Study N-200 February 21, 1996

Second Supplement to Memorandum 96-14

Judicial Review of Agency Action: Still More Unresolved Issues

Attached are two late-arriving letters commenting on the Tentative Recommendation on *Judicial Review of Agency Action*:

Western Center on Law and Poverty	Exhibit pp. 1-6
Department of Industrial Relations	Exhibit pp. 7-14

The staff will raise for discussion at the meeting only those matters below preceded by a bullet [•].

§ 1122.030. Concurrent agency jurisdiction

The Department of Industrial Relations suggests we look at Farmers Ins. Exch. v. Superior Court, 2 Cal. 4th 377, 6 Cal. Rptr. 2d 487 (1992), concerning primary jurisdiction. The staff will analyze that case and report back to the Commission.

§ 1123.230. Public interest standing

• The Western Center on Law and Poverty opposes the Attorney General's proposal to abolish or limit public interest standing. The Center says that to abolish or limit public interest standing would delay correction of illegal government activity, harm those most in need of access to the courts, and could increase rather than decrease litigation costs.

The Department of Industrial Relations suggests we authorize adoption of regulations to require the request for a new or modified decision to be directed to the proper division or administrator, to specify the action the party wants the agency to take, and to state the party's intention to seek court relief if the agency refuses to take the requested action. The staff has no objection to the first of these, and will draft language for Commission consideration. The staff believes the second is already covered by the statute (request to "correct the agency action"), and the third would serve no useful purpose.

§ 1123.420. Review of agency interpretation or application of law

• In the basic memorandum, the staff suggested an alternative to limit abuse of discretion review of questions of law to an agency's statutory interpretation in a regulation. This would codify an aspect of the *Henning* and *Moore* cases there cited. To preserve these cases, the draft in the basic memorandum deletes the requirement that the statute must expressly provide that the delegation is for the purpose of this section. If that language is not deleted, *Henning* and *Moore* will be overruled except to the extent our proposal includes express delegations for particular agencies. Our previous drafts provided an express delegation only for the labor agencies — the Public Employment Relations Board, Agricultural Labor Relations Board, and Workers Compensation Appeals Board.

• We have been working with Herb Bolz of the Office of Administrative Law to draft satisfactory language. He believes the requirement that the statute must expressly provide that the delegation is for the purpose of this section should not be deleted. He says many statutes give agencies authority to adopt regulations, and that, if the restrictive language is deleted, hundreds of agencies would be subject to the limited abuse of discretion review provided by Section 1123.420. He does not believe *Henning* and *Moore* go so far.

• In light of this objection, it may be best to handle the delegation problem by not providing a separate abuse of discretion standard of review in such cases, but rather to allow the general standard of independent judgment with appropriate deference to apply. The Comment to Section 1123.420 now says that one factor in determining the appropriate degree of deference to the agency interpretation is "whether the agency is interpreting a statute or its own regulation." This solution is attractive because it eliminates a somewhat arbitrary category for this purpose, recognizes that the degree of deference should be viewed as a smooth continuum, and preserves the ultimate authority and discretion of the court to determine the degree of deference. See, e.g., Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 575-76, 888 P.2d 1268, 38 Cal. Rptr. 2d 139, 147-48 (1995) ("appropriate degree of judicial scrutiny in any particular case is perhaps not susceptible of precise formulation, but lies somewhere along a continuum with nonreviewability at one end and independent judgment at the other").

If we use this solution, we should preserve case law for the three labor agencies — PERB, ALRB, and WCAB — by simply exempting them from this section:

1123.420. (a) . . . .

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

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

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

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

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

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

The Comment would say:

> Under subdivision (d), Section 1123.420 does not affect case law for the Public Employment Relations Board, Agricultural Labor Relations Board, or Workers' Compensation Appeals Board under which legal interpretations by those agencies of statutes within their area of expertise are upheld unless "clearly erroneous" or "arbitrary and capricious." See, e.g., Banning Teachers Ass'n v. Public Employment Relations Bd., 44 Cal. 3d 799, 804, 750 P.2d 313, 244 Cal. Rptr. 671 (1988); Agricultural Labor Relations Bd. v. Superior Court, 16 Cal. 3d 392, 400, 411, 546 P.2d 687, 128 Cal. Rptr. 183 (1`976); Judson Steel Corp. v. Workers' Compensation Appeals Bd., 22 Cal. 3d 658, 668, 586 P.2d 564, 150 Cal. Rptr. 250 (1978). *But see* United Farm Workers v. Agricultural Labor Relations Bd., 48 Cal. Rptr. 2d 696, 703 (1995).

