Study N-200 February 1, 1996

Memorandum 96-14

Judicial Review of Agency Action: Unresolved Issues From Tentative Recommendation

Attached is a report of the State Bar Committee on Administration of Justice on the Tentative Recommendation on *Judicial Review of Agency Action*. This Memorandum discusses issues in that report and unresolved issues from the last meeting.

We hope to have language from Dan Siegel of the Attorney General's Office for Sections 1123.230 (limitations on public interest standing) and 1123.340 (remand to agency where person lacked notice of remedy), and from Bill Heath of the California School Employees Association for Section 1123.435 (additional procedural requirements to qualify local agency adjudication for substantial evidence review of fact-finding). We also hope to have comment from Herb Bolz of the Office of Administrative Law on Sections 1121.280 ("rule" defined) and 1123.140 (no injunction against rulemaking), and from the Department of Health Services on Sections 1123.240 (standing for review of DHS adjudications) and 1123.510 (statutory authority to determine claims by health care providers). The staff will supplement this memorandum when we have this material.

The staff will prepare a revised draft for Commission consideration, incorporating Commission decisions at the December, January, and February meetings. We should circulate the revised draft for general review and comment. Because of the magnitude of the changes proposed, interim legislative hearings may be appropriate before a bill is introduced next session.

§ 1121.280. Rule

Section 1121.280 defines "rule" by incorporating the definition of "regulation" in Section 11342 of the Government Code, but expands that by adding "agency statement." The Energy Commission is concerned that "agency statement" is not defined, and asks whether it permits judicial review of informal telephone advice or an advice letter. The Energy Commission would make clear that informal advice in this manner is not subject to judicial review, both to ensure that the advice really represents the views of the agency and to avoid discouraging the

giving of informal advice. The concern of the Energy Commission could be addressed by deleting "statement" from subdivision (b). Subdivision (c) should be added to make clear "rule" includes a local agency ordinance:

> 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) applies only to state agencies. Although subdivision (b) duplicates much of Section 11342 of the Government Code, it is nonetheless needed to apply to local agencies.

The Department of Health Services would make the last sentence of subdivision (b) ("rule" includes amendment, etc.) a separate subdivision, and would revise subdivision (a) as follows:

> 1121.280. "Rule" means both of the following:
>
> (a) ~~"Regulation" as defined in Section 11342 of the Government Code.~~ A regulation adopted, or in the process of being adopted, pursuant to the Administrative Procedure Act (Government Code Section 11342 et seq.).
>
> (b) . . . .

This suggestion does not appear to present substantive issues, because of the broad definition of "rule" that would remain in subdivision (b). **The staff has asked the Office of Administrative Law to comment.**

§ 1123.140. Exceptions to finality and ripeness requirements

At the last meeting, the Commission wanted to prohibit an action to enjoin a rulemaking proceeding. Language to do this is set out in subdivision (b):

> 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 would 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).

§ 1123.420. Review of agency interpretation or application of law

Language to effectuate Commission decision. Section 1123.420(c) provides abuse of discretion review for agency interpretation or application of law if a statute delegates to the agency primary authority to interpret or apply the statute. At the last meeting, the Commission wanted the delegation to the Public Employment Relations Board, Agricultural Labor Relations Board, and Workers' Compensation Appeals Board to be limited to matters within agency expertise, and not include procedural rules not within agency expertise, such as what constitutes a "quorum." **The staff would revise the delegation language for these three agencies as follows:**

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

Alternative: Limit abuse of discretion review to statutory interpretation in a regulation? Commission approval of the delegation to these agencies was by a narrow vote, suggesting we should perhaps reexamine the underlying policy. Professor Asimow stated the rule as follows:

> Where the legislature has demonstrably delegated authority to an agency to interpret the law, the court must accept a reasonable agency interpretation under the abuse of discretion standard. Such delegation typically occurs where a statute empowers an agency to adopt a rule that defines language in the statute. This is *not* the same as saying that the legislature delegated interpretive power

> when it wrote an ambiguous statute. Instead, this principle applies only when a statute *demonstrably* delegates to the agency the power to interpret *particular* statutory language.

Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1198 (1995). Professor Asimow cites Henning v. Division of Occupational Safety & Health, 219 Cal. App. 3d 747, 758-59, 268 Cal. Rptr. 476, 482 (1990), and Moore v. California State Bd. of Accountancy, 2 Cal. 4th 999, 1013-14, 9 Cal Rptr. 2d 358, 365-67 (1992). Both involved judicial review of a regulation. In *Henning*, the court said:

> [W]e are not bound by an administrative agency's construction of its controlling statutes. What is at issue here is an interpretation of the governing statutes for occupational safety and health. That comes within our respectful but nondeferential standard of review. "[W]hen the agency is not exercising a discretionary rule-making power, but [is instead] merely construing a controlling statute[,] [t]he appropriate mode of review . . . is one in which the judiciary. . . tak[es] ultimate responsibility for the construction of the statute, [although] accord[ing] great weight and respect to the administrative construction." [Citation omitted.] ". . . 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, which it is the purpose of the statutory scheme to invoke, the judicial role 'is limited to determining whether the [agency] has reasonably interpreted the power which the Legislature granted it.'"

