Study N-200 January 18, 1996

First Supplement to Memorandum 96-4

Judicial Review of Agency Action: Additional Comments

Attached are six more letters commenting on the Tentative Recommendation on *Judicial Review of Agency Action*:

Daniel L. Siegel, Attorney General's Office	Exhibit pp. 1-4
Department of Industrial Relations	Exhibit pp. 5-6
Attorney General (January 10, 1996)	Exhibit pp. 7-8
Steven Feldman, Swimming Pool Chem. Mfr. Ass'n	Exhibit pp. 9-12
Charles P. Scully, II, Calif. Labor Fed., AFL-CIO	Exhibit pp. 13-16
Steven R. Pingel, Consumer Atty's Ass'n of Calif.	Exhibit pp. 17-21

The following sections in the draft statute are discussed in this supplement:

§ 1122.030. Concurrent agency jurisdiction

In the basic memorandum, the staff proposed language for the Comment to Section 1122.030 to make clear the section does not apply if the jurisdiction of the court and agency involve different subject matter or issues arising out of the same event, such as where a licensee faces civil or criminal liability in court and disciplinary proceedings by the agency for the same act. The court does not have original jurisdiction to apply disciplinary sanctions and the agency does not have jurisdiction to determine the civil or criminal question. Dan Siegel of the Attorney General's Office wants to codify this. **The staff suggests adding the following subdivision to Section 1122.030 to accomplish Mr. Siegel's objective:**

> (b) This section does not apply to a criminal proceeding. Nothing in this section confers concurrent jurisdiction on a court over the subject matter of a pending disciplinary proceeding under

the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

This also requires that the first paragraph of Section 1122.030 be designated as subdivision (a), and subdivisions (a) through (g) be redesignated as paragraphs (1) through (7).

§ 1123.140. Exceptions to finality and ripeness requirements

Section 1123.120 prohibits judicial review unless the agency action is final. Section 1123.130 prohibits judicial review of an agency rule until the rule has been applied by the agency. Section 1123.140 permits judicial review of agency action that is not final or of a rule that has not been applied by the agency, under specified conditions. The Department of Industrial Relations is concerned the exceptions in Section 1123.140 may create a problematic loophole for rulemaking, and allow judicial review of a proposed regulation before it has gone through the adoption process. **The staff agrees, and would 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 chapter authorizes a person, prior to final adoption of an agency rule, to obtain judicial review of agency action required by Article 5 (commencing with Section 11346) or Article 6 (commencing with Section 11349) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code.

The Comment would say subdivision (b) continues case law, citing 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).

§ 1123.230. Public interest standing

In the basic memorandum, the staff recommends the Commission adhere to its earlier decision to continue existing law by keeping public interest standing. Public interest standing permits a person to bring a proceeding to vindicate a public interest without showing any private injury. Federal law does not recognize public interest standing.

The Attorney General reasserts his earlier view that public interest standing should either be eliminated or limited to selected areas such as proceedings to vindicate environmental, consumer, and civil rights protections. He says existing law on public interest standing promotes litigation and attorneys fees. Instead, he would require a showing of injury in fact. Injury in fact would qualify a person under Section 1123.220 (private interest standing).

The staff continues to believe public interest standing is a valuable tool to vindicate the public interest, and should be continued. The attorneys' fee provision should not be a problem, because fees may be awarded only in the limited case where agency action is "arbitrary or capricious." Gov't Code § 800 (to be continued in Section 1123.850).

§ 1123.330. Judicial review of rulemaking

Herb Bolz of the Office of Administrative Law suggests the following technical, clarifying amendments to Section 1123.330, and the staff agrees:

> 1123.330. (a) A person may obtain judicial review of rulemaking notwithstanding the person's failure to ~~do either of the following~~:
>
> ~~(a) Petition~~ petition the agency promulgating the rule for, or otherwise seek, amendment, repeal, or reconsideration of the rule.
>
> (b) ~~Object to a state agency that a rule of that agency was not submitted for review to the Office of Administrative Law, or that the agency failed to comply with~~ A person may obtain judicial review of an agency's failure to adopt a rule under Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, notwithstanding the person's failure to request or obtain a determination from the Office of Administrative Law under Section 11340.5 of the Government Code.

The Comment should say the petition to the agency referred to in subdivision (a) is authorized by Government Code Section 11340.6.

§ 1123.340. Exceptions to exhaustion of administrative remedies

Mr. Siegel is concerned about Section 1123.340(d) in the draft statute which says exhaustion of administrative remedies is not required if the "person lacked notice of the availability of a remedy." He would require remand to the agency in this case. In the basic memorandum, the staff recommends adding language to say "and the remedy is no longer available." If the administrative remedy is no longer available, remand would be futile. The staff will ask Mr. Siegel if the language suggested in the basic memorandum addresses this concern.

§ 1123.420. Review of agency interpretation or application of law

Mr. Bolz of OAL wants to be sure we preserve the existing rule that courts uphold an agency determination under Government Code Section 11342.2 that a regulation is "reasonably necessary to effectuate the purpose of the statute" unless arbitrary and capricious. Moore v. State Board of Accountancy, 2 Cal. 4th 999, 1015, 831 P.2d 798, 9 Cal. Rptr. 2d 358, 367 (1992); California Ass'n of Psychology Providers v. Rank, 51 Cal. 3d 1, 11, 793 P.2d 2, 270 Cal. Rptr. 796 (12990). **The staff recommends doing this by adding a new paragraph (3) to Section 1123.420(c):**

> 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 ~~expressly~~ delegates ~~that function~~ 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 ~~expressly~~ delegates ~~that function~~ 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.
> ~~(3)~~ (4) A local legislative body's construction or interpretation of its own legislative enactment.

This replaces the revisions to Section 1123.420(c) on page 36 of the basic memorandum. The reference in paragraphs (1) and (2) of subdivision (c) to "primary" authority to interpret or apply a statute was suggested by Mr. Bolz, and comes from Professor Asimow's study. See Asimow, *The Scope of Judicial*

Review of Decisions of California Administrative Agencies, 42 UCLA L. Rev. 1157, 1221 (1995). This requires similar revisions in the delegating language for the Public Employment Relations Board, Agricultural Labor Relations Board, and Workers Compensation Appeals Board (Gov't Code §§ 3520, 3542, 3564; Lab. Code § 1160.8) in place of the language on page 4 of the basic memorandum:

> For the purpose of Section 1123.420 of the Code of Civil Procedure, the board is delegated primary authority to interpret and apply this ["chapter" for PERB, "part" for ALRB].