The Department of Industrial Relations is concerned that independent judgment review of questions of law with appropriate deference would impact four appellate decisions applicable to that agency. The staff will analyze these cases and report to the Commission. Based on the DIR analysis, some or all of these cases appear to involve an exercise of discretion, rather than interpretations or applications of law. Agency exercise of discretion would be subject to abuse of discretion review under Section 1123.440.

§ 1123.435. Review of fact finding in local agency adjudication

• In light of suggestions of the California School Employees Association discussed in the First Supplement, the staff would replace the draft of Section 1123.435 on page 6 of the basic memorandum with the following:

> 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 arising out of employment 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 provides parties with notice of the proceeding at least 10 days prior to the proceeding.
>
> (2) 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~~ (3) The procedure provides parties t~~o the proceeding~~ the right to discovery to the extent provided in Section 11507.6 of the Government Code.
>
> (4) The procedure provides parties with the rights provided in Section 11513 of the Government Code.
>
> (5) The procedure provides for written notice to the parties of the decision.
>
> (6) The procedure permits parties to apply for reconsideration of the decision, which may be granted or denied in the discretion of the agency.

§ 1123.620. Applicability of rules of practice for civil actions

The Department of Industrial Relations is concerned that the broad incorporation of rules of practice for civil actions in judicial review proceedings would inject uncertainty into the law, citing specific sections that may create problems. Section 1123.620 merely continues existing law in this respect, and

may be superseded by Judicial Council rules. Nonetheless, the staff will analyze the sections cited by DIR and report back to the Commission.

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

The Department of Industrial Relations suggests a provision to authorize state agencies to adopt regulations clarifying when a decision is "effective" for the purpose of the running of the time for judicial review. The staff has no objection to doing this, and will draft language for Commission consideration.

DIR suggests a provision to authorize state agencies to adopt regulations clarifying what agency action is a "decision" within the meaning of our statute. The staff is opposed to doing this. To do so would permit an agency to narrow the actions subject to judicial review by narrowing the definition of what is a "decision."

§ 1123.650. Stay of agency action

The Department of Industrial Relations recommends we codify Palma v. U. S. Industrial Fasteners, 36 Cal. 3d 171 (1984). The staff will analyze this case and report back to the Commission.

DIR suggests broadening the provision permitting the court to require the giving of security for the protection of third parties during a stay to include protecting the agency whose decision is being challenged. DIR says this is of particular concern to an enforcement agency trying to assure payment of wages and workers' compensation benefits where the employer is approaching insolvency. The staff will study this and report back to the Commission.

§ 1123.760. New evidence on judicial review

The Department of Industrial Relations asks if the closed record requirement of Section 1123.760 would preclude evidence of agency decisions in prior cases if not cited in the decision under review. This appears to be a matter of which the court may take judicial notice under Evidence Code Section 452. The staff thinks the closed record requirement ought not to preclude judicial notice on review, but the staff needs to give this question further study.

Respectfully submitted,

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Re: Proposal to Abolish Public Interest Standing

Dear Commission Members:

The Commission is considering a proposal to consolidate existing public interest standing doctrines into one statute. In response, Attorney General Dan Lungren has requested that public interest standing in California be abolished and replaced with restrictive federal standing rules. Letters from Attorney General's Office, dated Jan. 10 and Feb. 8, 1996.

The Attorney General has offered no plausible rationale for this recommendation, which would radically alter the law as it has stood since California became a state. Imposing federal standing rules in California would delay, in some cases indefinitely, correction of illegal government activity; would harm those persons most in need of access to the courts; and could increase rather than decrease litigation costs.

