Study N-200 April 11, 1996

Third Supplement to Memorandum 96-26

Judicial Review of Agency Action: Revised Tentative Recommendation

Attached are the following letters on the Revised Tentative Recommendation:

Richard Rothschild, West'n Ctr. on Law & Poverty	Exhibit pp. 1-2
Lucy Quacinella, West'n Ctr. on Law & Poverty	Exhibit pp. 3-8
Sue Ochs	Exhibit pp. 9-12
Steven Pingle, Consumer Att'ys of Calif. etc.	Exhibit pp. 13-18
Richard Shinee, Ass'n LA County Deputy Sheriffs	Exhibit p. 19

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

General Comment

Mr. Pingle strongly urges the Commission not to replace administrative mandamus. He says the system is not broken and does not need fixing.

§ 1120. Application of title

• Legislation in 1995 added language to Code of Civil Procedure Section 1094.5 saying the court shall not review disciplinary action against a member of the California Highway Patrol under Government Code Section 19576.1. Government Code Section 19576.1 provides for review by the Department of Personnel Administration of minor disciplinary action against a member of the CHP. This legislation ratified a Memorandum of Understanding between the CHP and the State Department of Personnel Administration reached in collective bargaining. **The staff recommends continuing this provision as subdivision (i) of Section 1120**:

> (i) This title does not govern or apply to a disciplinary decision under Section 19576.1 of the Government Code.

By a conforming revision, the staff would add to Section 19576.1 the language saying "the court shall not review" a disciplinary decision under that section.

§ 1123.140. Exceptions to finality and ripeness requirements

• Section 1123.140(b) says nothing in the section "authorizes a court to enjoin or otherwise prohibit an agency from adopting a rule." Herb Bolz of the Office of Administrative Law thinks this should go further and say the rule applies "notwithstanding any other provision of law." This broader language is consistent with the case cited in the Comment, State Water Resources Control Bd. v. Office of Admin. Law. **The staff recommends doing as Mr. Bolz suggests by deleting subdivision (b) from Section 1123.140 and recodifying it as a separate section**:

> 1123.145. Notwithstanding any other provision of law, a court may not enjoin or otherwise prohibit an agency from adopting a rule.
>
> **Comment.** Section 1123.145 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). The section prohibits, for example, a court from enjoining a state agency from holding a public hearing or otherwise proceeding to adopt a proposed rule on the ground that the notice was legally defective. Similarly, the section prohibits a court from enjoining the Office of Administrative Law from reviewing or approving a proposed rule that has been submitted by a regulatory agency pursuant to Government Code Section 11343(a). See also Gov't Code § 11346.9(a)(3) (agency summary of objections to rulemaking).

§ 1123.230. Public interest standing

• For public interest standing, Section 1123.230 requires that the petitioner (1) be "a proper representative of the public" and (2) "will adequately protect the public interest." Mr. Rothschild says this "could lead to broad and intrusive discovery by governmental defendants." He would delete the requirement that petitioner be "a proper representative of the public."

• This language comes from the Federal Rules of Civil Procedure on class actions, which require the representative party to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). As Mr. Rothschild notes, the federal rules do not require the representative party to be "a proper representative of the public." Moreover, these qualifications are not found in the case law cited in the Comment to Section 1123.230, and so appear to be a limitation on existing law. Nor are they in the Model State Administrative Procedure Act, which has no provision for public interest standing.

• The staff thinks the two requirements — proper representative of the public and adequate protection of the public interest — amount to the same thing. Thus

the "proper representative" language appears superfluous and may be deleted from subdivision (b) without significantly changing the meaning of the section.

• The revision to subdivision (c) below was recommended by staff in the basic memorandum to effectuate a suggestion of the Department of Industrial Relations. The draft below of Section 1123.230 replaces the draft on page 6 of the basic memorandum:

> 1123.230. A person has standing to obtain judicial review of agency action that concerns an important right affecting the public interest if all of the following conditions are satisfied:
>
> (a) The person resides or conducts business in the jurisdiction of the agency or is an organization that has a member that resides or conducts business in the jurisdiction of the agency, if the agency action is germane to the purposes of the organization.
>
> (b) The person ~~is a proper representative of the public and~~ will adequately protect the public interest.
>
> (c) The person has previously requested the agency to correct the agency action and the agency has not, within a reasonable time, done so. The request shall be in writing unless made orally on the record in the agency proceeding. The agency may by rule require the request to be directed to the proper agency official. As used in this subdivision, a reasonable time shall not be less than 30 days unless the request shows that a shorter period is required to avoid irreparable harm. This subdivision does not apply to judicial review of an agency rule.

§ 1123.440. Review of fact-finding in local agency adjudication

Mr. Shinee objects to replacing independent judgment review with the substantial evidence test, saying it would defeat meaningful review.

• Mr. Pingle says the present unfairness in local agency proceedings might be ameliorated somewhat by a procedural bill of rights, but not at the expense of giving up independent judgment review of fact-finding.

• Although Mr. Pingle opposes substantial evidence review, he would at least strengthen the procedural protections necessary for substantial evidence review:

• He would require decisionmakers to place their deliberations on the record.

• He would not limit hearsay evidence. Section 1123.440 applies the "residuum rule" under which hearsay may be used to explain or supplement other evidence, but is not sufficient in itself to support a finding. The residuum rule has been thought to be a protection for the individual against the government, because it forces use of reliable evidence. **The staff is not sure**

whether the residuum rule affords more protection for agencies or for individual parties, and solicits comment on this question.

