Study N-200 December 5, 1997

Memorandum 97-80

Judicial Review of Agency Action: Report on SB 209 Interim Study

On December 3, Senate Judiciary Committee staff held a working session on SB 209 with interested participants that was quite productive. We were able to resolve a number of objections to the bill as reported below.

STANDARD OF REVIEW

State Agency Factfinding

The Committee staff made clear the Chair of the Senate Judiciary Committee, Senator John Burton, will continue to find the bill unacceptable as long as it provides for substantial evidence review of state agency factfinding where a fundamental vested right is involved, replacing existing independent judgment review. The Commission has consistently adhered to the view that the bill in its present form reflects the best policy. However, in light of the strong view of the Committee Chair, the staff believes the Committee will not approve the bill unless amended to restore existing law on this point. **The staff recommends amending Section 1123.430 as follows:**

> **§ 1123.430. Review of agency factfinding**
>
> 1123.430. (a) ~~Except as provided in Section 1123.440, the~~ The standard for judicial review of whether agency action is based on an erroneous determination of fact made or implied by the agency is ~~whether the agency's determination is supported by substantial evidence in the light of the whole record.~~ :
>
> (1) In an adjudicative proceeding in which the court is authorized by law to exercise its independent judgment on the evidence, the independent judgment of the court whether the determination is supported by the weight of the evidence.
>
> (2) In all other cases, whether the determination is supported by substantial evidence in light of the whole record.
>
> (b) If the factual basis for a decision in a state agency ~~adjudication~~ adjudicative proceeding includes a determination of the presiding officer based substantially on the credibility of a witness, the court shall give great weight to the determination to

the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

~~(c) Notwithstanding any other provision of this section, 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 agency's determination of that fact is supported by the weight of the evidence.~~

Comment. ~~Section 1123.430 supersedes former Section 1094.5(b)-(c) (abuse of discretion if decision not supported by findings or findings not supported by evidence).~~

Subdivision (a) ~~eliminates for state agencies the rule of former Section 1094.5(c), providing for independent judgment review in cases where "authorized by law." The former standard was interpreted to provide for independent judgment review where a fundamental vested right is involved.~~ of Section 1123.430 continues the substance of former Section 1094.5(c). Thus whether the court applies independent judgment or substantial evidence review of factfinding continues to be determined by case law. See, e.g., Bixby v. Pierno, 4 Cal. 3d 130, 144, 481 P.2d 242, 93 Cal. Rptr. 234 (1971) (state agency); Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 32, 520 P.2d 29, 112, Cal. Rptr. 805 (1974) (local agency); see generally Asimow, *The Scope of Judicial Review of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1161-76 (1995).

~~The substantial evidence test of subdivision (a) is not a toothless standard which calls for the court merely to rubber stamp an agency's finding if there is any evidence to support it: the court must examine the evidence in the record both supporting and opposing the agency's findings. Bixby v. Pierno, *supra.* If a reasonable person could have made the agency's findings, the court must sustain them. But if the agency head comes to a different conclusion about credibility than the administrative law judge, the substantiality of the evidence supporting the agency's decision is called into question.~~

Subdivision (b) continues the substance of language formerly found in Government Code Section 11425.50(b). The requirement that the presiding officer identify specific evidence of observed demeanor, manner, or attitude of the witness in credibility cases is in that section.

~~Under subdivision (c), independent judgment review of a changed determination of fact is limited to that fact. All other factual determinations are reviewed using the standard of subdivision (a) — substantial evidence in light of the whole record.~~

Drafting paragraph (1) of subdivision (a) in this seemingly noncommittal form preserves existing language in Code of Civil Procedure Section 1094.5(c), and avoids locking in the courts to a rule the Commission does not support. With this revision of Section 1123.430, the special local agency rule in Section 1123.440 should be deleted, since it will be subsumed under the general rule in Section 1123.430. References to the local agency rule in Section 1123.440 should be deleted from Comments to Sections 1123.410, 1123.450, and 1123.850.

Subdivision (c) is deleted as superfluous, since it only applies to a determination of fact by an administrative law judge of the Office of Administrative Hearings. These are made in licensing and other proceedings which virtually always involve a fundamental vested right, thus subject to independent judgment review under subdivision (a)(1). Professor Kelso thought perhaps subdivision (c) should be kept, since it may override the "great weight" provision of subdivision (b) where an agency head changes an ALJ determination of fact. As a matter of policy, the staff would not do this. The "great weight" provision is sound, since credibility is most reliably determined by the one who saw and heard the witness.