I. IMPOSING FEDERAL STANDING RULES ON CALIFORNIA WOULD RADICALLY ALTER STATE LAW THAT HAS STOOD SINCE 1858

The Attorney General's proposal to impose rigid federal standing requirements on California courts conflicts with the entire history of California law. The standing of taxpayers to sue the government was first recognized nearly 140 years ago in Foster v. Coleman, 10 Cal. 278, 281 (1858), and later codified by Code of Civil Procedure §526a. The purpose of both the common law doctrine and the statute is "to 'enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement.'" Blair v. Pitchess, 5 Cal.3d 258, 267-68 (1971) (citation omitted).

To effect that purpose, California courts have long rejected arguments requiring plaintiffs to show greater injury than the payment of taxes. See, e.g., Barry v. Goad, 89 Cal. 215, 223 (1891) ("The objection that the plaintiff cannot maintain this action for the reason that he will sustain any special injury different from that of the public at large is untenable."); Blair v. Pitchess, 5 Cal.3d at 268 ("'no showing of special damage to the particular taxpayer is necessary.'").

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Similarly, the right of citizens to obtain writs of mandate without particularized injury was first recognized more than 50 years ago in Bd. of Soc. Welfare v. County of L.A., 27 Cal.2d 98, 100-01 (1945), in which the Supreme Court held that

> where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws enforced and the duty in question enforced . . . .

This doctrine has stood for 50 years, and was reaffirmed most recently by Chief Justice Lucas in Common Cause v. Board of Supervisors, 49 Cal.3d 432, 439 (1989).

Even in cases other than taxpayer and writ of mandate actions, California courts apply "less stringent rules to cases litigating issues in the public interest." Stocks v. City of Irvine, 114 Cal.App.3d 520, 533 (1981); see also California Water & Telephone Co. v. County of Los Angeles, 235 Cal.App.2d 16, 26 (1967) ("[w]ere there any doubt about the justiciability of the controversy, that doubt would be resolved in favor of present adjudication, because the public is interested in the settlement of the dispute.").

Thus, it is fair to say that the Attorney General's proposal would turn California law entirely on its head.

II. ELIMINATING PUBLIC INTEREST STANDING WOULD SERVE NO LEGITIMATE INTEREST

Given the earth-shaking nature of the Attorney General's proposals, one would expect that he would document a compelling need to overturn existing law. The Attorney General has failed to show any need, much less a compelling one.

First, he points to an increase in litigation in recent years. Jan. 10 letter at 1. Linking this phenomenon to public interest standing doctrines is equivalent to arguing that preservation of the bald eagle has led to a substantial increase in the number of animals in the world. Sit through any crowded trial court or appellate calendar, or skim a recent California Appellate Reports and try to find any case in which public interest standing is invoked. Most attorneys I have talked to are not even aware of public interest standing doctrines, and one judge I know who has sat for 15 years in Superior Court has never seen a case in which the doctrines have been invoked. Public interest standing is used in considerably less than one in a hundred cases, and does not contribute to clogged courts.

Second, the Attorney General raises the specter of attorneys filing "frivolous suits" to obtain private attorney general attorneys' fees. Jan. 10 letter. As an attorney whose office

regularly seeks court-awarded attorneys' fees when we win cases, I can assure him that this does not and could not happen.

To obtain attorneys' fees under the private attorney general statute--Code of Civil Procedure §1021.5--an attorney has to achieve a successful result for his or her client; hope that the defendant does not require waiver of fees to obtain a settlement on the merits; and then convince a court that the case has enforced an important public right. Even then, the attorney must hope that the judge does not slash the number of hours to be compensated or the hourly rate. All of this is extremely difficult to do in meritorious litigation, and impossible for "frivolous" suits. An attorney seeking to get rich would be better advised to play the state lottery than to file private attorney general suits.

Third, the Attorney General quotes out of context language from Carsten v. Psychology Examining Com., 27 Cal.3d 793 (1980). Feb. 8 letter at 2. Carsten, in fact, disproves the need for abolishing public interest standing. In Carsten, a board member of a state agency sued her own agency to challenge one of its decisions. The Supreme Court, while recognizing that citizen-taxpayers ordinarily have standing to sue government agencies without a showing of particularized injury, concluded that "a board member is not a citizen-taxpayer for the purpose of having standing to sue the very board on which she sits." Id. at 801.[1] Carsten thus demonstrates that abusive litigation can be curbed without abolishing public interest standing.