§ 1123.450. Review of agency exercise of discretion

The Department of Industrial Relations asks that, in the Comment to Section 1123.450, we refer to cases cited on page 9 of the basic memorandum. The staff agrees, and would add the following to the second paragraph of the Comment to refer to the three published decisions (International Brotherhood of Electrical Workers, Local 889 v. Department of Industrial Relations will not be published):

> Section 1123.450 also applies to a decision to rescind a prevailing wage determination for a particular job classification, Independent Roofing Contractors v. Department of Industrial Relations, 23 Cal. App. 4th 345, 28 Cal. Rptr. 2d 550 (1994), to refuse to publish a jurisdictional agreement between unions as part of a prevailing wage determination, Pipe Trades Dist. Council No. 51 v. Aubry, 41 Cal. App. 4th 1457, 49 Cal. Rptr. 2d 208 (1996), to reduce the prevailing wage for construction electricians in certain areas, International Brotherhood of Electrical Workers, Local 11 v. Aubry, 41 Cal. App. 4th 1632, 49 Cal. Rptr. 2d 759 (1996).

§ 1123.680. Type of relief

• Section 1123.680(a) gives courts broad authority to grant any appropriate relief. At the request of the Attorney General, we added subdivision (c) to provide a narrower scope of relief for review of formal adjudicative proceedings under the Administrative Procedure Act, drawn from existing law. See Code Civ. Proc. § 1094.5(f) (court may enter judgment either commanding the agency to set aside the decision or denying relief). Dan Siegel of the AG's Office correctly points out that, to continue existing law, this provision should apply to all state agency adjudication. **The staff agrees, and recommends revising subdivision (c) as follows**:

> (c) In reviewing a decision in a ~~proceeding under Chapter 5 (commencing with Section 11500)~~ state agency adjudication subject to Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code, the court shall enter judgment either commanding the agency to set aside the decision or denying relief. If the judgment commands that the decision be set aside, the court may order reconsideration of the case in light of the court's opinion and judgment and may order the agency to take further action that is specially enjoined upon it by law.

The Comments to Sections 1123.680(c) and 1094.5(f) should be augmented to show the disposition of this language.

§ 1123.760. New evidence on judicial review

• In the First Supplement, the staff suggested a new subdivision (e) be added to Section 1123.760 in response to a concern of the Department of Industrial Relations that the closed record requirement might preclude judicial notice of agency decisions in prior cases if not referenced in the record. That suggestion is reproduced here for convenience to make it unnecessary to refer to the First Supplement at the meeting:

> (e) Nothing in this section precludes the court from taking judicial notice of a prior decision of the agency as authorized by the Evidence Code.

The Comment should refer to Evidence Code Section 452(c) (judicial notice of official acts of executive department).

Welf. & Inst. Code § 10962 (amended). Judicial review

• Section 10962 provides a one-year statute of limitations for judicial review of welfare decisions. The draft statute would shorten this to 30 days from the effective date of the decision. A staff note under Section 10962 asks for comment on whether the one-year statute of limitations should be preserved. Lucy Quacinella and Sue Ochs oppose shortening the one-year limitations period because they believe it will effectively deny judicial review to many applicants for aid. Ms. Ochs says this will have a "devastating effect on poor people," especially in view of the funding cuts for legal services programs in California. She says it is "absolutely crucial" that the one-year limitations period be preserved. Ms. Quacinella's letter provides supporting statistical information, and examples of real cases where a short limitations period would have denied judicial review.

Ms. Ochs also argues for independent judgment review of fact-finding in these proceedings on the ground that they are politicized and the hearing officers are employees of the department and thus are not impartial. One of her examples involved the question of whether the aid recipient would suffer "hardship" for the purpose of invoking the estoppel doctrine. But "hardship" appears to be a question of application of law to fact, and would therefore be

subject to independent judgment review under the draft statute. See Section 1123.420.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

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Attention: Bob Murphy

Re: Public Interest Standing

Dear Commission Members:

The Western Center is grateful that the Commission has voted to retain public interest standing in California in actions to review public agency actions. We are concerned, however, with proposed Code of Civil Procedure Section 1123.230, subdivision (b), which requires, as one of the conditions for public interest standing, that the person seeking standing be "a proper representative of the public" who "will adequately protect the public interest." The ambiguity and potentially open-ended nature of the phrase "proper representative of the public" could lead to broad and intrusive discovery by governmental defendants and unpredictable interpretations by the courts.

Arguably, the staff's reference in the Comment to Rule 23(a) of the Federal Rules of Civil Procedure, narrows the scope of this requirement. Rule 23(a)(4) requires that a class action may be certified only if "the representative parties will fairly and adequately protect the interests of the class." There is no analogue in Rule 23, however, to the "proper representative of the public" language.

We suggest deleting that language so that subdivision (b) requires only that the person seeking standing "will adequately protect the public interest."

Alternatively, the Commission might borrow from its own staff proposals concerning amendments to the unfair business practices statutes. There, the Commission proposes that the "attorney for a private plaintiff in a representative action must be an adequate legal representative of the interests of the general public pled"

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and that "[n]either a private plaintiff nor the plaintiff's attorney in a representative action may have a conflict of interest that reasonably could compromise the good faith representation of the interests of the general public pled." [Proposed] Bus. & Prof. Code §§17303(a), 17303(b), Staff Memorandum dated March 22, 1996, Unfair Competition: Revised Draft of Tentative Recommendation. The focus on the adequacy of plaintiffs' attorneys and whether there is a conflict of interest is proper. Going beyond those requirements, however, could lead to unwarranted fishing expeditions and unintended consequences.

