Study N-117 July 18, 2000

Second Supplement to Memorandum 2000-48

Separation of Functions in DMV Hearings (Comments of CDD)

Attached to this memorandum is a letter from the California Deuce Defenders concerning separation of functions in Department of Motor Vehicles drivers license proceedings. CDD is concerned about the problems caused when the same person acts as both prosecutor and hearing officer. CDD indicates that the due process abuses inherent in this system are exacerbated by use of non-attorney hearing officers who lack training in law.

As an example CDD refers us to the unpublished opinion in *Cornell v. Department of Motor Vehicles* (Nov. 9, 1999). The Court of Appeal in that case ruled that the administrative hearing officer did not properly balance his dual roles as prosecutor and trier of fact, going beyond the role of an impartial administrative judge and becoming an advocate for DMV. The hearing officer interrupted the license holder's counsel to question witnesses, ruled on objections to his own questions, attempted to rehabilitate witnesses, and recalled witnesses to rebut prior testimony. This "unauthorized conduct" played a large role in influencing the decision in the administrative hearing.

CDD would extend the separation of functions concept to drivers license hearings. CDD indicates they can provide plenty of testimony about systemic abuses that persons appearing in these DMV hearings have experienced. "People's lives and livelihoods are being routinely destroyed without regard to Due Process. The situation cannot be allowed to continue."

The staff has recommended against separation of functions in drivers license hearings because the cost of the proposal would make it impossible to obtain enactment of the bill. On the other hand, if the state's finances continue to be strong, the proposal might be able to receive serious legislative consideration. A middle ground could be to require DMV to use administrative law judges rather than lay hearing officers in these proceedings.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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July 14, 2000

Nathaniel Sterling, Esq.
California Law Revision Commission
4000 Middlefield Rd., Ste D-2
Palo Alto CA 94303

Re: Comment on Memorandum 2000-48 - Separation of Functions in DMV Hearings.

Dear Mr. Sterling:

The California Deuce Defenders is a bar association of over 200 attorneys and a few other professionals who represent persons accused of drunk driving both in the courts and at D.M.V. driver's license hearings. This organization has always opposed any exemption for the D.M.V. from the separation of functions requirement. In January of 1994 I wrote to you on this subject outlining the problems caused by the judge in driver's license hearings being both judge and prosecutor and D.M.V. employee all rolled into one. (A copy of the text of that letter is enclosed.)

Since that letter was written in 1994, the situation has deteriorated dramatically. I could go on for a thousand pages about the abuses of Due Process spawned by D.M.V.'s control over the judge and their inability to fairly fill the roles of both judge and prosecutor. These problems are exacerbated by these non-attorneys' lack of training in the law. Instead though, I've included a recent summary of the problem that I wrote in connection with the opinion of the Second District Court of Appeal in *Cornell v. D.M.V.* A copy of the opinion in that case is also attached.

Rest assured that nothing short of separating the functions of judge and prosecutor at D.M.V. hearings could possibly end the systemic Kafkaesque atmosphere at D.M.V. licensee hearings. And even with a separation of functions, the judge would still remain a D.M.V. employee, subject to the routine discipline imposed for being too fair to the licensees that appear before them.

I hope that instead of "do nothing" the California Law Revision Commission recommends that the legislature repeal the D.M.V.'s exemption for all driver's license hearings.

If you like I can easily persuade a hundred attorneys who regularly appear before the D.M.V. in driver's license hearings to testify before the Law Revision Commission about the systemic abuses they have experienced. People's lives and livelihoods are being routinely destroyed without regard to Due Process. The situation cannot be allowed to continue. Every day another attorney asks me when we're going to file a Federal class action civil rights lawsuit. I tell them all that we've only got $45,000 in our treasury now, and when we get $50,000 it's time to spend it.

