STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Administrative Adjudication by State Agencies

The expense of printing this report is offset by receipts, at no net cost to the State.

January 1995

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

CALIFORNIA LAW REVISION COMMISSION

NOTE

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This report will appear in Volume 25 of the Commission's *Reports, Recommendations, and Studies*.

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NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

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STATE OF CALIFORNIA PETE WILSON, Governor

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January 26, 1995

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

This recommendation proposes revision of the law governing administrative adjudication by state agencies. It would be the first comprehensive revision of state agency administrative procedure in the fifty years since enactment of the Administrative Procedure Act.

The proposed revision has three major aspects:

(1) It requires all state adjudicative proceedings to adhere to a fundamental "administrative adjudication bill of rights." These rights include such basic matters of due process and fairness as an accessible procedure, a public hearing, a neutral presiding officer, a prohibition on ex parte communications, and a written decision based on the record.

(2) It adds flexibility and economy to existing agency procedures by authorizing such options as alternative dispute resolution, an informal hearing procedure, an emergency decision procedure, and a declaratory decision procedure.

(3) It modernizes the existing formal Administrative Procedure Act (applicable mainly in licensing hearings) by such devices as consolidation of proceedings, administrative resolution of discovery disputes, telephonic hearings and voting, electronic reporting, and simplified procedures for correction of errors.

The recommendation is the product of a study begun by the Law Revision Commission in 1990, and is the result of a number of different drafts and approaches explored by the Commission with the

input of hundreds of persons, agencies, and organizations, many of whom regularly attended Commission meetings and commented on proposals. The Commission appreciates their substantial participation, which is recognized in the Acknowledgments set out in this recommendation.

The Commission particularly appreciates the major contribution of its principal consultant on this study, Professor Michael Asimow of UCLA Law School. Professor Asimow prepared the four background studies from which this recommendation evolved, and provided the Commission with invaluable advice at public meetings where the matter was considered. The first three background studies are published as Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067 (1992). This article is reprinted in this report, along with the fourth study, Asimow, *The Adjudication Process*.

The Commission also wishes to thank the following persons who agreed to serve as consultants to give the Commission additional private sector perspective on many issues that arose throughout the course of this study:

Mark Levin, Los Angeles
Gene Livingston, Sacramento
James Mattesich, Sacramento
Preble Stolz, University of California, Berkeley, Law School
Robert Sullivan, Sacramento
Richard Turner, Sacramento

The Commission is also grateful for the regular and substantial contributions of Karl S. Engeman of the Office of Administrative Hearings and Herb Bolz of the Office of Administrative Law during the study.

This recommendation is submitted pursuant to authority of 1987 Cal. Stat. res. ch. 47, as continued in 1994 Cal. Stat. res. ch. 81.

Respectfully submitted,

Colin W. Wied
Chairperson

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The Law Revision Commission developed this recommendation with the input of hundreds of individuals, agencies, and organizations, many of whom regularly attended Commission meetings and commented on Commission drafts. The Commission appreciates their substantial involvement and contributions. The participation of a broad spectrum of experts and other persons interested in administrative adjudication aids the Commission in preparing a better recommendation. The Commission benefits greatly from the public service performed by these individuals, agencies, and organizations.

Inclusion of the name of an individual, agency, or organization should not be taken as an indication of the person's position or opinion on any part of the recommendation. The Commission regrets any errors or omissions that may have been made in compiling these acknowledgments.

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The Commission is indebted to its principal consultant on this project, Professor Michael Asimow of UCLA Law School. Professor Asimow prepared the background studies from which this recommendation evolved, and provided the Commission with invaluable advice at public meetings where the matter was considered. The Commission also named several other persons as consultants to give the Commission additional private sector perspective on many issues that arose in the course of this study.

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ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

SUMMARY OF RECOMMENDATION

Purpose of Revision

This recommendation proposes to supplement the hearing provisions of both the 1945 California Administrative Procedure Act (APA) and other state agency hearing procedures. The proposed law would govern all state proceedings where an evidentiary hearing for determination of facts is statutorily or constitutionally required. The purpose of the revision is to:

- Promote greater uniformity in state agency hearing procedures.
- Make state agency hearing procedures more accessible to the public.
- Improve fairness of state agency hearing procedures.
- Modernize and add greater flexibility to state agency hearing procedures.

The recommendation represents a balancing of agency costs and citizen rights.

Effect on Existing Procedures

The proposed law would leave in place existing basic hearing procedures. It would superimpose on all state agency hearing procedures an "administrative adjudication bill of rights" providing fundamental due process and public policy protections. It would supplement existing procedures with optional provisions to add flexibility to state agency hearing procedures. And it would modernize the 1945 California APA.

Administrative Adjudication Bill of Rights

All state agency adjudicative proceedings would be subject to fundamental due process and public policy requirements:

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

Optional Provisions that Add Flexibility

The proposed law would expand the hearing procedure options available to a state agency. The agency could use the agency's regular hearing procedure, an informal hearing procedure, an emergency decision procedure, or a declaratory decision procedure. Other useful supplemental provisions include telephonic hearings, subpoena authority, provisions

for enforcement of orders and imposition of sanctions, intervention procedures, and alternative dispute resolution.

Informal Hearing Procedure. The informal hearing procedure satisfies due process and public policy requirements in a manner that is simpler and more expeditious than formal hearing procedures. In appropriate circumstances, it provides an informal forum in the nature of a conference, in which a party has an opportunity to be heard by the presiding officer. It can accommodate a hearing where by regulation or statute a member of the public may participate without intervening as a party. In an informal hearing, the presiding officer regulates the course of the proceeding. The presiding officer must permit the parties, and may permit others, to offer written or oral comments on the issues, and may limit pleadings, intervention, discovery, prehearing conferences, witnesses, testimony, evidence, rebuttal, and argument.

Emergency Decision Procedure. The proposed law makes available to all agencies authority to act immediately in emergency situations. The decision is limited to temporary, interim relief in a situation involving an immediate danger to the public health, safety, or welfare that requires immediate agency action. The emergency decision must be followed up by a regular adjudicative proceeding.

Declaratory Decision Procedure. The proposed law makes clear that all agencies have discretionary authority to issue advice by means of declaratory decisions. Regular hearing procedures do not apply in this situation, since the declaratory decision is based on assumed facts.

Alternative Dispute Resolution. The proposed law encourages use of alternative dispute resolution techniques such as mediation and arbitration, in addition to settlement, by expressly authorizing these techniques and protecting communications.

Modernization of 1945 California APA

Important modernizations of the 1945 California APA include provisions for consolidation and severance, resolution of discovery disputes by the presiding officer rather than in superior court, telephonic conduct of prehearing conferences, electronic reporting of proceedings, telephonic voting by agency members, and simple procedures for correction of errors and modification of decisions.

Costs

The proposed law is designed to limit transitional costs by minimizing and simplifying adoption of implementing regulations. The proposed law may generate substantial long-term savings through provision of less formal hearing options, alternative dispute resolution, simplified hearing processes, modernization of procedures (such as telephonic hearings and conferences and electronic reporting), summary review techniques, and other changes to expedite the administrative adjudication process and make it more efficient. The proposed law may also result in a public perception of fairness and greater satisfaction with the administrative hearing process, with a consequent decrease in the need for administrative and judicial review of state agency decisions.

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ADMINISTRATIVE ADJUDICATION BY STATE AGENCIES

BACKGROUND

Introduction

The Legislature in 1987 directed the California Law Revision Commission to study whether there should be changes to administrative law.[1] The Commission divided the study into four phases, in the following order of priority: (1) administrative adjudication, (2) judicial review, (3) rulemaking, (4) nonjudicial oversight.

This report presents the Commission's recommendations concerning administrative adjudication by state agencies.

History of Project

The Commission initiated this project by retaining Professor Michael Asimow of UCLA Law School to serve as a consultant and prepare background studies.[2] The Commission also collected and made extensive use of materials from other jurisdictions, as well as the Model State Administrative Procedure Act (1981) promulgated by the National Conference of

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1. 1987 Cal. Stat. res. ch. 47; see also *Annual Report*, 19 Cal. L. Revision Comm'n Reports 501, 517 (1988).

2. The first three studies prepared for the Commission have been revised and published as Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067 (1992), *reprinted infra*, 25 Cal. L. Revision Comm'n Reports 321 (1995) [hereinafter Asimow I].

The fourth study prepared for the Commission is Asimow, *The Adjudication Process*, *printed infra*, 25 Cal. L. Revision Comm'n Reports 447 (1995) [hereinafter Asimow II].

Commissioners on Uniform State Laws,[3] and the Federal Administrative Procedure Act.[4]

The Commission's consideration of policy issues and draft statutory language occurred at a series of public meetings between 1990 and 1994. The meetings were held primarily in Sacramento as a convenience to the many state agencies headquartered there and were well-attended by agency representatives. In order to help achieve balance in its deliberations, the Commission named several non-agency experts as volunteer consultants to provide the Commission the benefit of their knowledge and experience.[5] During this process colloquia on the proposed law were held at two State Bar Annual Meetings.

In 1993 the Commission released for comment a tentative recommendation to provide a single administrative procedure for all state agencies, with an opportunity for an agency to adopt regulations to tailor the procedure to suit its needs. Comment on the draft convinced the Commission that the single procedure approach has substantial problems and that a variety of procedures is necessary to accommodate the wide range of state agency hearings. The Commission restructured the draft during 1994 to provide a variety of procedures, subject to fundamental due process and public policy requirements. Further comment on the restructured draft resulted in the present recommendation.

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3. 15 U.L.A. 1 (1990). The Model Act is referred to in this report as "1981 Model State APA."

4. The federal statute was originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237. See 5 U.S.C. §§ 551-583, 701-706, 1305, 3105, 3344, 5372, 7521 (1988 & Supp. V 1993), and related sections. The federal statute is referred to in this report as "Federal APA."

5. The consultants are Gene Livingston, James Mattesich, Robert Sullivan, and Richard Turner, all of Sacramento; Mark Levin of Los Angeles; and Professor Preble Stolz of Berkeley.

EXISTING CALIFORNIA LAW GOVERNING ADMINISTRATIVE ADJUDICATION[6]

California's Administrative Procedure Act[7] was enacted in 1945[8] in response to a study and recommendations by the Judicial Council.[9] The Judicial Council studied only occupational licensing agencies and the statute originally covered only the adjudications conducted by those agencies.[10] The decision to limit coverage to licensing agencies was not based on a principled decision that an Administrative Procedure Act was inappropriate for other agencies of government; rather, the Judicial Council thought that improvements in the procedures of other agencies were needed, but it was not prepared to make recommendations with respect to them.[11]

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6. The description of existing California law governing administrative adjudication is drawn from a report prepared for the Commission by its consultant. See Asimow I, *supra note 2*.

7. The Administrative Procedure Act appears at Government Code Sections 11340-11530. Adjudication is governed by Sections 11500-11530. Provisions relating to the Office of Administrative Hearings are at Sections 11370-11373.3. The California statute is referred to in this report as "1945 California APA."

8. 1945 Cal. Stat. ch. 867. Provisions on rulemaking were added in 1947 and substantially revised in 1979. 1947 Cal. Stat. ch. 1425; 1979 Cal. Stat. ch. 567. The adjudication provisions have had only minor revisions since 1945.

9. Judicial Council of California, Tenth Biennial Report (1944). See Clarkson, *The History of the California Administrative Procedure Act,* 15 Hastings L.J. 237 (1964).

10. The Judicial Council recommended a scheme of judicial review applicable to all administrative adjudications, not just those of licensing agencies. See Judicial Council of California, Tenth Biennial Report 10, 26-28 (1944). This statute was the precursor of present Code of Civil Procedure Section 1094.5.

11. Judicial Council of California, Tenth Biennial Report 10, 28-29 (1944). The Judicial Council expressed hope that its work would be adapted to nonlicensing agencies such as tax, workers' compensation, public utilities, and benefit adjudications. These agencies were not covered because of practical limitations on the resources of the Judicial Council. See Kleps, *California's Approach to the Improvement of Administrative Procedure,* 32 Cal. L. Rev. 416 (1944).

The Judicial Council's report and the resulting legislation were a pioneering effort. The creation of a central panel of hearing officers, for example, was far ahead of its time. There were no comparable administrative procedure acts at that time and the idea of an administrative procedure code applicable to agencies in general was untried and controversial. The Judicial Council and the Legislature moved cautiously, but the Administrative Procedure Act was well-conceived and has served well in the 50 years since it was enacted.

During that time, the provisions of the Administrative Procedure Act relating to adjudication have been little changed.[12] Yet the regulatory and social welfare responsibilities of state government have broadened in ways unforeseen in 1945 and the scope of administrative adjudication is vastly expanded now.

The 1945 California APA prescribes a single and unvarying mode of formal, trial-type adjudicative procedure conducted by an independent hearing officer (administrative law judge) assigned by the Office of Administrative Hearings.[13] The administrative law judge writes a proposed decision that the agency head can adopt, modify, or reject.[14] There is little or no flexibility in the system to accommodate the many differ-

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12. The Administrative Procedure Act now covers a few agencies engaged in prosecutory functions that are not concerned with occupational licensing, such as the Fair Political Practices Commission. Also, the act has been amended to include provisions for interpreters and to ban ex parte contacts with administrative law judges. See Gov't Code §§ 11500(g), 11501.5, 11513(d)-(n), 11513.5.

The provisions on rulemaking were completely rewritten in 1979 and cover almost all California agencies.

13. The procedures relating to disputes about granting licenses differ slightly from those relating to revoking or suspending licenses. *Compare* Gov't Code § 11503 (revocation or suspension) *with* § 11504 (grant, issuance, or renewal).

14. Gov't Code § 11517(b)-(c). Thus the final decision rests with the agency heads who are also responsible for rulemaking and law enforcement. With very few exceptions, adjudication is not separated from other regulatory functions in agencies governed by the Administrative Procedure Act. The only known exception is the Alcoholic Beverage Control Appeals Board.

ing types of determinations an agency now may be required to make.

The Administrative Procedure Act covers only named agencies, and it covers only those proceedings specified by the agency's organic statute.[15] Many important California agencies are wholly or largely uncovered by the adjudicative provisions of the act: the Public Utilities Commission, the Workers' Compensation Appeals Board, the Coastal Commission, the State Board of Equalization, the Agricultural Labor Relations Board, the State Personnel Board, the Unemployment Insurance Appeals Board, and numerous others. Some agencies are partially covered by the act, but major areas of their adjudication remain uncovered.[16]

Adjudication in agencies not covered by the Administrative Procedure Act is subject to differing procedural rules. In each case, there are statutes, regulations, and unwritten practices that prescribe adjudicative procedures. The procedures vary greatly from formal adversarial proceedings to informal meetings. The only unifying theme is that adjudication in these agencies is not conducted by an administrative law judge assigned by the Office of Administrative Hearings. Instead, the persons who make the initial decision in these agencies are employed by the agencies themselves.[17]

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15. Gov't Code § 11501. However, the Administrative Procedure Act is made specifically applicable to most license denials and licensee reprovals. Bus. & Prof. Code §§ 485, 495. A partial list of agencies covered by the Administrative Procedure Act, broken down into covered and uncovered functions, is found in California Administrative Hearing Practice (Cal. Cont. Ed. Bar, Supp. 1994).

16. For example, the Administrative Procedure Act covers only certain adjudicative functions of the Department of Corporations, Department of Insurance, Department of Motor Vehicles, and the Horse Racing Board.

17. In some agencies (such as the Coastal Commission), there is no initial decision; the agency heads hear the evidence and argument themselves and their initial decision is also the final decision.

PROPOSED REVISION OF ADMINISTRATIVE ADJUDICATION

Basic Hearing Procedures Unchanged

Although the Law Revision Commission has given careful consideration to the concept of unifying the various administrative adjudication statutes, the Commission cannot recommend a uniform statute at this time. State agencies have suffered substantial reductions in staffing and other resources in recent years. Many agencies are under increasing pressure to perform their primary missions and cannot afford to divert their resources to review new procedures, adopt implementing regulations, retrain staff, educate parties that appear before them, and deal with other consequences of a comprehensive revision of their hearing procedures. Although long-term benefits to the state and the public would result from unification of procedures, the Commission does not recommend it at this time because of the short-term costs involved.

Instead, the Commission recommends enactment of a more narrowly focused revision of the California administrative adjudication statutes. The revision would leave in place the existing hearing procedures, which are familiar to the agencies and persons experienced in appearing before them, but would supplement the existing procedures with provisions that take into account the many developments in administrative procedure that have occurred over the past 50 years. This period has seen an explosive growth of our knowledge and experience in administrative adjudication, including development of well-articulated statutes in other states and at the federal level, as well as promulgation of several generations of model State Administrative Procedure Acts. The Commission's proposals are designed to achieve important improvements in state administrative procedure without imposing substantial costs on state agencies.

Administrative Adjudication Bill of Rights[18]

The Commission recommends that existing state agency hearing procedures be subject to a set of fundamental public policy and due process requirements. These requirements, which constitute a kind of "administrative bill of rights," are:

- Notice and an opportunity to be heard, including the right to present and rebut evidence.
- An accessible hearing procedure.
- A presiding officer free of bias, prejudice, and interest.
- An independent presiding officer, achieved by separating adjudicative from investigative, prosecutorial, and advocacy functions within an agency.
- Prohibition of ex parte communications.
- Open hearings.
- Language assistance.
- A written decision based on the record, including a statement of its factual and legal basis. Credibility determinations made by the presiding officer are given great weight on review. A penalty may be based on an agency "guideline" only if adopted as a regulation.
- Designation and indexing of precedent decisions.

The hearing procedures of most agencies already satisfy some or all of these requirements. The proposed law would extend the requirements uniformly to all state agency administrative adjudications.

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18. For a more detailed discussion, see "Administrative Adjudication Bill of Rights" *infra* p. 99 *et seq.*

Flexibility in Hearing Procedures[19]

The 1945 California APA and many other agency hearing procedures provide a single, relatively formal type of adjudicative proceeding. This is a significant limitation. For many types of agency decisions, a less formal procedure or an expedited process is needed. The proposed law sets forth a range of procedures and allows an agency to select the type of procedure that is most appropriate for a particular decision. These options include:

• *The Agency's Existing Hearing Procedure.* The proposed law does not affect an agency's existing hearing procedure, which remains the default procedure applicable to the hearing unless one of the other options is available and selected.

• *The Informal Hearing Procedure.* The informal hearing procedure is intended for small cases and is useful in other situations such as for taking public testimony. It is more in the nature of a conference than a trial, with the presiding officer authorized to limit pleadings, intervention, discovery, prehearing conferences, witnesses, testimony, evidence, rebuttal, and argument.

• *Emergency Decision Procedure.* An agency may need to act immediately in an emergency situation, and the agency's existing hearing procedure may be inadequate for this purpose. A few statutes provide authority for an agency to take immediate action for certain types of decisions, but there is no general provision to this effect. The proposed law provides an emergency decision framework for any agency that adopts a regulation specifying the parameters of the procedure.

• *Declaratory Decision Procedure.* It may be important that an agency issue advice on the application of statutes or regulations it administers. The proposed law provides a declara-

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19. For a more detailed discussion, see "Flexibility in Hearing Procedures" *infra* p. 108 *et seq.*

tory decision structure in which agencies may do this. Other hearing procedures do not apply in this situation, since the declaratory decision is based on stipulated facts.

The proposed law also encourages alternative dispute resolution techniques and gives agencies clear authority to settle cases without a hearing. The proposed law also provides other procedural enhancements for all state agency hearings.

Modernization of 1945 California APA[20]

In addition to the administrative adjudication bill of rights and the added flexibility in hearing procedures that would be applicable to all agencies, the proposed law includes modernization of the 1945 California APA. For example, the proposed law would add provisions for consolidation and severance, resolution of discovery disputes, settlement conferences, correction of mistakes in decisions, and electronic voting by agency members.

Transitional Provisions

The proposed law defers the operative date for a year and a half. This will enable agencies to promulgate any regulations necessary for smooth operation under the proposed law. The proposed law also allows for immediate adoption of interim regulations by an agency, to ease the transition process. The proposed law and implementing regulations would govern only cases initiated after the operative date. Pending cases would continue to be governed by existing law.

Cost Considerations

The Commission's recommendations seek to achieve the basic goals of promoting greater uniformity in state agency hearing procedures, making state agency hearing procedures more accessible to the public, improving the fairness of state

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20. For a more detailed discussion, see "Modernization of 1945 California APA" *infra* p. 117 *et seq.*

agency hearing procedures, and modernizing and adding greater flexibility to state agency hearing procedures.