Very truly yours,

RICHARD A. ROTHSCHILD

RAR:mlh

cc: Lucy Quacinella

VIA FAX & MAIL

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April 10, 1996

Attn: Robert J. Murphy, Staff Counsel
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Re: Statute of Limitations for Judicial Review of Administrative Adjudications

Dear Commission Members:

The Commission's current recommendations would change the statute of limitations for review of public benefits cases from the one-year period now provided under Welfare and Institutions Code (W&IC) Section 10962 to a maximum of 90 days[1]. Under this dramatic reduction in the time to file, public benefits applicants and recipients will without doubt lose important rights affecting their very survival. We urge the Commission to keep the existing statute of limitations in these cases.

1) **By their very nature, subsistence payments and basic medical care involve fundamentally important rights. California's one-year statute of limitations for judicial review should be maintained to protect such crucial rights.**

As our Supreme Court has held, the right to welfare benefits is "fundamental both in economic... and human terms and...[its] importance...to the individual in the life situation.'...Because need is a condition erroneous denial of aid...deprives the eligible person 'of the very means for his survival and his situation becomes immediately desperate' [citations omitted.] Frink v. Prod, 31 Cal.3d 166, 178-179 (1982). Federal courts concur:

> Numerous cases have held that reductions in [Aid to Families with Dependent Children (AFDC)] benefits, even reductions of a relatively small magnitude, impose irreparable harm on recipient families...'For those in the grip of poverty, living on the financial edge, even a small decrease in

[1]Thirty days from the effective date of the administrative decision, which is usually 30 days from the date the decision is mailed. An additional 30 days would be added if the Director alternated the administrative law judge's decision. Recommendation, Section 1123.640.

> payments can cause irreparable harm'...'When a family is living at subsistence level, the subtraction of *any* benefit can make a significant difference to its budget and to its ability to survive' [Emphasis added][citations omitted.]

Beno v. Shalala (9th Cir. 1994) 30 F.3d 1057, 1063-1064, n. 10.

The clear purpose of W&IC Section 10962 is to insure access to judicial review for the poor precisely because of the unique importance of the rights involved. Tripp v. Swoap, 17 Cal.3d 671 (1976). Recognition of the need to facilitate access to the courts for this population is further reflected in the provisions of W&IC Section 10962 permitting the filing of public benefits writs *without* paying fees. Indeed, California courts have long recognized the fundamental importance of ensuring judicial access for the poor. See, e.g., Martin v. Superior Court, 176 Cal. 289, 294 (1917).

2) **Families with young children and other persons who must rely on public benefits programs for their survival have greater difficulty than the public in general in accessing the courts. The one-year statute of limitations is an essential tool in preserving whatever access is available to the poor.**

In welfare cases, "'those affected are not the average citizens...' [citation omitted.]" Beno v. Shalala, supra. With poverty comes disadvantage. The accomplishment of tasks that many of us in the "mainstream" take for granted can become nearly impossible for families or individuals who are poor, especially if they are sick or disabled. Making a phone call, getting from one place to another, keeping track of paper, getting access to information, making photocopies, finding a babysitter, and similar tasks can all become tremendously difficult for people "living on the financial edge." Legal Services attorneys routinely represent people living under bridges, in cars or shelters when not literally on the streets, often with young children; who have to make long trips on city buses, on bicycles, or on foot, no matter the weather, to get to the grocery store, a medical clinic, the welfare department, or a law office; who can barely read or write. Colleagues in my former field office had elderly clients in rural areas whose homes lacked electricity, who relied on wood stoves for heat. I myself had clients living in grain silos.

Legal Services clients are also much more likely than the general population to be in poor health: the medical literature confirms a significant correlation between poverty, especially when it results in homelessness, and compromised health status. Our clients are often unable to come to appointments or follow through on assigned tasks because of illness; the severely mentally ill, such as the schizophrenic homeless clients I have represented, probably pose the greatest difficulties in this regard.

Poor people in California have never had adequate access to the courts, not even when Legal Services experienced its highest funding level in 1980 (the year before the first round of massive federal cuts) and there was one Legal Services attorney in California for every 5,863 poor people. In 1996, the ratio has ***fallen 200%:*** now, there is only one Legal Services lawyer for every 11,423 Californians in poverty. Not surprisingly, under these circumstances very few people are represented at state administrative fair hearings involving public benefits . And the situation will get dramatically worse soon: Congress recently ***cut the Legal Services budget by an additional 30%.***

Given this combination of poverty among the client base and insufficient numbers of lawyers for the poor, a writ petition could not be prepared and filed in most cases involving public benefits within the maximum 90-day limitations period the Commission has recommended, even if a client contacted a Legal Services office the same day as receiving an adverse fair hearing decision. The time needed to

schedule an appointment (at many Legal Services offices, because of the volume of requests for assistance and limited staffing, non-emergency clients do not get appointments until several weeks or even a month or more after the initial contact with the office), meet with the client, get access to his or her welfare department and fair hearing records, review the record, including listening to a tape recording of the hearing, analyze the validity of claims, draft the petition, points and authorities, related stipulations on hearing and peremptory writ forms, and confer again with the client to review the papers and procure a signature easily consumes more than 90 days in most cases.

Meeting the shortened limitations period is even more difficult when class action notices go out informing class action members that they may come forward for administrative determinations of newly vindicated rights: if the administrative agency denies significant numbers of claimants, as has occurred in such cases, Legal Services offices are swamped with requests for assistance requiring review by writ all at approximately the same time.

