

Memorandum 96-16**Administrative Adjudication: Quasi-Public Entities (Draft of Tentative Recommendation)**

The Commission has previously determined that it will pursue the concept of making the statutory administrative adjudication protections (particularly the “bill of rights”) applicable in hearings conducted by quasi-public entities under state auspices. The Commission asked the staff to prepare a draft tentative recommendation to circulate to affected persons and entities for comment.

A draft tentative recommendation is attached to this memorandum. The most difficult problem in preparing the draft is to adequately describe what entities the provisions apply to, so that an entity will be able to tell with some assurance whether or not it is subject to the statute. The draft seeks to do this by narrowing the draft so it is limited to entities created by statute for the purpose of administration of a state function. This would not cover entities such as nonprofit corporations that have contracted with state agencies to perform an agency function. However, the staff believes it is better to proceed slowly in this uncharted area.

Instances of quasi-public entities that are created by statute for the purpose of administration of a state function include:

California Insurance Guarantee Association (Ins. Code §1063)
Escrow Agents’ Fidelity Corporation (Fin. Code § 17311)
State Compensation Insurance Fund (Ins. Code § 11773)

The various agricultural produce commissions appear to be quasi-public entities within the meaning of this definition. A typical example is the Winegrowers of California Commission, created by the Dills-Bronzan Winegrowers Joint Commission Act of 1986. The statute proclaims that “There is in state government, the Winegrowers of California Commission.” Food & Ag. Code § 74061. However, the statute then proceeds to distance the Commission from the state, providing that it is a corporate body and the state is not liable for its acts. Food & Ag. Code §§ 74074, 74078. It is funded by producer assessments. Food & Ag. Code § 74104. The Commission must provide an informal hearing for

individuals aggrieved by its acts; appeals from Commission decisions are made to the Director of Food and Agriculture; the Director's determinations are subject to judicial review. Food & Ag. Code § 74172.

The staff would include a reference to this type of entity in the Comment. Statutes exist that create hearing-conducting commissions for apples, asparagus, avocados, cherries, cut flowers, dates, eggs, forest products, grape rootstock, kiwifruit, navel oranges, pepper, pistachios, sheep, strawberries, tomatoes, walnuts, wheat, wine, and winegrapes.

Our intent is to circulate this proposal for comment as a tentative recommendation. We will send it to entities that we can identify, such as these, as well as to state agencies within whose jurisdiction entities such as these may operate. We know already that the Department of Corporations does not like the concept of applying the Administrative Procedure Act to hearings of these entities; we will ask them to itemize their concerns.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

TENTATIVE RECOMMENDATION

relating to

ADMINISTRATIVE ADJUDICATION BY QUASI-PUBLIC ENTITIES

Comprehensive legislation enacted in 1995 requires state agency administrative adjudication to adhere to fundamental due process and public policy requirements.¹ Among the requirements imposed by the Administrative Procedure Act as revised are:²

- The agency must give notice and an opportunity to be heard, including the right to present and rebut evidence.
- The agency must make available a copy of its hearing procedure.
- The hearing must be open to public observation.
- The presiding officer must be neutral, the adjudicative function being separated from the investigative, prosecutorial, and advocacy functions within the agency.
- The presiding officer must be free of bias, prejudice, and interest.
- The decision must be in writing, be based on the record, and include a statement of the factual and legal basis of the decision. Credibility determinations made by the presiding officer are entitled to great weight on review. A penalty may not be based on an agency “guideline” unless the agency has adopted the guideline as a regulation.
- The decision may not be relied on as precedent unless the agency designates and indexes it as precedent.
- Ex parte communications to the presiding officer are prohibited.
- The agency must make available language assistance to the extent required by existing law.

The new legislation also encourages settlements,³ alternative dispute resolution,⁴ and informal proceedings.⁵

1. 1995 Cal. Stat. ch. 938, § 21. The legislation implements a recommendation of the California Law Revision Commission, and is operative July 1, 1997. See *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm’n Reports 55 (1995); *Annual Report for 1995*, 25 Cal. L. Revision Comm’n Reports 615, 711 (Appendix 7) (1995).

2. Gov’t Code § 11425.10 (administrative adjudication bill of rights).

3. Gov’t Code § 11415.60 (settlement).

4. Gov’t Code §§ 11420.10-11420.30 (alternative dispute resolution).

5. Gov’t Code §§ 11445.10-11445.60 (informal hearing).

The coverage of the new provisions is limited to decisions made by state agencies pursuant to constitutionally and statutorily required hearings.⁶ However, in many cases statutes delegate or authorize delegation of a state decision to a private entity. Examples of such delegations include decisions of the following quasi-public entities:

- California Insurance Guarantee Association (Ins. Code §1063)
- Escrow Agents' Fidelity Corporation (Fin. Code § 17311)
- State Compensation Insurance Fund (Ins. Code § 11773)
- Various agricultural produce commissions (Food & Ag. Code § 67111 ff)⁷

Decisions of quasi-public entities of this type are not subject to the requirements of the Administrative Procedure Act.

