

Study N-200

September 11, 1996

First Supplement to Memorandum 96-63

Judicial Review of Agency Action: More Comments on Revised Tentative Recommendation

We received letters from the California Judges Association and Department of General Services commenting on the revised Tentative Recommendation on *Judicial Review of Agency Action*, discussed below:

GENERAL COMMENTS

The California Judges Association reports that the three judges who commented and its Legislative Counsel are generally in support of the Tentative Recommendation, and that CJA will likely support the bill.

SECTIONS IN DRAFT STATUTE

The staff plans to discuss at the meeting only items below preceded by a bullet [•]:

§ 1123.420. Review of agency interpretation or application of law

Justice Morrison of CJA noted that, although the three labor agencies are exempted from this section and its standard of independent judgment with appropriate deference on questions of law, the Department of Alcoholic Beverage Control and ABC Appeals Board are not exempted, even though they also receive special deference. A similar point was made by David Parker Hall, discussed in the basic Memo. The staff found no case giving ABC agencies the “clearly erroneous” deference given to the labor agencies. In *California Beer & Wine Wholesalers Ass’n v. Department of Alcoholic Beverage Control*, 201 Cal. App. 3d 100, 107, 247 Cal. Rptr. 60, 65 (1988), the court said:

Where the language of the governing statute is intelligible to judges, their task is simply to apply it Where the intelligibility of the statutory language depends upon the employment of administrative expertise, which it is the purpose of the statutory scheme to invoke, the judicial role “is limited to determining whether the [Department] has reasonably interpreted the power

which the Legislature granted it.” [Citing *Ralphs Grocery Co. v. Reimel*, 69 Cal. 2d 172, 176-77, 444 P.2d 79, 70 Cal. Rptr. 407 (1968) (review of regulations of Department of ABC).]

In this case no deference to an administrative interpretation of sections 25501 or 25600 is required (or for that matter sought) because the meaning of the applicable statutory language and its legislative history is accessible (and hence intelligible) to judges.

Both *California Beer & Wine Wholesalers* and *Ralphs Grocery* involved judicial review of rulemaking. They call for reasonableness review, and probably conflict with Government Code Section 11342.2 which appears to say courts in reviewing regulations use reasonableness review on discretionary aspects of the regulation, but use independent judgment on legal issues. Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1201 (1995). In any event, the existing standard of review of the ABC agencies is less deferential than the “clearly erroneous” standard for the labor agencies. The staff talked to attorney Allan Renische on the staff of the ABC Appeals Board, and they are in general agreement with the foregoing analysis. **The staff would not exempt the ABC agencies from the standard of review of questions of law in Section 1123.420.**

§ 1123.430. Review of agency fact finding

Justice Morrison of the California Judges Association supports replacing independent judgment review of state agency action with substantial evidence review.

§ 1123.720. Stay of agency action

- The Department of General Services says it would “assist the public contracting community” to have a 30-day time limit for requesting a stay of a contract under the Public Contract Code. **The staff has no objection, and would add the following two sections to the Public Contract Code:**

10290.2. Notwithstanding Section 1123.720 of the Code of Civil Procedure, application for a stay of an award, implementation, or performance of a contract under this chapter shall be made not later than 30 days after issuance of a decision by a protest hearing officer.

12114. Notwithstanding Section 1123.720 of the Code of Civil Procedure, application for a stay of an award, implementation, or performance of a contract under this chapter shall be made not later

than 30 days after issuance of a decision by a protest hearing officer.

The staff consulted with Kathleen Yates, Staff Counsel for the Department of General Services, in drafting this language.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

September 5, 1996

California Judges Association



301 Howard Street
Suite 1040
San Francisco
California 94105-2252

(415) 495 1999
(415) 974 1209 Fax

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Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Judicial Review of Agency Action

Dear Mr. Sterling:

I am responding to your request for review of the above law revision proposal. The proposal was sent to several members of our Civil Law Committee. At this point I have received input from a few judges.

Judge Robert Hess (L.A. Municipal Court) felt that the simplification of mandamus procedures is helpful. He stated that he is not an expert in the field, but believes clarification of these laws is a good idea. Judge Hess also holds high regard for the CLRC generally.

Judge Paul Coffee (San Luis Obispo Superior Court) stated generally that he appreciates and endorses the CLRC mandamus revisions.

