Study N-200 May 8, 1996

First Supplement to Memorandum 96-32

Judicial Review of Agency Action: Revised Tentative Recommendation

Fact-Finding in Local Agency Adjudication (§ 1123.440)

Agency changing finding of fact by ALJ from OAH. Section 1123.440 in the draft statute preserves the existing standard of review of fact-finding in a local agency adjudication — independent judgment if a fundamental vested right is involved, otherwise substantial evidence. The basic memorandum suggests applying substantial evidence review whether or not a fundamental vested right is involved (1) if the local agency applies basic procedural protections to the adjudication, or (2) if the local agency adjudication is conducted by an administrative law judge from the Office of Administrative Hearings. Should independent judgment review apply in these two cases if the agency changes a finding of fact by the hearing officer?

To do so would make review of local agency adjudication parallel Section 1123.430, the general provision for state agency fact-finding and non-adjudicative local agency fact-finding. This general provision applies substantial evidence review, except that independent judgment applies to review of a determination of fact made by an ALJ from OAH that is changed by the agency head. The staff sees no sound reason to apply a different rule for a local agency adjudication. **So if the Commission adopts substantial evidence review of fact-finding in a local agency adjudication in either case suggested in the basic memorandum, the staff recommends independent judgment review override this if a determination of an ALJ from OAH is reversed by the agency head**:

> (d) Notwithstanding subdivisions (b) [local agency procedural protections] and (c) [determination of fact by ALJ from OAH], the standard for judicial review of a determination of fact made by an administrative law judge employed by the Office of Administrative Hearings that is changed by the agency head is the independent judgment of the court whether the determination is supported by the weight of the evidence.

Local agency procedural protections. Attached is a letter from Steven Pingel for the California Consumer Attorneys suggesting additions to local agency

procedural protections necessary for substantial evidence review set out on pages 2 and 3 of the basic memorandum, although his preference would be to keep existing law. His suggested additions are substantially as follows:

> (9) The procedure provides that the hearing officer is to be selected by mutual agreement of the parties.
>
> (10) The procedure provides that if the agency does not adopt the hearing officer's proposed decision, findings of fact and conclusions of law must be prepared jointly by all the members of the agency who voted in connection with the agency decision.
>
> (11) In a hearing concerning an application for disability retirement, a report prepared by a medical expert retained by the agency to evaluate the applicant's claim is admissible only if the expert is selected with the agreement of the applicant, and the report of a medical expert is not made inadmissible by the absence of the expert at the hearing and may support a finding of fact.
>
> (12) The procedure provides that, unless the person to which agency action is directed requests otherwise, the agency shall conduct all deliberations on the record during its consideration of the case.

Mr. Pingel gives reasons for each of these provisions in footnotes on pages 1 and 2 of his letter.

§ 1120. Application of title

Section 1120 says the draft statute does not apply to a "trial de novo, including an action for refund of taxes under the Revenue and Taxation Code." This language may be defective because some issues in tax refund actions, such as the valuation method in state and local property tax assessments, are determined by reviewing the administrative record, not by an evidentiary proceeding in court. Bret Harte Inn, Inc. v. City and County of San Francisco, 16 Cal. 3d 14, 544 P.2d 1354, 127 Cal. Rptr. 154 (1976) (valuation method in local property tax assessment); DeLuz Homes, Inc. v. County of San Diego, 45 Cal. 2d 546, 290 P.2d 544 (1955) (same); Prudential Ins. Co. v. City and County of San Francisco, 191 Cal. App. 3d 11452, 236 Cal. Rptr. 869 (1987) (same); Kaiser Center, Inc. v. County of Alameda, 189 Cal. App. 3d 978, 234 Cal. Rptr. 603 (1987) (valuation method challenged in an action under Rev. & Tax. Code § 5097); Trailer Train Co. v. State Bd. of Equalization, 180 Cal. App. 3d 565, 225 Cal. Rptr. 717 (1986) (valuation method for property tax on railroad flatcars); Hunt-Wesson Foods, Inc. v. County of Alameda, 41 Cal. App. 3d 163, 116 Cal. Rptr. 160 (1974)

(valuation method challenged in action for refund of taxes under Rev. & Tax. Code §§ 5103 et seq.); Westlake Farms, Inc. v. County of Kings, 39 Cal. App. 3d 179, 114 Cal. Rptr. 137 (1974) (challenge to selection of comparable sales in valuing property). So, to be technically correct, the reference to an action for refund of taxes should be split out and put in a separate paragraph:

> 1120. (a) . . . .
> (b) This title does not apply where a statute provides for judicial review of agency action by any of the following means:
> (1) A trial de novo~~, including an~~
> (2) An action for refund of taxes under the Revenue and Taxation Code.
> ~~(2)~~ (3) An action under Division 3.6 (commencing with Section 810) of the Government Code, relating to claims and actions against public entities and public employees.
> (c) . . . .

