

## CALIFORNIA LAW REVISION COMMISSION

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2/9/96

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|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------|
| <i>Date:</i> February 22, 1996                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | <i>Place:</i> Sacramento |
| February 22 (Thursday) 9:00 am – 5:00 pm                                                                                                                                                                                                                                                                                                                                                                                                                                                             | State Capitol, Room 113  |
| <p>Changes may be made in this agenda, or the meeting may be rescheduled, on short notice. <b>If you plan to attend the meeting, please call (415) 494-1335 and you will be notified of any late changes.</b></p> <p>Individual items on this agenda are available for purchase at the prices indicated or to be determined. Prices include handling, shipping, and sales tax. Orders must be accompanied by a check in the correct amount made out to the "California Law Revision Commission".</p> |                          |
| Selected Commission materials are available on the Internet at: <a href="http://www.clrc.ca.gov">http://www.clrc.ca.gov</a>                                                                                                                                                                                                                                                                                                                                                                          |                          |

**FINAL AGENDA***for meeting of the*

## CALIFORNIA LAW REVISION COMMISSION

1. MINUTES OF JANUARY 19, 1996, MEETING (sent 1/30/96) (\$8.50)
2. ADMINISTRATIVE MATTERS
  - Report of Executive Secretary**
3. 1996 LEGISLATIVE PROGRAM
  - Memorandum 96-8 (NS) (to be sent)
4. HOMESTEAD EXEMPTION (STUDY D-352)
  - Proceeds Exemption**
  - Memorandum 96-9 (SU) (to be sent)
5. UNFAIR COMPETITION (STUDY B-700)
  - Revised Draft**
  - Memorandum 96-11 (SU) (sent 2/9/96) (\$8.50)
  - Statute of Limitations**
  - Memorandum 96-18 (BG) (to be sent)

6. CORPORATE GOVERNANCE

**Business Judgment Rule (Study B-601)**

Memorandum 96-12 (NS) (sent 1/30/96) (\$8.50)

**Demand and Excuse In Shareholder Derivative Actions (Study B-602)**

Memorandum 96-13 (NS) (sent 1/30/96) (\$8.50)

7. JUDICIAL REVIEW OF AGENCY ACTION (STUDY N-200)

**Unresolved Issues from Tentative Recommendation**

Memorandum 96-14 (RM) (sent 2/1/96) (\$8.50)

First Supplement to Memorandum 96-14 (RM) (to be sent)

8. ADMINISTRATIVE ADJUDICATION

**SB 794 — Followup Legislation (Study N-110)**

Memorandum 96-19 (NS) (sent 2/8/96) (\$5.50)

**Code of Ethics for Administrative Law Judges (Study N-111)**

Memorandum 96-15 (NS) (sent 2/8/96) (\$8.50)

**Quasi-Public Entity Hearings (Study N-112)**

Memorandum 96-16 (NS) (sent 1/24/96) (\$5.50)

9. MARKETABLE TITLE: OBSOLETE RESTRICTIONS (STUDY H-407)

**Comments on Revised Tentative Recommendation**

Memorandum 96-10 (NS) (sent 2/1/96) (\$8.50)

Revised Tentative Recommendation (sent 11/95) (\$5.50)

10. MEDIATION COMMUNICATIONS (STUDY K-401)

**Problems in Existing Law**

Memorandum 96-17 (BG) (to be sent)

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MINUTES OF MEETING  
CALIFORNIA LAW REVISION COMMISSION  
FEBRUARY 22, 1996  
SACRAMENTO

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A meeting of the California Law Revision Commission was held in Sacramento on February 22, 1996.