Application of Law to Fact

Professor Asimow recommended treating the standard of review of application questions (sometimes called "mixed questions of law and fact") the same as questions of law — independent judgment with appropriate deference. Application decisions often involve considerations of policy and create precedents for future cases, thus resembling questions of law and justifying less judicial deference to the agency determination. Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies,* 42 UCLA L. Rev. 1157, 1216 (1995). Existing law treats application questions as a question of fact if the basic facts in the case are disputed, and as a question of law if there is no dispute of basic facts — a "misguided" scheme. Asimow, *supra,* at 1213-15.

Local agencies opposed Professor Asimow's recommendation, fearing independent judgment review of application questions would swallow up and destroy the benefit of substantial evidence review of local agency factfinding where no fundamental vested right is involved, and might be read to allow courts to interfere with a lawful exercise of agency discretion. They persuaded the Commission to delete the application provision from the bill, and to say in the Comment that this question is left to case law.

There would be some benefit in having a statutory provision on standard of review of application questions to avoid having a gap in the statutory scheme. It would have to be drafted to permit case law to continue to apply. The staff suggests adding a new Section 1123.440 to the bill, to replace the deleted local agency provision on factfinding:

> 1123.440. The standard for judicial review of whether the agency has erroneously applied the law to the facts is:
>
> (a) In cases in which the court is required to affirm the determination of the agency if supported by substantial evidence, whether the determination is supported by substantial evidence in light of the whole record.
>
> (b) In all other cases, the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action.
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> **Comment.** Section 1123.440 codifies existing law on the standard of review of agency application of law to fact. See, e.g., S. G. Borello & Sons, Inc. v. Department of Indus. Relations, 48 Cal. 3d 341, 349, 769 P.2d 399, 256 Cal. Rptr. 543 (1989); Halaco Engineering Co. v. South Central Coast Regional Comm'n, 42 Cal. 3d 52, 74-77, 720 P.2d 15, 227 Cal. Rptr. 667 (1986); Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1213-14 (1995). Like prior law, Section 1123.440 is "designed to leave to the courts the establishment of standards for deciding which cases require independent judgment review and which substantial evidence review." Frink v. Prod, 31 Cal. 3d 166, 173, 6432 P.2d 476, 181 Cal. Rptr. 893 (1982).

The staff will send this to the local agency working group to make sure they do not have a problem with it.

OTHER SECTIONS IN DRAFT STATUTE

The staff plans to discuss only material below preceded by a bullet [•].

§ 1123.110. Requirements for judicial review

• Although the draft statute does not codify the doctrine that a case must be ripe for judicial review, Section 11213.110(a) refers to the ripeness "requirement." Herb Bolz, Office of Administrative Law, objects to referring to the ripeness doctrine as a "requirement," saying correctly that it is a discretionary doctrine that the court may or may not apply. Professor Kelso suggested moving the

reference to ripeness from subdivision (a) into subdivision (b), where it will be clearer that the ripeness doctrine is discretionary. **The staff recommends revising Section 1123.110 as follows:**

> 1123.110. (a) Subject to subdivision (b), a person who has standing under this chapter and who satisfies the requirements governing exhaustion of administrative remedies, ~~ripeness~~, time for filing, and other preconditions is entitled to judicial review of final agency action.
>
> (b) Nothing in this title limits ~~court~~ either of the following:
>
> (1) Court discretion conferred by Article VI of the California Constitution summarily to decline to grant judicial review.
>
> (2) Court discretion to decline to grant judicial review on the ground that the case is not ripe for review.

§ 1123.120. Finality

Section 1123.120 says a person "may not obtain judicial review of agency action unless the agency action is final." OAL was concerned this might prevent judicial review of emergency regulations, normally in effect for not more than 120 days. Gov't Code § 11346.1. **The staff agreed to put the following in the Comment:**

> **Comment.** . . . Emergency regulations of a state agency adopted under Government Code Section 11346.1 are final for the purpose of Section 1123.120.