3) **Retroactive benefits payments and retroactive coverage for health care costs are essential supplemental payments to families and aged, blind, and disabled persons on aid. Re-application for future benefits is often futile and will otherwise not meet the person's need. Moreover, in many cases, an individual does not know and could not reasonably be expected to know that he or she has a right to a retroactive award until an intervening event, unrelated to the state's wrongful benefits denial, occurs.**

As indicated, most public benefits recipients represent themselves at administrative fair hearings. The relevant law is complex, even for legal practitioners, involving not only federal and state statutes and regulations promulgated under the Administrative Procedures Acts, but also a myriad of internal policy statements, memoranda, manuals, guidelines, lists of criteria, and forms from the federal Health and Human Services Administration and related federal agencies as well as the state Departments of Social Services and of Health Services, much of which has been interpreted by an extensive body of federal and state case law. Because these programs are "means tested", complex accounting procedures are also frequently involved. See e.g., Dill v. Mayer, 57 Cal.App.3d 793(1976) (Agency manual provision limiting the availability of a stepfather's income to an AFDC family budget unit to an amount less than "the stepfather's gross income less any prior support liability, mandatory payroll deductions and the appropriate minimum basic standard of adequate care figure for persons in the stepfather unit" did not apply to calculating the income of a family with a stepfather who was contributing to the support of another family for purposes of establishing the amount a medically needy family had to pay toward the health care of their son before receiving any Medi-Cal payments); Welsh v. Gnaizda, 58 Cal.App.3d 119 (1976) (Director, apparently in reliance on internal Medi-Cal Letter No. 33-73 which was inconsistent with applicable state law and regulation, erroneously denied Medi-Cal eligibility of petitioner, an incompetent, by failing to prorate the amount of an encumbrance on her home while she was living in a skilled nursing facility).

Poor people, with their multiple deficits as a group, simply cannot be expected to navigate these treacherous waters as effectively as trained lawyers can. Not surprisingly, they frequently miss issues in administrative fair hearings when they represent themselves, and do not even learn of legal rights until long after the agency has denied their claims and only because some other, unrelated event brings them into contact with a source of legal help.

Attachment A includes but a few examples of the kinds of cases in which a person legally entitled to essential aid payments or medical care was wrongly denied but did not know, and could not reasonably have been expected to know, that the denial was wrong or that judicial relief might be available until

long after expiration of the maximum 90-day limitations period that the Commission's proposal would impose. ***In each of the attached examples, re-applying for the benefit would have been futile and would have failed to effectively ease the individual's financial crisis. The retroactive benefits involved were an essential supplement to the family's income or the only way a family could get coverage of an old medical bill.***

In addition to mitigating harm to low-income people wrongfully denied administrative claims, the attached case examples also demonstrate at least two important additional benefits of the existing one-year limitations period: medical providers are much more likely to get reimbursed for their services to the poor, a result that supports the health care system as a whole, and the government is less likely to be unjustly enriched.

4) **The public policies promoted through California's one-year statute of limitations in public benefits cases are as important-- if not more important-- than those promoted through the California Environmental Quality Act's (CEQA) one-year limitations period, which the Commission has recommended to preserve.**

Surely the need of poor children and their families for basic aid payments for food, clothing, and shelter, and of the sick of whatever age for health care coverage to pay their medical bills merits preservation of a limitations period as long as that recommended for environmental cases.

> ...[I]t would strike one with surprise to be credibly informed that the common law courts of England shut their doors upon all poor suitors...Even greater would be the reproach to the system of jurisprudence of the state of California if it could be truly declared that in this twentieth century, by its codes and statues, it had said the same thing...

Martin v.Superior Court, supra, 176 Cal. at 294. California's existing limitations period, which is intended to promote access to the courts in cases involving a person's very survival, must be retained.

Thank you for this opportunity to comment.

Sincerely,

Lucy Quacinella
Staff Attorney

Attachment A

1) A woman was receiving AFDC on behalf of her minor children when her adult daughter and the daughter's child came to live with her. At the time, the law allowed the woman to continue receiving benefits for herself and her minor children without regard to any income or resources that her adult daughter had, so long as the woman did not seek an increase in benefits for her adult daughter and grandchild. Later, however, the law changed, so that the woman no longer had the option of excluding her adult daughter and grandchild from the family unit for AFDC purposes; the change in law meant that the adult daughter's income and resources had to be counted along with the woman's in determining whether she was still eligible for aid and how much she would get. The county welfare department (where an individual's AFDC eligibility and benefits level are determined) cut the woman's aid payments, informing her in a written notice that the cut had to take place because her adult daughter had a car worth more than the allowable resource limit. The woman went to a fair hearing on her own and argued that she knew nothing about the change in the law, otherwise she might have had her daughter and grandchild leave, so the cut was unfair. Her claim was denied, and the cut in benefits went into effect. She got deeper and deeper into a financial hole. Her landlord worked with her for a while, but eventually grew tired of not receiving the full month's rent. About six months after the administrative agency's denial, her landlord served her with an eviction notice. The eviction notice prompted her to go to the local Legal Services office, where she was asked why she was having trouble paying the rent. A review of her fair hearing file indicated that the county had overvalued her adult daughter's car, which had been damaged in a wreck and repaired; the family should not have been disqualified. Only a writ of mandamus could restore the lost income to her.