Decisions of private entities, when affecting the public interest, are subject to common law "fair procedure" requirements.⁸ For example, private hospitals in the administration or exclusion of physicians to staff privileges, and professional societies in the exclusion and expulsion of members, must provide fair procedures, particularly notice and an opportunity to be heard. These principles apply whether or not the decision amounts to "state action" for purposes of equal protection and due process of law.⁹

6. Gov't Code § 11410.10. There are a number of state agency hearings exempted from the coverage of the new provisions. Separation of powers principles exempt the Legislature, the Governor and Governor's Office, and the courts and judicial branch. The California Constitution also exempts the University of California. See discussion in *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55, 87-91 (1995).

Specified hearings of the following executive branch agencies are also exempted by statute:

- State Bar of California
- Alcoholic Beverage Control Appeals Board
- Commission on State Mandates
- Military Department
- Department of Corrections (including Board of Prison Terms, Youth Authority, Youthful Offenders Parol Board, Narcotic Evaluation Authority)
- Public Utilities Commission
- State Board of Equalization
- Public Employment Relations Board
- Agricultural Labor Relations Board
- Franchise Tax Board

7. A typical example is the Winegrowers of California Commission, created by the Dills-Bronzan Winegrowers Joint Commission Act of 1986. The statute proclaims that "There is in state government, the Winegrowers of California Commission." Food & Ag. Code § 74061. However, the statute then proceeds to distance the Commission from the state, providing that it is a corporate body and the state is not liable for its acts. Food & Ag. Code §§ 74074, 74078. It is funded by producer assessments. Food & Ag. Code § 74104. The Commission must provide an informal hearing for individuals aggrieved by its acts; appeals from Commission decisions are made to the Director of Food and Agriculture; the Director's determinations are subject to judicial review. Food & Ag. Code § 74172.

8. For discussion of the fair procedure principal, see California Administrative Hearing Practice §§ 1.35-1.36 (Cal. Cont. Ed Bar. 1984; Supp. 1995).

It is likely that decisions of quasi-public entities are subject to fair procedure requirements to the same or a greater extent than decisions of private entities, but the law is not clear on this matter. In the interest of clarifying this issue, the Law Revision Commission recommends that quasi-public entities be subject to the Administrative Procedure Act in their conduct of constitutionally and statutorily required adjudicative hearings. This proposal will also provide certainty as to the precise standards that are applicable, in place of nebulous “fair procedure” requirements.

It is appropriate that these decisions of quasi-public entities be treated the same as decisions of public entities. Quasi-public entities perform a state function, and in this capacity should be held to the same due process and public policy standards as any entity serving a governmental function. Application of the same procedural framework to quasi-public entity decisions will also promote uniformity of procedure, regardless of the type of decision maker involved, to the ultimate benefit of the regulated public.

A critical step in applying the Administrative Procedure Act to a quasi-public entity that performs a state function is specification of precisely which entities are covered. Because many private entities perform functions that are arguably “public” in nature, a private entity needs to know with some assurance whether any of its decisions is subject to the Administrative Procedure Act. For this reason, the Law Revision Commission recommends a narrow and precise definition of “quasi-public entity” — a private entity’s decision will be subject to the Administrative Procedure Act if the entity is a creature of statute, the entity is administering a state function, and the entity’s decision is required by statute (or constitution) to be formulated pursuant to an evidentiary hearing for determination of facts.

9. See 1 G. Ogden, California Public Agency Practice § 2.03 (1994).

PROPOSED LEGISLATION

An act to add Section 11410.60 to the Government Code, relating to administrative adjudication by quasi-public entities.

The people of the State of California do enact as follows:

Gov't Code § 11410.60 (added). Application to quasi-public entities

SECTION 1. Section 11410.60 is added to the Government Code, to read:

11410.60. (a) This chapter applies to a decision by a private entity if all of the following conditions are satisfied:

(1) The entity is created by or pursuant to statute for the purpose of administration of a state function.

(2) Under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision.

(b) For the purpose of application of this chapter to a decision by a private entity, unless the provision or context requires otherwise:

(1) "Agency" means the private entity.

(2) "Regulation" means a rule promulgated by the private entity.

(3) Article 8 (commencing with Section 11435.05), requiring language assistance in an adjudicative proceeding, applies to the private entity to the same extent as to a state agency governed by Section 11018.

Comment. Section 11410.60 applies this chapter to decisions of quasi-public entities. It is limited to decisions for which an evidentiary hearing is required by law. Examples of quasi-public entities whose decisions may be subject to this chapter include:

California Insurance Guarantee Association (Ins. Code §1063)

Escrow Agents' Fidelity Corporation (Fin. Code § 17311)

State Compensation Insurance Fund (Ins. Code § 11773)

Various agricultural produce commissions (e.g., Food & Ag. Code § 67111 *ff*)