However, a major factor in the formulation of recommendations to achieve these goals is a concern to avoid unnecessary imposition of costs on an agency. In the state's current fiscal situation, the resources of most agencies to perform their statutory tasks are reduced. The Commission has carefully considered procedural changes that could have the effect of increasing the burden on agencies, and has built in mitigating factors in each case.

Of particular concern to agencies has been (1) the cost of reviewing existing procedures and regulations and adopting new ones, and (2) the cost of providing separation of functions in agency hearings. Examples of techniques the proposed law uses to address these concerns are:

(1) Existing basic procedural rules of agencies remain intact. The process for adopting regulations is simplified. Ample time is allowed for the transitional process.[21]

(2) Existing agency practices regarding lay hearing officers are preserved. Neutral staff assistance to the presiding officer is recognized. The separation of functions requirement is waived where circumstances compel it.[22]

It may be argued that the proposed changes in procedural law could result in temporary implementation costs. The Commission believes the proposed law will generate immediate offsetting savings that significantly outweigh any short-term costs. Examples of cost saving measures include:

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21. See, e.g., discussion of "Transitional Provisions" *supra*.

22. The overwhelming volume of drivers license cases, for example, requires an exemption from separation of functions. Other exemptions are provided. See discussion of "Neutrality of Presiding Officer" *infra*.

- Providing an informal hearing process as an alternative to the lengthy and costly formal hearing process required by existing law.
- Providing agency emergency decision procedures as an alternative to court proceedings currently required.
- Facilitating inexpensive alternative dispute resolution techniques.
- Resolving discovery disputes under the 1945 California APA administratively rather than judicially.
- Making telephonic hearings and conferences, electronic recording of proceedings, and other cost-saving innovations available to agencies under the 1945 California APA.
- Increasing the presiding officer's authority under the 1945 California APA to efficiently manage the conduct of proceedings, for example by limiting cumulative evidence or imposing sanctions.
- Expanding the options for summary administrative review under the 1945 California APA.

The Commission also foresees long-term savings for the administrative dispute resolution process. If the public believes it has received a fair administrative hearing, it is likely to abide by the decision in the case rather than challenge it by administrative or judicial review. The proposed law will help achieve fundamental fairness in the administrative adjudication process and will foster greater public confidence in the system, to the ultimate benefit of both the public and state government.

The state will benefit substantially over the years from a revision of the Administrative Procedure Act that modernizes and increases the uniformity of procedures, and that provides a sound structure for future development.

APPLICATION OF STATUTE

Application to Hearings Required by Constitution or Statute

Governmental agencies make many decisions that affect the rights and interests of citizens. However, most of these decisions are informal in character, and it would be inappropriate, as well as impracticable, to burden those decisions with the hearing formalities of administrative adjudication. It is only where a decision affects a right or interest entitled to due process protection under the state or federal constitution, or where the Legislature by statute has expressly extended such protection, that the decision should be made through the statutory hearing procedures.

The proposed law would provide procedures to govern all state agency decisions for which an evidentiary hearing for determination of facts is required by the state or federal constitution or by statute. For this purpose, a "decision" is an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person. Thus the proposed law does not apply to rulemaking since rules are of general rather than particular applicability. Likewise, because the proposed law governs only statutorily or constitutionally required hearings, it does not cover a large amount of informal adjudication in which agencies choose to provide hearings even though hearings are not legally required.

Definition of "State Agency"

The proposed law applies to state agency, as opposed to local agency, administrative adjudication.[23] As a rule, state agencies are easily distinguished from local agencies. In a few cases, however, there are hybrid types of agencies, with the

23. This recommendation is limited to state agencies. Extension of the hearing provisions of the Administrative Procedure Act to local agencies is beyond the scope of the present study.

result that it is unclear whether their administrative adjudications are to be governed by the proposed law. The proposed law deals with these situations so as to effect the broadest possible coverage:

(1) If the agency is created or appointed by joint or concerted action of the state and one or more local agencies, the proposed law applies.[24]
(2) If the public entity is a local agency but existing statutes make the current Administrative Procedure Act applicable to it, the local agency is governed by the proposed law.[25]

The proposed law also authorizes local agencies voluntarily to adopt the provisions of the proposed law. This may be useful for a local agency that needs administrative adjudication rules but does not have the resources or desire to formulate its own procedural code. Adoption of the proposed law will ensure that the local agency has workable procedures that satisfy due process of law.

Separation of Powers

Separation of powers doctrine requires that the heads of the three branches of state government be autonomous and independent in their internal affairs.[26]

The Legislature. The Legislature is constitutionally and statutorily vested with a number of adjudicative functions, such as judging the qualifications and elections of its mem-

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24. This provision is drawn from 1981 Model Act § 1-102(1).

25. An example is school districts, which are governed by the existing Administrative Procedure Act under Government Code Section 11501 with respect to certificated employees. See also Educ. Code §§ 44944, 44948.5, 87679.

26. The scope of the exemption may depend on whether a rulemaking or adjudicative function of the government head is involved. The Law Revision Commission has not yet reviewed the rulemaking function.

bers and expulsion of members,[27] determination of ethics violations of members,[28] impeachment of state officers and judges,[29] and confirmation of gubernatorial appointments.[30] These judgments are politically sensitive in nature, and the procedure for arriving at them is not susceptible to formalization but must be left to the political judgment of the Legislature based on its determination of the propriety of the procedure for each of these decisions.

Excluding the Legislature from coverage of the proposed law would not frustrate the objective of a body of administrative procedural law applicable to all state agencies. The adjudicative decisions made by the Legislature do not affect the relations between the average citizen and the state bureaucracy.

The Judicial Branch. In addition to the court system,[31] the judicial branch of state government includes the Judicial Council,[32] the Commission on Judicial Appointments,[33] the Commission on Judicial Performance,[34] and the Judicial Criminal Justice Planning Committee.[35]

With respect to adjudicative functions of the agencies within the judicial branch:

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27. Cal. Const. Art. IV, § 5.

28. Gov't Code §§ 8940-8956 (Joint Legislative Ethics Committee).

29. Cal. Const. Art. IV, § 18.

30. See, e.g., Cal. Const. Art. IV, § 20 (approval by Senate of gubernatorial Fish and Game Commission appointees; removal by concurrent resolution adopted by each house).

31. The court system in California consists of the Supreme Court, courts of appeal, superior courts, and municipal courts. Cal. Const. Art. VI, § l.

32. Cal. Const. Art. VI, § 6.

33. Cal. Const. Art. VI, § 7.

34. Cal. Const. Art. VI, § 8.

35. Penal Code § 13830.

(1) The Judicial Council does not conduct constitutionally or statutorily required adjudicative hearings.

(2) The Commission on Judicial Appointments conducts hearings to make judicial appointment confirmation decisions that are vested in the discretion of the commission. The administrative adjudication provisions of the proposed law would be inappropriately applied to them.

(3) The Commission on Judicial Performance conducts judicial misconduct and involuntary disability retirement hearings by procedures whose formulation is constitutionally vested in the commission.[36]

(4) The Judicial Criminal Justice Planning Committee does not conduct constitutionally or statutorily required adjudicative hearings.

Since the judicial branch agencies either do not conduct constitutionally or statutorily required administrative hearings, or the hearings they do conduct are or should be constitutionally exempt, the proposed law has been drafted to exempt the entire judicial branch (not just the courts) from its application.

The Governor's Office. Although the Administrative Procedure Act is designed primarily for executive branch agencies, the head of the executive branch — the Governor and the Governor's executive office — must be able to make the kinds of political decisions necessary to run the executive branch effectively, free of Administrative Procedure Act formalities, in a way that appears appropriate to the Governor. The proposed law maintains the independence of the Gover-

36. Cal. Const. Art. VI, § 18(i).

nor and Governor's office by exempting it from application of the act.[37]

University of California

Article IX, Section 9 of the California Constitution makes the University of California independent and free of legislative control.[38] Although the Commission's fundamental recommendation is that the proposed administrative procedures should apply to all agencies of the state, it does not appear that the University may be subjected to the proposed law under this provision.[39]

Basic due process constraints apply to rulemaking and adjudicative proceedings by the University of California as they do to all other state agencies. The Commission's inquiry reveals that the University has developed well-articulated notice and hearing procedures. Given the constitutional independence of the University, the Commission recommends that the University of California not be subject to the proposed law.

Nonetheless, the proposed law is reasonable, flexible, and satisfies basic due process constraints. The Commission

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37. There are a few exceptions to this general rule. See, e.g., Bus. & Prof. Code § 106.5 ("The proceedings for removal [of specified board members] shall be conducted in accordance with the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the Governor shall have all the powers granted therein.").

38. Subdivision (a) of the section provides in relevant part:

> The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services.

39. *Cf.* Scharf v. Regents of the Univ. of Cal., 234 Cal. App. 3d 1393 (1991).

believes the proposed law is suitable for the University of California's adjudicative proceedings. The proposed law makes clear that the University may voluntarily adopt the procedures. Adoption of the procedures by the University would promote the important objective of a uniform body of law applicable throughout the state. It would also make the University's internal governance consistent with the procedures the University must follow in its external relations with the rest of state government.

Executive Branch Agencies

Although the Administrative Procedure Act is designed specifically for hearings by executive branch agencies, some hearings are so uncharacteristic and require such special treatment that exemption from the proposed law is appropriate. However, constitutional due process requirements would still apply to those hearings.

The Commission recommends exemptions from the proposed law for the following types of hearings:

Agricultural Labor Relations Board: election certification. The collective bargaining election certification provisions administered by the Agricultural Labor Relations Board are modeled after federal procedures and are unique and inconsistent with other procedures.[40]

Alcoholic Beverage Control Appeals Board: appeals from ABC decisions. The Alcoholic Beverage Control Appeals Board is a review tribunal for appeals from decisions of the Department of Alcoholic Beverage Control. The Constitution provides procedural rules for these appeals that cannot be altered by statute.[41]

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40. See, e.g., Lab. Code §§ 1156-1159.

41. Cal. Const. Art. XX, § 22.

Department of Corrections, Board of Prison Terms, Youth Authority, Youthful Offender Parole Board, and Narcotic Evaluation Authority: parole hearings. Fundamental principles of the proposed law, such as open hearings, are irrelevant in parole hearings. In addition, the interplay of due process principles and the likelihood that any fundamental change in procedures will generate extensive litigation in this area make application of the proposed law inadvisable.

Military Department: hearings under Military and Veterans Code. California Military Department hearings under the Military and Veterans Code and pursuant to federal regulation are a hybrid of federal and special state provisions that are unique and involve primarily matters of military classification and discipline. The only workable approach is to exempt these hearings completely.

Public Employment Relations Board: election certification. The collective bargaining election certification provisions administered by the Public Employment Relations Board are modeled after federal procedures and are unique and inconsistent with other procedures.[42]

Public Utilities Commission: hearings under the Public Utilities Act. The Public Utilities Commission is a constitutional agency that is authorized to establish its own procedures, subject to statute and due process.[43] In addition to special constitutional provisions, there is an extensive body of special statutory rules governing hearings under the Public Utilities Act. As a practical matter, application of the proposed law would have little effect other than to add complexity to the law.

Commission on State Mandates: resolution of disputes over state mandated local programs. The Commission on State

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42. See, e.g., Gov't Code §§ 3520-3595.

43. Cal. Const. Art. XII, § 2.

Mandates hears and decides applications from local government for reimbursement from the State for state-mandated programs that impose costs on local government.[44] This is an intergovernmental relations matter that has little in common with ordinary administrative hearings and does not affect the public.

All other statutorily or constitutionally required hearings of executive branch agencies should generally remain subject to the proposed law. However, there are special statutes applicable to particular decisions of agencies and these special provisions should ordinarily be preserved in conforming changes as reflective of a legislative policy determination.

CENTRAL PANEL OF ADMINISTRATIVE LAW JUDGES

Background

Under existing California law, many types of adjudicative hearings of many state agencies are conducted by administrative law judges employed by the Office of Administrative Hearings in the Department of General Services.[45] However, most of the major state agencies employ their own administrative law judges and hearing officers.[46] The Law Revision Commission estimates that at least 95% of the state's administrative law judges and hearing officers are employed by the adjudicating agencies rather than the Office of Administrative

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44. See Gov't Code §§ 17525-17571.

45. Gov't Code §§ 11501, 11502. The Office of Administrative Hearings has identified 95 state and miscellaneous agencies for which it currently conducts some or all adjudicative hearings.

46. Each of the following major adjudicative agencies employs a greater number of administrative law judges or hearing officers than the total number employed by the Office of Administrative Hearings: Board of Prison Terms, Department of Industrial Relations, Department of Social Services, Public Utilities Commission, Unemployment Insurance Appeals Board, Workers' Compensation Appeals Board.

Hearings. Even this figure does not take into consideration hearings conducted by agency heads, agency attorneys, and agency lay experts.

The Commission has given lengthy and serious consideration to whether independent administrative law judges, employed by the Office of Administrative Hearings or by a successor central panel, should play a greater role in the California administrative adjudication process. The Commission concludes, for the reasons outlined below, that there should not be a general removal of state agency hearing personnel and functions to a central panel. Any transfer of an agency's hearing functions to the central panel should be specific to that agency and its functions and should be based on a showing of the need for the particular transfer.

History of Central Panel in California

California was the first, and for many years the only, jurisdiction in the United States to have a central panel of hearing officers to hear administrative adjudications for a number of different agencies. The California central panel was created in 1945 as a result of recommendations of the Judicial Council for adoption of the Administrative Procedure Act. The Judicial Council recommended creation of a central panel to maintain a staff of qualified hearing officers available to all state agencies.[47] The Council pointed out that the central panel would create a corps of qualified hearing officers who would become expert in a number of fields, yet who would not have a potential conflict of interest with the agency for which they conducted hearings and would impart an appearance of fairness to hearings. The Judicial Council also foresaw some organizational efficiency in this arrangement.

Although the Judicial Council considered the possibility that hearing officers could be drawn from the central panel for

47. Judicial Council of California, Tenth Biennial Report 10, 11 (1944).

all agency hearings, the report did not recommend this and the legislation that was enacted did not require use of the central panel by the larger administrative agencies. While recognizing that a complete separation of functions would be desirable in the larger agencies, "Any such requirement would have produced such a drastic alteration in the existing structure of some agencies, however, that it was thought unwise."[48]

The California system is generally considered a success. It has been copied elsewhere and central panels are now in place in Colorado, Florida, Iowa, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, Tennessee, Washington, and Wisconsin. Proposals for adoption of the central panel system have recently been or are currently being considered in four other states of which the Law Revision Commission is aware — Hawaii, New York, North Dakota, and Oregon. Legislation is also pending in Congress for a central federal panel.

No Expansion of California Central Panel Proposed

With this favorable experience, a logical conclusion might be that the central panel system should be expanded in California to cover all administrative hearings. The main argument in favor of broader use of the central panel is that central panel administrative law judges are independent of the agency and therefore are able to hold hearings that are fair both in appearance and in fact. Other suggested benefits of centralization are economy, efficiency, and improved working conditions for administrative law judges.

The Law Revision Commission's study of the operation of the central panel system in California and in the other jurisdictions that have adopted it, including review of California's major administrative agencies not presently covered by the

48. *Id.* at 14.

central panel, indicates that despite these potential benefits, there are a number of serious objections to expansion of the central panel beyond its present scope in California.[49]

First, there does not appear to be a compelling case for a general removal of hearing officers to the central panel. The Commission's investigation disclosed some concern among private practitioners about fairness, and the appearance of fairness, where the hearing is conducted by an employee of the agency prosecuting the matter. However, the concern was

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49. Among the concerns that various state agencies have expressed regarding expansion of the central panel, the following are common:

(1) The agency deals in a specialized area for which special knowledge and expertise is necessary, which could not be maintained in a central panel setting.

(2) The agency has a high volume operation that must deal with cases in a way far different from the typical central panel administrative law judge hearing.

(3) The cases dealt with by the agency take months or even years to complete, so they would not be appropriate for central panel treatment.

(4) The cases dealt with by the agency are time-sensitive, and the agency must be able to control the administrative law judges in order to control processing of the cases.

(5) The agency manages federal funds, which are subject to regulations requiring that the agency itself resolve the issues.

(6) The agency's board is charged with responsibility for deciding issues and the board itself hears the cases; the board does not wish to delegate this responsibility to a hearing officer, and removal of this function to the central panel is inappropriate.

(7) The agency's hearing procedure is constitutionally exempt from legislative control.

(8) The purpose of the agency is to be a neutral appeals board; removing the hearing officers to a central panel will serve no useful purpose.

(9) The agency's hearing officers are also part-time legal advisers; removal of the hearing officers will cause increased expense for legal advice.

(10) The agency has used central panel officers occasionally in the past, but the experience was not wholly satisfactory.

(11) The agency conducts informal hearings; it would be undesirable to formalize the hearings and a waste of money to have a highly-paid administrative law judge conduct the informal hearings.

directed to a few problem areas, insufficient to warrant a fundamental change in the existing hearing officer structure for all agencies and all proceedings.

Second, the various agencies are generally satisfied with their present in-house hearing personnel. They have tailored their systems to their particular needs and the hearing personnel appear to be functioning appropriately.

Third, most of the agencies that employ a significant number of in-house judges are themselves purely adjudicating agencies rather than agencies with a mixture of prosecutory and adjudicative functions. Therefore, there is much less need to make their judges independent. This is true, for example, of the State Personnel Board, the Unemployment Insurance Appeals Board, and the Workers' Compensation Appeals Board. The same principle applies to the Department of Social Services when it adjudicates welfare disputes between counties and welfare recipients.

Fourth, further centralization is unlikely to generate savings for the state and could increase costs for some agencies. The Department of Finance in 1977 conducted a fiscal study of the concept of statewide centralization of administrative law judges and concluded it was not clear any savings would result.[50] There is also no concrete evidence from other central panel states of any significant savings. One reason for this, besides the greater bureaucracy involved in centralization, is the likelihood that centralization would lead to a leveling upward of minimum qualifications and salary ranges among the wide range of lay and professional hearing officers and administrative law judges that presently exists in state government. There would also likely be increased costs for some agencies in which administrative law judges serve several functions, acting as legal advisors as well as hearing officers;

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50. California Department of Finance, Program Evaluation Unit, Centralized v. Decentralized Services: Administrative Hearings (November 1977).

loss of these persons to a central panel would cause the agencies to incur additional expense for legal costs.

Fifth, the agency charged with administering an area of state regulation needs to be able to control the enforcement process. This includes not only the timing of hearings but also the use of a hearing officer familiar with the technicalities of the area and the policies of the agency.

Sixth, each agency, and its mission and needs, is unique. The Commission has found that it is not possible to generalize with respect to the central panel issue and the propriety of the central panel for all agencies. Any recommendation for transfer of an agency's functions should be specific, based on a review of the individual agency and its operations.

Finally, the benefits of an independent hearing officer can be achieved without disruption of existing personnel structures by ensuring fairness and due process through the basic requirement of impartiality of the decisionmaker. The proposed law codifies fundamental elements of impartiality for all state agency hearings: the decision should be based exclusively on the record in the proceeding, credibility determinations made by the presiding officer should be given great weight on review, the decisionmaker should be free of bias, ex parte communications to the decisionmaker should be prohibited, adversarial functions should be separated from decisionmaking functions within the agency, and decisionmaking functions should be insulated from adversarial command influence within the agency.[51]

ADMINISTRATIVE ADJUDICATION BILL OF RIGHTS

The proposed law includes an "administrative adjudication bill of rights" that prescribes fundamental due process and public policy protections for persons involved in administra-

51. See discussion of "Administrative Adjudication Bill of Rights" *infra*.

tive adjudication by state agencies. These provisions are described below.

Notice and an Opportunity To Be Heard

Notice to the person that is the subject of agency proceeding and an opportunity for the person to be heard are fundamentals of due process of law. The proposed law codifies this principle and makes clear that the opportunity to be heard includes the right of the person to present and rebut evidence.

Accessibility of Procedures

A major problem under the existing California law governing administrative adjudication is that the law setting forth the hearing procedures of an individual agency may be relatively inaccessible. It is common to find an agency's procedure governed by a combination of general procedural statutes, special statutes applicable to the particular agency, regulations adopted by the agency, rules of procedure that have not been adopted by regulation, and unwritten practices followed by the agency.[52] This situation makes it difficult or a person having to deal with the administrative procedures of that agency to know what to expect and how to proceed.

One objective of the proposed law is to make the procedures of an agency more readily accessible to those having business before the agency. The proposed law would require an agency to make available a copy of its procedure to parties appearing before it.