Sincerely,

Ed Kuwatch

cc: Richard Hutton, President

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November 11, 1999

Honorable Walter H. Croskey
Presiding Justice
Second District Court of Appeal, Division Three
300 So. Spring St., 2nd Floor, North Tower
Los Angeles CA 90013

Re: *Cornell v. D.M.V.*, filed November 9, 1999, #B126052
Request for Publication of Opinion
(Rules of Ct., Rules 976)

Dear Presiding Justice Croskey and Associate Justices Kitching and Aldrich:

The above referenced appeal was decided on November 9, 1999. Pursuant to Rule 976 of the California Rules of Court, I request that this court certify the opinion for publication in the Official Reports.

An opinion meets the standards for publication in the Official Reports pursuant to Rule 976(b) of the California Rules of Court, if such opinion, among other things,

(1) Resolves an apparent conflict in the law; or,
(2) Involves a legal issue of continuing public interest.

This court's opinion in this case does both. It resolves the conflict in how far a D.M.V. employee, acting as both judge and prosecutor, can go in pursuing both roles without violating the respondent's right to a fair hearing. It draws the line at the sort of conduct described in this case.

In addition, the opinion speaks to a matter of continuing public interest. I am the author of *California Drunk Driving Law*, a 1600 page, two-volume treatise on the subject of drunk driving law in California. I have over 1200 subscribers to this book's four annual updates. I hear from my subscribers about unfair D.M.V. hearings of the sort described in this case on an a regular basis. I have a stack communications that I call "The D.M.V. Horrors Pile". It's about seven inches high at this point, containing hundreds of letters, e-mails and memos from lawyers all over the state reporting scenarios much like that experienced by Mr. Crawford in the *Cornell* case. The misdeeds described in *Cornell* are not an aberration, but rather they are the normal conduct of many of today's D.M.V. hearing officers.

Most D.M.V. hearing officers routinely wait for the respondent's case to be presented before deciding what witnesses to subpoena. They then routinely grant themselves continuances to subpoena these rebuttal witnesses, without any showing of good cause for not having subpoenaed them in the first place. They routinely overrule the routine objections to this practice.

Many D.M.V. hearing officers routinely disregard all evidence presented by the driver. The standard practice seems to be that if the D.M.V. presents a prima facie case, it declares itself the winner. There's no weighing of conflicting evidence from the respondent driver. The only control over hearing outcome that respondents have is to insist that the rules of evidence be followed, as these rules have been laid out in the many cases on that topic. Even then, D.M.V. must be repeatedly

forced to follow these rules in accordance with the controlling cases. This requires endless Superior Court writs rehashing the same issues over and over again.

In the past, before 1997, D.M.V. made an effort to fairly conduct these hearings, and there was meaningful dialogue between them and the defense bar to resolve problems. Now, only the D.M.V., the employer, has the ear of the judge, its employee. As the judge's employer, D.M.V. has set forth an official policy where hearing officers are disciplined for setting aside too many suspensions. None have ever been disciplined for affirming too many suspensions. The message to the troops is that if suspensions are set aside, there will be repercussions, and that hearing officers who uphold suspensions will have job security. By this process the D.M.V. has encouraged an attitude among hearing officers that results in the type of abuses you see in *Cornell*.

Since 1997, the D.M.V. has entirely abrogated its duty to see that hearing officers fairly play the dual role of both prosecutor and judge. As a result, many hearing officers act only as prosecutors, using their judicial role only as a tool to aid in the singular pursuit of prosecution. It is an agency run amok, with no regard for fairness to the public. Your opinion is the official first light on this new problem. Publishing it won't right all the wrongs, but it's a beginning. It will begin the process of assuring fair hearings by shedding light on the widespread abuses happening ever day at that agency.

Thank you for your consideration of this matter.

Very truly yours,

Ed Kuwatch

cc: James M. Crawford, Attorney for Respondent
Jerald L. Mosely, Attorney for Appellant
Marilyn Schaff, D.M.V. Chief Trial Counsel
Hon. David P. Yaffee, Judge of the Los Angeles County Superior Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DONALD CORNELL,

Plaintiff and Respondent,

v.

DEPARTMENT OF MOTOR VEHICLES et al.,

Defendants and Appellants.