Property tax assessments. The cases cited above raise the policy question whether judicial review of property tax assessments ought to be subject to the draft statute. Summarizing the property tax cases, a leading treatise says:

> The taxpayer has no right to a trial de novo in the superior court to resolve conflicting issues of fact, and the "trial" in the superior court is generally confined to record presented before the board, and new evidence may not be introduced . . . [footnotes omitted].

Ehrman & Flavin, Taxing California Property § 30:10, at 29 (3d ed.).

Thus judicial review of a property tax assessment resembles administrative mandamus, except that presumably the trial court has no discretion summarily to decline to grant judicial review as in mandamus. We could make property tax assessments subject to the draft statute by limiting the exemption in paragraph (2) proposed above as follows:

> (2) An action for refund of taxes under Division 2 (commencing with Section 6001) of the Revenue and Taxation Code.

(Division 1 of the Revenue and Taxation Code deals with property taxation. Division 2 deals with all other taxes.)

To make review of local property tax assessments subject to the draft statute would apply independent judgment review of local agency fact-finding in Section 1123.440, subject to whatever exceptions are ultimately decided upon.

This would address criticism of the limited scope of judicial review of equalization proceedings, which puts taxpayers at the mercy of equalization boards. Ehrman & Flavin, *supra*, at 32. (It would not change existing substantial evidence review of State Board of Equalization proceedings.)

Sales and use taxes. An action for refund of sales and use taxes under Division 2 appears to be an ordinary trial-type evidentiary proceeding with the taxpayer having the burden of producing evidence to establish the proper amount of the tax. Honeywell, Inc. v. State Bd. of Equalization, 128 Cal. App. 3d 739, 744, 180 Cal. Rptr. 479 (1982). Thus actions for refund of sales and use taxes should be exempt from the draft statute, as the above draft would do.

§ 1123.450. Review of agency exercise of discretion

Section 1123.450(b) provides substantial evidence review of agency fact-finding for discretionary action. Mr. Pingel would preserve independent judgment review in discretionary cases affecting a fundamental vested right, presumably referring to local agencies. Under existing law, in administrative mandamus to review discretionary action, the factual basis for the action is reviewed under substantial evidence or independent judgment, the same as for questions of fact generally. See Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1229 (1995).

Substantial evidence review of fact-finding in discretionary cases under Section 1123.450 parallels the general standard of substantial evidence review for state agency and non-adjudicative local agency fact-finding. The Comment to Section 1123.450 makes clear the section applies to land use decisions, prevailing wage determinations, and other kinds of quasi-legislative proceedings. Section 1123.450 does not appear to be intended to apply to discretionary aspects of adjudication, such as the fixing of a penalty. **The staff recommends revising Section 1123.450 to make clear it does not apply to local agency adjudication**:

> 1123.450. (a) The standard for judicial review of whether agency action is a proper exercise of discretion, including 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, is abuse of discretion.
>
> (b) Notwithstanding subdivision (a), and subject to Section 1123.440, to the extent ~~the~~ agency ~~action~~ exercise of discretion is based on a determination of fact, made or implied by the agency, the standard for judicial review is whether the agency's

determination is supported by substantial evidence in the light of the whole record.

Damages for Agency Breach of Fiduciary Duty

Mr. Pingel suggests a general provision making agencies liable for damages for breach of fiduciary duty to a person to whom agency action is directed, particularly in connection with agency administration of pension systems. For example, Education Code Sections 22250-22259 establish a fiduciary duty with respect to the teachers' retirement system. **The staff recommends against getting into this area — it is beyond the scope of our judicial review study.**

Writ Proceedings Under Revenue and Taxation Code

Four sections in the Revenue and Taxation Code dealing with judicial review by writ should be made subject to the draft statute by conforming revisions:

Rev. & Tax. Code § 2954 (amended). Assessee's challenge by writ

2954. (a) An assessee may challenge a seizure of property made pursuant to Section 2953 by petitioning for ~~a writ of prohibition or writ of mandate in the superior court~~ review under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure alleging:

(1) That there are no grounds for the seizure;

(2) That the declaration of the tax collector is untrue or inaccurate; and

(3) That there are and will be sufficient funds to pay the taxes prior to the date such taxes become delinquent.

(b) As a condition of maintaining the ~~special~~ review proceedings ~~for a writ~~, the assessee shall file with the tax collector a bond sufficient to pay the taxes and all fees and charges actually incurred by the tax collector as a result of the seizure, and shall furnish proof of the bond with the court. Upon the filing of the bond, the tax collector shall release the property to the assessee.

