue to apply to a decision by an administrative law judge of the Office of Administrative Hearings in a formal adjudicative proceeding under the Administrative Procedures Act?

RESPONSE:

CAJ answered "no." It does not believe there should be discrimination in the standard of review as between administrative law judges of the OAH and other kinds of administrative law judges. Indeed, earlier this year CAJ went on record favoring administrative proceedings run by ALJs administered by the OAH and independent of the particular agencies. This reform ultimately did not find its way into proposed legislation. Nonetheless, there is certainly no empirical basis on which to impose a tighter standard (independent judgment review) on the ALJs of the OAH, and a lesser standard (findings of fact supported by substantial evidence) when conducted by other types of ALJs.

Moreover, in connection with state or local agency action affecting a vested fundamental right, courts presently have the right of applying their independent judgment rather than the traditional appellate standard of whether substantial evidence exists to support the agency's determination. The independent judgment test has roots in the California constitution. Making a statutory change on the application of independent judgment would not eliminate the constitutional basis for the test.

Lastly, some members feel that the substantial evidence test, which can be passed with a mere scintilla of evidence, is too loose.

3. Should questions of application of law to fact (mixed questions of law and fact) be treated as questions of law on judicial review, so the Court would exercise its independent judgment on such questions with appropriate deference to agency findings?

RESPONSE:

CAJ answered "yes", but with a reservation. CAJ would like to eliminate the phrase "appropriate deference to the agency findings" as vague and potentially opening up many problems. Because of unsettled areas and lack of available guidance regarding many mixed questions of law and fact dealt with by agencies, if courts exercise independent judgment on such questions it would help generate a body of law which would give greater guidance than that presently available.

4. Should initial judicial review of agency action be transferred from Superior Court to Court of Appeal, except in low-stakes, fact-oriented cases such as drivers license, welfare, and unemployment cases which would remain in Superior Court.

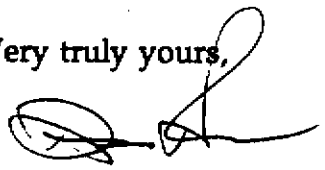
RESPONSE:

CAJ answered "no", emphatically. First, to call these "low-stakes" matters is somewhat callous; they are not "low-stakes" to the persons whose economic rights are involved. Second, this would do away with trial by jury which is available for traditional mandate under Section 1085, Code of Civil Procedure. (See Section 1090 C.C.P.)

Third, administrative mandate proceedings (now to be given, assumably, a different label) under the change would tie up three appellate judges rather than one Superior Court judge. An obvious implication would be that litigants in mandamus proceedings on the crowded dockets of appellate courts would have much less time for review and oral argument on their issues. This is particularly the cause with the application of independent judgment (which is presently required for state or local agency action affecting a vested fundamental right). Three appellate judges would be required to weigh the credibility of declarants and documents. This would generate an impossible workload on the appellate courts unless they were to adopt such broad

streamlining procedures that they would effectively eliminate the ability of the parties seeking relief to obtain any real "independent judgment."

Very truly yours,



Denis T. Rice

DTR:rkn
062095/f-666666:/36/215386

cc: Charles W. Willey, Chair
Curtis E.A. Karnow, Vice Chair
Monroe Baer, Staff Attorney
Robert C. Vanderet, Acting Chair

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3198

June 22, 1995

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

Dear Commissioners:

This letter addresses issues concerning the scope of review of the proposed judicial review statute discussed during the Commission's meeting of April 24, 1995 and in Professor Asimow's letter to the Commission dated April 27, 1995. In my April 6, 1995 letter to the Commission I reviewed the relationship between the Public Employment Relations Board (PERB or Board) and the reviewing courts with regard to questions of law and questions of fact.

When reviewing PERB's statutory construction, or other questions of law regarding the statutes in PERB's jurisdiction, a court of appeal will generally defer to PERB's interpretation unless it is "clearly erroneous." This standard is clearly described in the State Bar of California's California Public Sector Labor Relations (Labor and Employment Law Section) 1994 in Section 43.01(2)(b) which states in pertinent part:

> (2) Standards of Review
> (b) Questions of Law-Deference Standard
> It is ultimately the duty of the courts to construe the statutes administered by PERB. Nevertheless, when an appellate court reviews statutory construction or other questions of law within PERB's expertise, the court ordinarily defers to PERB's construction unless it is "clearly erroneous."

