Study N-200 July 18, 1997

First Supplement to Memorandum 97-48

Judicial Review of Agency Action: Standard of Review

Attached is a letter from Robert Bezemek on behalf of his public employee clients, urging the Commission to abandon further efforts to enact SB 209. He particularly objects to the Commission's recommendation to replace independent judgment review of state agency factfinding when a fundamental vested right is involved with substantial evidence review in all such cases.

Respectfully submitted,

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July 17, 1997

Via Facsimile
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California Law Revision Commission
4000 Middlefield Rd. Rm. D-1
Palo Alto, CA 94303-4739

Re: Opposition to Changes in CCP Section 1085 (Ordinary Mandate)

Dear Chair and Members of the
California Law Revision Commission:

I write to oppose any proposal to modify current statutes or law concerning ordinary mandate and the independent judgment test.

I write on behalf of many of my clients, including the California Federation of Teachers, American Federation of Teachers, AFL-CIO, the Foothill-DeAnza Faculty Association, the San Jose-Evergreen Faculty Association, the San Mateo Community College District Federation of Teachers, AFT Local 1493, the San Francisco Community College Federation of Teachers, AFT Local 2121, the West Valley-Mission Faculty Association, the United Professors of Marin, and the International Association of Firefighters, Local 1230.

I also write to reiterate the position of the California Employment Lawyers Association and the Consumer Attorneys of California, which was recently expressed at the hearing on S.B.209.

I. Ordinary Mandate is a Constitutional Right

The writ of mandate dates back to the 1600's. It was developed to check excessive executive power. "The Prerogative Writs in English Law," 32 Yale Law Journal 523 (1923) The writ has been given Constitutional protection. The California Constitution, Art. VI, Sec. 10, provides that California courts have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus.

The writ of mandate is available when there is no plain or speedy remedy at law (for example, when a breach of contract suit would take too long).

During this century, the writ has been used to enforce a variety of rights derived from the Constitution, statutes, rules, regulations, policies and procedures.

In 1978 I handled the case of Anderson v. San Mateo Community College District (1978) 87 Cal. App. 3d 441, hrg. den. (1979) In this case it was claimed by a probationary teacher and his union that the District had terminated his employment without following evaluation procedures required by statute and district policy. The district defended partly on grounds that it had evaluated him properly, and that the courts had no jurisdiction to review its action. The Court of Appeals rejected this claim, writing:

> "...it is unlikely that the Legislature can lawfully disallow recourse to an extraordinary writ...In Brock v. Superior Court (1952) 109 Cal. App. 2d 194, 601, 241 P. 2d 283, 288 the court discussed the nature of the writ: " 'Historically the writ of mandate was invented to provide a remedy where no other remedy existed. As is stated in 9 Halsbury's Laws of England, 744, section 1269, in speaking of the writ of *mandamus*: " 'Its purpose is to supply defects of justice; and accordingly it will issue, to the end that justice will be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right.' (See, also, 16 Cal. Jur. 764, sec. 4.)" (Drummery v. State Board of Funeral Directors, 13 Cal. 2d 75, 82, 87 P. 2d 848.)'" 87 Cal. App. 2d at 447-448.

The proposal of the Commission to effectively eliminate the writ of mandate, and put it under the umbrella of a "writ of review" will violate the California Constitution, and eviscerate the writ of mandate. The writ will be irreparably weakened as individuals, companies, agencies and labor organizations will be forced into the time-suming, costly, convoluted web of the proposed writ of review.

II. Writs of Mandate Are the Routine Method of Enforcing Many Individual and Collective Employee Rights

I have practiced law for more than 20 years. In my experience, and that of my clients and other labor organizations, the writ of mandate is crucial to protecting individual and collective employee rights. Let me give you a simple example:

Several years ago the State Colleges were permitted by state and federal law to terminate older faculty who reached age 70, unless the faculty annually applied for continuation and were certified by the school as "standard or above." Bernard Weddell, a long-time professor of business at San Jose State, was informed by his school that based on student evaluations, he was

not "standard" and he was terminated. He received no hearing, nor any opportunity to review, rebut or contest the college's determination. We filed a Petition for Writ of Mandate arguing that he had a right, under California law, to a due process hearing of some sort prior to termination. We won. Professor Weddell was ordered reinstated (Santa Clara Superior Court No. 647 068.)

Had Professor Weddell been forced into the "writ of review" which the Commission proposed in S.B. 209, he would have been unable to pursue his case in a timely or inexpensive manner. Your proposal places responsibility for assembling the record on the employer. It creates numerous, time-consuming and expensive barriers to such writs. Employees will be discouraged, and in many cases, prevented, especially by the cost and time involved, from pursuing such writs. This is why we view this effort to replace the writ of mandate as curtailing the rights of individuals, employees and labor unions to vindicate their rights.