**Commission:**

*Present:* Colin Wied, Chairperson  
Robert E. Cooper  
Quentin L. Kopp, Senate Member  
Arthur K. Marshall

*Absent:* Allan L. Fink, Vice Chairperson  
Christine W.S. Byrd  
Bion M. Gregory, Legislative Counsel  
Edwin K. Marzec  
Sanford Skaggs

**Staff:** Nathaniel Sterling, Executive Secretary  
Stan Ulrich, Assistant Executive Secretary  
Barbara S. Gaal, Staff Counsel  
Robert J. Murphy, Staff Counsel

**Consultants:** Melvin A. Eisenberg, Business Judgment & Derivative  
Actions  
Robert C. Fellmeth, Unfair Competition Litigation

**Other Persons:**

D. Steven Blake, State Bar Business Law Section, Corporations Committee,  
Sacramento  
Herb Bolz, Office of Administrative Law, Sacramento  
Margaret Farrow, Office of Administrative Hearings, Sacramento  
Robert Harvey, California Occupational Safety and Health Appeals Board,  
Sacramento  
Bill Heath, California School Employees' Association, San Jose  
Reed Kathrein, Milberg, Weiss, Bershad, Hynes & Lerach, San Francisco  
Ron Kelly, Berkeley  
Earl Lui, Consumers Union, San Francisco  
Alan M. Mansfield, Milberg, Weiss, Bershad, Hynes & Lerach, San Diego

Charlene Mathias, Office of Administrative Law, Sacramento  
Bernard McMonigle, Public Employment Relations Board, Sacramento  
Julie Miller, Southern California Edison, Rosemead  
Thomas A. Papageorge, California District Attorneys Association and Los Angeles  
District Attorney's Office, Los Angeles  
Joel Perlstein, California Public Utilities Commission, San Francisco  
Lucy Quacinella, Western Center on Law and Poverty, Northern California Office,  
Sacramento  
Dick Ratliff, California Energy Commission, Sacramento  
Ronald H. Sargis, California Association of Collectors  
Daniel Siegel, Attorney General's Office, Sacramento  
John Sikora, Association of California State Attorneys, Sacramento  
Tom Sobel, Agricultural Labor Relations Board, Sacramento

A quorum not having been present at this meeting, actions reported in these Minutes are subject to ratification at a subsequent meeting.

| C O N T E N T S                                                                       |   |
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#### MINUTES OF JANUARY 19, 1996, MEETING

The Commission approved the Minutes of the January 19, 1996, Commission meeting as submitted by the staff.

#### ADMINISTRATIVE MATTERS

##### **Change in Meeting Schedule**

The date of the meeting scheduled for July 11 was shifted to July 25 in consideration of a conflict with the annual meeting of the National Conference of Commissioners on Uniform State Laws.

### **Report of Executive Secretary**

The Executive Secretary reported that there has not yet been legislative action to fill the vacancy of the Assembly Member of the Commission. The Speaker's Office has indicated to the Executive Secretary that an effort will be made to give this matter some priority.

### **1996 LEGISLATIVE PROGRAM**

The Commission considered Memorandum 96-8 and the attached chart showing the status of the Commission's legislative program for 1996. In connection with its consideration of the legislative program, the Commission took action on the following matters, reported elsewhere in these Minutes:

Homestead Exemption (Study D-352)

Tolling Statute of Limitations When Decedent Is Out of State (Study J-110)

### **STUDY B-601 – BUSINESS JUDGMENT RULE**

The Commission considered Memorandum 96-12, relating to the staff draft codification of the business judgment rule. The Commission directed the staff to prepare the draft in the form of a tentative recommendation for the next Commission meeting, with the following changes.

#### **Corp. Code § 309 (amended). Director's duties of loyalty and care**

The reference in the leadline of this section to the duty of loyalty should be deleted.

#### **Corp. Code § 312 (amended). Officer's duty of care**

The duty of care of officers should include authority to rely on expert advice. The staff should consult the ALI Principles of Corporate Governance for appropriate language. There should be an indication of to whom the duty runs, and the Comment might note that the statute does not address duty issues involving insolvency.

#### **Corp. Code § 320 (added). Business judgment rule**

The references in this section to "reasonably believes" and "rationally believes" should be recast so that they are phrased as objective rather than subjective standards. Thus, for example, they might be phrased to state that the director or officer "believes, and that belief is rational" or "has a rational belief".

**Corp. Code § 323 (added). Action that has foreseeable effect of blocking unsolicited tender offer**

The commentary to this section should be augmented with material from the ALI Principles of Corporate Governance that explain its operation, particularly with regard to the concept of an action that “has the foreseeable effect of blocking an unsolicited tender offer”.

