

Second Supplement to Memorandum 96-26

Judicial Review of Agency Action: Revised Tentative Recommendation

Attached is a letter from Bill Heath of the California School Employees Association suggesting improvements in Sections 1123.430 and 1123.440. The staff agrees with these suggestions, and would further revise these two sections as set out below (double underscore shows Mr. Heath's suggested additions):

§ 1123.430. Review of agency fact finding generally

The following replaces the statutory material in the First Supplement, page 1:

1123.430. (a) The standard for judicial review of whether agency action, other than a decision of a local agency in an adjudicative proceeding affecting a fundamental, vested right, is based on an erroneous determination of fact made or implied by the agency is whether the agency's determination is supported by substantial evidence in the light of the whole record.

(b)

(The standard of review of fact-finding of a local agency in an adjudicative proceeding affecting a fundamental, vested right is governed by the next section — Section 1123.440.)

§ 1123.440. Review of fact finding in local agency adjudication

The following replaces the statutory material in the basic memo, pp. 11-12:

1123.440. (a) The standard for judicial review 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 is the independent judgment of the court whether the decision is supported by the weight of the evidence.

(b) Notwithstanding subdivision (a), the standard for judicial review is whether the decision is supported by substantial evidence in the light of the whole record if the procedure adopted by the agency for the formulation and issuance of the decision satisfies all of the following requirements:

(1) The procedure provides parties with notice of the proceeding at least 10 days before the proceeding.

(2) The procedure complies with Article 6 (commencing with Section 11425.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, relating to the administrative adjudication bill of rights.

(3) The procedure complies with Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, relating to subpoenas.

(4) ~~The procedure provides parties the right to discovery to the extent provided in Section 11507.6 of the Government Code.~~

(5) The procedure provides parties with the rights provided in Section 11513 of the Government Code, relating to evidence.

~~(6) (5) The procedure provides for written notice to the parties of the decision. that, if a contested case is heard before the agency itself, no member of the agency who did not hear all the evidence shall vote on the decision or be present during consideration of the case.~~

(6) The procedure provides that if a contested case is heard by a hearing officer alone, the hearing officer shall be present during consideration of the case by the agency and, if requested, shall assist and advise the agency.

(7) The procedure provides that the agency itself may adopt the hearing officer's proposed decision, reduce or otherwise mitigate the proposed penalty, and make technical or other minor changes in the proposed decision and adopt it as the decision, but may not increase the proposed penalty or change the factual or legal basis of the proposed decision unless a copy of the proposed decision is furnished to each party and his or her representative, the parties have an opportunity to present oral or written argument before the agency itself, and every member who participates in consideration of the case or votes on the decision has read the entire record, including the transcript or an agreed statement of the parties, with or without taking additional evidence.

~~(7) (8)~~ The procedure permits parties to apply for reconsideration of the decision, which may be granted or denied in the discretion of the agency.

(c) Subdivision (b) does not apply to a determination of fact made by the presiding officer in the hearing that is changed by the agency.

Gov't Code § 11350 (amended). Judicial declaration on validity of regulation

The reference to an "interested" person having standing to seek judicial review of a regulation should be deleted from Government Code Section 11350.

The Comment would note that standing is determined under the draft statute, which generally codifies existing law.

11350. (a) ~~Any interested~~ A person may obtain a judicial declaration as to the validity of any regulation by ~~bringing an action for declaratory relief in the superior court in accordance with under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure. The right to a judicial determination shall not be affected either by the failure to petition or to seek reconsideration of a petition filed pursuant to Section 11347.1 before the agency promulgating the regulations.~~ The regulation may be declared to be invalid for a substantial failure to comply with this chapter, or, in the case of an emergency regulation or order to repeal, upon the ground that the facts recited in the statement do not constitute an emergency within the provisions of Section 11346.1.

(b) In addition to any other ground that may exist, a regulation may be declared invalid if either of the following exists:

(1) The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.

(2) The agency declaration pursuant to paragraph (8) of subdivision (a) of Section 11346.5 is in conflict with substantial evidence in the record.