PERB requests that your judicial review draft permit the court to continue to use this standard.

Professor Asimow's letter states that "there would be immediate and unending confusion" if the courts continued to apply the current standards of deference to the Agricultural Labor Relations Board and PERB. I am unaware of any reason why such confusion would result. The courts, PERB, and practitioners before the Board have functioned for close to 20 years under the "clearly erroneous" standard without confusion.

The professor appears to argue either to maintain the "clearly erroneous" standard under a different description or require a new standard. Neither position is defensible. If the standard is to remain "clearly erroneous" then why change the description of the standard. If a new standard is to be required, what evidence supports a finding that the present standard is unworkable.

Professor Asimow also makes the statement that there is "no justification" for allowing the current standard of deference for PERB and ALRB cases continue. He appears to cast aside the justifications given by the U.S. Supreme Court and appellate courts in California, but does not explain why the courts are wrong.

Another area in which the courts of California and Professor Asimow are in direct contradiction is in Professor Asimow's statement that "the 'clearly erroneous' standard found in several California cases applicable to PERB is not drawn from federal law." In Moreno Valley Unified School District v. Public Employment Relations Board (1983) 142 Cal.App.3d 191 at 196 the court stated:

> Second, the relationship of a reviewing court to an agency such as PERB, whose primary responsibility is to determine the scope of the statutory duty to bargain and resolve charges of unfair refusal to bargain, is generally one of deference (*Ford Motor Co. v. NLRB* (1979) 441 U.S. 488, 495 [60 L.Ed.2d 420, 426-427, 99 S.Ct. 1842]). The Supreme Court stated in *Ford* that the delegation of those duties to agencies such as the NLRB was the intent of Congress, and thus deference to their findings is entirely appropriate since they are 'tasks lying at the heart of the Board's function' (*id.*, at p. 497 [60 L.Ed.2d at p. 428]). The Court noted that the board's view should be accepted if it is 'not an unreasonable or unprincipled construction of the statute' (*id.*). Even though the board's judgment is subject to judicial review . . . if its construction of the statute is reasonable defensible, it should not be rejected merely because the courts might prefer another 'view of the statute' (*id.*)" (*Oakland Unified School Dist. v. Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007, 1012 [175 Cal.Rptr. 105].)

A similar reliance on federal cases is found in Oakland USD, supra, and South Bay Union School District v. PERB (1991) 229 Cal.App.3d 502 at 506.

Professor Asimow incorrectly states in his letter that I argue that PERB should receive the same deference as does the NLRB in federal cases. Rather, I make two arguments. First, that the deference given to PERB cases should continue to be the "clearly erroneous" standard which the California courts have traditionally applied to PERB cases. Second, that the federal courts apply a similar standard to review questions of law with regard to the NLRB.[1] The standard applied by the federal courts is at least as deferential and is probably more accurately

---

[1] The American Bar Association Section of Labor and Employment Law's treatise - The Developing Labor Law 3rd Edition, at page 189, states:

> The Supreme Court has indicated, however, that the Board is entitled to a greater degree of deference on questions of law involving interpretations of the Act. In *Beth Israel Hospital v. NLRB* the Court stressed that such judicial review must be "limited," for "[it] is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy . . . The function of striking [the balance between competing interests] to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [Board], subject to limited judicial review." The Court reaffirmed this approach most recently in *Curtin-Matheson Scientific v. NLRB*, saying that it would uphold the Board's construction of the Act when it is "rational and consistent with the Act . . . even if we would have formulated a different rule had we sat on the Board." As a general rule, courts also defer to the Board's expertise when the Board changes substantive rules of decision regarding the administration or application of the Act.
>
> When issues of law arise outside the Act (thus outside the Board's area of expertise), the courts are less likely to defer to the Board's judgment. Furthermore, when the Board fails to articulate its rationale, courts are less likely to defer to the Board's expertise.

described as the rational basis test. As stated by the U.S. Supreme Court in NLRB v. Curtin-Matheson Scientific (1990) 494 U.S. 775, "We will uphold a Board rule as long as it is rational and consistent with the Act, Fall River, supra at 42 even if we would have formulated a different rule had we sat on the Board." Clearly, this test does not reflect the "weak deference," independent judgment review advocated by Professor Asimow.