STUDY B-602 – DEMAND AND EXCUSE IN SHAREHOLDER DERIVATIVE ACTIONS

The Commission considered Memorandum 96-13, relating to demand and excuse in shareholder derivative actions.

The Commission noted that there is pending legislation sponsored by the Governor that addresses this matter — SB 994 (Haynes). The Commission also noted that a pending initiative matter — Proposition 201 — would affect derivative actions by imposing a “loser pays” litigation expense requirement.

The Commission decided to proceed with the study. The staff should prepare for Commission consideration an analysis of each issue, with any recommended draft language and an indication of its impact on existing California law.

STUDY B-700 – UNFAIR COMPETITION

The Commission considered Memorandum 96-11, and the First Supplement thereto, relating to the unfair competition litigation study and reviewed most of the staff draft statute attached to the memorandum. The staff will prepare a revised draft tentative recommendation for consideration at the next meeting. (The related Memorandum 96-18 concerning statute of limitations issues was not considered.) The Commission made the following decisions:

**Bus. & Prof. Code § 17300. Definitions**

The definition of “representative action” may be too broad and could cause problems. The staff should review the use of this term in the draft statute and consider whether it is needed.

**Bus. & Prof. Code § 17303. Adequate legal representation**

**Bus. & Prof. Code § 17304. Conflict of interest**

Consideration should be given to whether the statute should preclude bringing an individual cause of action and an action on behalf of the general public on the same claim. This would address the issue of tacking a claim on

behalf of the general public under Section 17204 onto what is essentially a private dispute in an effort to gain leverage in discovery and settlement. The statute could provide that the named party cannot bring both the individual and general public claim, or it could provide a presumption that there is a conflict of interest in such situations and the court could permit the action to proceed on a sufficient showing.

The staff should consider combining these two sections since they deal with related concepts.

**Bus. & Prof. Code § 17306. Notice of filing**

In addition to giving notice of the filing of a representative action to the Attorney General, notice should be published in the state Notice Register and given to any agency that licenses the defendant in the jurisdiction. The statute should make clear that notice is not required until after the adequacy and conflict of interest matters are determined under draft Sections 17303 and 17304.

**Bus. & Prof. Code § 17308. Notice of terms of judgment**

As in the case of notice of filing, this section providing for giving notice of the terms of judgment should be published in the state Notice Register and given to any agency that licenses the defendant in the jurisdiction. This would replace the draft provision for notice to regulatory agencies with jurisdiction over the defendant relevant to the allegations in the pleadings. Subdivision (a)(3) should be revised to provide for giving notice to any person who has filed a request for notice of the terms of the judgment with the court. Technical details will need to be worked out so that the notice and disclosure provisions are coordinated.

The second sentence of the Comment referring to the application of the section to both public and private plaintiffs should be deleted.

**Bus. & Prof. Code § 17309. Findings required for entry of judgment**

This section should be revised as follows:

17309. (a) Before entry of a judgment ~~in a representative action~~ that is a final determination of the representative cause of action, a hearing shall be held to determine whether the requirements of this chapter have been satisfied.

(b) At the hearing, the court shall consider the showing made by the parties and any other persons permitted to appear and shall order entry of judgment only if the court finds that all of the following requirements have been satisfied:

(1) The plaintiff and the plaintiff's attorney satisfy the requirements of Section 17303 and 17304.

(2) The defendant has disclosed other pending cases pursuant to Section 17307.

(3) Notice has been given pursuant to Sections 17306 and 17308.

(4) The proposed judgment and any stipulations and associated agreements are fair, reasonable, and adequate to protect the interests of the general public pled.

(5) The pleadings have not been amended, or supplemented by any stipulations or associated agreements, to the detriment of the interests of the general public pled.

(6) Entry of the judgment is in the interests of justice.

(7) Any award of attorney's fees included in the judgment or any stipulation or associated agreements complies with Section 17317.

The "fair, reasonable, and adequate" standard is adopted for consistency with class action law and the "interests of justice" standard is omitted because it overlaps with the "fair, reasonable, and adequate" standard and does not add much to the section.

