Study N-200 August 11, 1995

First Supplement to Memorandum 95-38

Judicial Review of Agency Action: Miscellaneous Issues

This supplemental memorandum provides additional information on miscellaneous issues involved in judicial review of agency action.

Judicial Review Process

Exhibit pp. 1-2 is an opinion piece by Professor Bob Fellmeth (who serves as the Commission's consultant on unfair competition). Professor Fellmeth suggests that the administrative review process be simplified by reducing the five-part process (ALJ/agency head/superior court/court of appeal/supreme court) to a three-part process (ALJ/court of appeal/supreme court).

Review of PUC Decisions

Exhibit pp. 3-4 is a newspaper article about efforts to subject Public Utilities Commission decisions to review in the Court of Appeal. The article suggests that the effort is likely to succeed, despite the opposition of the PUC. The Law Revision Commission has previously concluded that it would incorporate in its legislation on judicial review whatever might be the outcome of the current debate.

Substantial Evidence v. Independent Judgment Review

Exhibit pp. 5-9 is a letter from Bill Heath of the California School Employees Association. Mr. Heath notes that substantial evidence review of agency fact-finding may be appropriate where there are proper safeguards on the agency's fact-finding process, such as those contained in the Commission's Administrative Procedure Act revisions. But local agencies are not governed by the Administrative Procedure Act, and according to Mr. Heath a significant number of local agency hearings affecting his clients deserve the label "kangaroo court". In these cases, at least where a fundamental right of a person is being determined, there should be more careful judicial scrutiny through the independent judgment of the court; this is existing law.

Mr. Heath notes that under the Comission's legislation, a local agency may voluntarily adopt the Administrative Procedure Act. He suggests that the judicial review statute could provide substantial evidence review of local agency determinations even if they affect fundamental rights, provided the agency has adopted the Administrative Procedure Act for its hearings. This would be an inducement to make local agency hearings more fair and would encourage statewide uniformity of procedure.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

ADMINISTRATIVE LAW
San Francisco Daily Journal
Wednesday, July 19, 1995

Focus

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THE PRACTITIONER

BY ROBERT C. FELLMETH

Corrective Measures

The Review Process for License Revocation

Most sociologists agree that human behavior is more easily influenced by positive reward than by threat of punishment. However, regulatory agencies — perhaps partially out of necessity — generally follow the traditional modus operandi of law enforcement. Such enforcement employs standards of compliance, detection of violations, due process notice, hearing and review, followed by the possibility of sanctions.

The most draconian remedy used by occupational licensing agencies, revocation of a license, is certainly momentous. For over 40 trades and professions, the license is a condition precedent to practice. And many businesses require a license. However, the scope of the loss of the right to practice a trade may never reach beyond those who are disciplined if there is no deterrent effect. Sociologists argue that individuals are not easily deterred, partially because humans are rather wildly optimistic about the odds of getting caught.

Robert C. Fellmeth holds the Price Chair in Public Interest Law and directs the Center for Public Interest Law at the University of San Diego Law School The center publishes the California Regulatory Law Reporter, a quarterly on the proceedings of 50 California regulatory agencies.

Scholars studying human behavior contend that the impact of deterrence turns much more on the perceived *likelihood* of suffering a sanction than its precise severity. And they contend that a perceived likelihood depends on such things as what people observe others doing and whether violation of a standard is followed relatively quickly by a sanction.

Providing certitude and dispatch, however, is not always consistent with due process fairness to those accused. The dilemma of finding a way to provide both has driven important proposals to reform the enforcement systems of administrative agencies, including those recently proposed by UCLA School of Law Professor Michael Asimow and the Law Revision Commission to revise the Administrative Procedure Act.

The challenge for reformers is to afford due process in fewer than five separate proceedings.

Asimow and others believe that it is possible to improve the efficiency of administrative adjudications, while at the same time enhancing due process. They contend that it is not a zero-sum game, but that win-win changes are possible. To weigh the various reforms now being considered, one must understand the basics of the current system, and some of the current criticisms of it.

Assuming that an agency has a clear and enforceable standard and that a serious violation is detected, investigated and warrants formal enforcement, the first step in the APA adjudicative process is an "accusation," the notice of formal charges against the license. This is a public pleading filed by a deputy attorney general on behalf of the agency seeking the action. California Government Code Section 11505.

The respondent may file a "notice of defense" within 15 days of the service of the accusation. Section 11506. Limited discovery is allowed; depositions are confined to preserving testimony for the hearing. Sections 11507.6 and 11511.