Mr. Siegel would like to have the following added to the Comment to Section 1123.420, and the staff has no objection:

> In addition, agency application of law to facts should not be confused with an exercise of discretion that is based on a choice or judgment. See the Comment to Section 1123.440. Typical exercises of discretion include whether to impose a severe or lenient penalty, whether there is cause to deny a license, whether a particular land use should be permitted, and whether a corporate reorganization is fair. Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1224 (1995). The standard of review for an exercise of discretion is provided in Section 1123.440.

As proposed to be revised in the First Supplement, subdivision (c) of Section 1123.420 would provide abuse of discretion review of an agency interpretation or application of law if a statute delegates to the agency primary authority to apply or interpret the statute, and expressly provides that the delegation is for the purpose of this section. Mr. Siegel asks for abuse of discretion review for various agencies in the Department of Consumer Affairs where the Legislature has delegated authority to determine what constitutes "unprofessional conduct" of a professional licensee. This is a question of application of law to fact. The agency's determination of the underlying facts would be subject to substantial evidence review, while the application of law to facts would be subject to independent judgment review with appropriate deference to the agency.

The abuse of discretion standard under subdivision (c) is to continue the present standard of review for specified agencies, requiring courts to uphold the agency determination unless "clearly erroneous." **The staff has found no case applying a "clearly erroneous" standard of review in the licensing context, and so is reluctant to impose such a strongly deferential standard in this context.**

Courts should have latitude to determine what degree of deference is appropriate. As said in Henning v. Division of Occupational Safety & Health, 219 Cal. App. 3d 747, 758-599, 268 Cal. Rptr. 476 (1990):

> Where the language of the governing statute is intelligible to judges their task is simply to apply it . . . . Where the intelligibility of the statutory language depends upon the employment of administrative expertise . . . the judicial role 'is limited to determining whether the [agency] has reasonably interpreted the power which the Legislature granted it.'

§ 1123.430. Review of agency fact finding

We have two more letters expressing concern about our proposal to limit independent judgment review of agency fact-finding. These are from attorney Steven Feldman, writing for the Swimming Pool Chemical Manufacturers Association, and from attorney Steven Pingel, writing for the Consumer Attorneys Association of California and public employees generally.

Hearings of Department of Pesticide Regulation. Mr. Feldman objects to the proposed replacement of independent judgment review of fact-finding of the California Department of Pesticide Regulation with substantial evidence review. He is concerned about lack of procedural due process in DPR hearings, especially lack of separation between prosecutorial and adjudicatory functions and bias. He says there is "a growing perception that too much power is vested in bureaucratic, non-elected, governmental regulatory agencies," and that independent judgment review is an essential protection against bureaucratic power.

DPR hearings under Food and Agricultural Code Section 12999.4 are not under the formal adjudication provisions of the Administrative Procedure Act. However, DPR is not exempt from the new administrative adjudication bill of rights, so it will no longer be possible for DPR to combine prosecutorial and adjudicatory functions, and the presiding officer will be subject to disqualification for bias. Gov't Code § 11425.10. Mr. Feldman says that, despite the administrative adjudication bill of rights, DPR hearing officers will remain biased in favor of the agency, and that proving bias is "virtual impossibility."

Section 1123.430 in the draft statute applies substantial evidence review to fact-finding of all state agencies in APA and non-APA hearings, and in quasi-legislative, ministerial, informal, and discretionary action. **The staff thinks no persuasive case has been made for treating DPR hearings any differently from**

non-APA hearings of other state agencies. The effect of substantial evidence review of fact-finding will be softened considerably by our proposal to have independent judgment review of questions involving application of law to fact.

State agency adjudicative proceedings exempt from administrative adjudication bill of rights. Mr. Feldman's letter suggests a related question: whether independent judgment review of fact-finding should apply to adjudications by state agencies that are exempt from the new administrative adjudication bill of rights. These are: Agricultural Labor Relations Board (election certification, Lab. Code § 1144.5), Alcoholic Beverage Control Appeals Board (appeals from decisions of Department of ABC, Bus. & Prof. Code § 23083), Department of Corrections and related agencies (Pen. Code § 3066; Welf. & Inst. Code §§ 1778, 3158), Military Department (Mil. & Vet. Code § 105), Public Employment Relations Board (election certification, Gov't Code §§ 3541.3, 3563), Public Utilities Commission (hearings under Public Utilities Act, Pub. Util. Code § 1701), Commission on State Mandates (disputes over state-mandated programs, Gov't Code § 17533), University of California (Educ. Code § 92001), Department of Motor Vehicles (drivers' license hearings, Veh. Code § 14112), Franchise Tax Board (deficiency protest and jeopardy assessment hearings, Rev. & Tax. Code §§ 19044, 19084), and State Board of Equalization (Gov't Code § 15609.5).

The administrative adjudication bill of rights applies to an "adjudicative proceeding," which is "an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision." Gov't Code §§ 11425.10, 11405.20. A "decision" is "agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." *Id.* § 11405.50. Thus the administrative adjudication bill of rights does not apply to quasi-legislative, ministerial, informal, or discretionary action. Fact-finding in these contexts will be subject to substantial evidence review under the draft statute. To apply independent judgment review to fact-finding in state adjudications not subject to the administrative adjudication bill of rights appears inconsistent with applying substantial evidence review to quasi-legislative, ministerial, informal, or discretionary action. On the other hand, to apply independent judgment review to state adjudications not subject to the administrative adjudication bill of rights would create an incentive for agencies voluntary to apply the bill of rights under Section 11410.40. We could do this as

follows (the revision in subdivision (a) is discussed on page 2 of the basic memorandum):

> 1123.430. (a) This section applies to a determination by the court of whether agency action, other than a decision of a local agency in an adjudicative proceeding, is based on an erroneous determination of fact made or implied by the agency.
>
> (b) ~~The~~ Except as provided in subdivision (c), 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 decision by a state agency in an adjudicative proceeding not subject to the administrative adjudication bill of rights, Article 6 (commencing with Section 11425.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, is the independent judgment of the court whether the decision is supported by the weight of the evidence.

Practical feasibility of limiting independent judgment review of fact-finding. Mr. Pingel wants to keep independent judgment review of fact-finding in public employee disability retirement cases and for local public employee discipline. On page 3 of the basic memorandum, the staff suggests language to preserve independent judgment review of fact-finding in local agency adjudications if the agency has not adopted procedural protections that include the right to compel attendance of witnesses and production of documents by subpoena, limited discovery, and the new administrative adjudication bill of rights. However, Mr. Pingel says "it is naive to think that permitting local agencies to adopt superficially fair procedures will generally result in fair decisions and eliminate the need for independent judgment review," and gives examples to support this view.

