

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Administrative Adjudication by Quasi-Public Entities

February 1996

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **May 10, 1996.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
(415) 494-1335 FAX: (415) 494-1827

ADMINISTRATIVE ADJUDICATION BY QUASI-PUBLIC ENTITIES

Summary of Tentative Recommendation

An adjudicative decision of a private entity, when affecting the public interest, is subject to common law fair procedure requirements. The exact scope of the fair procedure requirement is not clear, particularly as applied to a quasi-public entity — a private entity created by or pursuant to statute for the purpose of administering a state function. This recommendation would impose the administrative adjudication provisions of the state Administrative Procedure Act, including the administrative adjudication “bill of rights”, on any statutorily or constitutionally required evidentiary hearing of a quasi-public entity administering a state function.

ADMINISTRATIVE ADJUDICATION BY QUASI-PUBLIC ENTITIES

1 Comprehensive legislation enacted in 1995 requires state agency administrative
2 adjudication to adhere to fundamental due process and public policy
3 requirements.¹ Among the requirements the Administrative Procedure Act
4 imposes on state agency administrative adjudication are:²

- 5 • The agency must give notice and an opportunity to be heard, including the
6 right to present and rebut evidence.
- 7 • The agency must make available a copy of its hearing procedure.
- 8 • The hearing must be open to public observation.
- 9 • The presiding officer must be neutral, the adjudicative function being
10 separated from the investigative, prosecutorial, and advocacy functions
11 within the agency.
- 12 • The presiding officer must be free of bias, prejudice, and interest.
- 13 • The decision must be in writing, be based on the record, and include a
14 statement of the factual and legal basis of the decision. Credibility
15 determinations made by the presiding officer are entitled to great weight on
16 review. A penalty may not be based on an agency “guideline” unless the
17 agency has adopted the guideline as a regulation.
- 18 • The decision may not be relied on as precedent unless the agency designates
19 and indexes it as precedent.
- 20 • Ex parte communications to the presiding officer are prohibited.
- 21 • The agency must make available language assistance to the extent required
22 by existing law.

23 The new legislation also encourages settlements,³ alternative dispute resolution,⁴
24 and informal proceedings.⁵

25 The coverage of the new provisions is limited to adjudication by state agencies
26 made pursuant to constitutionally or statutorily required hearings.⁶ However, in

1. 1995 Cal. Stat. ch. 938, § 21. The legislation implements a recommendation of the California Law Revision Commission, and is operative July 1, 1997. See *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm’n Reports 55 (1995); *Annual Report for 1995*, 25 Cal. L. Revision Comm’n Reports 615, 711 (Appendix 7) (1995).

2. Gov’t Code § 11425.10 (administrative adjudication bill of rights).

3. Gov’t Code § 11415.60 (settlement).

4. Gov’t Code §§ 11420.10-11420.30 (alternative dispute resolution).

5. Gov’t Code §§ 11445.10-11445.60 (informal hearing).

6. Gov’t Code § 11410.10. A number of state agency hearings are exempted from the coverage of the new provisions. Separation of powers principles exempt the Legislature, the Governor and Governor’s Office, and the courts and judicial branch. The California Constitution also exempts the University of

1 many cases a statute delegates or authorizes delegation of a state function to a
2 private entity, including delegation of adjudicative authority. Examples of such
3 delegations to “quasi-public” entities include:

4 California Insurance Guarantee Association (Ins. Code §1063)
5 Escrow Agents’ Fidelity Corporation (Fin. Code § 17311)
6 State Compensation Insurance Fund (Ins. Code § 11773)
7 Various agricultural produce commissions (Food & Ag. Code § 67111 *ff.*)⁷

8 Adjudicative proceedings conducted by quasi-public entities of this type are not
9 subject to the administrative adjudication requirements of the Administrative
10 Procedure Act.⁸

11 Adjudicative proceedings of private entities, when affecting the public interest,
12 are subject to common law “fair procedure” requirements.⁹ For example, private
13 hospitals in the admission or exclusion of physicians to staff privileges, and
14 professional societies in the exclusion and expulsion of members, must provide
15 fair procedures, particularly notice and an opportunity to be heard. These
16 principles apply whether or not the activity amounts to “state action” for purposes
17 of equal protection and due process of law.¹⁰

California. See discussion in *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm’n Reports 55, 87-91 (1995).

Specified hearings of the following executive branch agencies are also exempted by statute:

State Bar of California
Alcoholic Beverage Control Appeals Board
Commission on State Mandates
Military Department
Department of Corrections (including Board of Prison Terms, Youth Authority, Youthful
Offenders Parol Board, Narcotic Evaluation Authority)
Public Utilities Commission
State Board of Equalization
Public Employment Relations Board
Agricultural Labor Relations Board
Franchise Tax Board

7. A typical example is the Winegrowers of California Commission, created by the Dills-Bronzan Winegrowers Joint Commission Act of 1986. The statute proclaims that “There is in state government, the Winegrowers of California Commission.” Food & Agric. Code § 74061. However, the statute then proceeds to distance the Commission from the state, providing that it is a corporate body and the state is not liable for its acts. Food & Agric. Code §§ 74074, 74078. It is funded by producer assessments. Food & Agric. Code § 74104. The Commission must provide an informal hearing for individuals aggrieved by its acts; appeals from Commission decisions are made to the Director of Food and Agriculture; the Director’s determinations are subject to judicial review. Food & Agric. Code § 74172.