Open Hearings

Existing California law is generally silent on whether an administrative hearing is open to the public. The general assumption is that hearings are open, and there is authority

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52. Asimow I, *supra* note 2, 39 UCLA L. Rev. at 1077-78, *reprinted infra* pp. 331-32.

that this is a matter of due process.[53] The proposed law makes clear that a state agency hearing is generally open to the public, subject to special statutes such as those protecting trade secrets or other confidential or privileged matters, or those protecting child victims and witnesses.

Neutrality of Presiding Officer

Existing California statutes and case law on separation of the adjudicative function from other functions within the agency is unclear.[54] To avoid prejudgment, the decisionmaker should not have served previously in the capacity of an investigator, prosecutor, or advocate in the case. The proposed law codifies this principle.

As a practical matter, the separation of functions requirement could cripple an agency in a number of situations, due to staffing limitations.[55] The proposed law addresses these situations specifically:

(1) Agency personnel may confer in making preliminary determinations such as whether probable cause exists to commence a proceeding. The proposed law makes clear that this sort of involvement does not render a person unable ultimately to decide the case.

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53. See Asimow II, *supra* note 2, at 532-33.

54. See Asimow I, *supra* note 2, 39 UCLA L. Rev. at 1168-70, *reprinted infra* pp. 422-24.

55. Drivers' licensing cases are so voluminous that to require separation of prosecution and hearing functions by the Department of Motor Vehicles would gridlock the system. The most recent annual statistics (1993) show 325,000 DMV actions against drivers resulting in 157,716 hearings, including 4,259 hearings involving commercial drivers. The proposed law exempts drivers' licensing cases from the separation of functions requirements. The exemption is limited in scope and would not extend to other types of operators' certificates, such as schoolbus driver certificates. The special certificate hearings are a relatively small portion of the total, and they are all occupational in character. There were 211 special certificate hearings in 1993, at a total cost of $19,783. Requiring separation of functions in this limited class will provide useful experience on the actual cost and benefit of the separation of functions requirement.

(2) A person may serve as presiding officer at successive stages of the same proceeding.

Command Influence

A corollary of the separation of functions concept is the requirement that the decisionmaker should not be the subordinate of an investigator, prosecutor, or advocate in the case, for fear that their relative positions within the agency will allow an adversary to dictate the result to the decisionmaker. The proposed law codifies the command influence prohibition.

The command influence prohibition may pose difficulties for a small agency that has insufficient personnel to avoid using a subordinate as a hearing officer. The proposed law makes clear that the agency head may go outside the agency, for example to the Office of Administrative Hearings, for an alternate hearing officer.

Bias

The 1945 California APA makes clear that a decisionmaker may be disqualified if unable to "accord a fair and impartial hearing or consideration."[56] The proposed law recodifies this standard in the more concrete traditional terms of "bias, prejudice, or interest," and imports from the Code of Civil Procedure a few key criteria of particular relevance to administrative adjudication.[57] The disqualification provisions would

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56. Gov't Code § 11512(c). Notwithstanding actual bias, the 1945 California APA adopts a "rule of necessity" that if disqualification of the decisionmaker would prevent the agency from acting (e.g., causing lack of a quorum), the decisionmaker may nonetheless participate. The proposed law addresses this problem with a provision drawn from the 1981 Model State APA that provides for substitution of another person by the appointing authority. See 1981 Model State APA § 4-202(e)-(f).

57. The bias standard is circumscribed by a specification of characteristics that do not constitute bias, including cultural factors affecting the judge, prior expressions of the judge on legal and factual issues presented in the proceeding,

apply to any agency decisionmaker, not just hearing personnel under the 1945 California APA.

Exclusivity of Record

Existing California case law requires that the decision be based on the factual record produced at the hearing.[58] Both the Federal APA[59] and the 1981 Model State APA[60] codify this aspect of due process, and the proposed law does the same for California.

Findings and Basis of Decision

The 1945 California APA requires the decision to contain findings of fact and a determination of issues, together with the penalty, if any.[61] The statute is supplemented by the case-law requirement that the decision contain whatever necessary sub-findings are needed to link the evidence to the ultimate facts.[62] The proposed law codifies the requirement that the decision state its factual and legal basis. This will force the decisionmaker to articulate the rationale of the decision and will provide the parties with a complete agency analysis of the case for purposes of review or otherwise.

Since the presiding officer at the hearing has had the opportunity to observe the witnesses, the presiding officer's credibility determinations based on observation of demeanor and

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and involvement in formulation of the laws being applied in the proceeding. Code Civ. Proc. § 170.2.

58. See, e.g., Vollstedt v. City of Stockton, 220 Cal. App. 3d 265, 269 Cal. Rptr. 404 (1990). See also Asimow I, *supra* note 2, 39 UCLA L. Rev. at 1126-27, *reprinted infra* pp. 380-81.

59. 5 U.S.C. § 556(e) (1988).

60. 1981 Model State APA § 4-215(d).

61. Gov't Code § 11518.

62. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).

the like should be identified in the decision, and thereafter should be entitled to great weight on judicial review.[63]

It is common agency practice to use guidelines for imposition of penalties in agency proceedings. The Administrative Procedure Act precludes enforcement of these guidelines unless adopted and publicly-available as agency regulations.[64] The proposed law includes a specific application of this principle: the decisionmaker may not impose a penalty based on a disciplinary guideline that has not been promulgated as required by law.

Precedent Decisions

The proposed law allows an agency to designate a decision as precedential if the decision contains a significant legal or policy determination that is likely to recur. The agency must maintain an index of determinations made in precedent decisions. An agency's designation of, or failure to designate, a decision as precedential is not judicially reviewable, but a decision that is not designated as precedential may not be cited as precedent.

The precedent decision provision recognizes that agencies make law and policy through administrative adjudication as well as through rulemaking. Although agency decisions are public records, they are inaccessible to the public except in

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63. The great weight requirement for credibility determinations would be applied only indirectly, as a factor in any judicial review of the administrative decision. This requirement would codify in California the general rule applied in federal cases, as well as in a number of state agencies. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (Federal APA); Garza v. Workmen's Compensation Appeals Bd., 3 Cal. 3d 312, 318-19, 475 P. 2d 451, 90 Cal. Rptr. 355 (1970) (Workers' Compensation Appeals Board); Millen v. Swoap, 58 Cal. App. 3d 943, 947-48, 130 Cal. Rptr. 387 (1976) (Department of Social Services); Apte v. Regents of Univ. of Cal., 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312 (1988) (University of California); Precedent Decisions P-B-10, P-T-13, P-B-57 (Unemployment Insurance Appeals Board); Lab. Code § 1148 (Agricultural Labor Relations Board).

64. Gov't Code § 11340.5(a) ("underground regulations").

the case of the few existing agencies that publish their decisions or designate precedent decisions.[65]

Extension of the precedent decision requirement to all agencies would make the decisions generally available and would benefit everyone, including counsel for both sides, as well as the presiding officers and agency heads who make the decisions. It would encourage agencies to articulate what they are doing when they make new law or policy in an administrative adjudication. Additionally, it is more efficient to cite an existing decision than to reconstruct the policy or even decide inconsistently without knowing or acknowledging that this has occurred.

Ex Parte Communications

The 1945 California APA and statutes governing a few other agencies are clear that factual inputs to the decisionmaker must be on the record, but the rule as to other agency proceedings is not clear. Moreover, it is not clear whether ex parte contacts concerning law or policy are permissible.[66] Government Code Section 11513.5 prohibits ex parte contacts with an administrative law judge employed by the Office of

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65. Agencies that routinely publish all their decisions include the Agricultural Labor Relations Board, Public Employment Relations Board, Public Utilities Commission, and Workers' Compensation Appeals Board.

The Office of Administrative Law has determined that an agency's designation of a decision as precedential violates Government Code Section 11340.5 (formerly Section 11347.5) unless the designation is made pursuant to rulemaking procedures, except where in accordance with Section 11346 the designation is expressly exempted by statute. 1993 OAL Determination No. 1. The Fair Employment and Housing Commission (Gov't Code § 12935(h)),, and the State Personnel Board (Gov't Code § 19582.5) the Unemployment Insurance Appeals Board (Unemp. Ins. Code § 409) designate and publish precedent decisions pursuant to express statutory authority, but only a designations by the State Personnel Board and the Unemployment Insurance Appeals Board are expressly exempted by statute from rulemaking procedures. The proposed law expressly exempts agency designation of precedent decisions from rulemaking procedures.

66. See generally Asimow I, *supra* note 2, 39 UCLA L. Rev. at 1132-33, *reprinted infra* pp. 386-87.

Administrative Hearings, but is silent as to ex parte communications to agency heads, as well as to any decisionmaker in the great majority of administrative adjudications in California that do not fall under the 1945 California APA. In some state agencies ex parte contacts are tolerated or encouraged.[67]

Fundamental fairness in decisionmaking demands both that factual inputs and arguments to the decisionmaker on law and policy be made openly and be subject to argument by all parties. The proposed law prohibits ex parte communications with the decisionmaker in all state agency proceedings, subject to several qualifications necessary to facilitate the decision-making process:

(1) Discussion of noncontroversial matters of practice or procedure is permissible.

(2) The decisionmaker should be allowed the advice and assistance of agency personnel. This may be critical in a technical area where the only expertise realistically available to the decisionmaker is from personnel within the agency that is a party to the proceeding. The decisionmaker would not be allowed to consult with personnel who are actively involved in prosecution of the administrative proceeding.

(3) Agency personnel, including prosecutorial personnel, must be able to advise the decisionmaker concerning aspects of a settlement proposed by the prosecution. The proposed law recognizes this situation.

(4) The ban on ex parte communications would not apply in a nonprosecutorial proceeding that involves necessary technical advice or a decision by specified land use agencies. Although these nonprosecutorial proceedings are trial-like, they involve a substantial

67. *Id.*, 39 UCLA L. Rev. at 1130, *reprinted infra* p. 384. Some, such as the Public Utilities Commission, have developed elaborate ex parte prohibitions tailored to their specific needs.

> element of policy determination where it may be important that the decisionmaker consult more broadly than the immediate parties to the proceeding. The proposed law would allow policy advice to be given in these proceedings, provided it is summarized in the record and made available to all parties.

Where an improper ex parte contact has been made, the proposed law provides several protective and curative devices. A decisionmaker who receives an improper ex parte communication must place it on the record of the proceeding and advise the parties of it, and allow the parties an opportunity to respond. To rectify cases where the ex parte communication would unduly prejudice the decisionmaker, the ex parte communication could be grounds for disqualification of the decisionmaker. In such a case, the record of the communication would be sealed by protective order of the disqualified decisionmaker.

Language Assistance

Existing provisions require interpreters for language-disabled parties[68] in proceedings before specified agencies. The proposed law preserves this requirement and extends it to language-disabled witnesses.

FLEXIBILITY IN HEARING PROCEDURES

In addition to the mandatory provisions of the administrative adjudication bill of rights, the proposed law includes a number of optional provisions that will add flexibility to and help modernize and expedite state agency hearing procedures, whether conducted under the 1945 California APA or under an agency's other hearing procedures. The major optional provisions are described below.

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68. Gov't Code §§ 11500(g), 11501.5, 11513(d)-(n).

Telephonic Hearings

The 1945 California APA and other agency hearing procedures contemplate a hearing at which all persons involved are physically present at the hearing. However, considerations of distance, illness, or other factors may make physical attendance at the hearing difficult. Moreover, an in-person hearing may require parties or witnesses to sit and wait for long periods of time. In such situations, it makes sense to take testimony telephonically. The Unemployment Insurance Appeals Board makes use of telephone hearings with a great amount of success.[69]

The proposed law permits a hearing to be conducted by conference telephone call, video-conferencing, or other appropriate telecommunications technology, provided all participants are audible to each other. A telephonic hearing may not be used if a party objects.

Subpoenas

Under the 1945 California APA an agency has broad subpoena authority.[70] The proposed law continues this authority and extends it to the other state agencies, as well as to attorneys of the parties as in civil practice; the proposed law adds provisions clarifying procedures for quashing a subpoena once issued. In addition, the proposed law permits the respondent to request issuance of a subpoena duces tecum for production of a document at any reasonable time and place, rather than only at the hearing. This will give the respondent adequate time to prepare and help avoid the need for a continuance. To protect against hardship, the proposed law permits a custodian of subpoenaed documents to satisfy the subpoena by delivery of a copy or by making the documents

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69. See Asimow II, *supra* note 2, at 531.

70. See Gov't Code § 11510.

available for inspection and copying, in the manner allowed in court proceedings.

Enforcement of Orders and Sanctions

The 1945 California APA provides that disobedience of orders or obstructive or contumacious behavior in an administrative adjudication proceeding may be certified to the superior court for contempt proceedings.[71] This authority is extended in the proposed law to all state agency adjudicative proceedings.

The proposed law also seeks to curb bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. In civil actions, these are addressed by monetary sanctions,[72] and experience with such sanctions has been favorable. The proposed law extends to the presiding officer or agency in an adjudicative proceeding the right to order monetary sanctions for such behavior. The order is subject to administrative and judicial review to the same extent as other orders in the adjudicative proceeding.

Intervention

Existing law is not clear on the right of a third party to intervene in an administrative adjudication. Yet situations do arise where an administrative adjudication will affect the legal rights, duties, privileges, or immunities of a person who has not been made a party to the proceeding. The proposed law provides an intervention procedure that an agency may adopt to govern such situations. The proposed law would permit intervention by the affected party if the intervention will not impair the interests of justice and the orderly and prompt conduct of the proceedings. This determination is vested in the presiding officer, and the presiding officer's decision is final

71. Gov't Code § 11525.

72. Code Civ. Proc. § 128.5.

and nonreviewable. The presiding officer may impose appropriate conditions on intervention, such as limiting the issues addressed by the intervenor, regulating discovery and cross-examination by the intervenor, and limiting the intervenor's involvement in settlement negotiations.

Settlement

An agency has implied power to settle a case.[73] The proposed law codifies this rule, and makes clear that an agency head may delegate the power to approve a settlement.[74] This resolves the difficulty that the agency head is required to approve a settlement but in many cases the agency head is a body of part-time appointees unable to meet and consider the settlement for a considerable period of time. The proposed law also makes clear that a settlement may be made before or after commencement of the proceeding, except in an occupational licensing case. To ensure that the disciplinary action is a matter of public record, an occupational licensing case may be settled only after commencement of the proceeding.

Alternative Dispute Resolution

Alternative dispute resolution techniques, such as mediation and arbitration, offer the potential of substantial savings of time and money in administrative adjudication. In recent years, federal administrative procedure has made effective use of alternative dispute resolution.[75] In 1990 Congress amended the Federal APA to require agencies to explore and use alter-

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73. Rich Vision Centers, Inc. v. Board of Medical Examiners, 144 Cal. App. 3d 110, 115, 192 Cal. Rptr. 455 (1983).

74. Power to settle licensing cases before the Department of Social Services has been delegated so that settlements can be approved on the spot.

75. See Asimow II, *supra* note 2, at 484-85.

native dispute resolution techniques in all agency functions.[76] Existing California law is generally silent on the matter.

There is broad support for alternative dispute resolution in the administrative adjudication area.[77] A negotiated outcome is preferable in most situations to the costly, time-consuming, and difficult process of adjudication and judicial review. The Law Revision Commission recommends that alternative dispute resolution be fostered in California administrative adjudication by statutorily recognizing these techniques and encouraging agencies to put in place feasible mechanisms to facilitate them.

The proposed law makes clear that all agencies have authority to refer cases, with the consent of the parties, for mediation or for binding or nonbinding arbitration by neutral dispute resolution personnel. Mediation communications are kept confidential just as such communications remain confidential in civil proceedings,[78] and reference to nonbinding arbitration activities is inadmissible in a subsequent de novo proceeding; the presiding officer, mediator, or arbitrator cannot be compelled to testify in subsequent proceedings concerning the alternative dispute resolution activities.[79] The Office of Administrative Hearings is charged with responsibility to develop model regulations for alternative dispute resolution proceedings that govern disputes referred to alternative dispute resolution unless modified by the agency. The Commission believes these provisions will advance the prospects for alternative dispute resolution in California administrative adjudications.

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76. Administrative Dispute Resolution Act, Pub. L. No. 101-552, codified at 5 U.S.C. §§ 571-583 (Supp. V 1993).

77. See Asimow II, *supra* note 2, at 484.

78. Evid. Code § 1152.5.

79. *Cf.* Evid. Code § 703.5.

Informal Hearing Procedure

The standard formal adjudicative hearing procedure under the 1945 California APA and other procedural statutes may be inappropriate for some types of decisions. In some respects the administrative adjudication process has become too judicialized and too imbued with adversary behavior to provide an efficient administrative dispute resolution process.[80]

To address this concern, the proposed law permits agencies to resolve matters involving only a minor sanction or matters in which there is no factual dispute by means of an informal adjudicative hearing process, drawn from the 1981 Model State APA.[81] This process would also be available to an agency that specifies classes of cases where it would be appropriate, provided use of the informal process would not violate due process requirements for those cases.

An informal hearing procedure is essentially "a conference that lacks courtroom drama but nevertheless provides assurance that the issues will be aired, an unbiased decisionmaker will make a decision based exclusively on the record of the proceedings, the decision will be explained, and it will be reviewed by a higher-level decisionmaker (such as the agency heads)."[82]

The informal hearing may be particularly useful in a number of situations:[83]

- Where there is no disputed issue of fact but only a question of law, policy, or discretion.

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80. See Asimow II, *supra* note 2, at 518.

81. 1981 Model State APA §§ 4-401 to 4-403. Alternate adjudicative procedures are found in some of the more recent state acts, including Delaware, Florida, Montana, and Virginia. Bills have been introduced in Congress to amend the Federal APA by creating more than one type of adjudicative procedure. See also 31 Admin. L. Rev. 31, 47 (1979).

82. *Id.* at 522-24.

83. See Asimow II, *supra* note 2, at 520-21.

- A decision to deny a discretionary permit, grant, or license where a hearing is required by statute or due process of law.
- Various land use planning and environmental decisions.
- An individualized ratemaking case.
- Tax adjudications conducted by the State Board of Equalization.

A justification for providing a less formal alternate procedure is that, without it, many agencies will either obtain enactment of special hearing procedures, or will proceed "informally" in a manner not spelled out by any statute or regulation. As a consequence, wide variations in procedure will occur from one agency to another, and even within a single agency from one program to another, producing complexity for citizens, agency personnel, and reviewing courts, as well as for lawyers. This pattern is already apparent, to a considerable extent, at both the state and federal levels.

The proposed informal hearing process is a simplified administrative adjudication, involving no prehearing conference or discovery. At the hearing the presiding officer regulates the course of proceedings and limits witnesses, testimony, evidence, rebuttal, and argument. An informal hearing should only be used in a case that is susceptible of determination without the need for substantial cross-examination. The impartiality requirements and fundamental public policy and due process guarantees of the formal hearing procedure would continue to apply.

Emergency Decision Procedure

In some circumstances there is a need for an agency to take immediate action for the protection of the public. If there is serious abuse that causes immediate and irreparable physical or emotional injury to a ward in a child or elder care facility, for example, an agency may need to act quickly to remove the

ward or close the facility or temporarily suspend its license. Emergency situations can occur in connection with environmental or public health regulation (such as a tank that is leaking toxic fumes) or in connection with continued practice by a professional licensee who is jeopardizing the public. A court restraining order or injunctive relief may be unavailable as a practical matter in such a situation, and this remedy has proved to be unsatisfactory in professional licensing cases where interim suspension is urgently needed to protect public safety.[84]

The 1945 California APA does not recognize the need of an agency to make a quick decision in an emergency situation, although a few special statutes provide individual agencies the ability to act quickly in cases of necessity.[85] Absent a specific authorization for an emergency procedure, existing administrative procedure statutes mandate full proceedings. All agencies should have the same power to act in a genuine emergency that jeopardizes the public health, safety, or interest.

The proposed law permits an agency to adopt a regulation authorizing emergency action where there is immediate danger to the public health, safety, or welfare. Under the emergency proceeding, the affected person is given notice and an opportunity to be heard before the agency acts, if this is

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84. *Id.* at 526.

85. See, e.g., Bus. & Prof. Code §§ 494 (order for interim suspension of licensee), 6007(c) (attorney), 10086(a) (real estate licensee); Educ. Code §§ 66017 (immediate suspension of disruptive student, teacher, staff member, or administrator), 94319.12 (emergency suspension or approval of private postsecondary institution to operate); Fin. Code § 8201(f) (immediate removal of officer or employee of savings association); Food & Agric. Code §§ 56535-56537 (farm products licensees); Gov't Code § 11529 (medical licensee); Health & Safety Code §§ 1550.5 (community care facilities), 1569.50 (residential care facilities for elderly), 1596.886 (child daycare facilities); Pub. Util. Code § 1070.5 (trucking license); Veh. Code § 11706 (DMV licenses of manufacturers, transporters, and dealers).

feasible. The notice and hearing may be telephonic or by other electronic means.