§ 1123.330. Judicial review of rulemaking

• OAL was concerned about the effect of the requirement of exhaustion of administrative remedies on a preenforcement challenge to a state agency regulation on the ground that it is facially inconsistent with or not authorized by statute. According to Professor Asimow, under existing law, the requirement of exhaustion of administrative remedies applies to all forms of agency action, quasi-legislative, quasi-judicial, and ministerial. Asimow, *Judicial Review: Standing and Timing, reprinted in* 27 Cal. L. Revision Comm'n Reports 1, 254-55 (1997). OAL, however, believes a different rule may apply to judicial review of state agency regulations. In order to remove the OAL objection, the staff agreed to a provision that would make the exhaustion requirement inapplicable to preenforcement review of state agency regulations on the ground that it is not authorized by or is facially inconsistent with statute. **The following provision would carry out the staff agreement:**

1123.330. (a) A person may obtain judicial review of a rule notwithstanding the person's failure to participate in the rulemaking proceeding on which the rule is based, or to petition the agency promulgating the rule for, or otherwise to seek, amendment, repeal, or reconsideration of the rule after it has become final.

(b) A person may obtain judicial review of a rule whether or not a proceeding to enforce the rule has been commenced.

(c) Before commencement of an administrative proceeding to enforce a state agency regulation adopted or amended under the rulemaking portion of the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, without exhausting administrative remedies, a person may obtain judicial review of the regulation on either of the following grounds:

(1) That the regulation is not authorized by statute.

(2) That the regulation is facially inconsistent with statute.

Comment. . . . Subdivision (c) is new. See also Gov't Code § 11342.2 (state agency regulation adopted under Administrative Procedure Act must be authorized by and consistent with statute).

• However, subdivision (c) above might be contrary to OAL's interests by implying an exhaustion requirement in cases not covered by subdivision (c), even though subdivisions (a) and (b) may excuse exhaustion in most if not all rulemaking cases. The staff will discuss this further with OAL.

§ 1123.340. Exceptions to exhaustion of administrative remedies

OAL was concerned Section 1123.340 might change existing law on the futility exception to the exhaustion requirement for judicial review of state agency regulations. Russell Iungerich, California Academy of Attorneys for Health Care Professionals, asked that the Comment include a citation to Hollon v. Pierce (facts tantamount to exhaustion where "agency's jurisdiction is 'merely colorable' or where it indulges in unreasonable delay"). **The staff recommends revising the Comment to Section 1123.340 as follows:**

Comment. . . . The exceptions to the exhaustion of remedies requirement consolidate and codify a number of existing case law exceptions, including:

. . . .

Futility. ~~The exhaustion requirement is excused under subdivision (b) if it is certain, not merely probable, that the agency would deny the requested relief.~~ See, e.g., Grier v. Kizer, 219 Cal.

App. 3d 422, 432, 268 Cal. Rptr. 244, 249 (1990) (exhaustion futile if agency takes unyielding position that regulation was validly adopted); Ogo Assocs. v. City of Torrance, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (1974) (exhaustion futile if aggrieved party can positively state how agency would decide). See also Hollon v. Pierce, 257 Cal. App. 2d 468, 476, 64 Cal. Rptr. 808 (1967).

Steven Pingel, California Association of Consumer Attorneys, suggested addressing OAL's problem by putting in the statute a requirement of a clear and convincing showing that exhaustion of administrative remedies would be futile. However, it is evident this language would make OAL's problem more serious, and Mr. Bolz concurs.

§ 1123.410. Standards of review of agency action

In response to a suggestion by Earl Lui, Consumers Union, the staff recommends revising the first paragraph of the Comment to Section 1123.410 as follows:

> **Comment.** Section 1123.410 is drawn from 1981 Model State APA Section 5-116(a)(2). The appropriate review standard of this article to be applied must be decided by the court, and depends on the issue being considered. For example, in exercising discretion, an agency may be called upon to interpret a statute, to determine basic facts, and to make the discretionary decision. In reviewing this action, the court would use the standard of Section 1123.420 (independent judgment with appropriate deference) in reviewing the statutory interpretation, the standard of Section 1123.430 (substantial evidence) or 1123.440 (substantial evidence or independent judgment) in reviewing the determination of facts, and the standard of Section 1123.450 (abuse of discretion) in reviewing the exercise of discretion.