The initial hearing is almost always before an administrative law judge from the state's Office of Administrative Hearings. Section 11502. These judges are trained in the law, are subject to ex parte contact prohibitions and usually preside over the evidentiary hearing. Section 11513.5.

This office represents an important departure from the historical pattern of agencies providing their own administrative law judges. Almost from the outset of the regulatory state, critics objected to the anomaly of an agency investigating a case, deciding to prosecute and then using another employee as the judge to hear the case. Defenders of in-house ALJs (and some agencies still have them, e.g., the Public Utilities Commission and the Department of Insurance) contend that, as incestuous as it sounds, no formal check is needed because it would be provided by court review. Critics counter that courts tend to give agency adjudications great deference. And they add a more telling point: Why defend a laborious but flawed proceeding because there

will be another one without the flaw down the road? Why not fix the flaw and save time?

After the hearing, the ALJ issues a decision, usually including factual findings and recommended discipline. Section 11517. However, this is only a "recommended" decision to the director or governing board of the agency. The final decision is made by the agency. Furthermore, there are no standards guiding that decision, unlike the decision of the ALJ below — it is, rather, an ultimate "independent judgment" review.

Critics contend that this second step returns to the weakness of the prosecutor serving as judge, and that it is additionally objectionable where boards are dominated by members of the profession involved. Judgment by peers can be overly harsh where tribal rules are violated; where the issue involves fees, however, or the tribal rules themselves, empathy may predominate, resulting in bias.

Another line of criticism has centered on the lack of quality and consistency inherent in such agency review: Board members are usually tradespersons or professionals without legal or judicial training, unaware of precedents, and not present at the hearing to judge the credibility of witnesses.

Defenders argue that the agency director or board is in the best position to enforce the rules of their agency, and that they have often important expertise. Critics respond that where expertise is important, it should be offered on point, and that the presence of a urologist on the medical board does not assure a more informed decision about a neurosurgeon. One reform suggestion involves creation of a panel of neutral experts to testify before a more substantively informed ALJ.

After the agency makes the final decision, the case then proceeds to judicial review by way of petition for administrative mandamus (Code of Civil Procedure Section 1094.5) to superior court under the "independent judgment" test. Critics of the current system note that if expertise is so critical, why is the next level a de novo review by a generalist judge?

Following a superior court decision, the case goes to the California Court of Appeal under the substantial evidence test and then to the California Supreme Court via petition to review.

This system appears to be long on steps and short on quality. The challenge for reformers is to afford due process in fewer than five separate proceedings. Scholars argue that if the state can provide sufficient safeguards in a criminal case through three steps, it should be able to do the same in a professional discipline case. Rather than superimposing levels of review because of a lack of confidence in the quality of existing steps, why not improve the quality of fewer proceedings?

Hence, most reform efforts over the past five years have focused on improving the quality of the ALJ proceeding and eliminating or expediting the agency review and superior court steps of review. The California State Bar reforms of the early 1990s (that created a much different system than the APA rules applicable to other agencies) indicate that such a three-step process improves output, enhances predictability, stimulates settlements and dramatically expedites resolutions.

SAN FRANCISCO
Daily Journal
Wednesday, August 2, 1995

PUC Seems Sure to Come Under Sway of Appeal Courts

■ Reform is likely, legislators say, because old-guard opposition is fading and new legislation is more flexible.

By Tom Dresslar
Daily Journal Staff Writer

SACRAMENTO — Seven years ago, a blue-ribbon committee chaired by retired Supreme Court Justice Frank K. Richardson recommended an overhaul of the judicial review process of Public Utilities Commission decisions.

The general goal was to eliminate the Supreme Court's exclusive jurisdiction over such cases and transfer original jurisdiction to the Courts of Appeal. But since then, the panel's proposal has remained an unimplemented dust-collector.

Not that there haven't been attempts to give the recommendation life. Prior to 1995, five bills were introduced to carry out the Richardson committee's plan in one form or another. But all five failed; four in the Legislature and one, in 1991, at the hands of Gov. Pete Wilson.

News Analysis

But the legacy of losing may end this year, and with it the era of minimal judicial oversight of an agency that regulates the collection of $50 billion annually in consumer fees.

A sixth bill — SB1322 by Senate Judiciary Committee Chairman Charles Calderon, D-Montebello — is steadily making its way through the Capitol. The measure has renewed the intramural fight among utilities over whether to expand judicial review of PUC decisions.

On one side, new-age utilities such as cable television companies, cellular phone outfits and long-distance phone carriers support expansion. On the other side, opponents of the move include the PUC and old-guard utilities such as PG&E, Pacific Telesis, Southern California Gas and Southern California Edison.