The emergency decision is limited to interim, temporary relief, and is subject to immediate judicial review. Issuance of the emergency relief does not resolve the underlying issue, and the agency must proceed promptly to determine the basic dispute by standard administrative adjudication processes.

Declaratory Decision Procedure

Declaratory relief may be a useful means to obtain fully reliable information concerning application of agency regulations to a person's particular circumstances. The Federal APA provides for declaratory orders,[86] as do other modern statutes.[87] However, California law includes no provision for administrative declaratory relief because the concept was virtually unknown in 1945.

The proposed law creates a special proceeding to be known as a "declaratory decision" proceeding. Its purpose is to provide an inexpensive and generally available avenue for obtaining advice from an administrative agency. Issuance of a declaratory decision is discretionary with the agency. Procedural details may be provided by agency regulation. The Office of Administrative Hearings is charged with promulgation of model regulations that are applicable unless different rules are adopted by an agency. The agency may choose to preclude a declaratory decision by regulation if it appears that a declaratory decision is inappropriate for the matters administered by the agency.

Under the proposed law, the general rules of administrative hearing practice are inapplicable, since there often will be no fact-finding involved — only application of laws or regulations to a prescribed set of facts. As to those facts, a declara-

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86. 5 U.S.C. § 554(e) (1988).

87. *Cf.* 1981 Model State APA § 2-103.

tory decision has the same status and binding effect as any other agency decision.

Conversion of Proceedings

In an adjudicative proceeding, it may become apparent that a formal hearing is unnecessary to resolve the issues and the matter can be resolved by an informal hearing. Or, the agency may conclude that the matter should be resolved not by an individual decision but by adoption of general regulations. These and other circumstances indicate the desirability of a procedure permitting conversion of administrative proceedings from one type to another appropriate type.

There are no provisions in the California statutes for conversion. The proposed law includes a conversion procedure drawn from the 1981 Model State APA.[88] Under this procedure, the presiding officer or other agency official responsible for the proceeding may convert it to another type if the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of a party. Notice to affected parties is required.

MODERNIZATION OF 1945 CALIFORNIA APA

The proposed law makes a number of modernizations and improvements in the 1945 California APA to reflect experience over the past 50 years. Significant changes from existing law are outlined below.

Prehearing Procedures

Consolidation and Severance. The 1945 California APA contains no provisions allowing consolidation of related cases or severance of issues in a case that could be more economically handled in several parts. The proposed law follows the

88. 1981 Model State APA § 1-107.

consolidation and severance procedures of the Code of Civil Procedure,[89] which have worked well in civil cases. Control of consolidation and severance issues is vested in the administrative law judge.

Discovery. The 1945 California APA provides for limited discovery in administrative adjudications.[90] The Commission believes the extensive discovery available in civil proceedings is inappropriate for administrative adjudications, which should be simple, quick, and inexpensive. For this reason the proposed law continues the limited discovery approach of existing law, subject to a number of minor changes.[91]

Under the 1945 California APA, discovery disputes between the parties are referred to the superior court for resolution and enforcement. To expedite the discovery process, the proposed law vests resolution of discovery disputes in the administrative law judge.

Prehearing Conference. The proposed law adds the following features designed to enhance the effectiveness of the prehearing process:

(1) The conference may be conducted by telephone or other electronic means.

(2) The conference should serve as a forum for exchange of discovery information, where appropriate.

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89. Code Civ. Proc. § 1048.

90. Gov't Code §§ 11507.5, 11507.6, 11507.7, 11511.

91. For example, case law has questioned the fairness and constitutionality of Government Code Section 11511, which provides that when a witness is unavailable for trial, the agency *may*, but need not necessarily, allow the respondent to depose the witness. *See* Blinder, Robinson & Co. v. Tom, 181 Cal. App. 3d 283, 226 Cal. Rptr. 339 (1986). The proposed law addresses this point by allowing the presiding officer, if one has been appointed, to order a deposition.

(3) The conference should offer the opportunity for alternative dispute resolution, and where appropriate be converted into an informal hearing.

The prehearing conference is conducted by the administrative law judge who will preside at the hearing. Settlement possibilities may be explored at the prehearing conference. If it appears that there is a possibility of settlement, the proposed law allows the administrative law judge to order a separate mandatory settlement conference, to be held before a different settlement judge, if one is available. Offers of compromise and settlement made in the settlement conference are protected from disclosure to encourage open and frank exchanges in the interest of achieving settlement.

Hearing Record

The 1945 California APA requires reporting of proceedings by a stenographic reporter, except that on consent of all the parties, the proceedings may be reported phonographically. With the improved quality of electronic recording, and with the use of multi-track recorders, monitors, and trained hearing officers, the problems of electronic recording are minimized, and the cost saving may be substantial. For these reasons, the proposed law permits the administrative law judge to require electronic reporting; a party may require stenographic reporting at the party's own expense.

Evidence

Technical Rules of Evidence. The proposed law codifies a few key exceptions to the general rule that any relevant evidence is admissible in an administrative adjudication if it is the type on which responsible persons are accustomed to rely in the conduct of serious affairs.[92] Existing law permits the administrative law judge to exclude irrelevant and unduly

92. Gov't Code § 11513(c).

repetitious evidence.[93] This authority should be broadened so that the administrative law judge also has discretion to exclude evidence that contributes little to the result but promotes delay and confusion. The proposed law adopts the standard of Evidence Code Section 352, which provides for exclusion of evidence whose probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of confusing the issues.

Hearsay. Under the 1945 California APA, hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but is not sufficient in itself to support a finding.[94] This provision, known as the residuum rule, is desirable as a general matter because it forces the use of reliable evidence, which may be particularly important in an administrative adjudication in which the sanction is severe, such as a license revocation. The proposed law makes clear that the residuum rule can be raised either at the hearing or on reconsideration or other administrative review. Existing law is unclear on this matter.[95] It may not be apparent until the initial decision is issued that a finding on a particular matter has been based exclusively on hearsay evidence.

Review of Evidentiary Rulings. It is not clear whether an administrative law judge's evidentiary rulings are subject to administrative review. Arguably, the rulings are conclusive.[96] The proposed law makes clear that the agency head may review evidentiary determinations of the administrative law judge. The adjudicative authority is vested in the agency

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93. Gov't Code § 11513(c).

94. Gov't Code § 11513(c).

95. See Asimow II, *supra* note 2, at 504.

96. See *id.* at 500.

head, and the agency head should be the ultimate administrative decisionmaker.

Decision

Voting by Agency Members. The 1945 California APA permits agency members to vote by mail.[97] The proposed law adds flexibility by authorizing voting by other means, such as telephonic or other appropriate means.

Correction of Decision. To avoid unnecessary review procedures, the proposed law provides expeditious means of correcting mistakes and technical errors in the decision.

Review of Decision

Administrative Review. The proposed law continues the requirement that administrative review of a proposed decision be on the record, but adds a provision drawn from appellate practice enabling a record based on an agreed statement of the parties.[98] The proposed law also expands the ability of an agency head to adopt summarily a proposed decision without full administrative review. Under the proposed law, the agency head may summarily adopt the proposed decision with clarifying changes that do not affect the factual or legal basis of the decision. In addition, the agency head may summarily adopt the proposed decision with a change of legal basis, after offering the parties an opportunity to comment on the change.

Judicial Review. The proposed law generally leaves unchanged existing provisions governing judicial review.[99] This should not be taken as Law Revision Commission approval of the law. The Commission is currently studying the law governing judicial review of agency action and will

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97. Gov't Code § 11526.

98. Cal. R. Ct. 6 (agreed statement).

99. See Gov't Code § 11523.

make a separate recommendation concerning it. The present recommendation does not address the matter.

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I. Office of Administrative Law

CHAPTER 3.5. OFFICE OF ADMINISTRATIVE LAW

Gov't Code § 11340.4 (added). Study of administrative rulemaking

11340.4. (a) The office is authorized and directed to do the following:

(1) Study the subject of administrative rulemaking in all its aspects.

(2) In the interest of fairness, uniformity, and the expedition of business, submit its suggestions to the various agencies.

(3) Report its recommendations to the Governor and Legislature at the commencement of each general session.

(b) All agencies of the state shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge or control. Nothing in this subdivision authorizes an agency to provide access to records required by statute to be kept confidential.

Comment. Section 11340.4 transfers to the Office of Administrative Law authority formerly found in Section 11370.5 relating to the study of "administrative law" by the Office of Administrative Hearings, to the extent that authority related to administrative rulemaking.

II. Office of Administrative Hearings

CHAPTER 4. OFFICE OF ADMINISTRATIVE HEARINGS

Gov't Code §§ 11370-11370.5 (article heading added). General provisions

Article 1. General Provisions

Comment. Chapter 4 (commencing with Section 11370) is divided into articles for organizational purposes.

Gov't Code § 11370 (amended). Administrative Procedure Act

11370. Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), *Chapter 4.5 (commencing with Section 11400)*, and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act.

Comment. Section 11370 is amended to recognize the addition of Sections 11400-11470.50. The administrative adjudication provisions of the Administrative Procedure Act are found in Chapters 4.5 (administrative adjudication: general provisions) and 5 (administrative adjudication: formal hearing). Section 11400 (administrative adjudication provisions of Administrative Procedure Act).

Gov't Code § 11370.3 (amended). Personnel

11370.3. The director shall appoint and maintain a staff of full-time, and may appoint pro tempore part-time, administrative law judges qualified under Section 11502 which is sufficient to fill the needs of the various state agencies. The director shall also appoint ~~hearing officers, shorthand reporters, and such~~ *any* other technical and clerical personnel as may be required to perform the duties of the office. The director shall assign an administrative law judge for any proceeding arising under Chapter 5 (commencing with Section 11500) and, upon request from any agency, may

assign an administrative law judge ~~or a hearing officer~~ to conduct other administrative proceedings not arising under that chapter and shall assign hearing reporters as required. ~~The director shall assign an administrative law judge for any proceeding arising pursuant to Chapter 20 (commencing with Section 22450) of Division 8 of the Business and Professions Code upon the request of a public prosecutor.~~ Any administrative law judge~~, hearing officer~~, or other employee so assigned shall be deemed an employee of the office and not of the agency to which he or she is assigned. When not engaged in hearing cases, administrative law judges ~~and hearing officers~~ may be assigned by the director to perform other duties vested in or required of the office, including those provided for in Section 11370.5.

Comment. The references in Section 11370.3 to hearing officers and shorthand reporters are deleted to reflect current practice. The fourth sentence is deleted as unnecessary. See Bus. & Prof. Code § 22460.5.

Gov't Code § 11370.5 (amended). Administrative law and procedure

11370.5. The office is authorized and directed to study the subject of administrative ~~law and procedure~~ *adjudication* in all its aspects; to submit its suggestions to the various agencies in the interests of fairness, uniformity and the expedition of business; and to report its recommendations to the Governor and Legislature at the commencement of each general session. All departments, agencies, officers, and employees of the State shall give the office ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge or control. *Nothing in this section authorizes an agency to provide access to records required by statute to be kept confidential.*

Comment. Section 11370.5 is amended to limit the authority of the Office of Administrative Hearings to administrative adjudication. For authority of the Office of Administrative Law to study administrative

rulemaking, see Section 11340.4. Section 11370.5 is also amended to add language protecting confidentiality of records.

Gov't Code §§ 11371-11373.3 (article heading added). Medical Quality Hearing Panel

Article 2. Medical Quality Hearing Panel

Comment. Chapter 4 (commencing with Section 11370) is divided into articles for organizational purposes.

Gov't Code § 11380 (added). State Agency Reports and Forms Appeals

Article 3. State Agency Reports and Forms Appeals

§ 11380. State agency reports and forms appeals

11380. (a)(1) The office shall hear and render a decision on any appeal filed by a business, pursuant to subdivision (c) of Section 14775, in the event the business contests the certification by a state agency head that reporting requirements meet established criteria and shall not be eliminated.

(2) Before a business may file an appeal with the office pursuant to subdivision (c) of Section 14775, the business shall file a challenge to a form or report required by a state agency with that state agency. Within 60 days of filing the challenge with a state agency, the state agency shall either eliminate the form or report or provide written justification for its continued use.

(3) A business may appeal a state agency's written justification for the continued use of a form or report with the office.

(4) If a state agency fails to respond within 60 days of the filing of a challenge pursuant to paragraph (2), the business shall have an immediate right to file an appeal with the office.

(b) No later than January 1, 1996, the office shall adopt procedures governing the filing, hearing, and disposition of appeals. The procedures shall include, but shall not be limited to, provisions that assure that appeals are heard and decisions rendered by the office in a fair, impartial, and timely fashion.

(c) The office may charge appellants a reasonable fee to pay for costs it incurs in complying with this section.

Comment. Section 11380 continues former Section 11530 without change.

III. Administrative Adjudication: General Provisions

Gov't Code § 11400-11470.50 (added). Administrative adjudication: general provisions

CHAPTER 4.5. ADMINISTRATIVE ADJUDICATION: GENERAL PROVISIONS

Article 1. Preliminary Provisions

§ 11400. Administrative adjudication provisions of Administrative Procedure Act

11400. (a) This chapter and Chapter 5 (commencing with Section 11500) constitute the administrative adjudication provisions of the Administrative Procedure Act.

(b) A reference in any other statute or in a rule of court, executive order, or regulation, to a provision formerly found in Chapter 5 (commencing with Section 11500) that is superseded by a provision of this chapter, means the applicable provision of this chapter.

Comment. Section 11400 makes clear that references to the administrative adjudication provisions of the Administrative Procedure Act include both this chapter (general provisions) and Chapter 5 (formal hearing). The formal hearing provisions of Chapter 5 apply to an adjudicative proceeding as determined by the statutes relating to the proceeding. Section 11501. The general provisions of this chapter apply to all statutorily and constitutionally required state agency adjudicative proceedings, including proceedings under Chapter 5. See Section 11410.10 and sections following.

References in section Comments in this chapter and Chapter 5 to the "1981 Model State APA" mean the Model State Administrative Procedure Act (1981) promulgated by the National Conference of Commissioners on Uniform State Laws. See 15 U.L.A. 1 (1990). References to the "Federal APA" mean the Federal Administrative Procedure Act, 5 U.S.C. §§ 551-583, 701-706, 1305, 3105, 3344, 5372, 7521 (1988 & Supp. V 1993), and related sections (originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237). A number of the

administrative adjudication provisions of the Administrative Procedure Act are drawn from the Federal APA.

§ 11400.10. Operative date

11400.10. (a) This chapter is operative on July 1, 1997.

(b) This chapter is applicable to an adjudicative proceeding commenced on or after July 1, 1997.

(c) This chapter is not applicable to an adjudicative proceeding commenced before July 1, 1997, except an adjudicative proceeding conducted on a remand from a court or another agency on or after July 1, 1997.

Comment. Section 11400.10 provides a deferred operative date to enable state agencies to make any necessary preparations for operation under this chapter.

§ 11400.20. Adoption of regulations

11400.20. (a) Before, on, or after July 1, 1997, an agency may adopt interim or permanent regulations to govern an adjudicative proceeding under this chapter.

(b) Except as provided in Section 11351:

(1) Interim regulations need not comply with Article 5 (commencing with Section 11346) or Article 6 (commencing with Section 11349) of Chapter 3.5, but are governed by Chapter 3.5 (commencing with Section 11340) in all other respects.

(2) Interim regulations expire on December 31, 1998, unless earlier terminated or replaced by or readopted as permanent regulations under paragraph (3). If on December 31, 1998, an agency has completed proceedings to replace or readopt interim regulations and has submitted permanent regulations for review by the Office of Administrative Law, but permanent regulations have not yet been filed with the Secretary of State, the interim regulations are extended until the date permanent regulations are filed with the Secretary of State or March 31, 1999, whichever is earlier.

(3) Permanent regulations are subject to all the provisions of Chapter 3.5 (commencing with Section 11340), except that if by December 31, 1998, an agency has submitted the regulations for review by the Office of Administrative Law, the regulations are not subject to review for necessity under Section 11349.1 or 11350.

Comment. Subdivision (a) of Section 11400.20 makes clear that an agency may act to adopt regulations under this division after enactment but before the division becomes operative. This will enable the agency to have any necessary regulations in place on the operative date. It should be noted that revisions of regulations that merely conform to the new law may be adopted by simplified procedures under the rulemaking provisions of the Administrative Procedure Act pursuant to 1 California Code of Regulations Section 100.

Under subdivision (b), an agency may adopt interim procedural regulations without the normal notice and hearing and Office of Administrative Law review processes of the Administrative Procedure Act. However, this does not excuse compliance with the other provisions of the Administrative Procedure Act, including but not limited to the requirements that (1) regulations be consistent and not in conflict with statute and reasonably necessary to effectuate the purpose of the statute (Section 11342.2), (2) regulations be filed and published (Sections 11343-11344.9), and (3) regulations are subject to judicial review (Section 11350). Compliance with these provisions is not required for agencies exempted by statute. See Section 11351.

Interim regulations are only valid through December 31, 1998. They may be replaced by or readopted as permanent regulations before then, through the standard administrative rulemaking process. In case permanent regulations are pending on December 31, 1998, interim regulations may be extended up to three months.

Subdivision (b)(3) makes clear that permanent regulations governing administrative adjudication are subject to normal rulemaking procedures, other than review for necessity under Section 11349.1 (Office of Administrative Law) or 11350 (declaratory relief) in the case of permanent regulations promulgated during the transitional period.

Article 2. Definitions

§ 11405.10. Application of definitions

11405.10. Unless the provision or context requires otherwise, the definitions in this article govern the construction of this chapter.

Comment. Section 11405.10 limits these definitions to the general provisions on administrative adjudication. For definitions governing the formal hearing procedure under Chapter 5, see Section 11500.

§ 11405.20. Adjudicative proceeding

11405.20. "Adjudicative proceeding" means an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision.

Comment. Section 11405.20 is intended for drafting convenience.

§ 11405.30. Agency

11405.30. "Agency" means a board, bureau, commission, department, division, office, officer, or other administrative unit, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf of or under the authority of the agency head. To the extent it purports to exercise authority pursuant to this chapter, an administrative unit otherwise qualifying as an agency shall be treated as a separate agency even if the unit is located within or subordinate to another agency.

Comment. Section 11405.30 is drawn from 1981 Model State APA § 1-102(1). It supplements Section 11000. See also Section 11500(a). The intent of the definition is to subject as many governmental units as possible to this chapter. The definition explicitly includes the agency head and those others who act for an agency, so as to effect the broadest possible coverage. The definition also would include a committee or council.

The last sentence of the section is in part derived from Federal APA § 551(1) (1988), treating as an agency "each authority of the Government of the United States, whether or not it is within or subject to review by

another agency." A similar provision is desirable here to avoid difficulty in ascertaining which is *the* agency in a situation where an administrative unit is within or subject to the jurisdiction of another administrative unit.

An administrative unit of an agency that has no authority to issue decisions or take other action on behalf of the agency is not an "agency" within the meaning of this section.

§ 11405.40. Agency head

11405.40. "Agency head" means a person or body in which the ultimate legal authority of an agency is vested, and includes a person or body to which the power to act is delegated pursuant to authority to delegate the agency's power to hear and decide.

Comment. The first portion of Section 11405.40 is drawn from 1981 Model State APA § 1-102(3). The definition of agency head is included to differentiate for some purposes between the agency as an organic entity that includes all of its employees, and those particular persons in which the final legal authority over its operations is vested.

The last portion is drawn from Section 11500(a), relating to use of the term "agency itself" to refer to a nondelegable power to act. An agency may delegate review authority. Section 11440.10.

§ 11405.50. Decision

11405.50. (a) "Decision" means an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person.

(b) Nothing in this section limits any of the following:

(1) The precedential effect of a decision under Section 11425.60.

(2) The authority of an agency to make a declaratory decision pursuant to Article 14 (commencing with Section 11465.10).

Comment. Section 11405.50 is drawn from 1981 Model State APA § 1-102(5). The definition of "decision" makes clear that it includes only legal determinations made by an agency that are of specific applicability because they are addressed to particular or named persons. More than one identified person may be the subject of a decision. See Section 13

(singular includes plural). "Person" includes legal entity and governmental subdivision. Section 11405.70 ("person" defined); see also Section 17 ("person" defined).