Finally, though the Attorney General does not say so expressly, he may be suggesting a need to conform California law to federal law. While there may well be areas where uniformity is desirable, access to the courts is not one of them. Federal courts are courts of limited jurisdiction constrained by Article III of the federal constitution. State courts, by contrast, are courts of general jurisdiction with inherent equitable powers. Tulare Irr. Dist. v. Superior Court, 197 Cal. 649, 660 (1925). Indeed, the United States Supreme Court has recognized that "constitutional and prudential considerations" in federal standing cases "respond to concerns that are peculiarly federal in nature." Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 262, n. 8 (1977). Absent such considerations, there is no need to bind state courts to restrictive federal standing rules. Stocks v. City of Irvine, 114 Cal.App.3d at 528.

In short, the Attorney General has failed to demonstrate a need for abolishing public interest standing in California.

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[1] In the next writ of mandate standing case to arrive at the Supreme Court, Justice Mosk, the author of Carsten, reiterated the broad public interest standing rule, which "promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." Green v. Obledo, 29 Cal.3d 126, 144 (1981).

III. ABOLISHING PUBLIC INTEREST STANDING WOULD DELAY OR THWART ENFORCEMENT OF IMPORTANT RIGHTS FOR THE MOST VULNERABLE OF OUR CITIZENS

Adopting the Attorney General's proposals would cause considerable harm to Californians in a variety of situations.

In some cases, the very nature of the right involved guarantees that no person with particularized injury will sue. Suppose that a welfare department, in violation of state law, refuses to inform homeless families of the availability of special needs grants that could enable the families to find permanent housing. By definition, the only person who would sue is somebody who already knew about the grants and who would, under the Attorney General's proposals, have no standing. Yet, what conceivable legitimate governmental interest would permit the welfare department to continue its illegal policies? Compare Diaz v. Quitoriano, 268 Cal.App.2d 807, 810 (1969) (upholding the standing of welfare recipients to sue to require counties to advise recipients of their administrative appeal rights, even though by the time of suit "petitioners learned they had such rights.").

In other instances, the Attorney General would bar suits where the litigants could only show "an injury shared in substantially equal measure by all or a large class". Jan. 10 letter at 2. Yet, these are precisely the types of suits that our Supreme Court and the Legislature have determined not only should be brought, but subsidized as well. In explaining why it was necessary to adopt the private attorney general doctrine awarding attorneys' fees, now codified by Code of Civil Procedure §1021.5, our Supreme Court reasoned:

> In the complex society in which we live it frequently occurs that citizens in great numbers and across a broad spectrum have interests in common. These, while of enormous significance to the society as a whole, do not involve the fortunes of a single individual to the extent necessary to encourage their private vindication in the courts.

Serrano v. Priest, 20 Cal.3d 25, 44 (1977). The Attorney General cannot explain why a right of "enormous significance to the society as a whole" should remain unenforced merely because it is shared by a very large group.

In still other cases, especially those that my office and other legal services programs sometimes file, the named plaintiffs have particularized injuries that would satisfy even the Attorney General's test, but also seek to vindicate the rights of others. For example in Green v. Obledo, 29 Cal.3d 126, the Supreme Court struck down a portion of a state regulation governing the Aid to Families with Dependent Children (AFDC) program. Though the named plaintiffs were injured only by that portion, the Court concluded that they had standing as citizen-taxpayers to challenge the remainder of the regulation. Id. at 144-45.

If, as the Attorney General's office urged then and would urge now, the Court had denied standing to challenge the remainder of the regulation, one of two things would have happened. Most likely, the regulation would have remained in place for many years, illegally injuring many poor people, even though the Supreme Court had already cut its legal underpinnings. Alternatively, AFDC recipients affected by other portions of the regulation would have filed separate suits, thus clogging up the courts. Under a fair and equitable system of justice, neither alternative is desirable.

Some might suppose, however, that once a court decides an issue against a governmental entity the entity will change its policies even though not ordered to do so. That is not my experience or the experience of other attorneys who litigate against the government.