In past years, the opponents have prevailed. But for a variety for reasons, SB1322 may have a shot at becoming law. To wit:

The longtime, stiff opposition from old-guard utilities may be waning somewhat. Some utilities have developed a close working relationship with the PUC and a high comfort level with its decisionmaking process. They have fought attempts to reform the current appeal process, which gives PUC rulings great deference.

To be sure, the traditional utility giants remain opposed to Calderon's measure. But with the regulatory environment changing rapidly for electric, gas and phone service, those utility companies may be more leery of the PUC and more desirous of increasing court review of its decisions.

There is some evidence the established utilities are changing their stance. Not one fought against SB1322 as it sailed out of the Senate earlier this year, Calderon noted. They came out of the woodwork, however, when the bill reached the Assembly Judiciary Committee. Nevertheless, the panel unanimously approved the bill on a 14-0 vote.

Some Capitol sources have speculated the utilities opposed the bill in the judiciary committee not so much because they disliked it, but more because they were being pressured by PUC officials. PUC Chairman Daniel Fessler, in an interview, called that "a ludicrous suggestion [with] no basis in fact." But he said he had talked to "virtually any entity who would listen to me" about his opposition to the bill, including the traditional utilities.

■ A bipartisan effort has begun in the Legislature to restructure the state's utility regulatory structure. The legislative package would merge the PUC with the Energy Resources Conservation and Development Commission, an idea backed by Wilson. Members of the new Utilities Exchange Commission would be allowed to meet privately to discuss nonratemaking cases from the time the record is closed until the final decision is made.

Oversight Of PUC Is Facing an Overhaul

DANIEL FESSLER — "I worry about the consistency of outcomes when you have [88 appeal court justices] involved in these complex matters."

Calderon's bill has been included as part of the reform package. And with a merger generally supported by Wilson, both Republican and Democratic lawmakers moving to support the package and skeptics saying more judicial review is essential if the new body is allowed to meet behind closed doors, SB1322 may be the right bill at the right time.

Calderon said in an interview that his measure was "absolutely essential to any reform." He added, "Without it, you may have a different organization, but you'd still have an autocracy."

■ The drafting of SB1322, from the proponents' perspective, has undercut some of the arguments traditionally made by opponents.

Previous bills made judicial review a right, rather than discretionary on the part of courts. They also vested original jurisdiction in the appeal courts, per the Richardson panel's recommendation. Opponents said those provisions would place a costly burden on both appeal courts and the Supreme Court, add another layer of judicial review and cause great delay in making PUC decisions final.

SB1322 makes judicial review discretionary. And rather than requiring all review writs to be filed originally with the Courts of Appeal, the bill allows the petitions to be filed either in those courts or the high court. The lower court decisions could be appealed to the Supreme Court. Those features would appear to reduce opponents' concerns about cost, delay and additional layer of review.

The second main difference between Calderon's bill and some previous reform legislation relates to the expanded scope of judicial review.

Under current law, review is limited to a determination of whether the PUC "regularly pursued its authority," including whether the action violated the petitioner's constitutional rights. Supreme Court case law — *Camp Meeker Water System Inc. v. Public Utilities Commission*, 51 Cal.3d 845 (1990) — holds judicial review is precluded if there is the slightest evidence in the record to support the commission's findings and conclusions.

Like prior measures, SB1322 would expand the scope of judicial review to allow courts to determine whether the PUC's findings and conclusions were supported by "substantial evidence." But previous bills applied the expansion to both the PUC's quasi-judicial decisions, involving regulatory enforcement issues, and quasi-legislative decisions, which include ratemaking actions. SB1322 limits that provision to quasi-judicial decisions, while maintaining the existing, more deferential standard for review of PUC rate-setting actions.

Previous bills also encountered opposition because they either required all appeals to be filed in the 1st District Court of Appeal in San Francisco (where the PUC is headquartered) or fostered forum shopping by allowing petitions to be filed in any appeal court. SB1322, in contrast, requires appeal court petitions to be filed in the "judicial district in which the petitioner resides."

Calderon's drafting efforts have paid off by eliminating one key source of opposition: the state Judicial Council. The council had opposed all previous reform bills. But it dropped its opposition to SB1322 after Calderon amended it to make judicial review discretionary and limit the "substantial evidence" review standard to quasi-judicial decisions.

In addition, Calderon said some utilities, while still opposed, have told him "this is the best bill they've seen in this area."