B126052

(Super. Ct. No. BS050558)

APPEAL from a portion of the judgment of the Superior Court of Los Angeles County. David P. Yaffe, Judge. Affirmed.

Bill Lockyer, Attorney General, Martin H. Milas, Senior Assistant Attorney General, Silvia M. Diaz, Supervising Deputy Attorney General, and Jerald L. Mosley, Deputy Attorney General, for Defendants and Appellants.

James M. Crawford for Plaintiff and Respondent.

The Department of Motor Vehicles (DMV) appeals from that portion of a writ of mandate directing it to pay $7,500 in attorney fees to petitioner Donald Cornell (Cornell). The DMV suspended Cornell's license after determining that he had been arrested for driving with a blood-alcohol level of .13. After an administrative hearing, the DMV affirmed the suspension.

Cornell petitioned for writ of mandamus. The trial court found that the DMV hearing officer was not fair to Cornell and that the hearing officer completely stepped out of his role as an impartial administrative judge and became an advocate for one of the parties. The trial court stated the hearing officer "turned the administrative hearing into a travesty of a fair trial." The trial court granted mandamus relief to Cornell and awarded attorney fees pursuant to Government Code section 800 which provides that where an administrative proceeding is "arbitrary or capricious," a complainant may collect reasonable attorney fees up to $7,500.

We find the court's factual findings are supported by substantial evidence and the court did not abuse its discretion in finding the administrative proceeding was arbitrary or capricious. We affirm the award of attorney fees to Cornell.

FACTUAL AND PROCEDURAL BACKGROUND

On or about August 19, 1997, Cornell was arrested for driving under the influence of alcohol, in violation of California Vehicle Code section 23152, subdivisions (a) and (b). A deputy sheriff administered two breath tests, each of which revealed a blood-alcohol level of .13. The officer served Cornell with an " 'Administrative Per Se Order of Suspension/Revocation Temporary License Endorsement.' " This per se order notified Cornell that his driver's license would be administratively suspended or revoked in 30 days and that he had a right to a pre-suspension administrative hearing.

Cornell timely requested a hearing to contest the per se order of suspension. An administrative hearing was conducted on September 30, 1997. Roger Muro (Muro), principal driver safety officer presided over the hearing. After taking some testimony, the

hearing was continued to subpoena the two arresting officers. Cornell objected to the continuance. The hearing reconvened on November 10, 1997. Muro presided over the continued hearing. After some further testimony, the hearing was again continued to March 27, 1998, at the request of Cornell, to receive additional testimony from one of the officers. Hearing Officer Ralph Pena (Pena) presided over this portion of the reconvened hearing. At the conclusion of the hearing, Pena issued his order suspending Cornell's driver's license, effective April 7, 1998. Cornell requested an administrative review of the suspension.[1]

On April 14, 1998, Cornell filed a petition for writ of mandate contending, inter alia, that the hearing officer (Pena) was biased and denied Cornell a fair hearing. The DMV filed a return. After a hearing, the trial court granted Cornell's petition for writ of mandate and ruled that Cornell was entitled to reasonable attorney fees pursuant to Government Code section 800. The trial court stated, in relevant part:

"An independent review of the administrative record leads to the inescapable conclusion that petitioner did not receive a fair trial within the meaning of Code of Civil Procedure section 1094.5[, subdivision (b)] in the portion of the hearing conducted on March 27, 1998. The hearing officer on that date attempted to act as both the judge and as counsel for respondent. He interrogated witnesses, at times interrupting counsel for petitioner's examination to do so, he ruled on objections to his own questions, he attempted to rehabilitate witnesses whose credibility was impu[g]ned by counsel for petitioner, and he recalled witnesses to rebut testimony elicited by counsel for petitioner. On the whole, the transcript demonstrates that the hearing officer completely stepped out of his role as an impartial administrative judge, and became an advocate for one of the parties. By so doing he turned the administrative hearing into a travesty of a fair trial."