For example, several years ago, my office litigated a case involving interpretation of the AFDC/foster care laws. We sought an individual writ of mandate for the plaintiffs under Code of Civil Procedure §1094.5 and a general writ under §1085. The judge who heard the writ motion agreed with us on the law. His tentative decision, however, was to award individual relief under §1094.5, but not to order a change of policy under §1085. At oral argument, he said he was surprised we even cared about §1085 relief. "Surely," he said, "if I rule [on the §1094.5 writ] that the state has acted illegally, the state will change its policy." Before we could answer, the deputy attorney general representing the state agency, to his credit, stood up and informed the court that unless §1085 relief were awarded the agency would not change its policy. Needless to say, the judge changed his mind and issued §1085 relief. In this, as in many other instances, public interest standing conserves judicial resources as well as promoting enforcement of important rights.

It is no answer to these concerns to suggest, as does the Attorney General, that the Legislature can always carve out areas where standing can be liberalized. Jan. 10 letter at 2. Given the Attorney General's failure to document a single instance of abuse,[2] or to show a need for a change in the law, his presumptions are backwards. If there is an area of law where the public interest standing doctrine is being abused, the Legislature is free to narrow standing in that area.

CONCLUSION

Citizen-taxpayer suits have equalized public school spending (Serrano v. Priest, 5 Cal.3d 584, 618 (1971)); reformed the bail system (Van Atta v. Scott, 27 Cal.3d 424, 447 (1980)); improved jail conditions (Mendoza v. County of Tulare, 128 Cal.App.3d 403, 415 (1982));

[2] As noted above, Carsten was the closest to such an abuse, and there the Supreme Court remedied the situation without the need for abolishing public interest standing.

enabled homeless persons to receive subsistence aid (Nelson v. Board of Supervisors, 190 Cal.App.3d 25, 28 (1987)); stopped police departments from compiling dossiers on professors and students not suspected of illegal acts (White v. Davis, 13 Cal.3d 757, 762-65 (1975); and generally achieved much good in society. There is no reason to abolish them.

Very truly yours,

RICHARD A. ROTHSCHILD

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February 16, 1996

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Dear Mr. Sterling,

The following are the views of the Department of Industrial Relations regarding the Tentative Recommendation of the Commission on Judicial Review of Agency Action. We have taken into account comments that have been offered by other agencies and individuals, and the changes proposed by the Commission staff since the initial proposal was circulated in August.

1. Time for filing petition for review; effective date of agency decision.

The Commission is considering adoption of provisions that would establish a general rule that the effective date of an administrative agency decision is the date that is 30 days after issuance of the decision. Decisions take many forms; the date on which a decision is issued can be uncertain or debatable. To comply with the approach in the legislation, several agencies, including DIR, would be required, or would find it useful, to adopt new regulations in this area to specify when a decision issues. A similar problem, agency revision of hearing procedures, was creatively solved in SB 523 in 1995 (Gov. Code section 11400.20). We suggest that the proposed legislation likewise authorize state agencies to adopt regulations clarifying what agency action is a "decision," and when it issues, without the full APA panoply of public participation, provided the regulations are adopted within 12 months of the effective date of the legislation.

2. Concurrent jurisdiction of the courts and an administrative agency.

Proposed section 1122.030 appears to establish a preference for a court's retention of a dispute, and issuance of a decision on the merits, rather than referral of the matter to the proper administrative agency. The Comment states that the section "codifies the case law preference for judicial rather than administrative action in the case of concurrent jurisdiction." One recent decision of the Supreme Court, however, appears to point to a preference for initial consideration of a dispute by the proper

administrative agency: Farmers Insurance Exchange v. Superior Court (1992), 2 Cal. 4th 377, 6 Cal. Rptr. 2d 487. Is it the Commission's intent that the proposed statute codify the standards set out in that decision?

3. Public interest standing; written request to modify decision by person who was not a party to the administrative proceeding.

The Commission's proposal (section 1123.230) would provide standing to file a petition for review for individuals or entities that had not participated in the administrative agency, and would require these persons or entities to first submit a written request to the agency, asking for modification of the agency action.

To allow the agency a meaningful opportunity to modify its decision, and thereby avoid the necessity of litigation and the potential of large attorneys' fees, the agency should be able to require, by regulation, that: (1)the request for a new or modified decision be directed to the proper division or administrator; (2)the written request specify the action that the private party would like the agency to take; and (3)the request state the person or entity's intention to seek court relief if the agency does not adopt the desired change.