Professor Asimow's article and these cases suggest that abuse of discretion review should be limited to statutory interpretation in a regulation. Subdivision (c) of Section 1123.420 appears to go well beyond this by extending abuse of discretion review to any legal interpretation if there has been a delegation. The staff thinks it would more closely approximate existing law to limit subdivision (c) to a legal interpretation in a regulation. All other agency interpretations would be subject to independent judgment review with appropriate deference, preserving the latitude courts now have to determine the proper degree of deference. We could preserve the existing "clearly erroneous" standard of review for PERB, ALRB, and WCAB by completely exempting these agencies from Section 1123.420:

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~~ Interpretation of a statute in a rule adopted by a state agency, where a statute ~~delegates to~~ expressly gives the agency ~~primary~~ authority to ~~interpret~~ adopt a rule interpreting 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)~~ (2) 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)~~ (3) 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 would say:

Paragraph (1) of subdivision (c) continues one aspect of Henning v. Division of Occupational Safety & Health, 219 Cal. App. 3d 747, 758-59, 268 Cal. Rptr. 476, 482 (1990), and Moore v. California State Bd. of Accountancy, 2 Cal. 4th 999, 1013-14, 9 Cal Rptr. 2d 358, 365-67 (1992).

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).

§ 1123.430. Review of agency fact finding

§ 1123.435. Review of fact finding in local agency adjudication

At the last meeting, the Commission asked the staff to revise Section 1123.435 to limit independent judgment review of local agency adjudication to employment actions to which independent judgment now applies (especially

termination and discipline, drivers' licensing, and possibly pension cases), and not to expand independent judgment review to apply to cases now subject to substantial evidence review. Independent judgment should not apply, for example, to environmental cases or to business regulation.

The staff would carry out the Commission's decision as follows:

Code Civ. Proc. § 1123.430. Review of agency fact finding

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 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.

Code Civ. Proc. § 1123.435. Review of fact finding in certain local agency adjudications

1123.435. (a) This section applies to a determination by the court of whether a decision of a local agency in an adjudicative proceeding affecting a fundamental, vested right of an employee is based on an erroneous determination of fact made or implied by the agency.

(b) Except as provided in subdivision (c), 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.

(c) The standard for judicial review under this section is whether the decision is supported by substantial evidence in the light of the whole record if the ~~agency did both of the following~~ procedure adopted by the agency for the formulation and issuance of the decision satisfies all of the following requirements:

(1) ~~Adopted~~ The procedure complies with Article 6 (commencing with Section 11425.10) and Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code ~~for the formulation and issuance of the decision being reviewed~~.

(2) ~~Gave~~ The procedure provides parties t~~o the proceeding~~ the right to discovery to the extent provided in Section 11507.6 of the Government Code.

(3) [Additional procedural protections to be discussed in First Supplement.]

Gov't Code § 11410.40 (amended). Election to apply administrative adjudication provisions

11410.40. Notwithstanding any other provision of this article, by regulation, ordinance, or other appropriate action an agency may adopt this chapter, or Chapter 5 (commencing with Section 11500), or any of ~~its~~ their provisions for the formulation and issuance of a decision, even though the agency or decision is exempt from application of this chapter or Chapter 5.

The Comment to Section 1123.435 should say independent judgment review of fact-finding under subdivision (b) only applies to a local agency "decision" — action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person, and not to action of general application, such as quasi-legislative action. See Section 1121.250. For local agency action that is not a "decision," substantial evidence review will apply under Section 1123.430. The Comment to Section 1123.435 should also note that a local agency may adopt provisions of the Administrative Procedure Act under Government Code Section 11410.40.

CAJ position. The State Bar Committee on Administration of Justice opposes any narrowing of independent judgment review. CAJ would keep independent judgment review in all cases where a fundamental, vested right is involved, consistent with existing law. The CAJ position is consistent with the many letters we have received from practitioners who represent public employees. Practitioners have said administrative proceedings are often biased in favor of the agency, and that this will remain so whether or not more procedural due process is afforded.

At the last meeting, the staff unenthusiastically suggested the possibility of temporarily keeping existing law on standard of review of fact-finding to try to obtain enactment of the procedural reforms of the draft statute, and to revise the standard of review separately. The Commission was not attracted by this suggestion.