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1 On May 5, 1997, the DMV upheld the administrative hearing decision suspending Cornell's driver's license.

DMV timely filed a notice of appeal.

CONTENTIONS

DMV contends that the trial court abused its discretion in awarding Cornell $7,500 in attorney fees.

DISCUSSION

DMV contends that the hearing officer Pena's behavior did not rise to the level of arbitrary and capricious conduct to warrant an award of attorney fees under Government Code section 800. We disagree.

Government Code section 800 provides, in relevant part: "In any civil action to appeal or review the award, finding, or other determination of any administrative proceeding under this code or under any other provision of state law, . . . , where it is shown that the award, finding, or other determination of the proceeding was the result of *arbitrary or capricious* action or conduct by a public entity or an officer thereof in his or her official capacity, the complainant if he or she prevails in the civil action may collect reasonable attorney's fees, . . . not to exceed seven thousand five hundred dollars ($7,500), ..." (Italics added.)

This "statute authorizes an award of reasonable attorney fees where it is shown that an administrative decision 'was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity.' The phrase 'arbitrary or capricious action or conduct' encompasses ' "conduct not supported by a fair or substantial reason," ' 'stubborn insistence on following unauthorized conduct' or a bad faith legal dispute [citations], but not a bona fide legal dispute or simple erroneous decision. [Citations.]" (*Santos* v. *Department of Motor Vehicles* (1992) 5 Cal.App.4th 537, 550-551.)

Furthermore, the trial court's determination of whether an action is arbitrary or capricious is essentially one of fact, and within the sound discretion of that trial. (*Santos*, *supra*, 5 Cal.App.4th at p. 551.)

As the trial court acknowledged, at a DMV hearing, it is not improper for a hearing officer to act as both a trier of fact and as a representative of the department. (See *Poland* v. *Department of Motor Vehicles* (1995) 34 Cal.App.4th 1128, 1134). The DMV hearing officer's prosecutorial and adjudicatory roles are not separate. In certain administrative proceedings, "the combination of adjudicating functions with prosecuting or investigating functions will ordinarily not constitute a denial of due process [citations]." (*Griggs* v. *Board of Trustees* (1964) 61 Cal.2d 93, 98.) [Case involved school board proceeding.]

In our case, however, the trial court found the hearing officer did not fairly perform his dual roles. As the trial court commented: "He [Pena] was put in a rather -- in a tremendously awkward position because the DMV was not otherwise represented at that hearing, and I would like to as clearly as I can state that when you put a hearing officer in there who's responsible for presenting the respondent's case you just are in terrible danger of infecting the fairness of the hearing." The trial court determined that Pena "became an advocate for the respondent" and adversely influenced the decision. In support of its opinion the trial court, after reviewing the administrative hearing transcript, observed that Pena interrupted Cornell's counsel to question witnesses, ruled on objections to his own questions, attempted to rehabilitate witnesses, and recalled witnesses to rebut prior testimony. Regardless of Pena's dual role, the trial court found that Pena's actions constituted "unauthorized conduct" that played a large role in influencing the decision of the administrative hearing.

From our review of the record, we conclude that the hearing officer did not properly balance his dual roles as prosecutor and trier of fact. As the trial court pointed out, the hearing officer went beyond his role as an impartial administrative judge. We find the trial court's findings are supported by substantial evidence and the court did not abuse its discretion by awarding attorney fees to Cornell.

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DISPOSITION

The award of attorney fees is affirmed. Cornell is awarded costs on appeal. We deny Cornell's request for attorney fees on appeal.

KITCHING, J.

We concur:

CROSKEY, Acting P.J.

ALDRICH, J.

COPY OF TEXT OF ORIGINAL LETTER WRITTEN JANUARY, 1994

Nathaniel Sterling, Esq.
California Law Revision Commission
4000 Middlefield Rd., Ste D-2
Palo Alto CA 94303

Re: Comments on Proposed Amendments to Administrative Procedure Act

Dear Mr. Sterling:

I am writing both individually and on behalf of the California Deuce Defenders Association with comments on your agency's proposed revisions to the Administrative Procedure Act.