We suggest that the proposed legislation authorize state agencies to adopt appropriate regulations along these lines, on a simplified schedule as suggested in paragraph 1 above, within 12 months of the effective date of the legislation.

4. Proposed exception to the requirement of ripeness and finality.

We advised the Commission of our comments on this point in our letter of January 17, 1996. The Commission staff has agreed with our position, as reflected in its comments at the January 19 meeting.

5. Admission of evidence in the trial court that was not admitted in the administrative proceeding.

In certain quasi-legislative and quasi-judicial decisions, DIR often relies on its own administrative decisions in previous similar circumstances as guidance for decision-making in pending matters. The decision letter sent to interested parties often cites some, but not all, of the previous administrative decisions. The previous decisions are not commercially published (although they are public records available on request) and are not likely to be published, even after DIR carries out the process of designating certain decisions as precedential, as required by the recently enacted amendments to the Administrative Procedure Act.

Under the Evidence Code, section 452(c), the previous decisions are viewed as evidence, subject to permissive judicial/official notice. In the event that a DIR decision in such a case is challenged in court, would the parties to a petition for judicial review, including the agency, be prohibited from bringing to the court's attention previous decisions that were not cited by name in the decision under review? If that were true, in many cases it would deprive the court of information that the court would find useful in applying the "abuse of discretion" standard and in determinations in cases which require application of the law to the facts.

6. The standard of review to be applied to agency actions.

a. The proposed legislation would require the courts to apply an "independent judgment" test in several circumstances, including cases in which it is alleged that the agency "has "decided all issues requiring resolution" or "has erroneously interpreted the law," or "has erroneously applied the law to the facts." (section 1123.420(a), subsections [3], [4], and [5]). Requiring application of the "independent judgment" test to cases in which the Department of Industrial Relations has applied its expertise in complex labor relations matters is contrary to the holdings and analyses of at least four recent appellate decisions.

In Independent Roofing Contractors v. Department of Industrial Relations (1994) 23 Cal.App.4th 345, the Court applied an "arbitrary or capricious" standard to the department's determination to rescind a prevailing wage determination for a specific job classification.

In Pipe Trades District Council No. 51 v. Lloyd W. Aubry Jr. _____Cal App.4th ____ (January 4, 1996; 96 Daily Journal DAR 861) the court held that "an agency's non-adjudicatory action will not be set aside unless it is inconsistent with the statute, arbitrary, capricious, unlawful, or contrary to public policy." The court sustained the department's refusal to publish a "jurisdictional agreement" between two unions as part of the department's prevailing wage determinations.[1]

In International Brotherhood of Electrical Workers, Local 889 v. Director of the Department of Industrial Relations (2nd District, No. B085716, January 22, 1996), the Court of Appeal held that the trial court was correct in applying the substantial evidence standard - rejecting use of the independent judgment standard - in reviewing the director's determination of the proper

[1]A copy of this decision is enclosed.

collective bargaining unit for light rail maintenance employees of the Los Angeles County Metropolitan Transportation Authority.[2]

In International Brotherhood of Electrical Workers, Local 11 et. al. v. Lloyd W. Aubry Jr. (1996) ____Cal.App.4th ____ (Jan. 29, 1996, 96 Daily Journal DAR 959), the Court wrote, "We will only overturn the Director's quasi-legislative decision if it is 'arbitrary or capricious' or in conflict with the clear terms of the Director's statutory mandate."[3] The court sustained the director's decision to reduce the prevailing wage rate for construction electricians in areas where the union and signatory contractors had agreed to wage increases and accompanying union dues increases, with the additional funds then used by the union to subsidize some of the same contractors on selected construction jobs.

Thus, in various decisions, the courts of appeal have applied either a "substantial evidence" standard or an "arbitrary or capricious" standard in reviewing Department of Industrial Relations decisions within the department's area of expertise.

Therefore, we suggest adding to the proposed legislation language similar to that which has been suggested by the staff with respect to decisions of the Agricultural Labor Relations Board, the Public Employment Relations Board and the Workers' Compensation Appeals Board. The following language could be added to Labor Code section 54 or 55:

> For the purpose of Section 1123.420 of the Code of Civil Procedure, authority is delegated to the Director of Industrial Relations to interpret the provisions of Labor Code sections 1770, 1771.7, 1773.4, 1773.5, 1773.6, sections 3700 through 3709.5, 3720.1; and Public Utility Code sections 30751, 98162.5, 100301 and 103401.