A decision includes every agency action that determines any of the legal rights, duties, privileges, or immunities of a specific, identified individual or individuals. This is to be compared to a regulation, which is an agency action of general application, applicable to all members of a described class. See Section 11342 ("regulation" defined). This section is not intended to expand the types of cases in which an adjudicative proceeding is required; an adjudicative proceeding under this chapter is required only where another statute or the constitution requires one. Section 11410.10 (application to constitutionally and statutorily required hearings).

Consistent with the definition in this section, rate making and licensing determinations of specific application, addressed to named or particular parties such as a certain power company or a certain licensee, are decisions subject to this chapter. *Cf.* Federal APA § 551(4) (1988) (defining all rate making as rulemaking). On the other hand, rate making and licensing actions of general application, addressed to all members of a described class of providers or licensees, are regulations under the Administrative Procedure Act. Section 11342 ("regulation" defined). However, some decisions may have precedential effect pursuant to Section 11425.60 (precedent decisions).

§ 11405.60. Party

11405.60. "Party" includes the agency that is taking action, the person to which the agency action is directed, and any other person named as a party or allowed to appear or intervene in the proceeding. If the agency that is taking action and the agency that is conducting the adjudicative proceeding are separate agencies, the agency that is taking action is a party and the agency that is conducting the adjudicative proceeding is not a party.

Comment. The first sentence of Section 11405.60 is drawn from subdivision (b) of Section 11500; see also 1981 Model State APA § 1-102(6). The second sentence is new.

"Person" includes legal entity and governmental subdivision. Section 11405.70 ("person" defined); see also Section 17 ("person" defined).

Under this definition, if an officer or employee of an agency appears in an official capacity, the agency and not the person is a party. A staff

division authorized to act on behalf of the agency may be a party under this chapter. See Section 11405.30 & Comment ("agency" defined).

This section is not intended to address the question of whether a person is entitled to judicial review. Standing to seek judicial review is dealt with in other law.

§ 11405.70. Person

11405.70. "Person" includes an individual, partnership, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character.

Comment. Section 11405.70 supplements the definition of "person" in Section 17 ("person" defined). It is drawn from 1981 Model State APA § 1-102(8). It would include the trustee of a trust or other fiduciary.

The definition is broader than Section 17 in its application to a governmental subdivision or unit; this would include an agency other than the agency against which rights under this chapter are asserted by the person. Inclusion of such agencies and units of government insures, therefore, that other agencies or other governmental bodies can, for example, apply to an agency for a decision, and will be accorded all the other rights that a person has under this chapter.

§ 11405.80. Presiding officer

11405.80. "Presiding officer" means the agency head, member of the agency head, administrative law judge, hearing officer, or other person who presides in an adjudicative proceeding.

Comment. Section 11405.80 is intended for drafting convenience.

Article 3. Application of Chapter

§ 11410.10. Application to constitutionally and statutorily required hearings

11410.10. This chapter applies to a decision by an agency if, 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.

Comment. Section 11410.10 limits application of this chapter to constitutionally and statutorily required hearings of state agencies. See Section 11410.20 (application to state). The provisions do not govern local agency hearings except to the extent expressly made applicable by another statute. Section 11410.30 (application to local agencies).

Section 11410.10 states the general principle that an agency must conduct an appropriate adjudicative proceeding before issuing a decision where a statute or the due process clause of the federal or state constitutions necessitates an evidentiary hearing for determination of facts. Such a hearing is a process in which a neutral decision maker makes a decision based exclusively on evidence contained in a record made at the hearing or on matters officially noticed. The hearing must at least permit a party to introduce evidence, make an argument to the presiding officer, and rebut opposing evidence.

The coverage of this chapter is the same as coverage by the existing provision for administrative mandamus under Code of Civil Procedure Section 1094.5(a). That section applies only where an agency has issued a final decision "as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the [agency]." Numerous cases have applied Code of Civil Procedure Section 1094.5(a) broadly to administrative proceedings in which a statute requires an "administrative appeal" or some other functional equivalent of an evidentiary hearing for determination of facts — an on-the-record or trial-type hearing. See, e.g., Eureka Teachers Ass'n v. Board of Educ. of Eureka City Schools, 199 Cal. App. 3d 353, 244 Cal. Rptr. 240 (1988) (teacher's right to appeal grade change was right to hearing — Code Civ. Proc. § 1094.5 applies); Chavez v. Civil Serv. Comm'n of Sacramento County, 86 Cal. App. 3d 324, 150 Cal. Rptr. 197 (1978) (right of "appeal" means hearing required — Code Civ. Proc. § 1094.5 available).

In many cases, statutes or the constitution call for administrative proceedings that do not rise to the level of an evidentiary hearing as defined in this section. For example, the constitution or a statute might require only a consultation or a decision that is not based on an exclusive record or a purely written procedure or an opportunity for the general public to make statements. In some cases, the agency has discretion to provide or not provide the procedure. This chapter does not apply in such cases. Examples of cases in which the required procedure does not meet the standard of an evidentiary hearing for determination of facts are: Goss v. Lopez, 419 U.S. 565 (1975) (informal consultation between student and disciplinarian before brief suspension from school); Hewitt v. Helms, 459 U.S. 460 (1983) (informal nonadversary review of decision to place prisoner in administrative segregation — prisoner has right to

file written statement); Skelly v. State Personnel Bd., 15 Cal. 3d 194, 539 P. 2d 774, 124 Cal. Rptr. 14 (1975) (informal opportunity for employee to respond orally or in writing to charges of misconduct prior to removal from government job); Wasko v. Department of Corrections, 211 Cal. App. 3d 996, 1001-02, 259 Cal. Rptr. 764 (1989) (prisoner's right to appeal decision does not require a hearing — Code Civ. Proc. § 1094.5 inapplicable); Marina County Water Dist. v. State Water Resources Control Bd., 163 Cal. App. 3d 132, 209 Cal. Rptr. 212 (1984) (hearing discretionary, not mandatory — Code Civ. Proc. § 1094.5 inapplicable).

Agency action pursuant to statutes that do not require evidentiary hearings are not subject to this chapter. Such statutes include the California Environmental Quality Act (Pub. Res. Code §§ 21000-21178.1), the Bagley-Keene Open Meeting Act (Gov't Code §§ 11120-11132), and the California Public Records Act (Gov't Code §§ 6250-6268).

This chapter applies only to proceedings for issuing a "decision." A decision is an agency action of specific application that determines a legal right, duty, privilege, immunity or other legal interest of a particular person. Section 11405.50(a) ("decision" defined). Therefore this chapter does not apply to agency actions that do not determine a person's legal interests and does not apply to rulemaking, which is agency action of general applicability.

This chapter does not apply where agency regulations, rather than a statute or the constitution, call for a hearing. Agencies are encouraged to provide procedural protections by regulation even though not required to do so by statute or the constitution. An agency may provide any appropriate procedure for a decision for which an adjudicative proceeding is not required. Section 11415.50 (when adjudicative proceeding not required).

This section does not specify what type of adjudicative proceeding should be conducted. If an adjudicative proceeding is required by this section, the proceeding may be a formal hearing procedure under Chapter 5 (commencing with Section 11500), or may be a special hearing procedure provided by a statute applicable to the particular proceeding. This chapter also makes available the alternatives of an informal hearing, an emergency decision, or a declaratory decision, where appropriate under the circumstances. See Articles 10 (commencing with Section 11445.10), 13 (commencing with Section 11460.10), and 14 (commencing with Section 11465.10).

This section does not preclude the waiver of any procedure, or the settlement of any case without use of all available proceedings, under the general waiver and settlement provisions of Sections 11415.40 (waiver of provisions) and 11415.60 (settlement).

§ 11410.20. Application to state

11410.20. Except as otherwise expressly provided by statute:

(a) This chapter applies to all agencies of the state.

(b) This chapter does not apply to the Legislature, the courts or judicial branch, or the Governor or office of the Governor.

Comment. Section 11410.20 applies this chapter to all state agencies unless specifically excepted. The intent of this statute is to apply the provisions to as many state governmental units as possible.

Subdivision (a) is drawn from 1981 Model State APA § 1-103(a).

Subdivision (b) is drawn from 1981 Model State APA § 1-102(1). Exemptions from this chapter are to be construed narrowly.

Subdivision (b) exempts the entire judicial branch, and is not limited to the courts. Judicial branch agencies include the Judicial Council, the Commission on Judicial Appointments, the Commission on Judicial Performance, and the Judicial Criminal Justice Planning Committee.

Subdivision (b) exempts the Governor's office, and is not limited to the Governor. For an express statutory exception to the Governor's exemption from this chapter, see Bus. & Prof. Code § 106.5 ("The proceedings for removal [by the Governor of a board member in the Department of Consumer Affairs] shall be conducted in accordance with the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the Governor shall have all the powers granted therein.")

This chapter is not applicable to specified proceedings of the following state agencies:

Alcoholic Beverage Control Appeals Board (Bus. & Prof. Code § 23083)

University of California (Educ. Code § 92001)

Public Employment Relations Board (Gov't Code §§ 3541.3, 3563)

Commission on State Mandates (Gov't Code § 17533)

Agricultural Labor Relations Board (Lab. Code § 1144.5)

Military Department (Mil. & Vet. Code § 105)

Department of Corrections, Board of Prison Terms, Youth Authority, Youthful Offender Parole Board, and Narcotic Evaluation Authority (Pen. Code § 3066; Welf. & Inst. Code §§ 1788, 3158)

Public Utilities Commission (Pub. Util. Code § 1701)

This chapter is not applicable to the State Bar of California. Bus. & Prof. Code § 6001.

Nothing in this chapter precludes an agency from electing to have an exempt proceeding governed by this division. Section 11410.40.

§ 11410.30. Application to local agencies

11410.30. (a) As used in this section, "local agency" means a county, city, district, public authority, public agency, or other political subdivision or public corporation in the state other than the state.

(b) This chapter does not apply to a local agency except to the extent the provisions are made applicable by statute.

(c) This chapter applies to an agency created or appointed by joint or concerted action of the state and one or more local agencies.

Comment. Section 11410.30 is drawn from 1981 Model State APA § 1-102(1). Local agencies are excluded because of the very different circumstances of local government units when compared to state agencies. The section explicitly includes joint state and local bodies, so as to effect the broadest possible coverage.

The administrative adjudication provisions of the Administrative Procedure Act are made applicable by statute to local agencies in a number of instances, including:

Suspension or dismissal of permanent employee by school district. Educ. Code § 44944.

Nonreemployment of probationary employee by school district. Educ. Code § 44948.5.

Evaluation, dismissal, and imposition of penalties on certificated personnel by community college district. Educ. Code § 87679.

See also Sections 11410.50 (application where formal hearing procedure required), 11501 (application of chapter).

§ 11410.40. Election to apply administrative adjudication provisions

11410.40. Notwithstanding any other provision of this article, by regulation, ordinance, or other appropriate action an agency may adopt this chapter or any of its provisions for

the formulation and issuance of a decision, even though the agency or decision is exempt from application of this chapter.

Comment. Section 11410.40 is new. An agency may elect to apply this chapter even though the agency would otherwise be exempt or the particular action taken by the agency would otherwise be exempt. See Sections 11410.20 & Comment (application to state) and 11410.30 (application to local agencies); Section 11410.10 (application to constitutionally and statutorily required hearings).

§ 11410.50. Application where formal hearing procedure required

11410.50. This chapter applies to an adjudicative proceeding required to be conducted under Chapter 5 (commencing with Section 11500) unless the statutes relating to the proceeding provide otherwise.

Comment. Section 11410.50 makes clear that the provisions of this chapter supplement the formal hearing provisions of Chapter 5. See also Section 11501(c) (application of chapter). Thus if an agency is required by statute to conduct a hearing under Chapter 5, the agency may, unless a statute provides otherwise, elect to use alternative dispute resolution or the informal hearing procedure or other appropriate provisions of this chapter. Likewise, the general provisions of this chapter restricting ex parte communications, regulating precedent decisions, and the like, apply to a hearing under Chapter 5.

Article 4. Governing Procedure

§ 11415.10. Applicable procedure

11415.10. (a) The governing procedure by which an agency conducts an adjudicative proceeding is determined by the statutes and regulations applicable to that proceeding. If no other governing procedure is provided by statute or regulation, an agency may conduct an adjudicative proceeding under the administrative adjudication provisions of the Administrative Procedure Act.

(b) This chapter supplements the governing procedure by which an agency conducts an adjudicative proceeding.

Comment. The first sentence of subdivision (a) of Section 11415.10 is drawn from Section 11501(a) (formal hearing procedure applies to

agency as determined by statutes relating to agency). The second sentence enables an agency to use the procedures provided in this chapter and Chapter 5 without further action in a case where there is no other applicable governing procedure. See Section 11400 (administrative adjudication provisions of Administrative Procedure Act).

Subdivision (b) makes clear that the provisions of this chapter supplement the applicable hearing procedure. Some provisions of this chapter are optional, e.g., the informal hearing procedure (Article 10 (commencing with Section 11445.10)), the emergency decision procedure (Article 13 (commencing with Section 11460.10)), and the declaratory decision procedure (Article 14 (commencing with Section 11465.10)). The agency determines whether to use any of the optional provisions. The optional provisions do not replace any other agency procedures that serve the same purpose. For example, the informal hearing procedure provided in this chapter does not replace an agency's own informal hearing procedure, but offers a supplemental alternative. Likewise, the emergency decision procedure does not replace an agency's own procedures for interim suspension or other immediate action, but provides an alternative means of proceeding that an agency may wish to use.

Other provisions of this chapter are mandatory. See, e.g., Section 11425.10 (administrative adjudication bill of rights). The mandatory provisions govern any adjudicative proceeding to which this chapter is applicable, and supplement the governing procedure by which an agency conducts an adjudicative proceeding, subject to a contrary statute applicable to the particular agency or proceeding. Section 11415.20 (conflicting or inconsistent statute controls).

§ 11415.20. Conflicting or inconsistent statute controls

11415.20. A state statute or a federal statute or regulation applicable to a particular agency or decision prevails over a conflicting or inconsistent provision of this chapter.

Comment. Section 11415.20 makes clear that the provisions of this chapter are not intended to override a conflicting or inconsistent statute or applicable federal law that governs a particular matter. It should also be noted that if application of a provision of this chapter would cause loss or delay of federal funds, the Governor may suspend the provision. Section 11415.30.

§ 11415.30. Suspension of statute when necessary to avoid loss or delay of federal funds or services

11415.30. (a) To the extent necessary to avoid a loss or delay of funds or services from the federal government that would otherwise be available to the state, the Governor may do any of the following by executive order:

(1) Suspend, in whole or in part, any administrative adjudication provision of the Administrative Procedure Act.

(2) Adopt a rule of procedure that will avoid the loss or delay.

(b) The Governor shall rescind an executive order issued under this section as soon as it is no longer necessary to prevent the loss or delay of funds or services from the federal government.

(c) If an administrative adjudication provision is suspended or rule of procedure is adopted pursuant to this section, the Governor shall promptly report the suspension or adoption to the Legislature. The report shall include recommendations concerning any legislation that may be necessary to conform the provision to federal law.

Comment. Section 11415.30 is drawn from 1981 Model State APA § 1-104. *Cf.* Section 8571 (power of Governor to suspend statute in emergency). It is extended to include a delay in receipt as well as a loss of federal funds, and actions that may be taken include provision of an alternate procedure as well as suspension of an existing procedure. The administrative adjudication provisions of the Administrative Procedure Act are found in this chapter and in Chapter 5. See Section 11400 (administrative adjudication provisions of Administrative Procedure Act).

This section permits specific functions of agencies to be exempted from applicable administrative adjudication provisions of the Administrative Procedure Act only to the extent necessary to prevent the loss or delay of federal funds or services. The test to be met is simply whether, as a matter of fact, there will actually be a loss or delay of federal funds or services if there is no suspension or adoption of an alternate procedure. The suspension or adoption is effective only so long as and to the extent necessary to avoid the contemplated loss or delay.

The Governor cannot issue an executive order merely on the receipt of a federal agency certification that a suspension or adoption of an alternate procedure is necessary. The suspension or adoption must be actually necessary. That is, the Governor must first decide that the federal agency is correct in its assertion that federal funds may *lawfully* be delayed or withheld from the state agency if that agency complies with certain administrative adjudication provisions of the Administrative Procedure Act, and that the federal agency intends to exercise its authority to withhold or delay those funds if certain administrative adjudication provisions of the Administrative Procedure Act are followed. However, if these two requirements are met, the Governor may suspend the provision or adopt an alternate procedure.

§ 11415.40. Waiver of provisions

11415.40. Except to the extent prohibited by another statute or regulation, a person may waive a right conferred on the person by the administrative adjudication provisions of the Administrative Procedure Act.

Comment. Section 11415.40 is drawn from 1981 Model State APA § 1-105. It embodies the standard notion of waiver, which requires an intentional relinquishment of a known right. This section applies to all affected persons, whether or not parties.

A right under the administrative adjudication provisions of the Administrative Procedure Act is subject to waiver in the same way that a right under any other civil statute is normally subject to waiver. Although a right may be waived by inaction, a written waiver is ordinarily preferable. A waiver by inaction may be the procedural result of a failure to act. See, e.g., Section 11506 (failure to file notice of defense is waiver of right to hearing).

The administrative adjudication provisions of the Administrative Procedure Act are found in this chapter and in Chapter 5. See Section 11400 (administrative adjudication provisions of Administrative Procedure Act).

§ 11415.50. When adjudicative proceeding not required

11415.50. (a) An agency may provide any appropriate procedure for a decision for which an adjudicative proceeding is not required.

(b) An adjudicative proceeding is not required for informal factfinding or an informal investigatory hearing, or a decision

to initiate or not to initiate an investigation, prosecution, or other proceeding before the agency, another agency, or a court, whether in response to an application for an agency decision or otherwise.

Comment. Subdivision (a) of Section 11415.50 is subject to statutory specification of the applicable procedure for decisions not governed by this chapter. See Section 11415.20 (conflicting or inconsistent statute controls).

Subdivision (b) is drawn in part from 1981 Model State APA § 4-101(a). The provision lists situations in which an agency may issue a decision without first conducting an adjudicative proceeding. For example, a law enforcement officer may, without first conducting an adjudicative proceeding, issue a "ticket" that will lead to a proceeding before an agency or court. Likewise, an agency may commence an adjudicative proceeding without first conducting a proceeding to decide whether to issue the pleading. Nothing in this subdivision implies that this chapter applies in a proceeding in which a hearing is not statutorily or constitutionally required. Section 11410.10 (application to constitutionally and statutorily required hearings).

§ 11415.60. Settlement

11415.60. (a) An agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding. Subject to subdivision (c), the settlement may be on any terms the parties determine are appropriate. Notwithstanding any other provision of law, no evidence of an offer of compromise or settlement made in settlement negotiations is admissible in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose.

(b) A settlement may be made before or after issuance of an agency pleading, except that in an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned, a settlement may not be made before issuance of the agency pleading. A settlement may be made before, during, or after the hearing.

(c) A settlement is subject to any necessary agency approval. An agency head may delegate the power to approve a settlement. The terms of a settlement may not be contrary to statute or regulation, except that the settlement may include sanctions the agency would otherwise lack power to impose.

Comment. Subdivision (a) of Section 11415.60 codifies the rule in Rich Vision Centers, Inc. v. Board of Medical Examiners, 144 Cal. App. 3d 110, 192 Cal. Rptr. 455 (1983).

Subdivision (a) is analogous to Section 11420.30 (confidentiality of communications in alternative dispute resolution). The parties are, of course, free to make a stipulation concerning confidentiality of offers of compromise or settlement that goes beyond or otherwise varies the protection of this section.

Section 11415.60 is subject to a specific statute to the contrary governing the matter. Section 11415.20 (conflicting or inconsistent statute controls). Subdivision (c) recognizes that some other statutes provide for agency approval of a settlement. See, e.g., Gov't Code § 18681 (authority of State Personnel Board to approve settlements), Lab. Code §§ 98.2(d) (approval in labor standards enforcement), 5001 (approval of workers' compensation settlement), Pub. Res. Code § 6107 (approval by Governor of settlement by State Lands Commission), Rev. & Tax. Code §§ 7093.5, 9271, 19442, 30459.1, 32471, 40211, 41171, 43522, 45867, 50156.11, 55332 (approval of tax settlements).

Article 5. Alternative Dispute Resolution

§ 11420.10. ADR authorized

11420.10. (a) An agency, with the consent of all the parties, may refer a dispute that is the subject of an adjudicative proceeding for resolution by any of the following means:

(1) Mediation by a neutral mediator.