Writs of ordinary mandate are the *primary* means of labor organizations to challenge a public employer's breach of its duty under the Meyers-Milias-Brown Act (MMBA). Vernon Fire Fighters v. City of Vernon (1980) 107 Cal. App. 3d 802, 810. In this context such writs are used to challenge termination of employees for union or protected concerted activities (i.e. organizing unions), or an employer's failure to bargain in good faith. I have pursued many such writs. Speed is often critical. For example, several years ago the University of California and City of San Francisco became involved in a matter which threatened to deprive interns and residents at San Francisco General Hospital of health and other benefits. We successfully pursued a writ of mandate on short notice to preserve their rights.

Over the last 10 years we have brought many writs of mandate to protect the post-retirement health benefits of public employees. In Contra Costa County we have filed 5 actions when public employers shifted costs of medical plans onto retirees, in many cases decades after these employees retired and were on limited, fixed incomes. The availability the writ is crucial to protecting these benefits of hundreds of thousands of California citizens. Post-retirement health benefits are common in California. They are a form of deferred compensation. Actions in mandate to preserve such benefits, as contractually-vested rights, have been recognized by the courts. See Thorning v. Hollister Unified School District (1992) 11 Cal. App.4th 1598.

I have been one of the principal California attorneys initiating these actions to protect groups of retirees who are especially vulnerable. Unlike active employees, they cannot bargain with their former employers. They have no federal legislation, such as ERISA, to protect their post-retirement benefits. They are powerless. Without the writ, their post-retirement deferred compensation is at risk. I am familiar with countess stories of retirees who have lost medical benefits when employers viewed them as an easy target and reduced deferred compensation. If you include ordinary mandate in your proposal, these individuals will be unable to afford to challenge violations of their vested rights. Due to the complexity and time involved in your proposed writ of review, many retirees will die before any relief is possible. By changing the

standards of review in such situations, you will tilt the table so far in favor of the employer, that their chances of success in a meritorious case, will be doomed.

III. Conclusion

I and many California attorneys and organizations are committed to preserving the writ of ordinary mandate. It does not need to be changed. This Commission has done much good with its administrative bill of rights. But this proposal is bad. And, as your consultant Prof. Asimov has candidly explained, it will discourage individuals from suing to vindicate their rights:

> "People will not wish to pay lawyers to seek review..." "The Scope of Judicial Review of Decisions of California Administrative Agencies" 42 UCLA Law Review 1157, 1178 (June, 1995)

When I testified against S.B. 209 I pointed out to the Legislature that the writ of mandate in CCP 1085 contains a single sentence, and that your proposal would replace it with pages upon pages of convoluted, confusing, expensive, unnecessary and time-consuming hurdles. Quentin Kopp dissented, pointing to the scores of annotations (cases) applying and interpreting CCP 1085. He bemoaned the fact that no "pro-per" citizen could understand CCP 1085. Well, as Mr. Kopp must know, "pro-per" citizens rarely, if ever, bring writs of mandate. Citizens, unions, and other groups go to lawyers to sue. And the scads of annotations are evidence of the need for the writ. These annotations are the history of actions by governmental bodies to violate the rights of citizens. If you are so anxious to change CCP 1085 you should read these annotations. They document a history of public schools discriminating against minorities (Serrano v. Priest), of public schools, hospitals and other agencies firing teachers and other employees because of their political beliefs (DeGroat v. Newark Unified School District (1978) 62 Cal. App. 3d 358, Bagley v. Washington Township Hospital District (1966) 65 Cal. 2d 499 , of schools taking away post-retirement health benefits (Thorning v. Hollister), of public agencies violating collective bargaining laws. There are over 1000 school districts, 70 community college districts, and over a 1000 other public jurisdictions in California. That there are hundreds of annotations in this century is neither surprising nor grounds to make review more difficult. It should be grounds for considering statutes to more heavily penalize public officials who violate citizen's rights, not to provide a motive for restricting citizens rights to hold their officials to the law.. We confront similar cases to those I've discussed on a weekly basis.

Your Commission functions in relative anonymity. That your proposal to eliminate ordinary mandate took place with hardly a murmur of dissent illustrates this, as well as how busy organizations are dealing with the day-to-day business of collective bargaining, enforcing contracts, and so forth. Despite its obvious expertise and interest, it appears that neither CELA nor the Employment Law Section of the State Bar were notified of your proposals. But when your action became more widely known, the dissent by interested groups coalesced. These

groups, now informed, intend to remain vigilant and will not stand idly by if CCP 1085 remains a target.

For the reasons set forth above, I urge you to modify your proposals and recommend no changes in the writ of ordinary mandate.

Very truly yours,

ROBERT J. BEZEMEK

RJB:smz

cc: Mary Bergan, President, California Federation of Teachers
CELA (Nancy Bornn)
Consumer Attorney of California (Steven Pingel)
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Senator John Burton
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