Rev. & Tax. Code § 2955 (amended). Recovery of costs by assessee

2955. If the assessee prevails in the ~~special~~ review proceeding ~~for a writ~~ under Section 2954, the assessee is entitled to recover from the county all costs, including attorney's fees, incurred by virtue of the seizure and subsequent actions, and the tax collector shall bear the costs of seizure and any fees and expenses of keeping the seized property. If, however, subsequent to the date the taxes in question become delinquent, the taxes are not paid in full and it becomes necessary for the tax collector to seize property of the assessee in payment of the taxes or to commence an action against

the assessee for recovery of the taxes, in addition to all taxes and delinquent penalties, the assessee shall reimburse the county for all costs incurred at the time of the original seizure and all other costs charged to the tax collector or the county as a result of the original seizure and any subsequent actions.

Rev. & Tax. Code § 2956 (amended). Precedence for court hearing

2956. In all ~~special~~ review proceedings ~~for a writ~~ brought under this article, all courts in which such proceedings are pending shall, upon the request of any party thereto, give such proceedings precedence over all other civil actions and proceedings, except actions and proceedings to which special precedence is otherwise given by law, in the matter of the setting of them for hearing or trial and in their hearing or trial, to the end that all such proceedings shall be quickly heard and determined.

Rev. & Tax. Code § 7279.6 (amended). Judicial review

7279.6. An arbitrary and capricious action of the board in implementing the provisions of this chapter shall be reviewable ~~by writ~~ under Title 2 (commencing with Section 1120) of Part 3 of the Code of Civil Procedure.

(Revenue and Taxation Code Section 19710, which permits the Franchise Tax Board to seek mandamus to require a taxpayer to file a return, does not deal with judicial review of agency action, and so should not be subject to the draft statute.)

Respectfully submitted,

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Re: Study N-200 - Administrative Adjudication
5/3/96 letter

Dear Commissioners:

Thank you for your request for suggestions for an alternative to simply preserving existing law which permits employees of local public agencies to have administrative decisions affecting vested fundamental rights reviewed under the independent judgment standard.

While we strongly urge the Commission to, at least, preserve existing law, we offer the following suggested amendments to the alternate version of Section 1123.440.

The proceeding provides that hearing officers are selected my mutual agreement of the agency and the person to which the agency action is directed.[1]

The proceeding provides that, if the agency does not adopt the hearing officer's proposed decision, findings of fact and conclusions of law must be prepared jointly by all the members of the agency who voted in connection with the administrative decision.[2]

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[1]Hearing officers are often selected by the agency's management and/or the agency's attorneys who *try* the administrative hearing cases *against* the employees. Many hearing officers have no experience with medical issues and some have virtually no experience in dealing with evidence. The hearing officers are sometimes financially dependent on the agency's management.

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

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In any hearing concerning the application for a disability retirement, any report prepared by a medical expert retained by the agency to evaluate the claim of the applicant is only admissible if the expert has been selected with the agreement of the applicant.

Except as provided in (the preceding) section ( ), in any hearing concerning the application for a disability retirement, the report of a medical expert is not made inadmissable, and may support a finding of fact, despite the absence of the expert at the hearing.[3]

The proceeding provides that, unless the person to which the agency action is directed requests otherwise, the agency conduct all deliberations on the record during its consideration of the case.[4]

In addition, we suggest that Section 1123.450 (b) be modified to be in harmony with Section 1123.440, in its primary form, to make it clear that the independent judgment standard of review will apply in cases where presently authorized by law.

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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. The boards and commissions are often mere rubber stamps for the agency's advocates.

[3] A "limitation on use of hearsay evidence" by employees could have catastrophic effects on many public employees applying for a disability pension, a fundamental vested right. (Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28) 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.

[4] 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.

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In order to bring some basic accountability to public pension administration in all state and local pension systems[5], we believe the Commission should recommend legislative clarification of the fiduciary duty of such systems.

This could be done by adoption of the following statute:

When a public agency, which holds a fiduciary status in relation to the person to which the agency action is directed, breaches its fiduciary duty to that person, the agency may be held liable for all compensatory damages, including general damages, caused by its breach.

With respect to our general objection to any reduction of employee rights to independent judgment review, we continue to question whether the present system of judicial review is broken and in need of "fixing". We wonder what statistical data has been provided showing the number of administrative mandamus petitions which have been filed over the years in the Superior Courts of the State. If you have obtained such data from the annual Judicial Council reports, or elsewhere, would you please provide it to me.

Finally, we once again urge the Commission to reconsider its decision to adopt Section 1123.420. In its present form, it would eliminate the right of State employees to have appeals of adverse decisions of the Public Employees Retirement System reviewed under the independent judgment standard. As we have previously noted, fundamental vested rights are involved. This taking raises profound constitutional issues, among other problems.

We repeat our observation that all too often the problem with administrative adjudication at both the state and local levels is with the *people* sitting 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.

Thanks again for considering our thoughts.

Very truly yours,

STEVEN R. PINGEL

[5] Education Code Section 22225.65 (b) contains similar language, clarifying the liability for breach of fiduciary duty of the State Teacher's Retirement System.