(2) Binding arbitration by a neutral arbitrator. An award in a binding arbitration is subject to judicial review in the manner provided in Chapter 4 (commencing with Section 1285) of Title 9 of Part 3 of the Code of Civil Procedure.

(3) Nonbinding arbitration by a neutral arbitrator. The arbitrator's decision in a nonbinding arbitration is final unless within 30 days after the arbitrator delivers the award to the

agency head a party requests that the agency conduct a de novo adjudicative proceeding. If the decision in the de novo proceeding is not more favorable to the party electing the de novo proceeding, the party shall pay the costs and fees specified in Section 1141.21 of the Code of Civil Procedure insofar as applicable in the adjudicative proceeding.

(b) If another statute requires mediation or arbitration in an adjudicative proceeding, that statute prevails over this section.

(c) This section does not apply in an adjudicative proceeding to the extent an agency by regulation provides that this section is not applicable in a proceeding of the agency.

Comment. Under subdivision (a)(1) of Section 11420.10, the mediator may use any mediation technique.

Subdivision (a)(2) authorizes delegation of the agency's authority to decide, with the consent of all parties.

Subdivision (a)(3) parallels the procedure applicable in judicial arbitration. See Code Civ. Proc. §§ 1141.20-1141.21. The costs and fees specified in Section 1141.21 for a civil proceeding may not all be applicable in an adjudicative proceeding, but subdivision (a)(3) requires such costs and fees to be assessed to the extent they are applicable.

Subdivision (b) recognizes that some statutes require alternative dispute resolution techniques.

If there is no statute requiring the agency to use mediation or arbitration, this section applies unless the agency makes it inapplicable by regulation under subdivision (c).

§ 11420.20. Regulations governing ADR

11420.20. (a) The Office of Administrative Hearings shall adopt and promulgate model regulations for alternative dispute resolution under this article. The model regulations govern alternative dispute resolution by an agency under this article, except to the extent the agency by regulation provides inconsistent rules or provides that the model regulations are not applicable in a proceeding of the agency.

(b) The model regulations shall include provisions for selection and compensation of a mediator or arbitrator,

qualifications of a mediator or arbitrator, and confidentiality of the mediation or arbitration proceeding.

Comment. Section 11420.20 provides for regulations to govern the detail of alternative dispute resolution proceedings. In addition to the matters listed in subdivision (b), the regulations may address other issues such as cost allocation, discovery, and enforcement and review of alternative dispute resolutions.

This section does not require each agency to adopt regulations. The model regulations developed by the Office of Administrative Hearings will automatically govern mediation or arbitration for an agency, unless the agency provides otherwise. The agency may choose to preclude mediation or arbitration altogether. Section 11420.10 (ADR authorized).

The Office of Administrative Hearings could maintain a roster of neutral mediators and arbitrators who are available for alternative dispute settlement in all administrative agencies.

§ 11420.30. Confidentiality and admissibility of ADR communications

11420.30. Notwithstanding any other provision of law, a communication made in alternative dispute resolution under this article is protected to the following extent:

(a) Anything said, any admission made, and any document prepared in the course of, or pursuant to, mediation under this article is a confidential communication, and a party to the mediation has a privilege to refuse to disclose and to prevent another from disclosing the communication, whether in an adjudicative proceeding, civil action, or other proceeding. This subdivision does not limit the admissibility of evidence if all parties to the proceedings consent.

(b) No reference to nonbinding arbitration proceedings, a decision of the arbitrator that is rejected by a party's request for a de novo adjudicative proceeding, the evidence produced, or any other aspect of the arbitration may be made in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose.

(c) No mediator or arbitrator is competent to testify in a subsequent administrative or civil proceeding as to any

statement, conduct, decision, or order occurring at, or in conjunction with, the alternative dispute resolution.

Comment. The policy of Section 11420.30 is not to restrict access to information but to encourage dispute resolution.

Subdivision (a) is analogous to Evidence Code Section 1152.5(a) (mediation).

Subdivision (b) is drawn from Code of Civil Procedure Section 1141.25 (arbitration) and California Rules of Court 1616(c) (arbitration). Subdivision (b) protects confidentiality of a proposed decision in nonbinding arbitration that is rejected by a party; it does not protect a decision accepted by the parties in a nonbinding arbitration, nor does it protect an award in a binding arbitration. See also Section 11425.20 (open hearings).

Subdivision (c) is drawn from Evidence Code Section 703.5.

Article 6. Administrative Adjudication Bill of Rights

§ 11425.10. Administrative adjudication bill of rights

11425.10. (a) The governing procedure by which an agency conducts an adjudicative proceeding is subject to all of the following requirements:

(1) The agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence.

(2) The agency shall make available to the person to which the agency action is directed a copy of the governing procedure, including a statement whether Chapter 5 (commencing with Section 11500) is applicable to the proceeding.

(3) The hearing shall be open to public observation as provided in Section 11425.20.

(4) The adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in Section 11425.30.

(5) The presiding officer is subject to disqualification for bias, prejudice, or interest as provided in Section 11425.40.

(6) The decision shall be in writing, be based on the record, and include a statement of the factual and legal basis of the decision as provided in Section 11425.50.

(7) A decision may not be relied on as precedent unless the agency designates and indexes the decision as precedent as provided in Section 11425.60.

(8) Ex parte communications shall be restricted as provided in Article 7 (commencing with Section 11430.10).

(9) Language assistance shall be made available as provided in Article 8 (commencing with Section 11435.05) by an agency described in Section 11018 or 11435.15.

(b) The requirements of this section apply to the governing procedure by which an agency conducts an adjudicative proceeding without further action by the agency, and prevail over a conflicting or inconsistent provision of the governing procedure, subject to Section 11415.20. The governing procedure by which an agency conducts an adjudicative proceeding may include provisions equivalent to, or more protective of the rights of a person to which the agency action is directed than, the requirements of this section.

Comment. Section 11425.10 specifies the minimum due process and public interest requirements that must be satisfied in a hearing that is subject to this chapter, including a hearing under Chapter 5 (formal hearing). See Sections 11410.50 (application where formal hearing procedure required) and 11501 (application of chapter).

Under subdivision (b), this section is self-executing — it is part of the governing procedure by which an agency conducts an adjudicative proceeding whether or not regulations address the matter. The section does not, however, override conflicting or inconsistent state statutes, or federal statutes or regulations. Section 11415.20 (conflicting or inconsistent statute controls). If the governing procedure includes regulations that are at variance with the requirements of this section, it is desirable, but not necessary, that the agency revise the regulations; the requirements of this section apply regardless of the regulations. Conforming regulations may be adopted by a simplified procedure under the rulemaking provisions of the Administrative Procedure Act pursuant to 1 California Code of Regulations Section 100. Nothing in this section

precludes the agency from adopting additional or more extensive requirements than those prescribed by this section.

Subdivision (a)(2) requires only that the agency "make available" a copy of the applicable hearing procedure. This requirement is subject to a rule of reasonableness in the circumstances and does not necessarily require the agency routinely to provide a copy to a person each time agency action is directed to the person. The requirement may be satisfied, for example, by the agency's offer to provide a copy on request.

Subdivision (a)(9), relating to language assistance, is limited to agencies listed in Sections 11018 (state agency not subject to Chapter 5) and 11435.15 (application of language assistance provisions).

§ 11425.20. Open hearings

11425.20. (a) A hearing shall be open to public observation. Nothing in this subdivision limits the authority of the presiding officer to order closure of a hearing or make other protective orders to the extent necessary or proper for any of the following purposes:

(1) To satisfy the federal or state Constitution, statute, or other law, including but not limited to laws protecting privileged, confidential, or other protected information.

(2) To ensure a fair hearing in the circumstances of the particular case.

(3) To conduct the hearing, including the manner of examining witnesses, in a way that is appropriate to protect a minor witness or a witness with a developmental disability, as defined in Section 4512 of the Welfare and Institutions Code, from intimidation or other harm, taking into account the rights of all persons.

(b) To the extent a hearing is conducted by telephone, television, or other electronic means, subdivision (a) is satisfied if members of the public have an opportunity to do both of the following:

(1) At reasonable times, hear or inspect the agency's record, and inspect any transcript obtained by the agency.

(2) Be physically present at the place where the presiding officer is conducting the hearing.

(c) This section does not apply to a prehearing conference, settlement conference, or proceedings for alternative dispute resolution other than binding arbitration.

Comment. Section 11425.20 supplements the Bagley-Keene Open Meeting Act, Government Code §§ 11120-11132. Closure of a hearing should be done only to the extent necessary under this section, taking into account the substantial public interest in open proceedings. It should be noted that under the open meeting law deliberations on a decision to be reached based on evidence introduced in an adjudicative proceeding may be made in closed session. Section 11126(d). And under the open meeting law, a settlement proposal may be considered by the agency in closed session if it sustains its substantial burden of showing the prejudice to be suffered from conducting an open meeting. Section 11126(d), (q).

Subdivision (a) codifies existing practice. See 1 G. Ogden, California Public Agency Practice § 37.03 (1994).

Statutory protection of trade secrets and other confidential or privileged information is covered by subdivision (a)(1). See, e.g., Evid. Code §§ 1060-1063; Fin. Code §§ 1939, 16120, 18496.

Subdivision (a)(3) codifies and broadens an aspect of Seering v. Department of Social Serv., 194 Cal. App. 3d 298, 239 Cal. Rptr. 422 (1987). It should be noted that the rights of persons to be taken into account includes the right of the parties to observe the proceedings in an appropriate manner.

Subdivision (b) is drawn in part from 1981 Model State APA § 4-211(6). The right of the public to be present where a hearing is being conducted telephonically does not include the right to participate, and the right of the public to inspect the record does not impose a duty on the agency to provide a copy independent of the California Public Records Act.

§ 11425.30. Neutrality of presiding officer

11425.30. (a) A person may not serve as presiding officer in an adjudicative proceeding in any of the following circumstances:

(1) The person has served as investigator, prosecutor, or advocate in the proceeding or its pre-adjudicative stage.

(2) The person is subject to the authority, direction, or discretion of a person who has served as investigator,

prosecutor, or advocate in the proceeding or its pre-adjudicative stage.

(b) Notwithstanding subdivision (a):

(1) A person may serve as presiding officer at successive stages of an adjudicative proceeding.

(2) A person who has participated only as a decisionmaker or as an advisor to a decisionmaker in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding or its pre-adjudicative stage may serve as presiding officer in the proceeding.

(c) The provisions of this section governing separation of functions as to the presiding officer also govern separation of functions as to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

Comment. Subdivision (a) of Section 11425.30 is drawn from 1981 Model State APA § 4-214(a)-(b). See also Veh. Code § 14112 (exemption for drivers' licensing proceedings).

Under this provision, a person has "served" in any of the capacities mentioned if the person has personally carried out the function, and not merely supervised or been organizationally connected with a person who has personally carried out the function. The separation of functions requirements are intended to apply to substantial involvement in a case by a person, and not merely marginal or trivial participation. The sort of participation intended to be disqualifying is meaningful participation that is likely to affect an individual with a commitment to a particular result in the case.

Subdivision (b) is drawn from 1981 Model State APA § 4-214(c)-(d). It allows a person to be involved *as a decisionmaker* in both a probable cause determination and in the subsequent hearing; it does not allow a person to serve as a presiding officer at the hearing if the person was involved in a probable cause determination as an investigator, prosecutor, or advocate.

This provision, dealing with the extent to which a person may serve as presiding officer at different stages of the same proceeding, should be distinguished from Section 11430.10, which prohibits certain ex parte communications. The policy issues in Section 11430.10 regarding ex parte communication between two persons differ from the policy issues in subdivision (b) regarding the participation by one individual in two

stages of the same proceeding. There may be other grounds for disqualification, however, in the event of improper ex parte communications. See Sections 11430.60 (disqualification of presiding officer), 11425.40 (disqualification of presiding officer for bias, prejudice, or interest).

§ 11425.40. Disqualification of presiding officer for bias, prejudice, or interest

11425.40. (a) The presiding officer is subject to disqualification for bias, prejudice, or interest in the proceeding.

(b) It is not alone or in itself grounds for disqualification, without further evidence of bias, prejudice, or interest, that the presiding officer:

(1) Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group.

(2) Has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding.

(3) Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding.

(c) The provisions of this section governing disqualification of the presiding officer also govern disqualification of the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

Comment. Section 11425.40 applies in all administrative adjudications subject to this chapter, including a hearing under Chapter 5 (formal hearing). See Sections 11410.50 (application where formal hearing procedure required) and 11501 (application of chapter). It supersedes a provision formerly found in Section 11512(c) (formal hearing). Section 11425.40 applies whether the presiding officer serves alone or with others. For separation of functions requirements, see Section 11425.30.

Subdivision (a) is drawn from 1981 Model State APA § 4-202(b).

Subdivision (b) is drawn from Code of Civil Procedure Section 170.2 (disqualification of judges). Although subdivision (b)(2) provides that expression of a view on a legal, factual, or policy issue in the proceeding is not in itself bias, prejudice, or interest under Section 11425.40, disqualification in such a situation might occur under Section 11425.30 (neutrality of presiding officer).

§ 11425.50. Decision

11425.50. (a) The decision shall be in writing and shall include a statement of the factual and legal basis for the decision as to each of the principal controverted issues.

(b) The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review 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) The statement of the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. The presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence.

(d) Nothing in this section limits the information that may be contained in the decision, including a summary of evidence relied on.

(e) A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general

application or other rule unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340).

Comment. Section 11425.50 supersedes the first two sentences of Section 11518. See also former subdivision (f)(4) of Section 11500.

Subdivision (a) is drawn from the first sentence of 1981 Model State APA § 4-215(c). The decision must be supported by findings that link the evidence in the proceeding to the ultimate decision. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P. 2d 12, 113 Cal. Rptr. 836 (1974). The requirement that the decision must include a statement of the basis for the decision is particularly significant when an agency develops new policy through the adjudication of specific cases rather than through rulemaking. Articulation of the basis for the agency's decision facilitates administrative and judicial review, helps clarify the effect of any precedential decision (see Section 11425.60), and focuses attention on questions that the agency should address in subsequent rulemaking to supersede the policy that has been developed through adjudicative proceedings. The decision must only explain its actual basis. It need not eliminate other possible bases that could have been, but were not, relied upon as the basis for the decision. Thus, for example, if the decision imposes terms and conditions, it need not explain why other terms and conditions were not imposed.

Subdivision (a) requires the decision to contain a statement of the "factual … basis for the decision," while former Section 11518 required the decision to contain "findings of fact." The new language more accurately reflects case law, and is not a substantive change. See Topanga Ass'n for a Scenic Community v. County of Los Angeles, *supra;* Swars v. Council of the City of Vallejo, 33 Cal. 2d 867, 872-73, 206 P.2d 355 (1949).

The requirement in subdivision (b) that a mere repetition or paraphrase of the relevant statute or regulation be accompanied by a statement of the underlying facts is drawn from the second sentence of 1981 Model APA § 4-215(c).

Subdivision (b) adopts the rule of Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), requiring that the reviewing court weigh more heavily findings by the trier of fact (the presiding officer in an administrative adjudication) based on observation of witnesses than findings based on other evidence. This generalizes the standard of review used by a number of California agencies. See, e.g., Garza v. Workmen's Compensation Appeals Bd., 3 Cal. 3d 312, 318-19, 475 P. 2d 451, 90 Cal. Rptr. 355 (1970) (Workers' Compensation Appeals Board); Millen v. Swoap, 58 Cal. App. 3d 943, 947-48, 130 Cal. Rptr. 387 (1976)

(Department of Social Services); Apte v. Regents of Univ. of Cal., 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312 (1988) (University of California); Unemp. Ins. App. Bd., Precedent Decisions P-B-10, P-T-13, P-B-57; Lab. Code § 1148 (Agricultural Labor Relations Board). It reverses the existing practice under the administrative procedure act and other California administrative procedures that gives no weight to the findings of the presiding officer at the hearing. See Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1114 (1992), *reprinted in* 25 Cal. L. Revision Comm'n Reports 321, 368 (1995).

Findings based substantially on credibility of a witness must be identified by the presiding officer in the decision made in the adjudicative proceeding. This requirement is derived from Washington law. See Wash. Rev. Code Ann. §§ 34.05.461(3), 34.05.464(4) (West 1990). However, the presiding officer's identification of such findings is not binding on the agency or the courts, which may make their own determinations whether a particular finding is based substantially on credibility of a witness. Even though the presiding officer's determination is based substantially on credibility of a witness, the determination is entitled to great weight only to the extent the determination derives from the presiding officer's observation of the demeanor, manner, or attitude of the witness. Nothing in subdivision (b) precludes the agency head or court from overturning a credibility determination of the presiding officer, after giving the observational elements of the credibility determination great weight, whether on the basis of nonobservational elements of credibility or otherwise. See Evid. Code § 780. Nor does it preclude the agency head from overturning a factual finding based on the presiding officer's assessment of expert witness testimony.

The first sentence of subdivision (c) codifies existing California case law. See, e.g., Vollstedt v. City of Stockton, 220 Cal. App. 3d 265, 269 Cal. Rptr. 404 (1990). It is drawn from the first sentence of 1981 Model State APA § 4-215(d). Official notice of some matters may be taken by the presiding officer. See Section 11515 (official notice). The second sentence is drawn from 1981 Model State APA § 4-215(d).

Subdivision (e) is consistent with the rulemaking provisions of the Administrative Procedure Act. See Section 11340.5 ("underground regulations"). A penalty based on a precedent decision does not violate subdivision (e). Section 11425.60 (precedent decisions). If a penalty is based on an "underground rule" — one not adopted as a regulation as required by the rulemaking provisions of the Administrative Procedure Act — a reviewing court should exercise discretion in deciding the appropriate remedy. Generally the court should remand to the agency to

set a new penalty without reliance on the underground rule but without setting aside the balance of the decision. Remand would not be appropriate in the event that the penalty is, in light of the evidence, the *only* reasonable application of duly adopted law. Or a court might decide the appropriate penalty itself without giving the normal deference to agency discretionary judgments. See Armistead v. State Personnel Bd., 22 Cal. 3d 198, 583 P.2d 744, 149 Cal. Rptr. 1 (1978).

§ 11425.60. Precedent decisions

11425.60. (a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.

(b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340). An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review.

(c) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

(d) This section applies to decisions issued on or after July 1, 1997. Nothing in this section precludes an agency from designating as a precedent decision a decision issued before July 1, 1997.

Comment. Section 11425.60 limits the authority of an agency to rely on previous decisions unless the decisions have been publicly announced as precedential.

The first sentence of subdivision (b) recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking. It codifies the practice of a number of agencies to designate important decisions as precedential. See Sections 12935(h) (Fair Employment and Housing Commission), 19582.5 (State Personnel Board); Unemp. Ins. Code § 409 (Unemployment Insurance Appeals Board). Section 11425.60 is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision. An agency may not by precedent decision revise or amend an existing regulation or adopt a rule that has no adequate legislative basis.

Under the second sentence of subdivision (b), this section applies notwithstanding Section 11340.5 ("underground regulations"). See 1993 OAL Det. No. 1 (determination by Office of Administrative Law that agency designation of decision as precedential violates former Government Code Section 11347.5 [now 11340.5] unless made pursuant to rulemaking procedures). The provision is drawn from Government Code Section 19582.5 (expressly exempting the State Personnel Board's precedent decision designations from rulemaking procedures). See also Unemp. Ins. Code § 409 (Unemployment Insurance Appeals Board). Nonetheless, agencies are encouraged to express precedent decisions in the form of regulations, to the extent practicable.

The index required by subdivision (c) is a public record, available for public inspection and copying.

Subdivision (d) minimizes the potential burden on agencies by making the precedent decision requirements prospective only.

Article 7. Ex Parte Communications

§ 11430.10. Ex parte communications prohibited

11430.10. (a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.

(b) Nothing in this section precludes a communication, including a communication from an employee or

representative of an agency that is a party, made on the record at the hearing.

(c) For the purpose of this section, a proceeding is pending from the issuance of the agency's pleading, or from an application for an agency decision, whichever is earlier.

Comment. Section 11430.10 is drawn from former Section 11513.5(a) and (b). See also 1981 Model State APA § 4-213(a), (c). This provision also applies to the agency head, or other person or body to which the power to hear or decide is delegated. See Section 11430.70 (application of provisions to agency head or other person). For exceptions to this section, see Sections 11430.20 (permissible ex parte communications generally) and 11430.30 (permissible ex parte communications from agency personnel).