2) A working mother of two very young children found herself destitute when she got a divorce and her husband failed to pay his court-ordered child support. She kept her part-time minimum wage job, but didn't earn enough to beat the poverty line, so she swallowed her considerable pride and went down to the welfare office to apply for aid for the first time in her life. The worker explained that the District Attorney's office would try to collect her child support; if the D.A.'s office collected anything, the woman was to receive the first $50, the county would then be reimbursed the amount of the welfare she and her children were receiving each month (about $600), and, if anything remained, it would go to her and her children, eventually reducing the amount of the AFDC she would be receiving.

In a few months, the woman began receiving her $50 pass-through, but nothing more; since her ex-husband's child support payment was $680 a month, she wondered where the additional $30 a month was going after the county reimbursed itself the amount of her AFDC. She was especially curious since her ex-husband had been complaining about all the support he was paying. She called the D.A.'s office, but got nowhere. She asked her worker, who didn't really have an explanation; she asked to speak to a supervisor, who rummaged through her file and said the woman was getting all the support she was due from the county, but that, if she wasn't satisfied, she could have a fair hearing. At the fair hearing, the woman was totally befuddled by the county's accounting; when she lost, she figured the administrative law judge had to be right since she herself was so confused.

Financially, her situation was eroding as was her peace of mind, especially after collection agency letters and then a summons and complaint arrived, involving credit card bills from her marriage. One of the volunteers at the local Salvation Army soup kitchen, where she and the children regularly took their evening meals, noticed her depression, and eventually got her to talk. A referral was made to the local Legal Services program for help defending the collection action, and a review of the woman's history led to the discovery of a county error in the calculation of her child support distribution. Ten months after losing the administrative fair hearing on her own, a writ of mandate petition was filed on the

woman's behalf, and, eventually, the county disgorged the funds it had improperly been withholding from her. The several hundred dollars she received in back payments, plus interest, certainly did not resolve all of her financial problems, but the award helped her get caught up on some bills and paid for the kids' school clothes.

3) Miller v. Woods, 148 Cal.App.3d 862 (1983), a statewide class action, invalidated state regulations denying "protective supportive services" payments under the In-Home Supportive Services program for severely disabled people being cared for by relatives or others living with them in their homes. Notwithstanding judicial invalidation of the rule, eligible beneficiaries still continue to be erroneously denied the benefit and must appeal administratively. Elena Ackel, lead counsel for plaintiffs, reports that she recently filed a writ petition on a Miller case the day before the expiration of the one-year limitations period, after having had access to the administrative record for just three weeks. Her disabled client realized he could get this type of relief only after Ms. Ackel had assisted him with a later Miller claim.

4) A 45-year old woman underwent emergency surgery to unclog a femoral artery. The bill was about $40,000. After recovering, her sister helped her apply for Medi-Cal within the three month limit for covering medical expenses already incurred; she was denied, on the ground that her disability was not long-term. Again with her sister's help, she attended an administrative fair hearing; she lost. Frustrated, scared, confused by the technical rules on disability determinations, and homebound due to her illness, she gave up. Eventually, a collection agency sued, and she called a Legal Services office to for help. She learned then that bankruptcy was not an option, since the family had already filed on medical expenses related to her husband's fatal illness. Re-applying for Medi-Cal, even if successfully, would not have covered her old $40,000 surgery bill. Through a writ proceeding, begun close to a year after she had lost her administrative hearing, she was determined eligible beginning at the time of her original Medi-Cal application, and the hospital bill was paid.

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Re: Tentative Recommendation on Judicial Review of Agency Action

Dear Mr. Wied:

I am writing to oppose the amendment of Welfare and Institutions Code § 10962 to conform to the Commission's proposal to change and make uniform, the law on judicial review of agency actions. In particular, I believe the proposals to shorten the limitations period for appealing agency action from one year to sixty days or less and to eliminate independent review of agency fact-finding except where the agency executive or his/her delegatee has alternated the tentative decision of the Administrative Law Judge, will make it impossible for applicants for and recipients of public assistance to obtain full and effective judicial review of Department of Social Services or Department of Health Services decisions denying or reducing their benefits.

I.

THE PROPOSED TIME LIMIT FOR APPEALING UNFAVORABLE AGENCY DECISIONS WILL EFFECTIVELY DENY WELFARE APPLICANTS AND RECIPIENTS THE RIGHT TO JUDICIAL REVIEW OF UNFAVORABLE AGENCY DECISIONS.

Under Welfare and Institutions Code § 10962, aggrieved applicants for or recipients of public assistance (primarily Aid to Families with Dependent Children ("AFDC"), Food Stamps and Medical Assistance ("Medi-Cal"), have one year from the date on which they receive the director's final notice of decision, to seek judicial review of that decision. It is absolutely crucial that the one year limitations period be maintained. The Commission proposal to change the time limit to thirty days after the effective date of the decision would have a devastating effect on poor people.[1] Although I do

[1]For purposes of this letter, I will treat the proposed time limit of "thirty days after the effective date of the decision" as a sixty day limitations period in practice.

not know the reason that the Commission believes that this is an adequate time limit for seeking judicial review, I suspect that this determination was made without consideration of the special needs of the people who utilize the review provisions of Welfare and Institutions Code § 10962. Based on my years of experience representing low-income people in seeking judicial review of unfavorable government benefits decisions, I believe that it will be virtually impossible for the majority of appellants to comply with the new time limit for the following reasons.