We propose that similar language, delegating the comparable authority to the California Apprenticeship Council, be enacted to replace the appropriate portion of Labor Code section 3083. Finally, we propose that similar language be added to Labor Code section 66, referring to decisions of the Mediation and Conciliation Service pursuant to Public Utility Code sections 25052, 28551, 40122, 50121, 70122, 90300(b), 95651, 101344, and 102403 (determining the appropriate collective bargaining unit for employees of local transit districts).

The effect of such provisions would be to direct the courts to apply an abuse of discretion or substantial evidence standard, to review decisions of the Department of Industrial Relations that

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[2] A copy of the decision is enclosed. The Department has asked the court to order the decision published.

[3] A copy of the decision is enclosed.

are squarely within its areas of specialized expertise, as these have been recognized by the Legislature.[4]

Adoption of statutory language of the kind suggested, focused on the situations in which the Department is required to apply general statutory language to specific factual circumstances, is consistent with the approach proposed by the Commission staff on page 3 of the February 1, 1996 memorandum (Memorandum 96-14). The Commission staff also proposes an alternative approach, on pages 3-5, focused on an agency's adoption of a rule or regulation to implement a statute. The staff Memorandum relies on analysis in the decision Henning v. Division of Occupational Safety and Health (1990), 219 Cal.App.3d 747. The Henning decision distinguished between an agency's adoption of a regulation and an agency action construing a controlling statute; the court's analysis recognizes that an agency action in a specific instance should be granted greater deference than an agency's adoption of a general regulation:

> What is at issue here is an interpretation of the governing statutes for occupational safety and health. That comes within our respectful but non-deferential standard of review. When the agency is not exercising a discretionary rule-making power, but is instead merely construing a controlling statute, the appropriate mode of review is one in which the judiciary takes ultimate responsibility for the construction of the statute, although according great weight and respect to the administrative construction. Id. at page 758. [Internal quotation marks, brackets and citations omitted].

b. The proposed legislation may, inadvertently, alter the standard of review for decisions of the State Personnel Board. The current standard of review, under court precedent, is "substantial evidence." [5] Frequently, the State Personnel Board is called upon to "apply the facts to the law," e.g. in determining whether specific conduct of an employee constitutes "inexcusable neglect of duty" within the meaning of Government Code section 19572. Under proposed section 1123.420(a) and (b), the standard of review in such cases might be the "independent judgment" test in subsection (b). However, we believe the proposed legislation is not intended to change the current standard of review of such

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[4]The protection of minimum wages, working conditions and the provision of workers' compensation benefits for the state's employees, by the Department of Industrial Relations and its divisions, are all subjects on which the Department is given broad authority by the California Constitution, in Article XIV, sections 1, 2 and 4; i. e. "may confer on a commission, legislative, executive and judicial powers" (Section 1); and authority for "a complete system of workers' compensation" and "full provision for securing safety in places of employment" and "power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter...."(Section 4).

[5]See, e.g. Stanton v. State Personnel Board (1980) 105 Cal.App.3d 729.

State Personnel Board decisions. We suggest suitable modification of section 1123.420 or placement of a statement to that effect in the official Comment.

7. Application of the CCP provisions governing trials to court actions challenging administration agency actions.

Section 1123.620 provides that the Code of Civil Procedure rules of practice applying to trials (Part 2, beginning with section 307) apply to proceedings in which parties seek judicial review of agency actions. Wholesale incorporation by reference, as a general practice often produces legal uncertainties. We would suggest instead incorporation of specific sections, or the addition to the proposed legislation of clarifying provisions regarding specified provisions of the CCP.