The letters from Mr. Pingel and Mr. Feldman, and several letters attached to the basic memorandum, raise the question whether it will be practically possible in the present draft to implement Professor Asimow's recommendation to apply substantial evidence review to most agency fact-finding. This has proven to be the most controversial aspect of the draft, and has brought the most vehement objections. At some point, the Commission may wish to consider whether we should simply preserve existing law on standard of review of fact-finding, with a view toward enacting the rest of the draft and working on review of fact-finding

for separate legislation. This could be done by revising Section 1123.430 as follows:

> 1123.430. (a) 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), 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) In cases in which the court is authorized by law to exercise its independent judgment on the evidence, the standard for judicial review under this section is the independent judgment of the court whether the decision is supported by the weight of the evidence.

The Comment would say that subdivision (c) continues the first sentence of subdivision (c) of Code of Civil Procedure Section 1094.5(c) and case law thereunder.

§ 1123.510. Superior court proper court for judicial review

Attorney Charles P. Scully, II, writing for the California Labor Federation, AFL-CIO, echoes the comment of the Department of Health Services that there may be a constitutional problem with limiting judicial review to superior courts. The California Constitution gives the Supreme Court, courts of appeal, and superior courts original jurisdiction in mandamus proceedings. However, the Supreme Court and courts of appeal decline to exercise original jurisdiction in the first instance unless the issues presented are of great public importance and must be resolved promptly. Mooney v. Pickett, 4 Cal. 3d 669, 674-75, 483 P.2d 1231, 94 Cal. Rptr. 279 (1971); California Administrative Mandamus § 8.15, at 269 (Cal. Cont. Ed. Bar 1989); see 8 B. Witkin, California Procedure *Extraordinary Writs* § 126, at 764 (3d ed. 1985).

The Comment to Section 1123.510 says that "Under Section 1123.510, the superior court is the proper court for judicial review of agency action whether or not issues of great public importance are involved." Nonetheless, it seems clear the statute cannot limit the original jurisdiction given to the Supreme Court and courts appeal by the California Constitution. We could recognize this by adding an express exception to the section:

1123.510. (a) Except as otherwise provided by statute, the superior court is the proper court for judicial review under this chapter.

(b) Nothing in this section prevents the Supreme Court or courts of appeal from exercising original jurisdiction under Section 10 of Article VI of the California Constitution.

The Comment could say that, although the Supreme Court and courts of appeal may exercise original mandamus jurisdiction in exceptional circumstances, the superior courts are in a much better position to determine questions of fact than are the appellate tribunals, citing Roma Macaroni Factory v. Giambastiani, 219 Cal. 435, 437, 27 P.2d 371 (1933).

§ 1123.520. Superior court venue

For review of state agency action, Section 1123.520 provides for venue in the county where the cause of action arose. The Commission rejected Professor Asimow's recommendation, supported by the Attorney General, to limit venue for review of state agency action to Sacramento County, or, if the agency is represented by the Attorney General, in any county where the AG has an office (Los Angeles, Sacramento, San Diego, and San Francisco). The Commission was primarily concerned about serving the convenience of private parties. Mr. Siegel renews this point for the Attorney General. **Does the Commission wish to reconsider?**

§ 1123.660. Type of relief; jury trial

Mr. Siegel suggests language to say the "court shall not award any relief unless the facts pleaded in the petition for review support that relief." Under existing law, the rules for amending pleadings in ordinary civil actions apply to administrative and traditional mandamus. California Administrative Mandamus § 8.43, at 295 (Cal. Cont. Ed. Bar 1989). If the facts proved do not conform to the facts pleaded, courts are extremely liberal in allowing amendments to the pleadings to conform to proof, the only limitation being that recovery must still be sought on the same general set of facts. 5 B. Witkin, *supra*, § 1139, at 554-55.

Mr. Siegel suggests the Comment refer to the statutes that allow amendment of pleadings, but the staff is concerned the proposed statutory language might be read to limit the right to amend to conform to proof. Perhaps Mr. Siegel's desire to limit relief to that justified by the pleading is addressed by the revisions proposed immediately below to the permissible relief by the court.

Section 1123.660 in the draft statute broadly permits "appropriate relief, whether mandatory, injunctive, or declaratory, preliminary or final, temporary or permanent, equitable or legal." This broad language is needed to include the broad remedies available in traditional mandamus, such as ordering performance of a ministerial act, and to include the declaratory relief available to review a regulation. The Attorney General has consistently expressed concern about the breadth of this provision as it applies to adjudications under the Administrative Procedure Act. Mr. Siegel suggests a special provision on judicial relief for an adjudicative proceeding under the APA. He would continue language in the administrative mandamus statute, Code Civ. Proc. § 1094.5(f). The staff has no objection. To accomplish what Mr. Siegel suggests, we could revise Section 1123.660 as follows:

> 1123.660. (a) The court may award damages or compensation only to the extent expressly authorized by statute.
>
> (b) ~~The~~ Except as provided in subdivision (c), the court may grant other appropriate relief, whether mandatory, injunctive, or declaratory, preliminary or final, temporary or permanent, equitable or legal. In granting relief, the court may order agency action required by law, order agency exercise of discretion required by law, set aside or modify agency action, enjoin or stay the effectiveness of agency action, remand the matter for further proceedings, render a declaratory judgment, or take any other action that is authorized and appropriate.
>
> ~~(c)~~ The court may grant necessary ancillary relief to redress the effects of official action wrongfully taken or withheld~~, but the~~
>
> (c) In reviewing a decision in an adjudicative proceeding under the Administrative Procedure Act, Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, the court shall enter judgment either commanding the agency to set aside the decision, or denying relief. If the judgment commands that the decision be set aside, the court may order reconsideration of the case in light of the court's opinion and judgment, and may order the agency to take such further action as is specially enjoined upon it by law.
>
> (d) The court shall only grant relief justified by the general set of facts alleged in the petition for review.
>
> (e) The court may award attorney's fees or witness fees only to the extent expressly authorized by statute.
>
> ~~(d)~~ (f) If the court sets aside or modifies agency action or remands the matter for further proceedings, the court may make any interlocutory order necessary to preserve the interests of the

parties and the public pending further proceedings or agency action.

~~(e)~~ (g) All proceedings shall be heard by the court sitting without a jury.

The Comment would say nothing in this section authorizes the court to interfere with a valid exercise of agency discretion or to direct an agency how to exercise its discretion, citing Section 1121.140. This is consistent with the last clause in Code of Civil Procedure Section 1094.5(f) ("the judgment shall not limit or control in any way the discretion legally vested in the respondent").

Respectfully submitted,

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January 16, 1996

VIA FACSIMILE AND U.S. MAIL

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RE: Judicial Review of Agency Actions

Dear Bob:

Thank you for sending me possible language for the comment to section 1123.420 of the Commission's August 1995 Tentative Recommendation: Judicial Review of Agency Action. Enclosed please find our office's suggested modifications to that comment, as well other proposed modifications. (Additions are underlined; deletions stricken.) Please note that, as we discussed on the telephone, our office's suggested changes do not necessarily eliminate the Attorney General's overall concern that this may be an area in which existing law does not need to be overhauled.