First, there is frequently a delay of up to one week between the date on which the decision is signed and the date it is posted. Yet I assume that the effective date of the decision will be determined in reference to the date the head of the agency signs or adopts the decision. Second, decisions are mailed from Sacramento to the rest of the state and may therefore take up to a week to reach the addressee depending on her location. Third, there is no guarantee that a decision mailed to an appellant's last known address will reach her there. People who are in financial distress may be homeless or may move frequently. It may take time for the mailed decision to reach the appellant at her current location. Fourth, once an appellant receives a decision, she must read and interpret it. This may require enlisting the assistance of others if there is a language or reading comprehension problem, creating an additional delay. Fifth, once the appellant has read the decision and decided that she wants to seek judicial review, she must either figure out how to proceed pro per, or find an attorney. Both these tasks present nearly insurmountable obstacles.

Even if the appellant can figure out how to draft a petition for review that can withstand an agency demurrer prepared by the Attorney General's office, it is very likely that she simply will not have the funds necessary to pay for copying and service of process or travel to the court; not if she has only sixty days within which to raise such funds. Finding an attorney who can review the agency decision, evaluate the merits of the case and file a petition for review all within sixty days of the date of the decision will be utterly impossible. As you know, Legal Services programs in California have been devastated by funding cuts this past year. Even before that, these programs were unable to serve all eligible clients with meritorious claims. There are very few private attorneys who handle government benefits writs under Welfare and Institutions Code § 10962. It takes time for clients to find these lawyers. Moreover, government benefits law is a complex area making instant evaluation of a case difficult. In my experience, evaluation of a case requires careful legal research.[2] The sixty day limitations period you propose would put benefits attorneys between a rock and a hard place. On the one hand, they would be required to get the client's petition on file immediately. On the other hand, they will be bound by Code of Civil Procedure §128.7, which provides, among other things, that by presenting the petition to the court, the attorney "is certifying that... [t]he claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."

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[2]Research involving AFDC and Food Stamps issues is particularly difficult and time-consuming for private attorneys because Department of Social Services regulations governing these programs are not published in the California Code of Regulations and are therefore not available in law libraries, on-line services or computerized data compilations. Medi-Cal regulations are published in the CCR.

In sum, although uniformity is an admirable goal, it is unrealistic and unfair to treat those people who would seek judicial review of unfavorable welfare decisions as though they are similarly situated to other administrative law litigants. They are not. The imposition of a sixty day limitations period for filing petitions under Welfare and Institutions Code § 10962 will deny litigants the protection of that statute.

II.

INDEPENDENT REVIEW OF FACTS AND THE APPLICATION OF LAW TO FACTS IS ABSOLUTELY CRUCIAL IN PROCEEDINGS UNDER WELFARE AND INSTITUTIONS CODE § 10962.

So-called "fair hearings" under Welfare and Institutions Code § 10950, et seq. are highly politicized proceedings which are tightly controlled by the Departments of Social Services and Health Services to maintain and advance those agency's internal policies -- policies that may be at odds with governing state and federal statutes. First, the Administrative Law Judges ("ALJs"), are not independent, but are employed by the Department of Social Services. Welfare and Institutions Code §§ 10953, 10953.5. Second, although the law requires ALJs to prepare "a fair, impartial, and independent proposed decision" (Welfare and Institutions Code § 10958), the decision must be approved by the chief administrative law judge before it becomes a final "proposed" decision. Id. Third, after the approval of the Chief ALJ, the proposed decision is presented to the Director of the Department who "may adopt the decision in its entirety [or] decide the matter himself or herself...." Welfare and Institutions Code § 10959. Your proposal to retain independent review only in cases where the Director alternates the ALJ's decision addresses only the last one of these concerns. The fact is that the politicization of fair hearing decisions to advance the executive agency's policies is not restricted to alternated decisions.

Moreover, there are many cases where the ALJ simply does a sloppy and unprofessional job of fact-finding that does not warrant a deferential standard of review. For example, in one case involving Adoption Assistance Benefits, the County proposed to reduce adoption assistance benefits by $700 per month. The claimant refused to sign a new agreement for the reduced amount and appealed. The County cut off assistance altogether because the claimant failed to return the signed contract for the reduced rate. On appeal, claimant competently raised two issues, the correctness of the new reduced rate of assistance and the propriety of the total cessation of benefits. Between the claimant and the County, over twenty pages of documentary evidence concerning the condition of and services needed by the adopted child were introduced at the hearing. The ALJ issued a one paragraph decision that stated "it is undisputed that the claimant failed to return the new contract .... the county's proposed discontinuance action is correct." The ALJ failed to rule on the propriety of the $700 per month reduction in benefits. Thus the claimant went from receiving $1400 to receiving no benefits whatsoever with hardly a blink of the ALJ's eye.

The Claimant sought a rehearing. Two months later, the Director issued a tardy decision denying rehearing because "you disagree with a finding of fact in the decision in your case." After a petition for writ of mandate was filed the agency agreed to reopen the proceeding to consider the merits of the appellant's claim. I fear that the same result would not have been achieved if the

substantial evidence standard of review had been applicable.

In another case, a family was given Homeless Assistance although they were technically ineligible for the benefit. When the County asked for the money back, the woman appealed, claiming the county was equitably estopped from collecting the overpayment. The ALJ found that all the elements of equitable estoppel were present except injury. Although the ALJ ruled that the appellant's monthly expenses exceeded her income and she therefore had no money to repay the overpayment, he also ruled that recoupment would not impose a substantial hardship on the appellant because the amount of the overpayment was "large," the duration of the overpayment was "short," the family members were in good health with no special medical expenses and appellant could juggle her monthly expenses to satisfy her obligations. After a petition for writ of mandate was filed, the Department reversed itself and withdrew the demand for repayment of the Homeless Assistance. Again, this is a fanciful decision that simply does not deserve deferential review by a judicial body.