§ 1123.460. Review of agency procedure

In response to a suggestion by Professor Kelso, the staff recommends revising the second paragraph of the Comment to Section 1123.460 as follows:

> **Comment.** . . . The degree of deference to be given to the agency's determination under Section 1123.460 is for the court to determine, and is comparable to the court's deference under Section 1123.420 on agency interpretation of law. The deference is not absolute. Ultimately, the court must still use its judgment on the issue.

§ 1123.630. Time for filing petition for review of in adjudication of agency other than local agency and formal adjudication of local agency

OAL asks what the applicable limitations period is under the draft statute for judicial review of state agency rulemaking. The draft statute does not change existing law under which the limitations period for judicial review of rulemaking depends on the nature of the right or obligation to be enforced. A mandamus proceeding to review a regulation on the ground that it is inconsistent with statute is a "liability created by statute" subject to the three-year limit of Code of Civil Procedure Section 338(a). Green v. Obledo, 29 Cal. 3d 126, 141 n.10, 624 P.2d 256, 172 Cal. Rptr. 206 (1981); Ragan v. City of Hawthorne, 212 Cal. App. 3d 1361, 1367, 261 Cal. Rptr. 219 (1989); 2 G. Ogden, California Public Agency Practice § 51.10[2][a]; 3 B. Witkin, California Procedure *Actions* § 624, at 802 (4th ed. 1996). The same is true of declaratory relief — the limitations period is that applicable to an ordinary legal or equitable action based on the same claim. 3 B. Witkin, *supra,* § 625, at 804. If no other limitations period applies, the proceeding is governed by the four-year period of Code of Civil Procedure Section 343. 2 G. Ogden, *supra*. **To make this clear, the staff recommends adding the following to the Comment:**

> **Comment.** . . . Section 1123.630 does not apply to agency action other than an adjudicative proceeding. Existing limitations periods continue to govern such action, which depend on the nature of the right or obligation sought to be enforced, usually three or four years. California Civil Writ Practice § 6.25, at 211 (3d ed., Cal. Cont. Ed. Bar 1997).

§ 1123.710. Applicability of rules of practice for civil actions

Section 1123.710(d) says the "Judicial Council may adopt rules of court governing proceedings in the Supreme Court and courts of appeal for judicial review of agency action, which may be inconsistent with this title." Nini Redway, Judicial Council, thought the Council might have a problem with this, because the Council would view the provision as requiring it to act. She agreed to find out and get back to us. Professor Kelso thought the Judicial Council ought not to have authority to override the standards of review in the draft statute, since that might well lead to lobbying of the Council to modify the standards in these proceedings. The staff agrees with Professor Kelso, and would at a minimum replace "proceedings" with "procedures" in the quoted

language. We expect to hear from the Judicial Council before the December meeting. The staff will report further at that time.

§ 1123.810. Administrative record exclusive basis for judicial review

Steven Pingel wanted to be sure the draft statute would not interfere with his ability to have an evidentiary hearing in court where the administrative record is inadequate or nonexistent. **The staff agreed to add language to the Comment as follows:**

> **Comment.** . . . The closed record rule of subdivision (a) is limited to cases where the agency gave notice and an opportunity to submit oral or written comment, and maintained a record or file of its proceedings. These requirements will generally be satisfied in most administrative adjudication and quasi-legislative action. In other cases, subdivision (b) makes clear the court may either receive evidence itself or may remand to the agency to receive the evidence. This will apply to most ministerial and informal action. These rules are generally consistent with Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 888 P.2d 1268, 38 Cal. Rptr. 2d 139 (1995). If the court receives evidence itself under subdivision (b), general rules of civil practice apply to the proceeding. See Section 1123.710.

§ 1123.950. Attorney fees in action to review administrative proceeding

Steven Pingel reported that Robert Bezemek, California Federation of Teachers, remains concerned that Section 1123.950 might be read as the exclusive provision on attorneys' fees, thus interfering with Code of Civil Procedure Section 1021.5, the statute on attorneys' fees for private attorney general actions. This is not the intent of the section. **The staff recommends addressing this by adding the following to the Comment:**

> **Comment.** . . . Nothing in Section 1123.950 interferes with court discretion to award attorneys' fees under some other provision of law. See, e.g., Code Civ. Proc. § 1021.5.

Respectfully submitted,

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