Justice Morrison also supported the revision of mandamus laws. He believes the proposed change from independent judgment to substantial evidence in review of state agency actions is a good idea. Justice Morris notes that the Alcoholic Beverage Commission was not included among the various agencies which receive special deference. He understands that the ABC is usually granted such deference along with the other named agencies.

As I mentioned to you, I also support the proposed revisions, having practiced public entity law for several years. I hope this information is helpful. I know the judges would like to be able to provide more in depth critiques but, as you know, their schedules are very demanding. However, I believe their responses indicate that CJA would be supportive of any resulting legislation.

Please feel free to contact me if you have any questions or comments.

Sincerely,

Samuel T. Crump
Legislative Counsel

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M e m o r a n d u m

Date : September 5, 1996

To : Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto CA 94303-4739

From : *Kathleen A. Yates, Staff Counsel III*
DEPARTMENT OF GENERAL SERVICES
OFFICE OF LEGAL SERVICES
1325 J STREET, SUITE 1911
SACRAMENTO CA 95814

Subject: REVISED TENTATIVE RECOMMENDATION ON JUDICIAL REVIEW OF AGENCY ACTION

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On behalf of the Department of General Services (DGS) I would like to provide the Commission with the following comments. The DGS, pursuant to its authority in the Public Contract Code at sections 10343, 10345, 10376 and 10378, conducts non-Administrative Procedure Act (APA) bid protest hearings to review services and consulting service contract awards made by state agencies. Additionally, the DGS is an interested party in the non-APA bid protest hearings conducted by the Board of Control to review contract awards for purchase of commodities, equipment, information technology goods and services, and telecommunications goods and services pursuant to Public Contract Code sections 10306 and 12102.

We have experienced litigation and court review of DGS decisions on protests of other state agency contract awards, as well as litigation and court review of Board of Control decisions on protests of DGS proposed contract awards. Under the current system we have experienced difficulties with the fact that there is no time within which a writ must be filed or a stay of contract implementation must be requested. Based upon this experience we appreciate the time deadline provided in section 1123.640(b)(2) of the Revised Tentative Recommendation for filing of a petition for review. However there is no time deadline for a request of a stay of the agency decision. The stay provisions in section 1123.720 of the Revised Tentative Recommendation do not assist us in the situation where a contract award is made after the resolution of the protest by either the DGS or the Board of Control, then a petition for review is filed and sometime after that a stay of contract implementation is requested. It would assist the public contracting community if there were a deadline by which a complaining party were required to request a stay.

Attached please find suggested language providing a 30 day window in which to request a stay of contract performance in this situation.

Please contact me at ATSS 8-492-5948, or the public number, (916) 322-5948, if you wish to discuss this matter further. Thank you for your consideration of our comments.

Attachment

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1 §1123.720. **Stay of agency action**

2 1123.720.(a) The filing of a petition for review under this title does not of itself
3 stay or suspend the operation of any agency action.

4 (b) Subject to subdivisions (g), (h), on application of the petitioner, the reviewing
5 court may grant a stay of the agency action pending the judgment of the court if it finds
6 that all of the following conditions are satisfied:

7 (1) The petitioner is likely to prevail ultimately on the merits.

8 (2) Without a stay the petitioner will suffer irreparable injury.

9 (3) The grant of a stay to the petitioner will not cause substantial harm to others.

10 (4) The grant of a stay to the petitioner will not substantially threaten the public
11 health, safety or welfare.

12 (c) The application for a stay shall be accompanied by proof of service of a copy
13 of the application on the agency. Service shall be made in the same manner as service
14 of a summons in a civil action.

15 (d) The court may condition a stay on appropriate terms, including the giving of
16 security for the protection of parties or others.

17 (e) If an appeal is taken from a denial of relief by the superior court, the agency
18 action shall not be further stayed except on order of the court to which the appeal is
19 taken. However, in cases where a stay is in effect at the time of filing the notice of
20 appeal, the stay is continued by operation of law for a period of 20 days after the filing
21 of the notice.

22 (f) Except as provided by statute, if an appeal is taken from a granting of relief by
23 the superior court, the agency action is stayed pending the determination of the appeal
24 unless the court to which the appeal is taken orders otherwise. Notwithstanding
25 Section 916, the court to which the appeal is taken may direct that the appeal shall not
26 stay the granting of relief by the superior court.

27 (g) No stay may be granted to prevent or enjoin the state or an officer of the
28 state from collecting a tax.

29 (h) *A stay of contract performance must be requested within 30 days after*
30 *issuance of a decision of a protest hearing officer.*