I am the author and publisher of *California Drunk Driving Law*, a comprehensive reference to the law of drunk driving in California. This 800-page quarterly-updated publication currently has about 1350 subscribers. I have practiced law for nearly 15 years, with my practice limited almost exclusively to drunk driving cases. I have lectured at about 40 lawyer's continuing education seminars over the past 11 years; probably more than any other lawyer in this state. I am also a member of the editorial board of the *DWI Journal*, a national journal. I am considered the state's leading authority on the subject of drunk driving law. In addition, I am the founder and a past president of the California Deuce Defenders and a past president of the Berkeley-Albany Bar Association.

California Deuce Defenders is a statewide association of attorneys who specialize in the defense of persons accused of drunk driving. Founded in 1988, the organization now boasts over 125 members throughout the state.

The California Deuce Defenders and I are concerned with matters related to the California Administrative Procedure Act because we do thousands of administrative hearings each year before the California Department of Motor Vehicles (D.M.V.). Somewhere in the neighborhood of 300,000 motorists have their driving privileges suspended or revoked by the D.M.V. each year. Most of these actions are taken under the authority of Veh. C. §13353.2, the Admin Per Se Excessive B.A.C. statute.[1] Undoubtedly, the D.M.V.'s driver's license suspension and revocation hearings make up the single largest group of administrative adjudicative actions in the state.

My attention was directed to your agency's proposed revisions to the A.P.A. quite by accident. In early August I saw an announcement in the *San Francisco Daily Journal* that the TENTATIVE RECOMMENDATION was available for public comment. I ordered it, rece 16, 1993, I picked it up to look at it without knowing what it was. Then I quickly realized the significance of the document, and was startled to see that the D.M.V. had secured an exemption from the new A.P.A.'s most important section: the separation of prosecutorial and adjudicative functions set forth in §642.320.[2]

I immediately contacted the California Public Defender's Association and the California Attorneys for Criminal Justice. Neither had heard of the matter prior to my bringing it their attention. Thus, in light of the foregoing facts regarding the number of administrative adjudicative matters handled by the D.M.V., the TENTATIVE RECOMMENDATIONS were drafted with no input from anyone representing major non-governmental interests in the most common type of administrative adjudicative hearings that are conducted. I communicated my thoughts on all this to you the same day, and you invited comments and told me of an informal deadline of February 1, 1994. Thus, I'm submitting these comments to you after the close of the official comment period on August 31, 1993.

As I stated earlier, our primary concern is with the fairness of D.M.V. hearings. Shortly after the passage of Veh. C. §13353.2 the number of administrative hearings on driver's license suspensions skyrocketed. Whereas previously, only persons who refused chemical tests were suspended

administratively (under Veh. C. §13353), the new statute added administrative suspensions[3] for nearly all drivers. Also included was the right to a hearing to contest the action, as had been the case for those accused of chemical test refusal.

But, something else also went up dramatically: the number of writs under C.C.P. §1094.5 contesting the agency decision. Whereas, under the old provisions, one rarely found cause for a writ challenging a chemical test refusal suspension (I did fifty to seventy-five hearings with only two writs in 12 years), suddenly writs challenging excessive B.A.C. suspensions became routine.

The primary cause of this dramatic turn-around was the increased complexity of the new statutes and the failure of the D.M.V. to meet this challenge with well-trained[4] and independent hearing officers. Instead, the D.M.V. kept the hearing officers under the direct authority of the head of the Driver Safety Division, the prosecutorial entity in these matters, and rejected a plan to give them more independence by putting them in the legal division.[5] Predictably, the Driver Safety Division saw them as dutiful subordinates charged with the duty to carry out department policy rather than as independent adjudicators carrying out state law.[6] All this led to the generally recognized perception that the hearings were nothing but a sham, conducted by dutiful clerks carrying out the policies of the prosecutorial interests that employed them. The universal outrage translated into an explosion of writ litigation.