The reference to an "interested person outside the agency" replaces the former reference to a "person who has a direct or indirect interest in the outcome of the proceeding," and is drawn from federal law. See Federal APA § 557(d)(1)(A) (1988); see also Professional Air Traffic Controllers Organization v. Federal Labor Relations Auth., 685 F.2d 547, 562 (D.C. Cir. 1982) (construing the federal standard to include person with an interest beyond that of a member of the general public).

Where the agency conducting the hearing is not a party to the proceeding, the presiding officer may consult with other agency personnel. The ex parte communications prohibition only applies as between the presiding officer and parties and other interested persons, not as between the presiding officer and disinterested personnel of a non-party agency conducting the hearing. However, the presiding officer may not consult with the agency head. Section 11430.80 (communications between presiding officer and agency head).

While this section precludes an adversary from communicating with the presiding officer, it does not preclude the presiding officer from communicating with an adversary. This reverses a provision of former Section 11513.5(a). Thus it would not prohibit an agency head from communicating to an adversary that a particular case should be settled or dismissed. However, a presiding officer should give assistance or advice with caution, since there may be an appearance of unfairness if assistance or advice is given to some parties but not others.

Nothing in this section limits the authority of the presiding officer to conduct an in camera examination of proffered evidence. *Cf.* Section 11507.7(d)-(e).

Subdivision (c) defines the pendency of a proceeding to include any period between the time an application for a hearing is made and the time the agency's pleading is issued. Treatment of communications made to a

person during pendency of the proceeding but before the person becomes presiding officer is dealt with in Section 11430.40 (prior ex parte communication).

§ 11430.20. Permissible ex parte communications generally

11430.20. A communication otherwise prohibited by Section 11430.10 is permissible in any of the following circumstances:

(a) The communication is required for disposition of an ex parte matter specifically authorized by statute.

(b) The communication concerns a matter of procedure or practice, including a request for a continuance, that is not in controversy.

Comment. Subdivision (a) of Section 11430.20 is drawn from former Section 11513.5(a) and (b). This provision also applies to the agency head, or other person or body to which the power to hear or decide is delegated. See Section 11430.70 (application of provisions to agency head or other person).

This article is not intended to preclude communications made to a presiding officer or staff assistant regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, manner of service, and calendaring and status discussions. Subdivision (b). Such topics are not part of the merits of the matter, provided they appear to be noncontroversial in context of the specific case.

§ 11430.30. Permissible ex parte communications from agency personnel

11430.30. A communication otherwise prohibited by Section 11430.10 from an employee or representative of an agency that is a party to the presiding officer is permissible in any of the following circumstances:

(a) The communication is for the purpose of assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its pre-adjudicative stage. An assistant or advisor may evaluate the evidence in the record but shall not

furnish, augment, diminish, or modify the evidence in the record.

(b) The communication is for the purpose of advising the presiding officer concerning a settlement proposal advocated by the advisor.

(c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative proceeding that is nonprosecutorial in character, provided the content of the advice is disclosed on the record and all parties are given an opportunity to address it in the manner provided in Section 11430.50:

(1) The advice involves a technical issue in the proceeding and the advice is necessary for, and is not otherwise reasonably available to, the presiding officer.

(2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.

Comment. The exceptions to the prohibition on ex parte communications provided in Section 11430.30 are most likely to be useful in hearings where the presiding officer is employed by an agency that is a party. This provision also applies to the agency head, or other person or body to which the power to hear or decide is delegated. See Section 11430.70 (application of provisions to agency head or other person).

This article does not limit on-the-record communications between agency personnel and the presiding officer. Section 11430.10(b) (ex parte communications prohibited). Only advice or assistance given outside the hearing is prohibited.

The first sentence of subdivision (a) is drawn from 1981 Model State APA § 4-214(a)-(b). The second sentence is drawn from 1981 Model State APA § 4-213(b). Under this provision, a person has "served" in any of the capacities mentioned if the person has personally carried out the function, and not merely supervised or been organizationally connected with a person who has personally carried out the function. The limitation is intended to apply to substantial involvement in a case by a person, and not merely marginal or trivial participation. The sort of participation

intended to be disqualifying is meaningful participation that is likely to affect an individual with a commitment to a particular result in the case. Thus a person who merely participated in a preliminary determination in an adjudicative proceeding or its pre-adjudicative stage would ordinarily be able to assist or advise the presiding officer in the proceeding. *Cf.* Section 11425.30 (neutrality of presiding officer). For this reason also, a staff member who plays a meaningful but neutral role without becoming an adversary would not be barred by this section.

This provision is not limited to agency personnel, but includes participants in the proceeding not employed by the agency. A deputy attorney general who prosecuted the case at the administrative trial level, for example, would be precluded from advising the agency head or other person delegated the power to hear or decide at the final decision level, except with respect to settlement matters. Subdivision (b).

Subdivision (b), permitting an investigator, prosecutor, or advocate to advise the presiding officer regarding a settlement proposal, is limited to advice in support of the proposed settlement; the insider may not use the opportunity to argue against a previously agreed-to settlement. *Cf.* Alhambra Teachers Ass'n CTA/NEA v. Alhambra City and High School Districts (1986), PERB Decision No. 560. Insider access is permitted here in furtherance of public policy favoring settlement, and because of the consonance of interest of the parties in this situation.

Subdivision (c) applies to nonprosecutorial types of administrative adjudications, such as power plant siting and land use decisions. The provision recognizes that the length and complexity of many cases of this type may as a practical matter make it impossible for an agency to adhere to the restrictions of this article, given limited staffing and personnel. Subdivision (c)(1) recognizes that such an adjudication may require advice from a person with special technical knowledge whose advice would not otherwise be available to the presiding officer under standard doctrine. Subdivision (c)(2) recognizes the need for policy advice from planning staff in proceedings such as land use and environmental matters.

§ 11430.40. Prior ex parte communication

11430.40. If, while the proceeding is pending but before serving as presiding officer, a person receives a communication of a type that would be in violation of this article if received while serving as presiding officer, the person, promptly after starting to serve, shall disclose the content of the communication on the record and give all

parties an opportunity to address it in the manner provided in Section 11430.50.

Comment. Section 11430.40 is drawn from former Section 11513.5(c), but is limited to communications received during pendency of the proceeding. See also 1981 Model State APA § 4-213(d). This provision also applies to the agency head, or other person or body to which the power to hear or decide is delegated. See Section 11430.70 (application of provisions to agency head or other person). For the purpose of this section, a proceeding is pending on the earlier of issuance of an agency pleading or submission of an application for an agency decision. Section 11430.10(c) (ex parte communications prohibited).

§ 11430.50. Disclosure of ex parte communication

11430.50. (a) If a presiding officer receives a communication in violation of this article, the presiding officer shall make all of the following a part of the record in the proceeding:

(1) If the communication is written, the writing and any written response of the presiding officer to the communication.

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the presiding officer, and the identity of each person from whom the presiding officer received the communication.

(b) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record.

(c) If a party requests an opportunity to address the communication within ten days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication.

(2) The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded.

Comment. Section 11430.50 is drawn from former Section 11513.5(d). This provision also applies to the agency head, or other person or body to which the power to hear or decide is delegated. See Section 11430.70 (application of provisions to agency head or other person). See also Section 11440.20 (notice).

§ 11430.60. Disqualification of presiding officer

11430.60. Receipt by the presiding officer of a communication in violation of this article may be grounds for disqualification of the presiding officer. If the presiding officer is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order of the disqualified presiding officer.

Comment. Section 11430.60 is drawn from former Section 11513.5(e). This provision also applies to the agency head, or other person or body to which the power to hear or decide is delegated. See Section 11430.70 (application of provisions to agency head or other person).

Section 11430.60 permits the disqualification of a presiding officer if necessary to eliminate the effect of an ex parte communication.

In addition, this section permits the pertinent portions of the record to be sealed by protective order. The intent of this provision is to remove the improper communication from the view of the successor presiding officer, while preserving it as a sealed part of the record, for purposes of subsequent administrative or judicial review. Issuance of a protective order under this section is permissive, not mandatory, and is therefore within the discretion of a presiding officer who has knowledge of the improper communication.

§ 11430.70. Application of provisions to agency head or other person

11430.70. The provisions of this article governing ex parte communications to the presiding officer also govern ex parte communications to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

Comment. Under Section 11430.70, this article is applicable to the agency head or other person or body to which the power to act is delegated. For an additional limitation on communications between the presiding officer and agency head, see Section 11430.80.

§ 11430.80. Communications between presiding officer and agency head

11430.80. (a) There shall be no communication, direct or indirect, while a proceeding is pending regarding the merits of any issue in the proceeding, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(b) This section does not apply where the agency head or other person or body to which the power to hear or decide in the proceeding is delegated serves as both presiding officer and agency head.

Comment. Section 11430.80 is a special application of a provision of former Section 11513.5(a), which precluded a presiding officer from communicating with a person who presided in an earlier phase of the proceeding. Section 11430.80 extends the ex parte communications limitation of Section 11430.70 (application of provisions to agency head or other person) to include communications with an agency or non-agency presiding officer as well.

This section enforces the general principle that the presiding officer should not be an advocate for the proposed decision to the agency head, including a person or body to which the power to act is delegated. See Section 11405.40 ("agency head" defined). The decision of the agency head should be based on the record and not on off-the-record discussions from which the parties are excluded. Nothing in this section restricts on-the-record communications in between the presiding officer and the agency head. Section 11430.10(b).

This section precludes only communications concerning the merits of an issue in the proceeding while the proceeding is pending. It does not preclude, for example, the agency head from directing the presiding officer to elaborate portions of the proposed decision in the proceeding, from asking the presiding officer for tapes of settlement discussions in the proceeding, or from informing the presiding officer of an investigation concerning disciplinary action involving the presiding officer arising out of the proceeding.

Article 8. Language Assistance

§ 11435.05. "Language assistance"

11435.05. As used in this article, "language assistance" means oral interpretation or written translation into English of a language other than English or of English into another language for a party or witness who cannot speak or understand English or who can do so only with difficulty.

Comment. Section 11435.05 supersedes former subdivision (g) of Section 11500. It extends this article to language translation for witnesses.

§ 11435.10. Interpretation for hearing-impaired person

11435.10. Nothing in this article limits the application or effect of Section 754 of the Evidence Code to interpretation for a deaf or hard-of-hearing party or witness in an adjudicative proceeding.

Comment. Section 11435.10 makes clear that the language assistance provisions of this article are not intended to limit the application of Evidence Code Section 754 in adjudicative proceedings.

§ 11435.15. Application of article

11435.15. (a) The following state agencies shall provide language assistance in adjudicative proceedings to the extent provided in this article:

Agricultural Labor Relations Board
Department of Alcohol and Drug Abuse
State Athletic Commission
California Unemployment Insurance Appeals Board
Board of Prison Terms
State Board of Barbering and Cosmetology
State Department of Developmental Services
Public Employment Relations Board
Franchise Tax Board
State Department of Health Services
Department of Housing and Community Development

Department of Industrial Relations
State Department of Mental Health
Department of Motor Vehicles
Notary Public Section, Office of the Secretary of State
Public Utilities Commission
Office of Statewide Health Planning and Development
State Department of Social Services
Workers' Compensation Appeals Board
Department of the Youth Authority
Youthful Offender Parole Board
Bureau of Employment Agencies
Department of Insurance
State Personnel Board
California Board of Podiatric Medicine
Board of Psychology

(b) Nothing in this section prevents an agency other than an agency listed in subdivision (a) from electing to adopt any of the procedures in this article, provided that any selection of an interpreter is subject to Section 11435.30.

(c) Nothing in this section prohibits an agency from providing an interpreter during a proceeding to which this chapter does not apply, including an informal factfinding or informal investigatory hearing.

(d) This article applies to an agency listed in subdivision (a) notwithstanding a general provision that this chapter does not apply to some or all of an agency's adjudicative proceedings.

Comment. Subdivisions (a) and (b) of Section 11435.15 restate former Section 11501.5. Subdivision (c) restates a portion of former subdivision (f) of Section 11500. Subdivision (d) is added to make clear that even though this chapter does not otherwise apply to a hearing, the hearing is not exempt from the requirements of this article if the agency is listed in this section.

The application of this article is limited to adjudicative proceedings in which, 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 a decision. Section 11410.10. This continues

the general effect of the first paragraph of former subdivision (f) of Section 11500 ("adjudicatory hearing" defined).

In addition to the proceedings listed in this section, language assistance is also required of state agencies whose hearings are not governed by Chapter 5. Section 11018.

§ 11435.20. Provision for interpreter

11435.20. (a) The hearing, or any medical examination conducted for the purpose of determining compensation or monetary award, shall be conducted in English.

(b) If a party or the party's witness does not proficiently speak or understand English and before commencement of the hearing or medical examination requests language assistance, an agency subject to the language assistance requirement of this article shall provide the party or witness an interpreter.

Comment. Section 11435.20 continues the first sentence of former subdivision (d) of Section 11513 and extends it to witnesses as well as parties. See Section 11435.05 ("language assistance" defined).

§ 11435.25. Cost of interpreter

11435.25. (a) The cost of providing an interpreter under this article shall be paid by the agency having jurisdiction over the matter if the presiding officer so directs, otherwise by the party at whose request the interpreter is provided.

(b) The presiding officer's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the party in need of the interpreter to pay.

(c) Notwithstanding any other provision of this section, in a hearing before the Workers' Compensation Appeals Board or the Division of Workers' Compensation relating to workers' compensation claims, the payment of the costs of providing an interpreter shall be governed by the rules and regulations promulgated by the Workers' Compensation Appeals Board or the Administrative Director of the Division of Workers' Compensation, as appropriate.

Comment. Section 11435.25 continues the fourth sentence and the second paragraph of former subdivision (d) of Section 11513 without substantive change.

§ 11435.30. Certification of hearing interpreters

11435.30. (a) The State Personnel Board shall establish, maintain, administer, and publish annually an updated list of certified administrative hearing interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to Section 11435.40. Any interpreter so listed may be examined by each employing agency to determine the interpreter's knowledge of the employing agency's technical program terminology and procedures.

(b) Court interpreters certified pursuant to Section 68562, and interpreters listed on the State Personnel Board's recommended lists of court and administrative hearing interpreters prior to July 1, 1993, shall be deemed certified for purposes of this section.

Comment. Section 11435.30 continues former subdivision (e) of Section 11513 without substantive change.

§ 11435.35. Certification of medical examination interpreters

11435.35. (a) The State Personnel Board shall establish, maintain, administer, and publish annually, an updated list of certified medical examination interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to Section 11435.40.

(b) Court interpreters certified pursuant to Section 68562 and administrative hearing interpreters certified pursuant to Section 11435.30 shall be deemed certified for purposes of this section.

Comment. Section 11435.35 continues former Section 11513(f) without substantive change.

§ 11435.40. Designation of languages for certification

11435.40. (a) The State Personnel Board shall designate the languages for which certification shall be established under Sections 11435.30 and 11435.35. The languages designated shall include, but not be limited to, Spanish, Tagalog, Arabic, Cantonese, Japanese, Korean, Portuguese, and Vietnamese until the State Personnel Board finds that there is an insufficient need for interpreting assistance in these languages.

(b) The language designations shall be based on the following:

(1) The language needs of non-English-speaking persons appearing before the administrative agencies, as determined by consultation with the agencies.

(2) The cost of developing a language examination.

(3) The availability of experts needed to develop a language examination.

(4) Other information the board deems relevant.

Comment. Section 11435.40 continues former subdivision (g) of Section 11513 without substantive change.

§ 11435.45. Certification fees

11435.45. (a) The State Personnel Board shall establish and charge fees for applications to take interpreter examinations and for renewal of certifications. The purpose of these fees is to cover the annual projected costs of carrying out this article. The fees may be adjusted each fiscal year by a percent that is equal to or less than the percent change in the California Necessities Index prepared by the Commission on State Finance.

(b) Each certified administrative hearing interpreter and each certified medical examination interpreter shall pay a fee, due on July 1 of each year, for the renewal of the certification. Court interpreters certified under Section 68562 shall not pay any fees required by this section.

(c) If the amount of money collected in fees is not sufficient to cover the costs of carrying out this article, the board shall charge and be reimbursed a pro rata share of the additional costs by the state agencies that conduct administrative hearings.

Comment. Section 11435.45 continues former subdivisions (h) and (i) of Section 11513 without substantive change.

§ 11435.50. Decertification

11435.50. The State Personnel Board may remove the name of a person from the list of certified interpreters if any of the following conditions occurs:

(a) The person is deceased.

(b) The person notifies the board that the person is unavailable for work.

(c) The person does not submit a renewal fee as required by Section 11435.45.

Comment. Section 11435.50 continues former subdivision (j) of Section 11513 without substantive change.

§ 11435.55. Unavailability of certified interpreter

11435.55. (a) An interpreter used in a hearing shall be certified pursuant to Section 11435.30. However, if an interpreter certified pursuant to Section 11435.30 cannot be present at the hearing, the hearing agency shall have discretionary authority to provisionally qualify and use another interpreter.

(b) An interpreter used in a medical examination shall be certified pursuant to Section 11435.35. However, if an interpreter certified pursuant to Section 11435.35 cannot be present at the medical examination, the physician provisionally may use another interpreter if that fact is noted in the record of the medical evaluation.

Comment. Section 11435.55 continues the second and third sentences of former subdivision (d) and former subdivision (k) of Section 11513 without substantive change.

§ 11435.60. Duty to advise party of right to interpreter

11435.60. Every agency subject to the language assistance requirement of this article shall advise each party of the right to an interpreter at the same time that each party is advised of the hearing date or medical examination. Each party in need of an interpreter shall also be encouraged to give timely notice to the agency conducting the hearing or medical examination so that appropriate arrangements can be made.

Comment. Section 11435.60 continues former subdivision (*l*) of Section 11513 without substantive change.

§ 11435.65. Confidentiality and impartiality of interpreter

11435.65. (a) The rules of confidentiality of the agency, if any, that apply in an adjudicative proceeding shall apply to any interpreter in the hearing or medical examination, whether or not the rules so state.

(b) The interpreter shall not have had any involvement in the issues of the case prior to the hearing.

Comment. Section 11435.65 continues former subdivisions (m) and (n) of Section 11513 without substantive change.

Article 9. General Procedural Provisions

§ 11440.10. Delegation of review authority

11440.10. (a) The agency head may do any of the following with respect to a decision of the presiding officer or the agency:

(1) Determine to review some but not all issues, or not to exercise any review.

(2) Delegate its review authority to one or more persons.

(3) Authorize review by one or more persons, subject to further review by the agency head.

(b) By regulation an agency may mandate review, or may preclude or limit review, of a decision of the presiding officer or the agency.

Comment. Section 11440.10 is drawn from Section 11500(a) (power to act may be delegated by agency) and 1981 Model State APA § 4-216(a)(1)-(2). This section is subject to a contrary statute that may, for example, require the agency head itself to hear and decide a specific issue. Section 11415.20 (conflicting or inconsistent statute controls). See, e.g., Greer v. Board of Educ., 47 Cal. App. 3d 98, 121 Cal. Rptr. 542 (1975) (school board, rather than hearing officer, formerly required to determine issues under Educ. Code § 13443). See also Section 11500(a) (power to act may not be delegated where action required by "agency itself" under formal hearing procedure).

§ 11440.20. Notice

11440.20. Service of a writing on, or giving of a notice to, a person in a procedure provided in this chapter is subject to the following provisions:

(a) The writing or notice shall be delivered personally or sent by mail or other means to the person at the person's last known address or, if the person is a party with an attorney or other authorized representative of record in the proceeding, to the party's attorney or other authorized representative. If a party is required by statute or regulation to maintain an address with an agency, the party's last known address is the address maintained with the agency.

(b) Unless a provision specifies the form of mail, service or notice by mail may be by first class mail, registered mail, or certified mail, by mail delivery service, by facsimile transmission if complete and without error, or by other electronic means as provided by regulation, in the discretion of the sender.

Comment. The application of Section 11440.20 is limited to the procedures in this chapter. It does not apply to Chapter 5 (formal hearing), which includes its own notice and service provisions. See Section 11505.

Subdivision (b) authorizes delivery by a commercial delivery service as well as by the United States Postal Service. Proof of service under subdivision (b) may be made by any appropriate method, including proof in the manner provided for civil actions and proceedings. See Code Civ.

Proc. § 1013a; Cal. R. Ct. 2008(e) (proof of service by facsimile transmission).

§ 11440.30. Hearing by electronic means

11440.30. (a) The presiding officer may conduct all or part of a hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits.

(b) The presiding officer may not conduct all or part of a hearing by telephone, television, or other electronic means if a party objects.