**Bus. & Prof. Code § 17310. Dismissal, settlement, compromise**

This section should be revised substantially as follows:

17310. A representative cause of action may not be dismissed, settled, or compromised without the approval of the court and compliance with the requirements of this chapter. ~~If the representative action is dismissed, settled, or compromised with prejudice, or the complaint is amended to strike the representative cause of action with prejudice, the notice and hearing requirements of Sections 17308 and 17309 must be satisfied.~~

**Bus. & Prof. Code § 17312. Binding effect of representative action**

This section should be revised to make clear that it is binding on the right of all persons to bring a later representative action. However, the rule should not have any effect on other parts of an action that are not unfair competition claims on behalf of the general public under Section 17200. The section should provide an offset to the defendant for amounts previously paid by way of restitution, whether directly paid or through court-approved cy pres remedies.

**Bus. & Prof. Code § 17315. Priority between prosecutor and private plaintiff**

This section should be revised along the lines proposed in the First Supplement to avoid the possibility of routine intervention in actions brought by



public prosecutors. In addition, where a private plaintiff has commenced an action that includes a representative cause of action, the parts of the action that are not under Section 17200 should not be automatically stayed by the filing of a prosecutor's action.

#### STUDY D-352 – HOMESTEAD EXEMPTION

The Commission considered Memorandum 96-9 and the First Supplement thereto concerning additional changes in the recommendation on the *Homestead Exemption*. The Commission decided to postpone action on the proposed technical amendments to the bill introduced to implement the Commission's recommendation and directed the staff to prepare a memorandum summarizing the policy issues on the proceeds exemption for consideration at the next meeting.

#### STUDY J-110 – TOLLING STATUTE OF LIMITATIONS WHEN DEFENDANT IS OUT OF STATE

The Commission considered the First Supplement to Memorandum 96-8, relating to the recommendation on tolling the statute of limitations when the defendant is out of state. The staff should attempt to ascertain the position of the Consumer Attorneys of California on this proposal, and should report back to the Commission on both the CAC position and the issues raised by the State Bar Litigation Section.

#### STUDY N-110 – ADMINISTRATIVE ADJUDICATION FOLLOWUP LEGISLATION

The Commission considered Memorandum 96-19, relating to the administrative adjudication followup legislation. The Commission approved the matters set out in the memorandum for inclusion in the followup legislation.

#### STUDY N-111 – CODE OF ETHICS FOR ADMINISTRATIVE LAW JUDGES

The Commission considered Memorandum 95-15, relating to adoption of a code of ethics for administrative law judges. The Commission approved the proposal, but it should be redrafted to apply to all administrative law judges in state service, not just those that conduct hearings under the Administrative Procedure Act. As so revised, the staff should cast the proposal in the form of a tentative recommendation and circulate it for comment.

#### STUDY N-112 – QUASI-PUBLIC ENTITY HEARINGS

The Commission considered the proposal in Memorandum 96-16 to apply the Administrative Procedure Act to adjudicative hearings of quasi-public entities.

References in the draft to the Administrative Procedure Act should make clear that it is the administrative adjudication parts of the Act that are involved, not the rulemaking requirements. The staff should also look at statutes governing local community action agencies and cases involving local agencies to see whether any other useful distinguishing language can be incorporated in the draft.

As so revised, the Commission approved the proposal to circulate for comment as a tentative recommendation. The staff should send it directly to any quasi-public entity it can identify as being potentially affected by the tentative recommendation.

#### STUDY N-200 – JUDICIAL REVIEW OF AGENCY ACTION

The Commission considered Memorandum 96-14 and its First and Second Supplements. The Commission made the following decisions:

##### **§ 1121.280. Rule**

The Commission approved the staff recommendation to revise Section 1121.280 as follows:

1121.280. “Rule” means ~~both~~ all of the following:

(a) “Regulation” as defined in Section 11342 of the Government Code.

(b) The whole or a part of an agency ~~statement~~, regulation, order, or standard of general applicability that implements, interprets, makes specific, or prescribes law or policy, or the organization, procedure, or practice requirements of an agency, except one that relates only to the internal management of the agency. The term includes the amendment, supplement, repeal, or suspension of an existing rule.

(c) A local agency ordinance.

The Comment should note that subdivision (a) only applies to state agencies (see Gov’t Code § 11342(g)), while subdivision (b) is needed to apply to local agencies.