The D.M.V. began acknowledging the problem almost immediately. And at one point, the Attorney General's office announced publicly that it would not represent the D.M.V. anymore in the writ proceedings, due to lack of man/person power to handle all of them. In response to repeated complaints about unfair and incompetent hearing officers, in the Fall of 1992 the D.M.V. contracted with Richard Guarino, an acknowledged administrative adjudication expert,[7] to retrain their entire cadre of hearing officers. He conducted the retraining seminars in the Spring of 1993. But the problem remains, and apparently the retraining has not worked. D.M.V. officials confirmed this assessment to me as recently as November, 1993.

The essence of the problem, according to Guarino, is that the hearing officers see their primary duty as protecting public safety, rather than as hearing officers simply carrying out the law. Many of them worked their way up from driver's license examiners, riding in cars with people taking their driving test. Only a small minority have any formal legal education. They see themselves as simply employees of the Driver Safety Division, carrying out Department policy protecting the highways from drunk drivers. As such, their loyalty is to their employer, rather than the law, and it shows.

My colleagues, the drunk driving defense attorneys of this state, overwhelmingly agree that these hearings are not fair, that they are a sham and a crock.[8] I get phone calls and letters on an almost daily basis from attorneys complaining about these sham hearings. (A very typical example, that was faxed to me as I wrote this letter, is attached as Exhibit A.) I could not begin to list all the complaints I've heard. Suffice it to say that there is an overwhelming perception, well justified, that these hearings are not conducted by independent, fair and impartial hearing officers.

One final example of the problem: Two bills (Stats. 1993, Chapters 899 (SB 689) and 1244 (SB 126)) became operative January 1, 1994. They require a one-year driving privilege suspension for persons under the age of 21 who test 0.01%[9] or more on a *preliminary alcohol screening device* where such a device is *immediately available*. The clear intent of this statutory scheme is that young persons stopped for reasons other than impaired driving, that do not seem impaired by alcohol, be tested roadside, with minimal delay, to determine if they have been drinking alcohol. But many police officers do not carry the required Preliminary Alcohol Screening Device (P.A.S.) and for that reason, an immediate roadside test will not be possible in many cases.

Rather than take this state law and the legislatures intent at its face value and simply enforce it as directed, the Driver Safety Division decided to interpret it to permit a test at the police station or jail,

as long as it occurs within three hours of driving. Clearly, this was not the intent of the legislature. That body apparently felt that driver safety was adequately protected by requiring a prompt roadside breath test or none at all.

When I first heard of the plan to expand the scope of the statute to tolerate detentions as long as three hours I asked D.M.V. officials how they intended to implement the policy. I was told that they planned to simply send a memo to the hearing officers directing them to rule that way in accordance with department policy. The unfairness of doing that had not entered their minds until I pointed it out. At first they were somewhat incredulous. They felt they weren't interfering in the hearing process, but instead they were just directing their employees how to protect public safety. That's certainly to be expected of a zealous prosecutor. And it's also predictable that a prosecutor who employs the judge would not even think about any impropriety in telling the judge how to rule in pursuit of so noble a cause. Only after heated discussions with them and the D.M.V. legal office did they understand that, in this one instance, they ought not direct the hearing officers how to rule on the fair interpretation of state law.[10]

So what do to about all this? Certainly the D.M.V ought not be exempt from the provisions of the proposed §642.320. But we think more is required: These hearings ought to be conducted by a Central Panel of administrative law judges with a loyalty to the law rather the D.M.V. This position is well-supported by a look at the factors listed under the heading EXPANSION OF CALIFORNIA CENTRAL PANEL, on page 10 of the INTRODUCTION to the TENTATIVE RECOMMENDATION.

The first factor relates directly to unfairness and the perception of unfairness and states that a Central Panel is not needed because unfairness and the perception of it are not a problem. But in the D.M.V.'s case there is abundant evidence of unfairness and certainly a widespread and well-founded perception of unfairness surrounding hearings on D.M.V. license suspensions.