Below are some of the examples where application of the general rules to judicial review proceedings would introduce uncertainties regarding application to judicial review of agency decisions.

a. CCP section 426.30 requires a defendant in a court proceeding to bring cross-complaints against that party in the same action. From time to time, a division of DIR may have pending several unrelated requests to take action vis-a-vis a specific employer. If the employer were to file a petition for review challenging one action by DIR, while several additional unrelated allegations or requests for action were being investigated or being considered, it would be detrimental to the public interest to force DIR to initiate other actions against that employer by means of cross complaint, regardless of whether the agency's investigation and determination have been concluded. We assume that it is not the purpose of the proposed legislation to force an agency to initiate such actions by means of cross-complaint. The potential problem can be solved by adoption of a provision exempting section 426.30 from the blanket reference of section 1123.620.

b. CCP Section 632 provides for a trial court to issue a statement of decision upon the request of any party. It applies upon the "trial of a question of fact by the court" and therefore may be construed to exclude judicial proceedings to review agency actions, inasmuch as such proceedings may or may not be viewed as a "trial of a question of fact by the court."

We believe that in a case in which a trial court overturns or invalidates an agency action, it would be useful to all parties and to an appellate court for the trial court to issue a statement of decision, explaining its reason for finding the agency action to be invalid, and explaining what the agency will have to do differently to make its action valid in the eyes of the court. A suitable provision should be added to either the statute or the

official Comment to clarify the Commission's intent on this point. If there is objection from the judiciary to the burden of issuing new statements of decision, the provision could be written so as to remain in effect for just five years. By that time, most of the legal changes occasioned by this reform act should have reached the appellate courts.

8. Continued adherence to the holding of *Palma v. U. S Industrial Fasteners* (1984) 36 Cal.3d 171.

In Palma, the Supreme Court held that a court of appeal lacks authority to itself issue a peremptory writ of mandate (invalidating an agency action) as part of its decision. A writ invalidating an agency action may issue only when the appellate decision becomes final as to both the Court of Appeal and the Supreme Court. We recommend that this holding be codified. The appropriate place would be within section 1123.650 (stay of agency action).

9. Requirement for the posting of a bond to prevent financial loss to government agencies.

Section 1123.650(d) provides that a court may require the giving of security "for the protection of third parties." We suggest that the proposal be amended to also allow for a court order that would require the giving of security for the protection of the government agency whose decision is challenged. This is of particular concern to an enforcement agency which attempts to guarantee payment of wages and workers' compensation benefits to employees whose employers may be losing their ability to pay, concealing assets, or otherwise evading the legal obligations that apply to every business within the state (including every one of their competitors).

For example, each year, the Director of Industrial Relations requires self-insured employers to deposit specific amounts into a reserve fund for workers' compensation benefits. Labor Code section 3701. The director takes into account the size of each employer's current reserve fund, as well as possible future workers' compensation liability. (see Labor Code section 3701[b]). If an employer's reserve fund is insufficient to provide all required workers' compensation benefits in a given year, the shortfall would be made up by the Self-Insurer's Security Fund (Labor Code section 3702.5[b]), which is administered by the Director of Industrial Relations. The decision about the amount of deposit required may be challenged by the self-insured employer by a petition for review. The cost to an employer of litigating and seeking a stay may be far less than the cost of compliance, particularly where the cost of compliance may amount to millions of dollars for the additional security deposit required by the Department.

Given these circumstances, it is possible that if the Director's decision about the amount which a self-insured employer is required to deposit annually is overturned by a trial court, and if, during the pendency of the department's appeal, the employer's reserve fund is insufficient to cover all the workers' compensation payments to employees and medical providers, the Self-Insurer's Security Fund would incur additional liabilities. It is in these circumstances that it would be appropriate for a trial court to require the posting of a bond pending appeal to protect the financial interest of the Self-Insurer's Security Fund.

A similar situation occurs where the employer is not self-insured, but seeks to avoid purchasing workers' compensation insurance. In that case, the claims which would accrue during the uninsured period would fall directly on the Uninsured Employers Fund (Labor Code section 3716 et. seq.). A similar effect on the Unpaid Wage Fund (Labor Code sections 96.6 and 96.7) would eventuate with an employer opposing a Labor Commissioner requirement for payment of a bond, due to past non-payments (Labor Code sections 98.2, and 240).

We would recommend that a requirement of security be presumed where the stay is sought against a decision which exposes the general fund to liability, or which is sought against application of protective legislation pursuant to Article XIV of the Constitution.

Very truly yours,

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