Given the quality of these and many other similar decisions rendered by ALJs, the Commission's rationale for eliminating independent review is not persuasive. The Superior Court judge is the first actor in the administrative review process who is not biased in favor of the agency. He or she is, in effect, the only one who will make a truly independent and objective determination based on the facts and governing statutes. The usual reasons for deference to the "expertise" of the agency simply do not apply in government benefits cases. These cases do not deal with any type of scientific or technical expertise. The statutes that the agency interprets are, for the most part, based on federal program requirements. The state agency has no special expertise in interpreting these federal requirements and many times its interpretation of the law will be odds with the federal government's view of the same requirements. The state agency's mission is not even-handedly to administer the social welfare laws but to carry out the policies of the governor that appointed the agency head within the confines of the laws, but stretching the law to its limits. It is a political mission, not a judicial one. To eliminate independent review is to permit the fate of California's most disadvantaged people to be determined by a political agenda instead of by an objective system of neutral review. Justice should not be sacrificed in these cases in the name of uniformity.

Sincerely,

Sue Ochs

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California Law Revision Commission
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Re: Study N-200 - Administrative Adjudication
4/1/96 Revised Tentative Recommendation

Dear Chairperson Wied and Commission Members:

I write on behalf of the Consumer Attorneys Of California, the California Employment Lawyers Association, and the Los Angeles Police Protective League.

We are sorry to see that the Commission has, apparently, decided to return to its pre-January position of attempting to terminate the right of California's state and local employees to have adverse administrative decisions judicially reviewed under the independent judgment standard. This appears to be further erosion of the individual's access to the courts in favor of the Administrative-Arbitral State.

The stated goal of the Revised Tentative Recommendation is "to allow litigants and courts to *resolve swiftly* the substantive issues in dispute, rather than waste resources disputing tangential procedural issues." (Revised Tentative Draft, page 3, emphasis added) The fundamental problem of the Commission's approach is found in the conspicuous absence of the word "justice" in the stated goal or, indeed, anywhere in the introductory portion of the Revised Tentative Recommendation.

It is precisely because public employee litigants and others often experience very little justice at the administrative hearing level that the right to independent judicial review is so precious. Instead of glossing over the separation of powers and due process problems raised by the Tentative Recommendation (page 11), perhaps more thought should be given to why the judiciary is the ultimate repository of justice.

We strongly urge the Commission to abandon the effort to eliminate the remedy of administrative mandamus and the independent judgment standard of review where fundamental vested rights are involved. This particular aspect of administrative litigation is not "broke" and does not need fixing.

The unfairness experienced with local agencies, which do not have Administrative Procedure Act-type rules, might be ameliorated somewhat by a procedural bill of rights, but not at the expense of giving up the employee's right to have a bad decision reviewed "independently" by a judge.

Our first recommendation is to leave the present system of judicial review in place. If there is to be any tinkering, however, we renew our previous recommendations. First, any proposed legislation must continue independent judgment review of all local public employee disciplinary matters. Secondly, such legislation should state that superior court consideration of the grant or denial of disability retirement benefits will continue, in all cases, to be reviewed under the independent judgment standard.

It is "ivory-towerism" in the extreme to think that permitting local agencies to adopt superficially fair procedures will generally result in fair decisions and eliminate the need for independent judicial review of agency decisions. In fact, more litigation will take place where bias or procedural unfairness is in issue. The provisions do not take into account the fact that local agency triers-of-fact are mostly political appointees with no particular expertise.

Contrary to the assertion made in the Tentative Recommendation (page 11), with respect to public employee disciplinary appeals, there is **no time spent litigating** the "peripheral issue of whether or not independent judgment review applies" to a disciplinary action.[1] Practitioners in the field of public sector employment law bring meritorious discharge, demotion, and suspension appeals to the courts under C.C.P. Section 1094.5 without litigating so-called "peripheral" issues.

Nor is time spent litigating the peripheral issue of whether a vested or fundamental right is implicated in *disability retirement* cases. This issue was decided 22 years ago. (Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 32) In the case of United Firefighters of Los Angeles City v. City of Los Angeles (1989) 210 Cal.App.3d 1095, at 1102, the court summarized the protected status of a public employee's pension rights as follows:

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

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[1] Revised Tentative Recommendation, page 11

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

For example, the Public Employees Retirement System (PERS) administers one of the largest and most fiscally healthy pension funds in the world. PERS members include state employees and employees of many cities, some counties and most special districts. Those counties not in the PERS system are governed by the County Employees Retirement Act of 1937. Many municipalities (e.g., City of Los Angeles, Long Beach) have their own pension systems governed by their Charters.[2]

PERS state employee pension cases are governed by the Administrative Procedure Act whereas PERS local safety cases are bifurcated, with the local agency (often a hostile, biased City Manager) determining the issue of permanent disability and the Workers Compensation Appeals Board determining the causation issue.

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

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

The facts are, however, that the referees are selected and hired by the Association's management in consultation with the County Counsel deputies who <u>try</u> the administrative hearing cases

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

against the employee beneficiaries.[3] Many referees have no experience with medical issues and some have virtually no experience in dealing with evidence.[4] The referees are financially dependent on the Association and are all too aware that, when a referee decides "too many" cases in favor of the employees[5], those referees' contracts are not renewed and they are mysteriously blackballed at other retirement associations. Attorneys representing the employee applicants who complain about obvious bias and incapacity of some referees are ignored or worse. Yet, proving such bias or incapacity on a case-by-case basis would be unimaginably consumptive of court and attorney time. While it may be imperfect -- and while some superior court judges are hostile toward employees -- the present administrative mandamus laws generally work.[6]

"Administrative Adjudication Bill of Rights" - Problems:

(1) We are uncertain what "procedural requirements for adopting a decision" the Commission has in mind. (Revised Draft, page 12) Merely requiring local agencies to issue findings of fact and conclusions[7], for example, will not result in fairness to employees.