Proposed Amendment to Section 1122.030
Concurrent Agency Jurisdiction

Rather than address our concerns in a narrative comment, we suggest that they be addressed in the proposed statute by adding a new subsection. (One way to do so is to redesignate the existing first sentence as subdivision "(a)," and the remainder of the sentences as subdivision "(b)," then "(b)(1)," "(b)(2)," etc. The new subdivision would then be "(c).") The new subdivision would read:

(c) As used in this section, "concurrent jurisdiction" does not apply to:

A. Any criminal proceeding.

B. Any disciplinary proceeding under the Administrative Procedure Act (Government Code section 11370, et seq.).

Proposed Comment to Section 1122.030
Concurrent Agency Jurisdiction

~~Section 1122.030 does not apply if the jurisdiction of the court and agency involve different subject matter or issues arising out of the same event, such as where a licensee faces civil liability in court and disciplinary proceedings by the agency for the same act. The court does not have original jurisdiction to apply disciplinary sanctions and the agency does not have jurisdiction to determine the civil claim.~~

Subdivision 1122.030(h) explicitly provides that "concurrent jurisdiction" does not apply to criminal or agency disciplinary proceedings. Disciplinary proceedings have a different purpose from criminal proceedings (see *Viking Pools* v. *Maloney*, 48 Cal.3d 602, 607, fn.4 (1989) [purpose of disciplinary licensing laws is to protect consumers; they are not penal]), and a different purpose from civil suits by consumers against licensees (which are to remedy wrongs against a particular consumer, rather than to protect the public).

Proposed Comment to Section 1123.420
Review of Agency Interpretation or Application of Law

Agency application of law to facts should not be confused with basic fact-finding. Typical findings of basic facts include determinations of what happened or will happen in the future, when it happened, what the state of mind of the participants was. These findings may be subject to substantial evidence review under Section 1123.430 or 1123.435. Next, the agency must decide abstract legal issues that can be resolved without knowing anything of the basic facts in the case. Third and last, the agency must apply the general law to the basic facts, a situation-specific application of law, which will be subject to independent judgment review under Section 1123.420. See Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L.Rev. 1157, 1211-12 (1995).

In addition, agency application of law to facts should not be confused with an exercise of discretion that is based on a choice or judgment. (See comment to Section 1123.440.) Typical exercises of such discretion include whether to impose a severe or lenient penalty, whether there is cause to deny a license, whether a particular land use should be permitted, or whether a corporate reorganization is fair. *Id.* at 1224. Exercises of discretion are subject to review under Section 1123.440.

Subdivision (c)(2) applies, for example, when the Legislature has delegated to the agency the authority to determine the conduct which constitutes unprofessional conduct. See Bus. & Prof. Code section 1000, Appendix I section 10, and C.C.R., title 16, section 317

(Chiropractors); Bus. & Prof. Code section 1670 (Dentistry); 2220 - 2317 (Medicine); 2497 (Podiatry); 2670 (Physical Therapy); 2750 (Registered Nurses); 2875 (Licensed Vocational Nurses); 2960 (Psychologists); 3400 (Hearing Aid Dispensers); 3527 (Physician's Assistants); 4350 (Pharmacy); 4520 (Psychiatric Technician); 4875 (Veterinarians); 4955 (Acupuncturist); 4982 (Marriage, Family and Child Counselors); 5100 (Accountants); 5560 (Architecture); 5660 (Landscape Architecture); 6775 (Professional Engineers); 6925 (Collection Agencies); 7090 (Contractors); 7686 (Funeral Directors and Embalmers); 7860 (Geologists); 8620 (Structural Pest Control Operators); 8780 (Land Surveyors); 9889.1 (Automotive Repair).

Proposed Amendment to Section 1123.660
Type of Relief; Jury Trial

(a) The court may award damages or compensation only to the extent expressly authorized by statute.

(b) The court may grant other appropriate relief, whether mandatory, injunctive, or declaratory, preliminary or final, temporary or permanent, equitable or legal. In granting relief, the court may order agency action required by law, order agency exercise of discretion required by law, set aside or modify agency action, enjoin or stay the effectiveness of agency action, remand the matter for further proceedings, render a declaratory judgment, or take any other action that is authorized and appropriate.

(c) The court may grant necessary ancillary relief to redress the effects of official action wrongfully taken or withheld, but the court may award attorney's fees or witness fees only to the extent expressly authorized by statute.

(d) If the court sets aside or modifies agency action or remands the matter for further proceedings, the court may make any interlocutory order necessary to preserve the interests of the parties and the public pending further proceedings or agency action.

(e) The court shall not award any relief unless the facts pleaded in the petition for review support that relief.

[THE COMMENT CAN NOTE THAT STATUTES ALLOWING FOR THE AMENDMENT OF PLEADINGS, SUCH AS CCP §§ 472 AND 473, APPLY HERE.]

~~(e)~~ (f) All proceedings shall be heard by the court sitting without a jury.

1123.670. Notwithstanding the provisions of section 1123.660, in reviewing a decision of an adjudicative proceeding subject to Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code, the court shall proceed as follows:

(a) The court shall enter judgment either commanding the agency to set aside the decision, or denying relief. Where the judgment commands that the decision be set aside, it may order the

reconsideration of the case in the light of the court's opinion and judgment and may order the agency to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the agency.

(b) The court shall not award any relief unless the facts pleaded in the petition for review support that relief.

(c) All proceedings shall be heard by the court sitting without a jury.

In addition, I would like to clarify our office's concern about exceptions to exhaustion. The current draft provides that exhaustion is not required where a person lacked notice of a remedy in time to use it. (Section 1123.340(d).) Although we do not favor precluding all judicial review in this situation, we believe that the court's remedial power should be limited to remanding the matter back to the administrative agency and ordering the agency to hear the case. That will enable the party to seek relief from the agency while giving effect to the policies which underlie the exhaustion requirement.

Finally, our study of the above provisions has reinforced our belief that venue should be laid in a limited number of trial courts, as Professor Asimow has suggested. Review of agency actions is a specialized function. Trial courts must resolve difficult questions which are peculiar to this area of the law, such as differentiating among questions of fact, questions of law, and applications of the law to the facts (see section 1123.420). Judicial accuracy, efficiency and consistency will be promoted by enabling a select group of courts to develop the necessary expertise to properly review these cases.

Thank you for reviewing these matters. As before, please do not hesitate to contact me if you would like to discuss this further.

Sincerely,

DANIEL E. LUNGREN
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DANIEL L. SIEGEL
Deputy Attorney General

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January 17, 1996

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Re: Tentative Recommendation re: Judicial Review of Agency Action

Dear Mr. Murphy,

We are currently circulating among the various divisions of the Department of Industrial Relations our analysis of the proposed legislation. We expect to present a series of comments to the Commission shortly. We would like to raise one issue at this time, however.