Reform proponents contend the current system, featuring exclusive jurisdiction by the Supreme Court and an extremely narrow scope of review, has left California with virtually no judicial check on the powerful PUC. To buttress their argument, proponents cite data that shows from 1960 to 1989 the Supreme Court reviewed and issued decisions in only 48 PUC cases. That averages just 1.6 cases per year.

Expanded judicial oversight, say proponents, is more crucial now than ever before because the fast-evolving regulatory environment has increased the importance and scope of commission decisions.

But the PUC, at least, remains steadfast in its opposition to SB1322. Fessler cited three main objections.

First, he pointed to the provision allowing review petitions to be filed in every Court of Appeal. "I worry about the consistency of outcomes when you have [88 appeal court justices] involved in these complex matters."

Second, he noted "most utilities" have service areas that cut across the jurisdictional boundaries of the state's six appeal court districts. That could create confusion for utilities by making them subject to varying appeal court decisions, said Fessler.

Third, the PUC chairman argued the Calderon bill does not solve the problem of delay. "It takes 2½ years to dispose of a case in the Court of Appeal," said Fessler. "If the Supreme Court reviews the case, you can add another six months to a year. Utility decisions do not lend themselves to 3½ years."

Since SB1322 has passed the Senate and appears on its way to Assembly approval, the key remaining question is whether Wilson will sign it.

The bill's prospects for gaining a signature should be enhanced by the Judicial Council's decision to drop its opposition. And insiders report some of the traditional utilities may not lobby the governor for a veto. That would leave the PUC, Fessler in particular, as the main obstacle to enactment.

csea California School Employees Association

August 10, 1995

Colin Wied, Chairperson
California Law Review Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: **Standard of Judicial Review**

Dear Chairperson Wied and Members of the Commission:

California School Employees Association (CSEA) represents over 175,000 public employees in California, almost all employed by local agencies such as school and community college districts.

It has been almost two years since CSEA urged the Commission to retain independent judgment review of factfinding for an adjudicatory administrative decision which substantially affects a fundamental vested right. (See attached letter, dated September 10, 1993.)

Since the Commission has decided to recommend substantial evidence review, CSEA now urges the Commission to retain the safeguard of independent judgment review of factfinding for adjudicatory decisions of those local agencies that have not adopted the Administrative Procedure Act (APA) for such matters.

The current draft of the Commission's tentative recommendation states that there is no rational policy basis for the "fundamental right" distinction (July 1995 Draft, p. 10) and recommends substantial evidence review. Independent judgment review is applied only when an agency changes a finding of fact or increases the penalty of the administrative law judge's decision after a formal APA adjudicatory hearing. At page 6 of Memorandum 95-38 the Commission staff candidly admits, despite the concern for rational policy, that the exception to substantial evidence review is a political accommodation for doctors.

CSEA urges the Commission to reconsider. The rational policy basis for the "fundamental right" distinction is that the importance of the right affected should determine the intensity of judicial review. (See Bixby v. Pierno (1971) 4 Cal.3d 130, 144-147.)

CSEA members have dedicated themselves to public education for very little compensation. They do not have the typical doctor's financial cushion against the involuntary loss of permanent employment resulting from an erroneous or biased

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administrative determination. In most cases, they do not even have the protections guaranteed by the APA.

Most CSEA members are classified school or community college employees, e.g., instructional aides, bus drivers, maintenance workers, cafeteria workers, clerks, secretaries and police officers. Their disciplinary hearings are not subject to the APA. (Education Code § 45113.) Such hearings are usually conducted by the elected members of the school or community college district's governing board, not by an experienced administrative law judge.

Many board members try to conduct fair hearings, but as I have described to the Commission in prior appearances, a significant number of such hearings deserve the label "kangaroo court."

Three years ago, the Commission decided to recommend an amendment to Code of Civil Procedure section 1094.5 so that a reviewing court would be required to give great weight to the credibility determinations of the trier of fact. I presented CSEA's anecdotal evidence of certain unfair school board hearings and objected to the amendment because, although the Commission had decided to limit its other recommendations to state agencies, this amendment would make it harder to challenge a local agency decision arrived at through procedures the Commission had not reviewed for fairness.

The Commission addressed CSEA's concerns by amending its recommendation so that it only applied to APA proceedings. (Study N-100, Memorandum 93-30, May 1993 Draft, p. 159.) However, the Commission has now decided that Code of Civil Procedure section 1094.5 should be repealed. If the Commission remains determined to recommend a lower standard for judicial review of administrative factfinding, CSEA's concerns can again be addressed by limiting that change to factfinding in an APA proceeding.