The problem with permitting agencies to avoid independent judgment review if they issue "Topanga" findings is that the decision-makers themselves rarely, if ever, actually prepare the findings. Yet, the purpose of Topanga was to compel agency

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[3] Representatives of the employees are given no opportunity to help select truly *impartial* referees despite the fact that Retirement Associations occupy a fiduciary relationship to these employees. (See Hittle, supra) What fair system allows one party to hire and pay for the judge?

Equally abhorrent is the practice of most Retirement Associations of selecting supposedly impartial medical examiners from the ranks of the insurance industry's stable of "defense doctors instead of appointing phyicians with a reputation for neutrality.

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

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

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

[7] See Topanga Association For A Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 515-517

boards and commission to state their reasons for their decision. Such findings and conclusions were to serve as a bridge of reasoning between the evidence and the findings and conclusions drawn from the evidence.

In practice, one rarely gets to see the rationale of the decision-makers, but only the rationale of the agency's advocate against the employee. In plainer words, too many of the boards and commissions which the Tentative Draft erroneously suggests are composed of "experts" (page 11), in fact, are mere rubber stamps for the agency's advocates. One solution to this problem would be to apply the independent judgment test to all decisions where the agency's findings are drafted by anyone other than the board members themselves.

Perhaps, you can understand our concern that all too often the problem is with the *people* on the administrative bodies. All the procedures that can be conjured up will not produce fairness in those agencies whose members are biased, corrupt, incompetent, or otherwise unable to render fair decisions.

2) Some boards and commissions go into executive session to decide personnel and pension cases and later come out and announce their decision. The reasoning, such as it may be, takes place in Star Chamber and there is no public statement of their reasoning. At a minimum, there should be a requirement that the decision-makers place their entire deliberations on the record.

3) The draft's reference to "limitation on use of hearsay evidence" (page 12) could have catastrophic effects on many public employees applying for a disability pension, a fundamental vested right.[8] Many local agencies wisely follow the principle established in Richardson v. Perales 402 U.S. 389 (1971) and permit the introduction of medical reports -- hearsay -- without requiring the employee to produce the physician-author. One reason for this is the recognition of the inability of many employees, removed from their jobs by their employer because of medical restrictions, to afford to pay expert witness fees in administrative hearings.

Conclusion

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

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[8] Srumsky v. Board of Retirement, supra.

We respectfully differ with the author's assertion[9] that trial judges are less "expert" than "agency heads" or many administrative law judges in medical or disciplinary issues. First, while many (not all) of the ALJs in the Office of Administrative Hearings have acquired medical and disciplinary expertise, agency heads are often correctly perceived as biased and protective of senior and middle management. Further, "administrative law judges" are rarely used at the local agency level such as municipal civil service or retirement systems.

We also disagree with the author's statement that "trial judges must scrutinize every word in the (administrative) record."[10] This is not the practice. Superior court judges, their research attorneys, and law clerks generally read only those portions of the record that the attorneys for the employee and for the agency ask them to read.

Finally, we disagree with the attempt to impose a thirty-day limitations period for filing an administrative hearing appeal in court.[11] What is the rationale for such a limitation? This gives no time at all for an advocate to review the agency decision in any type of systematic matter. The net result will be more court filings just to protect the statute.

We believe that the proposed "reforms" will result in dramatically reduced fairness to employees whose fundamental vested rights are involved in administrative proceedings and will increase, not decrease, the time required to litigate administrative appeal cases in the courts.

We wonder if all of the proponents "get it" with respect to the manner in which many state and local agencies would operate with reduced judicial oversight. There is good reason the American public is not exactly clamoring for a utopian administrative state. They have witnessed the sometimes unintended, sometimes deadly effects of arrogant government decision making. Public employees have long known that, however imperfect many judges are, the judiciary is often their only hope for impartial review of their cases.

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

Very truly yours,

STEVEN R. PINGEL

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[9] Revised Tentative Recommendation, page 11.

[10] Revised Tentative Recommendation, page 11

[11] Revised Tentative Recommendation, page 9

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April 9, 1996

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Re: Study No. N-200 Administrative Adjudication
4/1/96 Revised Tentative Recommendation

Dear Chairperson Wied and Commission Members:

This office represents the Association for Los Angeles County Deputy Sheriffs (ALADS). ALADS is a certified bargaining unit for Deputy Sheriffs in the County of Los Angeles representing some 7000 Deputy Sheriffs.

On behalf of ALADS, I have been requested to make known to the Commission that ALADS opposes the Commission's current plan to recommend to the State Legislature that Code of Civil Procedure section 1094.5 be amended to exclude the independent judgment test as a standard by which to measure the administrative record when challenged by a public employee. If that standard were to be changed, a public employee's ability to appeal from an administrative decision to the Superior Court would be a futile gesture. If the Court is limited to a substantial evidence test, case law makes it quite clear that the opportunity for meaningful review would be lost.

ALADS vigorously opposes this change in law and urges you not to incorporate this change into your recommendations to the Legislature.

Very truly yours,

GREEN & SHINEE, A.P.C.

By: RICHARD A. SHINEE

RAS:grs
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cc: Pete Brodie, ALADS President