Section 1123.120 and 1123.130 set out requirements of "finality" and "ripeness" which must be satisfied before a person may petition for judicial review of an agency action. Section 1123.140 describes circumstances in which a person may gain judicial review of an agency action that is not final. The Department of Industrial Relations was recently defendant in a law suit which sought judicial review of steps taken by the Department to initiate the rule-making process. The steps taken were required under Government Code sections 11346 et. seq. The Superior Court issued a Temporary Restraining Order, and then a Preliminary Injunction, preventing the Department from proceeding with the rule-making process. Although we believe it was erroneous for the Superior Court to intervene in the statutory rule-making process, the Department issued a new Initial Notice pursuant to Government Code section 11346.4 and re-scheduled the public hearings concerning the proposed change of regulations.

It is implicit in the provisions of proposed sections 1123.120 and 1123.130 that an agency rule or regulation is subject to judicial review only after its final adoption, which is the culmination of the lengthy series of steps set out in Government Code sections 11346 et. seq. Statutory recognition of exceptions to this general rule (as proposed in section 1123.140), however, casts considerable doubt on this principle.

The effect of section 1123.140, as drafted, would be to double the opportunities to litigate rulemaking. It would allow a

challenge as to the suitability of preliminary notices, statements of reasons, and the rulemaking file when one of the possible outcomes of the process is unwelcome to a private party, and again at the end, if an unwelcome regulation is adopted. We believe that encouragement of litigation of this kind is unwise for the reasons that underlie the general "finality" and "ripeness" requirements of section 1123.120 and 1123.130.

A law suit challenging a state agency's conduct prior to final adoption of a regulation would be premature. In the case of an agency's "substantial failure" to comply with the pre-adoption requirements of Government Code sections 11346 et. seq., Section 11350(a) permits a private party to obtain a judicial declaration invalidating a regulation after it has been adopted in final form.

Adherence to the general rule permitting judicial review of only "final" agency rulemaking actions is consistent with the Court of Appeal's holding in State Water Resources Control Board v. OAL (1993) 12 Cal.App.4th 697 at 707-708.

To remedy the problem described, we suggest additional language to be added to section 1123.140 along these lines:

> Nothing in this chapter authorizes any person, prior to final adoption of an agency rule, to seek judicial review of agency conduct that is required by Government Code Title 2, Division 3, Chapter 3.5, Articles 5 and 6, beginning with Section 11346, nor is any court, prior to final adoption of an agency rule, authorized to enjoin such conduct or require alteration of such conduct as proposed or undertaken by a state agency.

If you have any question about this subject, feel free to call me or Chief Counsel John Rea at (415) 972-8900.

Very truly yours,

Martin Fassler
Counsel for Director of Industrial Relations

cc: Herb Bolz, OAL
Professor Asimow

Sent by FAX to (415) 494-1827

State of California

Office of the Attorney General

Daniel E. Lungren
Attorney General

January 10, 1996

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

RE: Commission's August 1995 Tentative Recommendation:
Judicial Review of Agency Action

Dear Commission Members:

In previous letters regarding Commission proposals to revise the law governing judicial review of agency actions, I indicated that both the current law and the Commission's proposed revisions regarding standing (see Section 1123.210, et seq.) may be too broad. I therefore asked my staff to analyze whether the narrower federal approach might be preferable. After reviewing the analysis which my staff has completed, I have concluded that the federal approach would benefit the California courts and public.

Our courts are clogged with an excessive number of lawsuits. We now have well over 700,000 Superior Court civil filings annually, up from less than 600,000 a decade earlier.[1] California's permissive standing provisions, which even allow persons who suffer no discernable harm to sue state and local governments, promote this trend. Of course, persons who are truly harmed by governmental action should be entitled to bring suit. In our overly litigious society, however, it is difficult to justify the promotion of lawsuits by those who suffer no harm. Rather, provisions which allow these suits tempt attorneys to find paper plaintiffs, to bring lawsuits, and then to seek attorney's fees under private attorney general provisions.

[1]In the last year for which figures are available (1993-94), 729,372 civil lawsuits were filed. That number has been creeping upward each year. In 1984-85, there were only 593,120 filings. (See 1995 Annual Report, Judicial Council of California, p. 85, "Superior Courts Civil Filings and Dispositions by Type of Proceeding, Fiscal Years 1984 through 1993-94.")

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Instead of this unrestrained approach, I suggest that the Commission craft standing provisions similar to those used in the federal courts. Litigants should, for example, be required to establish an injury in fact.[2] Moreover, litigants should be required to demonstrate an injury peculiar to themselves or to a distinct group of which they are a part, rather than an injury shared in substantially equal measure by all or a large class; and they should also be required to assert their own legal interests rather than those of third parties.[3] Finally, one's interest must fall within the "zone of interests" to be protected or regulated by the statute or constitutional guarantee in question.[4] These federal system requirements insure that lawsuits are brought by the most appropriate parties: persons who are actually harmed by governmental action and who the Legislature intended to protect. The requirements discourage frivolous suits, and suits pursued primarily to obtain attorney's fees as opposed to remedy wrongs.

Again, following the federal model, broader standing provisions can be adopted in selected areas. Many federal environmental, consumer and civil rights laws, for example, include "citizens suit" provisions designed to provide standing which would otherwise be unavailable. (See 13A Wright, Miller & Cooper, *Federal Practice and Procedure:* Jurisdiction 2d, §3531.13 at 69-73, ns. 8-10 (1984).) Wise public policy calls for broad standing where the Legislature determines it is specifically needed, rather that allowing it across the board, which merely promotes excessive litigation.

Please note that the purpose of this letter is solely to convey my thoughts regarding standing. I still retain the various concerns expressed in my November 27, 1995, letter regarding other specific proposals, as well as my overall concern that it may not be prudent to enact an omnibus approach to judicial review.

Thank you for your consideration of these views.

Sincerely,

DANIEL E. LUNGREN
Attorney General

---

[2]*Lujan* v *Defenders of Wildlife,* 504 US 555, 560-561 (1992).

[3]*Gladstone, Realtors* v. *Bellwood*, 441 U.S. 91, 100 (1979).

[4]*Association of Data Processing Service Organization, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970).

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January 12, 1996

Law Revision Commission
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Via Facsimile and U.S. Mail
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California Law Revision Commission
4000 Middlefield Road
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Palo Alto, California 94303

Re: Comment on Tentative Recommendation Judicial Review of Agency Action

Dear Members of the Commission:

This comment is submitted by Swimming Pool Chemical Manufacturers Association ("SPCMA"), a not-for-profit mutual benefit association of manufacturers, distributors and retailers of swimming pool chemical products.