The Commission has been repeatedly frustrated in its attempts to develop a uniform procedure for administrative adjudication. However, SB-523 allows a local agency exempt from the APA to adopt the APA for its own adjudicatory decisions. (Proposed Gov. Code § 11410.40.) If the standard for judicial review is lowered, this change should be used as an inducement to encourage local agencies to adopt the APA, a politically acceptable, voluntary process which would tend to bring more

uniformity to administrative adjudication throughout the State. The standard of review should remain unchanged for local agency adjudicatory decisions that are not subject to the protections of the APA.

In Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Board (1979) 24 Cal.3d 335, the case relied upon by Professor Asimow in recommending the substantial evidence standard of review, the Court found this standard to be constitutionally valid only after it reviewed the particular administrative procedure at issue in that case and found it contained procedural safeguards that guaranteed administrative due process. (Id. 24 Cal.3d at 344-346.)

The Commission has neither reviewed the numerous and varied adjudicatory procedures of local agencies nor recommended the imposition of due process safeguards upon local agencies. CSEA asks that the Commission not recommend any lowering of present safeguards available upon judicial review unless such a recommendation is tied to adequate safeguards in the administrative process subject to review.

I'm sorry, but I will not be able to attend the Commission's August 18 meeting in Los Angeles. I plan to attend the meeting in September. Thank you for the opportunity to present these comments to the Commission.

Sincerely,

William C. Heath
Deputy Chief Counsel

cc: Margie Valdez, CC
Barbara Howard, DGR

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csea California School Employees Association

September 10, 1993

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

Re: Scope of Judicial Review

Dear Chairperson Skaggs and Members of the Commission:

On September 24, 1993, the Commission will consider the standard for judicial review of agency factfinding. The staff alternatives set forth in the note to Memorandum 93-31, section 652.560, do not include any example whereby the choice between independent judgment/weight of the evidence review and rational basis/substantial evidence review is based on whether a fundamental right is affected. The comment states that such a distinction makes no sense. (Memorandum 93-31, pp. 7-8.) I disagree.

The right of a permanent public employee to continued employment, absent just cause for termination, is fundamental. (Pipkin v. Board of Supervisors (1978) 82 Cal.App.3d 652, 661.) The right of a permanent public employee to assign a particular grade to a student is not fundamental. (Eureka Teachers Association v. Board of Education (1988) 199 Cal.App.3d 353, 366.) The distinction between these two rights in terms of their importance to the employee's life situation is obvious. While there are no bright-line boundaries to "fundamentalness" such distinctions are not "utterly incoherent". (Contra, Memorandum 93-23, p. 24.) Some flexibility of "fundamentalness" is essential in a changing society.

I agree that it makes no sense to distinguish factfinding in constitutional and nonconstitutional agencies. (See Memorandum 93-31, comment, p. 7.) However, the recommendation to dispense with the independent judgment test resolves the inconsistency by moving in the wrong direction. The importance of the right affected should determine the intensity of judicial review.

Professor Asimow's recommendation depends upon Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Board (1979) 24 Cal.3d 335, where the Court declined to invalidate a deliberate legislative choice of the substantial evidence test. Significantly, the Court's holding included the specific safeguards required by the Agricultural Labor Relations Act (ALRA).

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> "We therefore hold that the Legislature may accord finality to the findings of the statewide agency that are supported by substantial evidence on the record considered as a whole and are made under safeguards equivalent to those provided by the ALRA for unfair practice proceedings, whether or not the California Constitution provides for that agency's exercising 'judicial power'." (Id. 24 Cal.3d at 346, emphasis added.)

As the Court noted, the ALRA mandates many procedural safeguards, including the separation of prosecutorial from adjudicatory functions (Labor Code § 1149), notice, written pleadings, evidentiary hearings (Labor Code § 1160.2), and a requirement that orders be accompanied by findings based on the preponderance of the reported evidence (Labor Code § 1160.3). Since the proposed new APA does not mandate such safeguards for all agencies, or even for all state agencies, it does not follow from Tex-Cal that the Legislature can mandate substantial evidence review for all agency adjudications.

The proposed new APA mandates these safeguards only for hearings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings (OAH). In light of Tex-Cal, the Legislature could mandate substantial evidence review of factfinding in such hearings, provided the agency did not change the findings of the OAH administrative law judge. Under both the State Constitution and public policy, the independent judgment test must apply to all other cases where a fundamental right is at stake.

Thank you for the opportunity to present these comments to the Commission.

Sincerely,

WILLIAM C. HEATH
Deputy Chief Counsel

WCH:ws

cc: Bud Dougherty, ED
Margie Valdes, CC
Barbara Howard, DGR