We might again consider an intermediate position for proceedings conducted by an administrative law judge from the Office of Administrative Hearings to provide independent judgment review in the limited case where the agency changes a finding of fact by the ALJ, and substantial evidence review for all other state agency fact-finding. The Commission considered a similar suggestion at the September 1993 meeting, and at that time thought substantial evidence review should apply to decisions under the APA unless the agency head changes a

finding of fact by the presiding officer, in which case independent judgment review would apply. A draft to do this was considered at the March and April 1995 meetings. The Commission rejected this, and opted for substantial evidence review for all fact-finding.

Subdivision (c) of Section 1123.430 proposed below is a narrower version of the March-April draft. It limits independent judgment review to the particular finding of fact by the ALJ that is changed by the agency head:

> 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.

Subdivision (d) should be added to Section 1123.430, whether or not the Commission approves the other suggested revisions. This is nonsubstantive, because this language is now in Section 11425.50 of the Government Code. It seems to belong with the other provisions on standard of review above, and thus should be deleted from Section 11425.50. Subdivision (d) is limited to review of state agency adjudication because the existing requirement that the determination of the presiding officer must identify the demeanor, manner, or attitude of the witness that supports the credibility determination applies only to state agency proceedings. See Gov't Code §§ 1141.20, 11410.30, 11425.50.

§ 1123.730. Preparation of record

The Department of Health Services wants to require that only an agency-certified record may be used by the court. This would stop the petitioner's attorney from submitting an unofficial record prepared from the hearing tape

and copied from exhibits. The requirement in Section 1132.720 that the record shall include an affidavit of the agency official who compiled it seems to address this problem. **The staff would make this clear by adding the underscored sentence to the Comment**:

> 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). <u>However, this does not authorize use of an unofficial record for judicial review.</u>

Respectfully submitted,

Robert J. Murphy
Staff Counsel

MEMORANDUM

TO: California Law Revision Commission (Attn: Nat Sterling)

FROM: Committee for Administration of Justice (Denis T. Rice, Reporter)

DATE: January 19, 1996

RE: 95-67 California Law Revision Commission: Judicial Review of Agency Action (CAJ 95-1)

RECOMMENDATION:

Retain independent judgment standard for judicial review.

Support amplification of procedural protections suggested by Commission

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DISCUSSION

The Committee on Administration of Justice ("CAJ") understands that the California Law Revision Commission ("CLRC") is scheduled to consider Judicial Review of Administrative Agency action at its meeting on January 19, 1996. Judicial Review was recently taken up in the CLRC Staff's Memorandum 95-67 and several supplements thereto, including 96-1. Judicial Review of Agency Action has also been considered by CAJ at several earlier junctures in the past two years. The position of this Committee has always been in favor of retaining of the "independent judgment" standard for matters involving a substantial effect on fundamental vested rights, rather than attempting to substitute the "substantial evidence" standard. In fact, CAJ has favored expanding application of the independent judgment test.

What the Staff is now recommending is that the review standard be "substantial evidence" where the agency involved has voluntarily adopted the so-called "Administrative Adjudication Bill of Rights." If the agency has not adopted the Bill of Rights, the standard for judicial review would be "independent judgment", i.e., whether in the court's independent judgment the decision is supported by the weight of the evidence. Applicability of independent judgment would not depend upon whether fundamental vested rights were involved.

CAJ does not believe there should be a change in the standard of review presently required in matters involving a substantial effect on rights. Nor should the review standard hinge on adoption of the Bill of Rights. The Bill of Rights comprises minimal acceptable procedures that were substituted in the draft statute in January, 1995 for detailed reforms that were previously included. It would be incongruous to lessen the review standard from what has traditionally prevailed in California where vested rights are involved merely because such minimal procedural standards are in place.

If the Bill of Rights is felt to be desirable such that a different review standard would apply unless it was in effect, then it would make more sense to mandate the Bill of Rights on all agencies rather than to allow a patchwork of competing standards to arise which would depend upon which agencies were to adopt the Bill of Rights.

The CLRC decided at its December 8, 1995 meeting not to exempt from the draft statute the five agencies that presently have review by writ of certiorari in the court of appeal. These five agencies include the Worker's Compensation Appeals Board, Public Employee Relations Board, Agricultural Labor Relations Board, Department of Alcoholic Beverage Control, and the Alcoholic Beverage Control Appeals Board. The CLRC asked the Staff to provide historical information on why review for these agencies was lodged in the court of appeal and how the draft statute would affect their procedures. CAJ took no position on these agencies at its January meeting. We might point out that we previously had generally supported the retention of appellate jurisdiction on administrative matters generally in the superior courts, rather than transferring jurisdiction to the court of appeal.

In addition to the Bill of Rights, the Commission has expressed the view that administrative procedural protections ought to be extended to include the right to compel attendance of witnesses, production of documents by subpoena and limited discovery (names, addresses, statements of witnesses, inspection and copying relevant documents). CAJ would support these additions to the Bill of Rights.