The Tentative Recommendation proposal for the elimination of the independent judgment test for review of agency action is shocking. It demonstrates a great deal of naivete regarding the "real world" of the lack of fundamental fairness of many state and local adjudicatory agency proceedings.

The elimination of the independent judgment test is most perplexing as there appears to be a growing perception that too much power is vested in bureaucratic, non-elected, governmental regulatory agencies. The Tentative Recommendation would shift an even greater degree of power to state or local agencies. It is a rare case indeed when the fact finding determinations of any agency would not be upheld on a "substantial evidence" standard.

The Tentative Recommendation states, incredibly, at page 10: "Independent judgment review substitutes the facts or conclusions of a non-expert trial judge for the expert and professional conclusions of the administrative law judge and agency heads. Especially in cases involving technical material or the clash of expert witnesses, the professionals are more likely to be in a position to reach the correct decision than a trial judge reviewing the record. The professionals are the administrative law judges who try cases of this sort every day, hear the lay and expert witnesses testify, and can take the necessary time to understand the issues and to question the experts until they do understand."

The members of the SPCMA are regulated at the state level by the California Department of Pesticide Regulation ("DPR"). This is a division of the California Environmental Protection Agency. The DPR is not subject to Chapter 5 of the recent amendments to the Administrative Procedures Act (SB 523 - Government Code 11501, et seq.).

The members of the SPCMA are also regulated at the federal level by United States Environmental Protection Agency ("USEPA"). Administrative adjudications conducted before the USEPA are conducted with adherence to due process requirements and with fundamental fairness. USEPA hearings are presided over by an Administrative Law Judge ("ALJ"). There is a complete separation between the prosecutorial arm of the USEPA and the office of the ALJ. The office of the ALJ is administered by the Chief ALJ in Washington D.C. The ALJs of the USEPA operate with complete independence from both the agency heads and the enforcement branch of the USEPA.

The USEPA full time ALJs are knowledgeable concerning technical aspects of environmental laws and the USEPA regulations.

On the contrary, DPR has no experienced ALJs. As a general proposition, only one individual is routinely appointed by the director of the DPR to act as a hearing officer at DPR adjudicatory proceedings. It is my understanding that this person is now retiring and will no longer be performing that function.

Moreover, there is no meaningful separation of prosecutorial and adjudicatory functions of the DPR. In DPR proceedings, it is well known that the hearing officer has a great bias in favor of the DPR's interpretation of the facts. In spite of the enactment of Government Code Section 11425.10 (Administrative Adjudication Bill of Rights), proof of actual bias will remain a virtual impossibility.

Under Food and Agricultural Code ("F&A") Section 12999.4, the director of the DPR may levy a civil penalty for violation of various statutes concerning the regulation and taxation of economic poisons. Economic poisons are both pesticides and those products which are used as wetting agents, spreading agents, deposits builders, adhesives, emulsifying agents, water modifiers or similar agents, with or without toxic properties of their own, which are intended to be used with pesticides as an aid to the application or effect of a pesticide. (F&A Sections 12753 and 12758).

The administrative penalty may be up to $5,000 per violation. It has been argued by the DPR prosecutorial office that each sale of a product in violation of the F&A Code sections

underlying F&A Section 12999.4 is a separate violation. If the part-time agency-loyal hearing officer were to accept that argument, F&A Section 12999.4 could result in fines of millions of dollars. F&A Section 12999.4 does provide for an adjudicatory hearing and the statute provides for review of the agency decision pursuant to Section 1094.5 of the Code of Civil Procedure.

After exhaustion of the review process, or failure to file a petition pursuant to Section 1094.5, the director of the DPR may file a certified copy of the final decision with the clerk of the Superior Court of any county. Judgment shall be entered immediately by the clerk in conformity with the decision of the hearing officer. (F&A 12999.4(d)).

Obviously, as a DPR biased hearing officer may levy millions of dollars of fines against producers, distributors or retailers of economic poisons, a DPR hearing officer has a great deal of power.

Independent judicial review constitutes an essential protection against the very real potential of unproveable DPR hearing officer bias in favor of the DPR. Even if a DPR hearing is conducted with a modicum of adherence to due process (and many hearings are not), that does not mean the factual conclusions of the DPR hearing officer are fair. Judicial review of agency action on an independent review basis is a fundamental protection against adjudicatory bias; it is a form of the "checks and balances" which our founding fathers had in mind when devising the executive, legislative and judicial branches of government.

The Tentative Recommendation opines at page 10 that: "Independent judgment review is inefficient because it requires the parties to litigate the peripheral issue of whether or not independent judgment review applies." However, the determination as to whether independent judgment review should apply is a determination which the courts are uniquely qualified to provide on a case-by-case basis. There is nothing improper or unusual about this.

Moreover, the administrative system of government should not be based upon what is more "efficient," but what is more fair.

CONCLUSION

The "one size fits all" Tentative Recommendation eliminating independent judgment review is a very, very bad idea. The SPCMA hereby registers its objection to the proposal in the strongest possible terms. Unlike the USEPA, DPR hearings under F&A Code, are not presided over by an ALJ. The DPR has no ALJ office, nor are there any independent or experienced ALJs.

Independent judgment review provides an essential "check and balance" against hearing officer unfairness involving fundamental rights.

The Commission must reject the Tentative Recommendation elimination of independent judgment review.

Very truly yours,

GOLDFARB, STURMAN & AVERBACH

By: _____
Steven L. Feldman

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January 11, 1996

VIA FAX - 494-1827

Attn: Executive Secretary Nathaniel Sterling
California Law Review Commission
400 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Re: California Labor Federation, AFL-CIO - Tentative Recommendation Judicial Review of Agency Action (Study N-200)

Dear Mr. Sterling:

These offices serve as counsel to the California Labor Federation, AFL-CIO. The Federation recently received the various materials referenced above. We understand that the above referenced matter is scheduled for the Tentative Agenda of the Commission covering the January 19, 1996 meeting of the Commission. On behalf of the Federation we supply these comments to the Commission and would request that they be shared with members of the Commission and staff.

Proposed Section 1123.510 states, "Except as otherwise provided by statute, the superior court is the proper court for judicial review under this chapter."

The comment to the foregoing states in part, "Section 1123.510 is drawn from 1981 Model State APA Section 5-104, alternative A. Under prior law, except where the issues were of great public importance and had to be resolved promptly or where otherwise provided by statute, the superior court was the proper court for administrative mandamus proceedings. See Mooney v. Pickett 4 Cal. 3rd 669, 674-75 (1971). Under Section 1123.510 the superior court is the proper court for judicial review of agency action whether or not issues of great public importance are involved." (Emphasis added.)