The second factor relates to the competence of hearing officers. The introduction of the statutory scheme for excessive B.A.C. suspensions greatly increased the complexity of issues at D.M.V. hearings. The new chapter on this topic in my book is 108 pages long. Even at that, many issues are only given limited coverage. A score of appellate opinions have been published, including one from the Supreme Court. I have almost daily contact with attorneys who have difficulty comprehending it all. Yet the present regulatory framework expects lay hearing officers to not only understand it, but to competently master it and act as judges on the facts and law. That's simply asking too much of people lacking a law school education. Contrary to the assumption mentioned in the discussion of this factor in the TENTATIVE RECOMMENDATIONS, <u>these</u> hearing officer personnel do not appear to be functioning properly.

Third, the D.M.V. is <u>not</u> a primarily adjudicative agency like the W.C.A.B. It is primarily a licensing agency.

Fourth, the D.M.V. claims the increased cost would prohibit transferring the hearing officer function to another entity. But it's not clear that there would be any increase in cost if the transfer is successful in achieving its aims. For one thing, an increase in fairness and competence would greatly reduced the expensive litigation we are now experiencing. And in any event, any increase could be passed on to licensees seeking reinstatement through the present provisions allowing the D.M.V. to assess an amount that covers the agency's costs. Presently the reinstatement fee is $100.00. Surely no one would object to paying somewhat more than that for a fair hearing. In comparison, the economic cost of losing one's right to drive is staggering. Hundreds of thousands of Californians have lost their jobs and all that befalls them along with that because they lost the right to drive.

As for the fifth factor, I can't agree with its premise:

- Exhibit A is a good and typical example of how the D.M.V. uses its power to control the timing of hearings to its unfair advantage.

- As for familiarity with the technicalities, that's a major part of the problem. These lay persons don't understand the complex legal issues involved.

- Further, the whole idea of eliminating bias for one side or the other embodies the concept that the hearing officer ought not be implementing *the policies of the agency*, but rather, following the law as it is written by the legislature. (There are no administrative regulations involved.)

Sixth, a review of the factors related to the D.M.V. makes an abundantly clear case for the need for a Central Panel. In addition, since D.M.V. license suspension hearings are the most common administrative adjudicative hearings there are, there's no problem with generalizing. They <u>are</u> the generalized hearings.

I hope you find my comments of interest and import. Please let me know if I can be of further assistance. And please include me on the mailing list for further announcement and communications on this project.

Sincerely,

ED KUWATCH

cc: Richard Hutton, C.A.C.J. Legislative Committee
Gail Dekreon, President, California Deuce Defenders
Marilyn Schaff, Chief Legal Counsel, D.M.V.

1. It requires a suspension of four months for a first offender, or one year for anyone with a prior conviction, for driving with a blood alcohol concentration (B.A.C.) of 0.08% or more.

2. Subdivision (b) exempts the D.M.V. from the provisions of subdivision (a).

3. These actions are completely separate from the post-conviction suspensions where there is no right to a hearing.

4. It would be unfair to place the blame for this on the D.M.V. itself. Officials there did the best they could with the limited funds available. The governor had drastically reduced the appropriation for implementing the program. Ironically, in the long-run that decision probably cost more money.

5. This would not would have given them adequate independence either, but it would have been a vastly better choice.

6. There are no relevant administrative regulations.

7. An attorney, and Cal. State Sacramento professor, Mr. Guarino has experience training administrative hearing officers in the essentials of their work. At one point in his career he retrained numerous welfare hearing officers and assisted in the reform of the welfare hearing process. The main problem there, he said, was that the hearing officer's supervisors were the prosecutors of the cases.

8. Of course, there are a exceptions in few district Driver Safety offices where the local manager has done a better job of getting the message of competence and fairness to his subordinates.

9. That's one-eighth the 0.08% limit applicable to persons 21 or over.

10. There probably is some need for a higher authority to tell lay hearing officers how to interpret cases and statutes. Our objection is that the higher authority ought not also be the prosecutorial authority.