**§ 1123.140. Exceptions to finality and ripeness requirements**

The Commission approved the staff recommendation to revise Section 1123.140 as follows:

1123.140. (a) A person may obtain judicial review of agency action that is not final or, in the case of an agency rule, that has not been applied by the agency, if all of the following conditions are satisfied:

(a) (1) It appears likely that the person will be able to obtain judicial review of the agency action when it becomes final or, in the case of an agency rule, when it has been applied by the agency.

(b) (2) The issue is fit for immediate judicial review.

(c) (3) Postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.

(b) Nothing in this section authorizes the court to enjoin or otherwise prohibit an agency from adopting a rule.

The Comment should say:

Subdivision (b) continues *State Water Resources Control Bd. v. Office of Admin. Law*, 12 Cal. App. 4th 697, 707-708, 16 Cal. Rptr. 2d 25, 31-32 (1993). Subdivision (b) prohibits, for example, a court from enjoining a state agency from holding a public hearing or otherwise proceeding to adopt a proposed rule on the ground that the notice was legally defective. Similarly, subdivision (b) prohibits a court from enjoining the Office of Administrative Law from reviewing or approving a proposed rule that has been submitted by a regulatory agency pursuant to Government Code Section 11343(a).

The staff should also include in the Comments to Sections 1123.120 and 1123.130 the language suggested by the Office of Administrative Law in the First Supplement.

**§ 1123.230. Public interest standing**

The Commission rejected the Attorney General's suggestion to eliminate or restrict public interest standing.

**§ 1123.340. Exceptions to exhaustion of administrative remedies**

The Commission revised Section 1123.340 as follows:

1123.340. The requirement of exhaustion of administrative remedies is jurisdictional and the court may not relieve a person of the requirement unless any of the following conditions is satisfied:

- (a) The remedies would be inadequate.
- (b) The requirement would be futile.
- (c) The requirement would result in irreparable harm disproportionate to the public and private benefit derived from exhaustion.
- (d) The person lacked notice of the availability of a remedy was entitled to notice of a proceeding in which relief could be provided but lacked timely notice of the proceeding. The court's authority under this subdivision is limited to remanding the case to the agency to conduct a supplemental proceeding in which the person has an opportunity to participate.
- (e) The person seeks judicial review on the ground that the agency lacks subject matter jurisdiction in the proceeding.
- (f) The person seeks judicial review on the ground that a statute, regulation, or procedure is facially unconstitutional.

**§ 1123.420. Review of agency interpretation or application of law**

The Commission approved the staff recommendation to revise subdivision (c) of Section 1123.340 as follows:

1123.420. (a) ....

(c) The standard for judicial review under this section of the following agency action is abuse of discretion:

(1) ~~An agency's interpretation of a statute, where a statute delegates to the agency primary authority to interpret the statute and expressly provides that the delegation is for the purpose of this section.~~

(2) ~~An agency's application of law to facts, where a statute delegates to the agency primary authority to apply the statute and expressly provides that the delegation is for the purpose of this section.~~

(3) An agency's determination under Section 11342.2 of the Government Code that a regulation is reasonably necessary to effectuate the purpose of the statute that authorizes the regulation.

(4) (2) A local legislative body's construction or interpretation of its own legislative enactment.

(d) This section does not apply to the Public Employment Relations Board, Agricultural Labor Relations Board, or Workers' Compensation Appeals Board.

The Comment should say:

Under subdivision (d), Section 1123.420 does not affect case law for the Public Employment Relations Board, Agricultural Labor Relations Board, or Workers' Compensation Appeals Board under which legal interpretations by those agencies of statutes within their area of expertise are upheld unless "clearly erroneous" or "arbitrary and capricious." See, e.g., *Banning Teachers Ass'n v. Public Employment Relations Bd.*, 44 Cal. 3d 799, 804, 750 P.2d 313, 244 Cal. Rptr. 671 (1988); *Agricultural Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 400, 411, 546 P.2d 687, 128 Cal. Rptr. 183 (1976); *Judson Steel Corp. v. Workers' Compensation Appeals Bd.*, 22 Cal. 3d 658, 668, 586 P.2d 564, 150 Cal. Rptr. 250 (1978). *But see* *United Farm Workers v. Agricultural Labor Relations Bd.*, 41 Cal. App. 4th 303, 48 Cal. Rptr. 2d 696, 703 (1995).