It is the view of the Federation that the proposed section is both unwise from a policy perspective and unconstitutional under the existing provisions of the

California Constitution.

Perhaps Henning v. IWC 46 Cal. 3rd 1262 (1988) best demonstrates the interests of all California residents in the ability to file writs in the first instance with higher courts. In merely the time from March 23, 1988 to October 31, 1988 the Court of Appeal under its original jurisdiction issued a writ of mandate and that action was affirmed by a unanimous Supreme Court Id. at 1265-1267. Press reports following the decision stated additional wages paid to tipped employees for hours worked from July 1, 1988 through October 31, 1988 were calculated to be in excess of $1 billion. Due to the June 16, 1994 Court of Appeal's decision employers across the state escrowed amounts to protect against the potential expense. The system envisioned by proposed Section 1123.510 would have added months if not years of delay, resulting in a less publicized initial decision, created massive liabilities for employers probably resulting in countless bankruptcies and would have forced tipped employees to forego their rightful wages for an extended period of time.

Other examples of original proceedings brought before the Court of Appeal or Supreme Court include: Pacific Legal Foundation v. Brown 29 Cal. 3rd 165 (1981), People Ex. Rel. Deukmeijan v. Brown 29 Cal. 3rd 150 (1980), Henning v. Division of Occupational Safety and Health 219 Cal. App. 3rd 747 (1990), California Labor Federation AFL,CIO v. California Occupational Safety and Health Standards Board 221 Cal. App. 3rd 1547 (1990) and Pitts v. Perluss 58 Cal. 2nd 824 (1962).

These offices filed amicus briefs in the first two cases referenced above and represented the petitioner in the other cases listed as well as Henning v. IWC supra.

Over 35 years of experience in original writ proceedings before the Court of Appeal and Supreme Court has convinced these offices that such original proceedings specifically authorized by the Constitution (Article VI, Section 10) assure a swift and relatively inexpensive resolution on matters of importance or of statewide concern.

The Constitution provides in pertinent part, "The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus

proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." California Constitution Article VI, Section 10 (emphasis added).

The Commission's staff in its memorandum 95-67 at page 26 states, "The Comments to Section 1123.510 says the superior court is the proper court for judicial review 'whether or not issues of great public importance are involved.' If appellate courts disregard Section 1123.510 and Comment and exercise original mandamus jurisdiction to review agency action that is their constitutional prerogative which we cannot change by statute."

The foregoing quote encourages the Committee to adopt a proposed statutory provision which the staff acknowledges to be in conflict with the California Constitution. Revisions in the Constitution are of course outside of the scope of this Commission's authority. That power to suggest revisions to the Constitution has been granted to the California Constitution Revision Commission (Government Code Sections 8275 et seq.). In any event the notion of proposing a statute which is acknowledged to be in conflict with the Constitution suggests the reasoning of a sophist rather than a scholar.

Comparable problems exist in terms of proposed Section 1121.120(a). That section provides in part, "Except as provided in subdivisions (b), the procedure provided in this title for judicial review of agency action shall be used in place of administrative mandamus, ordinary mandamus, certiorari, prohibition, declaratory relief, injunctive relief and any other judicial procedure, to the extent those procedures might otherwise be used for judicial review of agency action." (Emphasis added.)

The foregoing clearly is intended to eliminate remedies which are explicitly authorized by Article VI, Section 10 of the Constitution.

We presume that Professor Asimow is familiar with the provisions of the California Constitution as contained within Article XVIII relating to amendments of the California Constitution. Clearly the entire proposal before the Commission is not ripe for any form of consideration or recommendation to the Legislature unless and until a

proposed constitutional amendment is placed before the voters of the state of California pursuant to the procedures set forth in Article XVIII and a majority of the citizens voting on such a measure see fit to divest the Courts of the jurisdiction explicitly granted to them by the Constitution and to strip from the citizens of this state the remedies currently available to them.

In these days of tight budgetary restraints and at a time when the Commission itself states that it does not have sufficient assets, "...to bring the Commission back to an adequate operating level..." (Draft Minutes, December 8, 1995 meeting, p. 2) it seems absurd that the Commission is wasting its limited resources on a proposal which is clearly unconstitutional.

The Federation shares the concerns of the California School Employees' Association and California Teachers Association in terms of the draconian curtailment of rights of public employees proposed by Professor Asimow. However, the Federation believes that the proposal of Professor Asimow currently before the Commission also unconstitutionally infringes upon the constitutional rights and remedies available to all California residents as reflected in Article VI, Section 10 and the jurisdiction of the higher courts of this state as explicitly set forth in the same constitutional provision.

Thank you.

Very truly yours,

LAW OFFICES OF
CARROLL & SCULLY, INC.

Charles P. Scully, II

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cc: Mr. John F. Henning

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January 18, 1996

Law Revision Commission
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California Law Revision Commission
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Re: Administrative Procedure Act modifications

Gentlepersons:

I just read the Los Angeles Daily Journal article concerning the Commission's effort to drastically revise the Administrative Procedure Act and related statutes. Although I have read much of the pertinent information published by the Commission on the Web, I cannot conclude my review prior to Friday's Commission meeting. Not being aware of the Commission's timetable regarding this subject, however, I want to communicate some initial concerns.

My firm has almost thirty years' experience in representing public employees in labor and employment matters. Some of our appellate cases include the following: Bowen v. Board of Retirement (1986) 42 Cal.3d 572 ; Hoffman v. Board of Retirement (1986) 42 Cal.3d 590; Morcos v. Board of Retirement (1990) 51 Cal.3d 924; Huntington Beach Police Officers Association v. City of Huntington Beach (1976) 58 Cal.App.3d 492; McGriff v. County of Los Angeles (1973) 33 Cal.App.3d 394; Gelman v. Board of Retirement (1978) 85 Cal.App.3d 92; and Curtis v. Board of Retirement (1986) 177 Cal.App.3d 293. Every one of these cases went to superior court by way of a petition for writ of mandamus.

I also serve as Secretary of the Consumer Attorneys Association of California. In that capacity, I have been informed that many of our members' clients will be affected by the proposed legislation. We request that the Commission provide our Association (and other affected organizations) with reasonable time to fully review the proposal and an opportunity to provide information to your Honorable Commission.

Preliminarily, I have two recommendations with respect to the legislative proposal. First, any proposed legislation should state that superior court consideration of the grant or denial of disability retirement benefits will continue, in all cases, to be reviewed under the independent judgment standard. Similarly, we request that such legislation also continue independent judgment review of all local public employee disciplinary matters.

With all due respect, it is naive to think that permitting local agencies to adopt superficially fair procedures will generally result in fair decisions and eliminate the need for independent judicial review of agency decisions. We strongly believe that much more litigation will take place where bias or procedural unfairness is in issue. The provisions do not take into account the fact that local agency triers-of-fact are mostly political appointees with no particular expertise.