~~For purposes of this section, the record shall be deemed to consist of all material maintained in the file of the rulemaking proceeding as defined in Section 11347.3.~~

(c) The approval of a regulation by the office or the Governor's overruling of a decision of the office disapproving a regulation shall not be considered by a court in ~~any action for declaratory relief brought with respect to a proceeding for judicial review of a~~ regulation.

Comments and Narrative Portion of Tentative Recommendation

Mr. Heath suggests improvements in the comments and the narrative portion. The staff will incorporate these in the draft after the meeting.

Respectfully submitted,

Robert J. Murphy
Staff Counsel



California School Employees Association

March 4, 1996

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

File. _____

Re: **Revised Tentative Recommendation
Judicial Review of Agency Action**

Dear Chairperson Wied and Members of the Commission:

I have reviewed Memorandum 96-26 and the First Supplement to Memorandum 96-26, and wish to take this opportunity to express CSEA's appreciation of the understanding and responsiveness of the Commission and its staff to the issues CSEA has raised.

Memorandum 96-26 raises the question, at page 11, of whether it is necessary to apply all of Government Code section 11517 to local agency hearings. CSEA does not believe that subdivisions (d) and (e) of section 11517 need to be expressly applied. The remainder of that section, however, provides a much-needed road map for the many local agency members who have scant experience with administrative adjudications.

Given the confusion that will undoubtedly result if the statute merely directs readers to the rather complicated provisions of section 11517, CSEA recommends that the Commission substitute the following for the proposed subdivision (b)(5) of section 1123.440, set forth at page 12 of Memorandum 96-26:

The procedure provides:

(a) If a contested case is heard before the agency itself, no member of the agency who did not hear all the evidence shall vote on the decision or be present during the consideration of the case.

(b) If a contested case is heard by a hearing officer alone, the hearing officer shall be present during the consideration of the case by the agency itself and, if requested, shall assist and advise the agency. The agency itself can adopt the hearing officer's proposed decision, reduce or otherwise mitigate the penalty, make technical changes in the proposed decision, but cannot increase the penalty or change the factual or legal basis of the proposed decision until after:



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(1) a copy of the proposed decision has been furnished to each party and his or her representative and the parties have been afforded an opportunity to present either oral or written argument before the agency itself; and

(2) every member who participates in the consideration of the case or votes on the decision has read the entire record, including the transcript, or an agreed statement of the parties, with or without taking additional evidence.

I believe the Commission agreed at its last meeting to delete the phrase "arising out of employment" from section 1123.440, in order to avoid an equal protection challenge.

The technical revision to section 1123.430, subdivision (a), set forth on page 1 of the First Supplement to Memorandum 96-26, should mirror section 1123.440, subdivision (a) by adding "affecting a fundamental, vested right" after the word "proceeding."

The fourth paragraph of the comment to section 1123.450 at page 40 of the Memorandum refers to substantial evidence review of factual determinations without noting the different standard for local agencies in proceedings under section 1123.440, subdivision (a). The same omission occurs in the first full paragraph on page 16 of the First Supplement.

I note from page 3 of Memorandum 96-26 that subdivision (b) of section 1123.680 "is to codify the existing rule that, if money damages are incidental to the petition for extraordinary relief, the claims filing requirements of the Tort Claims Act do not apply...." The comment, at page 48, should include a reference to this rule, along with a citation to Eureka Teachers Association v. Board of Education (1988) 202 Cal.App.3d 469, 475-476.

The First Supplement to Memorandum 96-26 incorrectly states, at page 10, "The proposed law provides a single, uniform 30-day limitations period for judicial review of all adjudicatory action, whether state or local...." (See proposed § 1123.660.)

At pages 10-11, the First Supplement incorrectly states, "California is the only jurisdiction in the United States that uses independent judgment as a standard for judicial review of

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agency action generally." Like several other states, California uses independent judgment review for particular factfinding situations deserving of greater judicial scrutiny. In California, the standard is used for the review of factfinding only where the proceedings of a nonconstitutional agency affect a fundamental, vested right.

Thank you again for the opportunity to participate in this process, and particularly for the Commission's proposed incentive for a voluntary "Little APA" which CSEA believes will greatly improve administrative adjudications of those local agencies that choose to adopt it.

Sincerely,



William C. Heath
Deputy Chief Counsel

cc: Margie Valdez, CC
Barbara Howard, DGR