#### **§ 1123.430. Review of agency fact finding**

The Commission approved the staff recommendation to revise Section 1123.430 as follows:

1123.430. (a) This Except as provided in Section 1123.435, this section applies to a determination by the court of whether agency action is based on an erroneous determination of fact made or implied by the agency.

(b) The Except as provided in subdivision (c), and subject to subdivision (d), the standard for judicial review under this section is whether the agency's determination is supported by substantial evidence in the light of the whole record.

(c) The standard for judicial review under this section of a finding of fact made by an administrative law judge employed by the Office of Administrative Hearings that is changed by the agency head is the independent judgment of the court whether the finding is supported by the weight of the evidence.

(d) In reviewing an adjudicative proceeding of a state agency, the court shall give great weight to a determination of the presiding officer based substantially on the credibility of a witness to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

#### **§ 1123.435. Review of fact finding in local agency adjudication**

The Commission approved the thrust of the staff recommendation to revise Section 1123.435 as set out on page 4 of the Second Supplement. The Commission asked the staff to be sure local agency procedures in subdivision (c) for substantial evidence review include a requirement for *Topanga* findings in the

agency decision. The Commission also asked the staff to provide independent judgment review of fact-finding in local agency adjudication where the agency changes a finding of fact by the hearing officer. This would parallel subdivision (c) of Section 1123.430.

The staff should take another look at the reference to Section 11513 of the Government Code in subdivision (c)(4) of Section 1123.435 in the Second Supplement. The staff should consider whether Section 11513 will work in the context of a local agency hearing.

The Commission deleted “arising out of employment” from subdivision (a) of Section 1123.435 in the Second Supplement. The effect of the deletion is to apply Section 1123.435 in all local agency adjudications affecting a fundamental, vested right.

The Western Center on Law and Poverty was not content with providing substantial evidence review under subdivision (c) in social welfare cases where the local agency provides specified procedural rights. The Center said local welfare cases generally do provide procedural due process, but that independent judgment review is still needed. The Center asked for independent judgment review of local agency fact-finding in all social welfare cases involving a fundamental, vested right substantially affected by agency action, citing *Frink v. Prod*, 31 Cal. 3d 166, 643 P.2d 476, 181 Cal. Rptr. 893 (1982). The Commission asked the staff to analyze this case and report back.

#### **§ 1123.635. Time for filing petition for review**

In connection with its approval of the Minutes of the January 19, 1996, meeting, the Commission suggested that the staff look at the drafting of proposed Section 1123.635 to see whether the provision might not be more clearly stated.

#### **§ 1123.640. Time for filing petition for review in adjudicative proceeding**

The Western Center on Law and Poverty asked that the existing one-year statute of limitations for review of a welfare decision of the Department of Social Services be preserved. See Welf. & Inst. Code § 10962. The Commission declined to provide a special rule for these decisions. These would be covered by the general limitations period in Section 1123.640. The Commission asked the staff to highlight this provision in the revised Tentative Recommendation for comment,

and to try to find historical background as to why a one-year limitations period was provided for welfare decisions.

**§ 1123.730. Preparation of record**

The Commission approved the staff recommendation to revise the Comment to Section 1123.730 as follows:

Although Section 1123.730 requires the agency to prepare the record, the burden is on the petitioner attacking the administrative decision to show entitlement to judicial relief, so it is petitioner's responsibility to make the administrative record available to the court. *Foster v. Civil Service Commission*, 142 Cal. App. 3d 444, 453, 190 Cal. Rptr. 893, 899 (1983). However, this does not authorize use of an unofficial record for judicial review.

**Additional Staff Analysis**

The Commission asked the staff to analyze and report back on the points raised by the Department of Industrial Relations in the Second Supplement under Sections 1122.030, 1123.230, 1123.420, 1123.620, 1123.640, 1123.650, and 1123.760.

☐ APPROVED AS SUBMITTED

\_\_\_\_\_  
Date

☐ APPROVED AS CORRECTED  
(for corrections, see Minutes of next meeting)

\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Executive Secretary