In Professor Asimow's letter, he states that he found Supreme Court cases involving the NLRB "which used independent judgement in reviewing NLRB legal interpretations." I found that in these cases the Court did not undermine the rational basis test as the appropriate standard for review. In the Highland Park, Yeshiva University and International Brotherhood of Electrical Workers cases the standard for deference was discussed by the minority, and the majority did not dispute the standard for review.

Rather, the cases stand for the proposition that the Supreme Court found no rational basis for the NLRB decision. As the Court stated in Ford Motor Co. v. NLRB (1979) 444 U.S. 488, 497:

> Of course, the judgment of the Board is subject to judicial review; but if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute. NLRB v. Iron Workers, 434 U.S. 335, 350 (1978). In the past we have refused enforcement of Board orders where they had "no reasonable basis in law," either because the proper legal standard was not applied or because the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning. Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 166 (1971). We have also parted company with the Board's interpretation where it was "fundamentally inconsistent with the structure of the Act" and an attempt to usurp "major policy decisions properly made by Congress." American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965). Similarly, in NLRB v. Insurance Agents, supra, at 499, we could not accept the Board's application of the Act where we were convinced that the Board was moving "into a new area of regulation which Congress had not committed to it."

In the De Bartolo Corporation case discussed by Professor Asimow, he correctly states that at page 575, the U.S. Supreme Court

determined that the normal rule of deference to NLRB statutory construction was not applicable because of constitutional overtones. However, on page 574 the majority stated "that statutory interpretation [of the National Labor Relations Act] by the board would normally be entitled to deference unless that construction were clearly contrary to the intent of Congress." [2] (emphasis added.) Certainly, such a standard is much more similar to the "clearly erroneous" standard applied by California courts than to Professor Asimow's preferred "independent judgment" with "weak deference."

In addition to questions of law, the Judicial Review Draft of June 16, 1995 would make numerous other changes in review of PERB cases. These changes are presently being considered by PERB and I will address these modifications in the future.

Sincerely,

Bernard McMonigle
Senior PER Counsel

cc: Professor Asimow

[2] The Food and Commercial Workers case cited by Professor Asimow is inapposite. It is not a final decision of the NLRB in an unfair practice case. Rather, it deals with rulemaking and the validity of administrative regulations. PERB has never taken the position that it is not subject to the same rules as every other agency with regard to rulemaking under the APA. The current discussion addresses court review of PERB's adjudicatory decisions.

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE

1515 K STREET, SUITE 511
P.O. BOX 944255
SACRAMENTO, CA 94244-2550
(916) 445-9555

FACSIMILE: (916) 324-4293
(916) 324-5431

June 12, 1995

Clark Kelso, Esquire
Professor of Law
McGeorge School of Law
University of the Pacific
3200 Fifth Avenue
Sacramento, California 95817

RE: Judicial Council Request for Information: Superior Court and Appellate Review of Certain Administrative Adjudication Matters

Dear Professor Kelso:

You have requested, on behalf of the Judicial Council and in connection with an assessment of potential impact of various proposals to modify judicial review of administrative adjudication, information on the number of cases handled within this office which originate as administrative adjudications and thereafter proceed to judicial review. Because this office has not historically recorded or maintained case information on this basis, it is necessary to resort to estimates in order to provide information responsive to your request. I am able to provide the following limited information based on internal estimates I consider reliable.

Data compiled in response to the Judicial Council's request, which I consider to be reliable as estimates, have been produced by the division's two operating sections, known as the Licensing Section and the Health Quality Enforcement Section, which are dedicated almost exclusively to handling licensing cases of the boards and bureaus of the Department of Consumer Affairs. Although these estimates are not necessarily indicative of the frequency with which other classes of administrative decisions reach the courts (e.g., driver license actions by the Department

of Motor Vehicles), they do pertain to the largest composite body of cases handled by this office under a single form of practice at the administrative level (prescribed by the Administrative Procedure Act), and in turn subject to judicial review under Code of Civil Procedure section 1094.5.