Contrary to the assertion made in the Tentative Recommendation (page 15), there is **absolutely no time spent** litigating "the peripheral issue of whether or not independent judgment review applies" in *disability retirement* cases. This issue has been closed for 24 years. (Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 32) In the case of United Firefighters of Los Angeles City v. City of Los Angeles (1989) 210 Cal.App.3d 1095, at 1102, the court summarized the protected status of a public employee's pension rights as follows:

> "A public employee's entitlement to a pension 'is among those rights clearly "favored by the law." ' " [Hittle v. Santa Barbara County Employees Retirement Assn. (1985) 39 Cal.3d 374, 390. Accordingly, pension laws are to be liberally construed to protect pensioners and their dependents from economic insecurity. (Ibid) .... (Citations omitted)"

There are additional complexities with respect to disability retirement mandamus appeals resulting from the variety of state and local systems which administer retirement funds.

For example, the Public Employees Retirement System (PERS) administers one of the largest and most fiscally healthy pension funds in the world. PERS members include state employees and employees of many cities, some counties and most special districts. Those counties not in the PERS system are governed by the County Employees Retirement Act of 1937. Many municipalities (e.g., City of Los Angeles, Long Beach) have their own pension systems governed by their Charters.[1]

PERS state employee pension cases are governed by the Administrative Procedure Act whereas PERS local safety cases are bifurcated, with the local agency (often a hostile, biased City Manager) determining the issue of permanent disability and the Workers Compensation Appeals Board determining the causation issue. We have not yet determined how the proposed legislation

[1] Further, disability pension benefits vary according to whether an employee is "safety" (generally police, fire, or corrections) or "miscellaneous" and according to whether the employee's permanent disability was caused by the employment or not.

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would affect those cases. Nor have we yet determined what standard of review the proposal would impose on PERS state employee cases which are heard by Administrative Law Judges.

The only thing that has been consistently "uniform" throughout these systems, with all their varying benefits and procedures, is the right of their members to have appeals of adverse administrative decisions heard by a superior court judge who can independently evaluate the administrative record under Code of Civil Procedure Section 1094.5. This is true even in those PERS cases heard by Administrative Law Judges in the Office of Administrative Hearings. Section 1094.5 is often perceived as the employee's last chance for a fair determination of the "fundamental, vested right" involved.

This has been especially important in County Employee Retirement Act cases because many such systems are institutionally unfair. While some systems may provide the appearance of procedural fairness, they are anything but fair in substance or in practice. For example, the Los Angeles County Employees Retirement Association provides a panel of supposedly neutral referees to hear the administrative appeals, offers limited discovery, and provides the right to compel testimony.

The facts are, however, that the referees are selected and hired by the Association's management in consultation with the County Counsel deputies who try the administrative hearing cases against the employee beneficiaries.[2] Most referees have no experience with medical issues and some have virtually no experience in dealing with evidence.[3] The referees are financially dependent on the Association and are all too aware that, when a referee decides "too many" cases in favor of the employees[4], those referees' contracts are not renewed and they are mysteriously blackballed at other retirement associations. Attorneys representing the employee applicants who complain about obvious bias and incapacity of some referees are ignored or worse. Yet, proving such bias or incapacity on a case-by-case basis would be unimaginably consumptive of court and attorney time. While it may be imperfect -- and while some superior court judges are hostile toward employees -- the present administrative

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[2] Representatives of the employees are given no opportunity to help select truly *impartial* referees despite the fact that Retirement Associations occupy a fiduciary relationship to these employees. (See Hittle, supra)

[3] Nor do the politically appointed members of the various county boards of retirement have any expertise in medical or evidentiary issues and these boards are the ultimate decision-makers.

[4] regardless of whether the evidence and the law require a finding in the employee's favor

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mandamus laws generally work.[5]

While public employees may enjoy little favor in today's political climate, they are entitled to have the law followed. Particularly where they have paid their pension system contributions with each paycheck, their pension benefits are not unearned largesse. They prefer to have their fundamental rights ultimately reviewable de novo by an independent superior court judge rather than political appointees to commissions and boards or their paid designees. The proposal to severely limit independent judgment review is, plainly and simply, misguided with respect to the unfairness it will bring to the public sector.

Essentially the same comments apply to public employee disciplinary appeals. There is no time spent litigating the "peripheral issue" of whether a disciplinary action implicates a vested or fundamental right.[6] Practitioners in the field of public sector employment law bring meritorious discharge, demotion, and suspension appeals to the courts under C.C.P. Section 1094.5 without litigating so-called "peripheral" issues.

We respectfully differ with the author's assertion[7] that trial judges are any more "non-expert" than "agency heads" or many administrative law judges in medical or disciplinary issues. First, while many of the ALJs in the Office of Administrative Hearings have acquired medical and disciplinary expertise, agency heads are often correctly perceived as biased and protective of senior and middle management. First, "administrative law judges" are not used in County systems, nor in PERS/local agency cases.

We also disagree with the author's statement that "trial judges must scrutinize every word in the (administrative) record."[8] This is not the practice. Superior court judges, their research attorneys, and law clerks generally read only those portions of the record that the attorneys for the employee and for the agency ask them to read.

I am concerned that some of the "reforms" will result in dramatically reduced fairness to employees whose fundamental vested rights are involved in administrative proceedings and will increase, not decrease, the time required to litigate administrative mandamus cases in the superior courts.

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[5] Particularly because pension boards have been held immune from civil actions challenging misconduct that would make insurance companies blush, independent judgment review in administrative mandamus is the only possible relief for the aggrieved employee.

[6] Tentative Recommendation, page 15

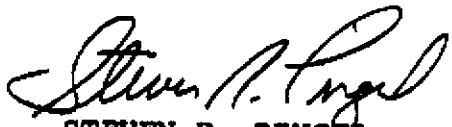
[7] Tentative Recommendation, page 15.

[8] Tentative Recommendation, page 16

As I read some of the Commission's materials, I wondered if the proponents "get it" with respect to how many state and local agencies would operate with reduced judicial oversight. There is good reason the American public is not exactly clamoring for a utopian administrative state. They have witnessed the sometimes unintended, sometimes deadly effects of arrogant government decision making. Public employees have long known that, however imperfect many judges are, the judiciary is often their only hope for impartial review of their cases.

For these reasons, we request that your Honorable Commission not attempt to change the laws that provide state and local employees with the right to challenge adverse administrative decisions concerning disability pensions and discipline in superior court under the independent judgment standard of review.

Very truly yours,



STEVEN R. PINGEL

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cc: Professor Michael Asimow
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Mary Alexander, Consumer Attorneys Association of California
Gilbert Cedillo, SEIU, Local 660

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