8. See Gov’t Code § 11410.20 (application to state); *cf.* *Henry George School of Social Science v. San Diego Unified School Dist.*, 183 Cal. App. 2d 82, 85-86, 6 Cal. Rptr. 661 (1960) (“While it is true that in a limited sense school districts are state agencies, we are of the view that the chapters last above referred to were intended to apply only to those state agencies exercising under authority of statute certain statewide functions, or who exercised some statewide function locally under some statute specifically localizing that function.”)

9. For discussion of the fair procedure principle, see California Administrative Hearing Practice §§ 1.35-1.36 (Cal. Cont. Ed Bar. 1984; Supp. 1995).

10. See 1 G. Ogden, California Public Agency Practice § 2.03 (1994).

1 It is likely that adjudicative proceedings of quasi-public entities are subject to
2 fair procedure requirements to the same or a greater extent than proceedings of
3 purely private entities, but the law is not clear on this matter. It should be made
4 clear. The Law Revision Commission recommends that a quasi-public entity
5 administering a state function be subject to the administrative adjudication
6 provisions of the Administrative Procedure Act in its conduct of a constitutionally
7 or statutorily required adjudicative hearing. This would also clarify the precise
8 standards that are applicable, in place of nebulous “fair procedure” requirements.

9 It is appropriate that an adjudicative proceeding of a quasi-public entity
10 performing a state function be treated the same as an adjudicative proceeding of a
11 state agency. A person’s right to fundamental due process and public policy
12 protections should not depend on whether the adjudication is done by a state
13 agency or by a quasi-public entity to which the agency’s authority is delegated.
14 Application of the state procedural protections to quasi-public entity adjudication
15 will also promote uniformity of administrative procedure, to the ultimate benefit of
16 the regulated public.

17 A critical step in applying the administrative adjudication provisions of the
18 Administrative Procedure Act to quasi-public entities is specification of precisely
19 which entities are covered. Because many private entities perform functions that
20 are arguably “public” in nature, a private entity needs to know with some
21 assurance whether any of its proceedings is subject to the administrative
22 adjudication provisions of the Administrative Procedure Act. For this reason, the
23 Law Revision Commission recommends a narrowly drawn statute — a private
24 entity’s adjudicative proceeding will be subject to the administrative adjudication
25 provisions of the Administrative Procedure Act if each of the following
26 requirements is satisfied:

27 (1) The entity is a creature of statute.

28 (2) The entity is administering a state function.

29 (3) The entity is engaged in making an adjudicative decision that
30 determines the legal rights or other legal interests of a particular individual
31 or entity.

32 (4) The entity is constitutionally or statutorily required to formulate its
33 decision pursuant to an evidentiary hearing for determination of facts.

34 Under this test, adjudicative proceedings of the quasi-public entities identified
35 above,¹¹ for example, would be subject to the administrative adjudication
36 provisions of the Administrative Procedure Act. But proceedings of a “community
37 action agency” would not, since those quasi-public entities do not conduct
38 evidentiary hearings.¹²

¹¹. See text preceding note 7, *supra*.

¹². See Gov’t Code §§ 12750-12763.

PROPOSED LEGISLATION

An act to add Section 11410.60 to the Government Code, relating to administrative adjudication by quasi-public entities.

Gov't Code § 11410.60 (added). Application to quasi-public entities

SECTION 1. Section 11410.60 is added to the Government Code, to read:

11410.60. (a) This chapter applies to a decision by a private entity if all of the following conditions are satisfied:

(1) The entity is created by or pursuant to statute for the purpose of administration of a state function.

(2) Under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the decision.

(b) For the purpose of application of this chapter to a decision by a private entity, unless the provision or context requires otherwise:

(1) "Agency" means the private entity.

(2) "Regulation" means a rule promulgated by the private entity.

(3) Article 8 (commencing with Section 11435.05), requiring language assistance in an adjudicative proceeding, applies to the private entity to the same extent as to a state agency governed by Section 11018.

Comment. Section 11410.60 applies this chapter to decisions of quasi-public entities. It is limited to decisions for which an evidentiary hearing by the quasi-public entity is required by law. *Cf.* Section 11405.50 ("decision" is action of specific application that determines legal right or other legal interest of particular person).

Examples of quasi-public entities whose decisions may be subject to this chapter include:

California Insurance Guarantee Association (Ins. Code §1063)

Escrow Agents' Fidelity Corporation (Fin. Code § 17311)

State Compensation Insurance Fund (Ins. Code § 11773)

Various agricultural produce commissions (e.g., Food & Agric. Code § 67111 *ff.*)