During the period from January 1990 through April 1995, the Licensing Section and the Health Quality Enforcement Section together handled an estimated 14,740 cases originating as administrative matters. Of these cases, approximately 340 cases were the subject of judicial review in administrative mandamus proceedings in superior court. Approximately 90 of these cases were taken to appeal. Based on these figures, the statewide experience of these two sections is that something more than 2.3 percent of the administrative cases opened during this period went to judicial review, and that something more than 0.6 percent of the administrative cases went to appeal.[1]

These figures indicate that one out of every three to four professional and vocational licensing cases taken to court on an administrative mandamus petition is ultimately litigated to appeal; thus, on the basis of these figures, California appellate courts could expect to see the number of professional and vocational licensing cases they encounter from administrative adjudications triple or quadruple under a plan requiring direct review of such decisions by the appellate courts.[2] Our estimates indicate that the increase in this particular caseload would be highest in the First Appellate District (almost quintupling), and lowest in the Third Appellate Districts and Division 1 of the Fourth Appellate Districts (trebling), with

---

1. Because these estimates include a number of administrative cases which will result in judicial review proceedings beyond the relevant time frame, the ratio of judicial review and appellate proceedings to administrative adjudications reported here is lower than it will be once all of the cases in the sample have resulted in decisions and become final.

2. This expectation assumes that the form of review available from the appellate courts will be administered as an obligatory rather than discretionary remedy. That is, it takes no account of the operation, at the appellate level, of the currently-available option of summary denial of all prerogative relief in writ cases.

caseload quadrupling in the Second Appellate District, and perhaps the remaining divisions of the Fourth Appellate District. Expectations for the Fifth Appellate District would be aligned with those for the Third, and those for the Sixth with those of the First.[3]

As indicated earlier, we do not suggest that the judicial review and appeal experience with professional and vocational licensing cases is comparable to, or indicative of, the experience with the universe of administrative decisions at large.[4] Decisionmaking in an adjudicatory context is a constantly expanding function of government, the products of which now reach the courts through a number of different conduits. As indicated, the estimates which we are able to provide are not necessarily representative of state government at large; nor are they necessarily valid predictors of consequences of any specific measure to reallocate the burden of judicial review of public agency decisions. In this connection, you have indicated that you are collecting available information from

---

3. Currently only about 22% of administrative mandamus cases handled by the two sections in the Bay Area proceed to appeal. The Attorney General's Bay Area offices in San Francisco and Oakland handle caseloads associated with the First and Sixth Appellate Districts. In the geographical area comprising the Third Appellate District, the Fifth Appellate District, and Division 1 of the Fourth Appellate District, about 35% of administrative mandamus cases handled by these two sections go to appeal at present. In the geographical area serviced by the Attorney General's Los Angeles office, most of which is within the Second Appellate District, about 26% of administrative mandamus cases handled by these two sections result in appeals.

4. By way of example, I am informed that during the period from July 1990 through April 1995, some 2,900 petitions for writ of mandate were filed to review decisions of the Department of Motor Vehicles in cases originating under the "Administrative Per Se" provisions of the Vehicle Code, and that 275 of those cases resulted in appeals. Assuming the correctness of this information, it is apparent that a much smaller percentage of cases filed with the intent of regaining one's driver license following administrative hearing under the "Admin Per Se" law are taken to appeal (less than 10% of superior court petitions filed) than are cases filed by professional or vocational licensees to retain the privilege of practicing their licensed occupation.

many sources, including administrative agencies and the courts, and have assured me of your understanding of the inherent limitations of the data we are able to supply.

With all of the foregoing in mind, I hope this information will be of some utility in your efforts and those of the Judicial Council to assess the potential impact of proposals to revise the current system of judicial review of administrative adjudication.

Sincerely,

DANIEL E. LUNGREN
Attorney General

ROBERT L. MUKAI
Chief Assistant Attorney General