Comment. Subdivision (a) of Section 11440.30 is drawn from 1981 Model State APA § 4-211(4), allowing the presiding officer to conduct all or part of the hearing by telephone, television, or other electronic means, such as a conference telephone call. The opportunity to observe exhibits includes a reasonable opportunity to examine and object to exhibits before or at the hearing. While subdivision (a) permits the conduct of proceedings by telephone, television, or other electronic means, the presiding officer may of course conduct the proceeding in the physical presence of all participants.

§ 11440.40. Evidence of sexual conduct

11440.40. (a) In any proceeding under subdivision (h) or (i) of Section 12940, or Section 19572 or 19702, alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is subject to all of the following limitations:

(1) The evidence is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided for under subdivision (b). This paragraph is intended only to limit the scope of discovery; it is not intended to affect the methods of discovery allowed by statute.

(2) The evidence is not admissible at the hearing unless offered to attack the credibility of the complainant as provided for under subdivision (b). Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.

(b) Evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is presumed inadmissible absent an offer of proof establishing its relevance and reliability and that its probative value is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.

(c) As used in this section "complainant" means a person claiming to have been subjected to conduct that constitutes sexual harassment, sexual assault, or sexual battery.

Comment. Section 11440.40 expands the application of provisions formerly limited to proceedings under Chapter 5 (commencing with Section 11500) to apply in all cases covered by this chapter. Subdivision (a) restates former subdivision (g) of Section 11507.6 and the unnumbered paragraph formerly located between subdivisions (c) and (d) of Section 11513, correcting the reference to Section 12940(h) and (i). Subdivision (b) restates former subdivision (o) of Section 11513. Subdivision (c) restates former subdivision (p) of Section 11513.

§ 11440.50. Intervention

11440.50. (a) This section applies in adjudicative proceedings of an agency if the agency by regulation provides that this section is applicable in the proceedings.

(b) The presiding officer shall grant a motion for intervention if all of the following conditions are satisfied:

(1) The motion is submitted in writing, with copies served on all parties named in the agency's pleading.

(2) The motion is made as early as practicable in advance of the hearing. If there is a prehearing conference, the motion shall be made in advance of the prehearing conference and shall be resolved at the prehearing conference.

(3) The motion states facts demonstrating that the applicant's legal rights, duties, privileges, or immunities will be substantially affected by the proceeding or that the applicant qualifies as an intervenor under a statute or regulation.

(4) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention.

(c) If an applicant qualifies for intervention, the presiding officer may impose conditions on the intervenor's participation in the proceeding, either at the time that intervention is granted or at a subsequent time. Conditions may include the following:

(1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the motion.

(2) Limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor so as to promote the orderly and prompt conduct of the proceeding.

(3) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceeding.

(4) Limiting or excluding the intervenor's participation in settlement negotiations.

(d) As early as practicable in advance of the hearing the presiding officer shall issue an order granting or denying the motion for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the applicant and to all parties.

(e) Whether the interests of justice and the orderly and prompt conduct of the proceedings will be impaired by allowing intervention is a determination to be made in the sole discretion, and based on the knowledge and judgment at that time, of the presiding officer. The determination is not subject to administrative or judicial review.

(f) Nothing in this section precludes an agency from adopting a regulation that permits participation by a person short of intervention as a party, subject to Article 7 (commencing with Section 11430.10) of Chapter 4.5.

Comment. Subdivision (a) of Section 11440.50 makes clear that this section does not apply to a proceeding unless an agency has acted to make it applicable. This section provides an optional means by which an agency can provide for intervention. This section does not provide an exclusive intervention procedure, and an agency may adopt other intervention rules or may preclude intervention entirely, subject to due process limitations.

Subdivision (b)(1) is drawn from 1981 Model State APA § 4-209(a). It provides that the presiding officer must grant the motion to intervene if a party satisfies the standards of the section. Subdivision (b)(3) confers standing on an applicant to intervene on demonstrating that the applicant's "legal rights, duties, privileges, or immunities will be substantially affected by the proceeding." *Cf.* Horn v. County of Ventura, 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979) (right to notice and hearing if agency action will constitute substantial deprivation of property rights). However, subdivision (b)(4) imposes the further limitation that the presiding officer may grant the motion for intervention only on determining that "the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention." The presiding officer is thus required to weigh the impact that the proceeding will have on the legal rights of the applicant for intervention (subdivision (b)(3)) against the interests of justice and the need for orderly and prompt proceedings (subdivision (b)(4)).

Subdivision (c) is drawn from 1981 Model State APA § 4-209(c). This provision, authorizing the presiding officer to impose conditions on the intervenor's participation in the proceeding, is intended to permit the presiding officer to facilitate reasonable involvement of intervenors without subjecting the proceeding to unreasonably burdensome or repetitious presentations.

Subdivision (d) is drawn from 1981 Model State APA § 4-209(d). By requiring advance notice of the presiding officer's order granting, denying, or modifying intervention, this provision is intended to give the parties and the applicants for intervention an opportunity to prepare for the adjudicative proceeding.

Subdivision (f) recognizes that there are ways whereby an interested person can have an impact on an ongoing adjudication without assuming the substantial litigation costs of becoming a party and without unnecessarily complicating the proceeding through the addition of more parties. Agency regulations may provide, for example, for filing of amicus briefs, testifying as a witness, or contributing to the fees of a party.

Article 10. Informal Hearing

§ 11445.10. Purpose of informal hearing procedure

11445.10. (a) Subject to the limitations in this article, an agency may conduct an adjudicative proceeding under the informal hearing procedure provided in this article.

(b) The Legislature finds and declares the following:

(1) The informal hearing procedure is intended to satisfy due process and public policy requirements in a manner that is simpler and more expeditious than hearing procedures otherwise required by statute, for use in appropriate circumstances.

(2) The informal hearing procedure provides a forum in the nature of a conference in which a party has an opportunity to be heard by the presiding officer.

(3) The informal hearing procedure provides a forum that may accommodate a hearing where by regulation or statute a member of the public may participate without appearing or intervening as a party.

Comment. Section 11445.10 states the policy that underlies the informal hearing procedure. The circumstances where the simplified procedure is appropriate are provided in Section 11445.20 (when informal hearing may be used). The simplified procedures are outlined in Section 11445.40 (procedure for informal hearing).

Basic due process and public policy protections of the administrative adjudication bill of rights are preserved in the informal hearing. Sections 11445.40(a) (procedure for informal hearing), 11425.10 (administrative adjudication bill of rights). Thus, for example, the presiding officer must be free of bias, prejudice, and interest; the presiding officer must be neutral, the adjudicative function being separated from the investigative, prosecutorial, and advocacy functions within the agency; the hearing must be open to public observation; the agency must make available language assistance; ex parte communications are restricted; the decision must be in writing, be based on the record, and include a statement of the factual and legal basis of the decision; and the agency must designate and index significant decisions as precedent.

Reference in this article to the "presiding officer" is not intended to imply unnecessary formality in the proceeding. The presiding officer may be the agency head, an agency member, an administrative law judge, or another person who presides over the hearing. Section 11405.80 ("presiding officer" defined).

§ 11445.20. When informal hearing may be used

11445.20. Subject to Section 11445.30, an agency may use an informal hearing procedure in any of the following proceedings, if in the circumstances its use does not violate another statute or the federal or state Constitution:

(a) A proceeding where there is no disputed issue of material fact.

(b) A proceeding where there is a disputed issue of material fact, if the matter is limited to any of the following:

(1) A monetary amount of not more than one thousand dollars ($1,000).

(2) A disciplinary sanction against a student that does not involve expulsion from an academic institution or suspension for more than 10 days.

(3) A disciplinary sanction against an employee that does not involve discharge from employment, demotion, or suspension for more than 5 days.

(4) A disciplinary sanction against a licensee that does not involve an actual revocation of a license or an actual suspension of a license for more than 5 days. Nothing in this

section precludes an agency from imposing a stayed revocation or a stayed suspension of a license in an informal hearing.

(c) A proceeding where, by regulation, the agency has authorized use of an informal hearing.

(d) A proceeding where an evidentiary hearing for determination of facts is not required by statute but where the agency determines the federal or state Constitution may require a hearing.

Comment. Subdivision (a) of Section 11445.20 permits the informal hearing to be used, regardless of the type or amount at issue, if no disputed issue of material fact has appeared, e.g., a power plant siting proceeding in which the power company and the Energy Commission have agreed on all material facts. However, if consumers intervene and dispute material facts, the proceeding may be subject to conversion from an informal hearing procedure to a formal or other type of hearing procedure in accordance with Sections 11470.10-11470.50.

Subdivision (b) permits the informal hearing to be used, even if a disputed issue of material fact has appeared or if the amount or other stake involved is relatively minor. The reference to a "licensee" in subdivision (b)(4) includes a certificate holder. Under subdivision (b), an informal hearing procedure may be used if the sanction imposed in the decision falls within the limitations of the subdivision, even though a greater penalty may result if a party fails to comply with the sanction imposed in the decision.

Subdivision (c) imposes no limits on the authority of the agency to adopt the informal hearing by regulation, other than the general limitation that use of the informal hearing procedure is subject to statutory and constitutional due process requirements. Thus, an agency by regulation may authorize use of the informal hearing procedure in a case where the amount in issue or sanction exceeds the amount provided in subdivision (b), so long as use of the informal hearing procedure would not contravene other statutes or due process of law.

Each subdivision in this section provides an independent basis for conducting an informal hearing. For example, if there is no issue of material fact, an agency may conduct an informal hearing under subdivision (a) whether or not a disciplinary sanction that exceeds the limits of subdivision (b) may result from the hearing.

Nothing in this section implies that this procedure is required in a proceeding in which a hearing is not statutorily or constitutionally required, including an agency's authority in minor disciplinary matters to

make an investigation with or without a hearing as it deems necessary. Sections 11410.10 (application to constitutionally and statutorily required hearings), 11415.50 (when adjudicative proceeding not required).

§ 11445.30. Selection of informal hearing

11445.30. (a) The notice of hearing shall state the agency's selection of the informal hearing procedure.

(b) Any objection of a party to use of the informal hearing procedure shall be made in the party's pleading.

(c) An objection to use of the informal hearing procedure shall be resolved by the presiding officer before the hearing on the basis of the pleadings and any written submissions in support of the pleadings.

Comment. Section 11445.30 provides a procedure for resolving objections to use of the informal hearing procedure in advance of the hearing. See also Section 11511.5 (prehearing conference). However, conversion to a formal hearing or other type of hearing may be appropriate if during the course of the hearing circumstances indicate the need for it. See Sections 11445.50 (cross-examination), 11445.60 (proposed proof).

§ 11445.40. Procedure for informal hearing

11445.40. (a) Except as provided in this article, the hearing procedures otherwise required by statute for an adjudicative proceeding apply to an informal hearing.

(b) In an informal hearing the presiding officer shall regulate the course of the proceeding. The presiding officer shall permit the parties and may permit others to offer written or oral comments on the issues. The presiding officer may limit the use of witnesses, testimony, evidence, and argument, and may limit or eliminate the use of pleadings, intervention, discovery, prehearing conferences, and rebuttal.

Comment. Section 11445.40 is drawn from 1981 Model State APA § 4-402. The section indicates that the informal hearing is a simplified version of a formal hearing. The informal hearing need not have a prehearing conference, discovery, or testimony of anyone other than the parties. However, it is intended to permit agencies to allow public

participation where appropriate. Section 11445.10 (purpose of informal hearing procedure).

§ 11445.50. Cross-examination

11445.50. (a) The presiding officer may deny use of the informal hearing procedure, or may convert an informal hearing to a formal hearing after an informal hearing is commenced, if it appears to the presiding officer that cross-examination is necessary for proper determination of the matter and that the delay, burden, or complication due to allowing cross-examination in the informal hearing will be more than minimal.

(b) An agency, by regulation, may specify categories of cases in which cross-examination is deemed not necessary for proper determination of the matter under the informal hearing procedure. The presiding officer may allow cross-examination of witnesses in an informal hearing notwithstanding an agency regulation if it appears to the presiding officer that in the circumstances cross-examination is necessary for proper determination of the matter.

(c) The actions of the presiding officer under this section are not subject to judicial review.

Comment. Subdivision (a) of Section 11445.50 gives the presiding officer discretion to limit availability of the informal hearing in situations where it appears that substantial cross-examination will be necessary. For provisions on conversion, see Sections 11470.10-11470.50.

Subdivision (b) permits an agency to specify types of informal hearings in which cross-examination will be precluded. In recognition of the possibility that on occasion a case may demand cross-examination for proper determination of a matter, the presiding officer has limited authority to depart from the general procedure for cases of that type.

§ 11445.60. Proposed proof

11445.60. (a) If the presiding officer has reason to believe that material facts are in dispute, the presiding officer may require a party to state the identity of the witnesses or other sources through which the party would propose to present

proof if the proceeding were converted to a formal or other applicable hearing procedure. If disclosure of a fact, allegation, or source is privileged or expressly prohibited by a regulation, statute, or the federal or state Constitution, the presiding officer may require the party to indicate that confidential facts, allegations, or sources are involved, but not to disclose the confidential facts, allegations, or sources.

(b) If a party has reason to believe that essential facts must be obtained in order to permit an adequate presentation of the case, the party may inform the presiding officer regarding the general nature of the facts and the sources from which the party would propose to obtain the facts if the proceeding were converted to a formal or other applicable hearing procedure.

Comment. Section 11445.60 is drawn from 1981 Model State APA § 4-403. For conversion of proceedings, see Sections 11470.10-11470.50.

Article 11. Subpoenas

§ 11450.10. Subpoena authority

11450.10. (a) Subpoenas and subpoenas duces tecum may be issued for attendance at a hearing and for production of documents at any reasonable time and place or at a hearing.

(b) The custodian of documents that are the subject of a subpoena duces tecum may satisfy the subpoena by delivery of the documents or a copy of the documents, or by making the documents available for inspection or copying, together with an affidavit in compliance with Section 1561 of the Evidence Code.

Comment. Subdivision (a) of Section 11450.10 supersedes a portion of former Section 11510(a). This article gives subpoena power to all adjudicating agencies, presiding officers, and attorneys for parties. See Section 11450.20 (issuance of subpoena). The Coastal Commission previously lacked statutory subpoena power. This section also makes clear that a subpoena duces tecum may be issued to provide documents at any reasonable time and place as well as at the hearing.

Subdivision (b) provides an alternative means of satisfying a subpoena duces tecum without the custodian's appearance. This is analogous to the procedure available in court proceedings. See Code Civ. Proc. § 2020. A custodian of subpoenaed documents who fails to comply with the subpoena may be compelled to appear and produce the documents. See Section 11455.10 (misconduct in proceeding).

This article incorporates privacy protections from civil practice. Section 11450.20(a).

§ 11450.20. Issuance of subpoena

11450.20. (a) Subpoenas and subpoenas duces tecum shall be issued by the agency or presiding officer at the request of a party, or by the attorney of record for a party, in accordance with Sections 1985 to 1985.4, inclusive, of the Code of Civil Procedure.

(b) The process extends to all parts of the state and shall be served in accordance with Sections 1987 and 1988 of the Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and driver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section has the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear in court at the time and place required for the appearance or testimony pursuant to a subpoena, shall prove to the court that the party has complied

with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law.

(c) No witness is obliged to attend unless the witness is a resident of the state at the time of service.

Comment. Section 11450.20 restates a portion of former Section 11510(a)-(b), and expands it to include issuance by an attorney and to incorporate civil practice privacy protections. See Code Civ. Proc. §§ 1985-1985.4. See also Sehlmeyer v. Department of Gen. Serv., 17 Cal. App. 4th 1072, 21 Cal. Rptr. 2d 840 (1993). For enforcement of a subpoena, see Sections 11455.10-11455.20.

Subdivision (a) requires a subpoena or subpoena duces tecum to be issued in accordance with Sections 1985-1985.4 of the Code of Civil Procedure. For a subpoena duces tecum, this includes the requirement of an affidavit showing good cause for production of the matters and things described in the subpoena. Code Civ. Proc. § 1985.

§ 11450.30. Motion to quash

11450.30. (a) A person served with a subpoena or a subpoena duces tecum may object to its terms by a motion for a protective order, including a motion to quash.

(b) The objection shall be resolved by the presiding officer on terms and conditions that the presiding officer declares. The presiding officer may make another order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands, including violations of the right to privacy.

(c) A subpoena or a subpoena duces tecum issued by the agency on its own motion may be quashed by the agency.

Comment. Section 11450.30 addresses matters not previously covered by statute but covered by regulation in some agencies. See, e.g., 20 Cal. Code Regs. § 61 (Public Utilities Commission).

§ 11450.40. Witness fees

11450.40. A witness appearing pursuant to a subpoena or a subpoena duces tecum, other than a party, shall receive for the

appearance the following mileage and fees, to be paid by the party at whose request the witness is subpoenaed:

(a) The same mileage allowed by law to a witness in a civil case.

(b) The same fees allowed by law to a witness in a civil case. This subdivision does not apply to an officer or employee of the state or a political subdivision of the state.

Comment. Section 11450.40 supersedes former Section 11510(c). Its coverage is extended to a subpoena duces tecum and is conformed to the mileage and fees applicable in civil cases. See Sections 68092.5-68093 (mileage and fees in civil cases); see also Sections 68096.1-68097.10 (witness fees of public officers and employees).

Article 12. Enforcement of Orders and Sanctions

§ 11455.10. Misconduct in proceeding

11455.10. A person is subject to the contempt sanction for any of the following in an adjudicative proceeding before an agency:

(a) Disobedience of or resistance to a lawful order.

(b) Refusal to take the oath or affirmation as a witness or thereafter refusal to be examined.

(c) Obstruction or interruption of the due course of the proceeding during a hearing or near the place of the hearing by any of the following:

(1) Disorderly, contemptuous, or insolent behavior toward the presiding officer while conducting the proceeding.

(2) Breach of the peace, boisterous conduct, or violent disturbance.

(3) Other unlawful interference with the process or proceedings of the agency.

(d) Violation of the prohibition of ex parte communications under Article 7 (commencing with Section 11430.10).

(e) Failure or refusal, without substantial justification, to comply with a deposition order, discovery request, subpoena,

or other order of the presiding officer, or moving, without substantial justification, to compel discovery.

Comment. Section 11455.10 restates the substance of a portion of former Section 11525. Subdivision (c) is a clarifying provision drawn from Code of Civil Procedure Section 1209 (contempt of court). Subdivision (d) is new. Subdivision (e) supersedes former Section 11507.7(i).

§ 11455.20. Contempt

11455.20. (a) The presiding officer or agency head may certify the facts that justify the contempt sanction against a person to the superior court in and for the county where the proceeding is conducted. The court shall thereupon issue an order directing the person to appear before the court at a specified time and place, and then and there to show cause why the person should not be punished for contempt. The order and a copy of the certified statement shall be served on the person. Upon service of the order and a copy of the certified statement, the court has jurisdiction of the matter.

(b) The same proceedings shall be had, the same penalties may be imposed, and the person charged may purge the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.

Comment. Section 11455.20 restates a portion of former Section 11525, but vests certification authority in the presiding officer or agency head. For monetary sanctions for bad faith actions or tactics, see Section 11455.30.

§ 11455.30. Monetary sanctions for bad faith actions or tactics

11455.30. (a) The presiding officer may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.

(b) The order, or denial of an order, is subject to judicial review in the same manner as a decision in the proceeding. The order is enforceable in the same manner as a money judgment or by the contempt sanction.

Comment. Section 11455.30 permits monetary sanctions against a party (including the agency) for bad faith actions or tactics. Bad faith actions or tactics could include failure or refusal to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer in discovery, or moving to compel discovery, frivolously or solely intended to cause delay. A person who requests a hearing without legal grounds would not be subject to sanctions under this section unless the request was made in bad faith and frivolous or solely intended to cause unnecessary delay. An order imposing sanctions (or denial of such an order) is reviewable in the same manner as administrative decisions generally.

For authority to seek the contempt sanction, see Section 11455.20.

Article 13. Emergency Decision

§ 11460.10. Application of article

11460.10. Subject to the limitations in this article, an agency may conduct an adjudicative proceeding under the emergency decision procedure provided in this article.

Comment. Section 11460.10 makes available an emergency decision procedure for decisions in which an adjudicative proceeding is required. See Section 11410.10 (application to constitutionally and statutorily required hearings). The emergency decision procedure does not apply to an agency decision to seek injunctive relief. See Section 11415.50 (when adjudicative proceeding not required). The decision whether to use the emergency procedure, if available, is in the discretion of the agency.

This article supplements and does not replace other statutes that provide for interim suspension orders or other emergency orders. See Section 11415.10 & Comment (applicable procedure). For other statutes on interim suspension orders and other emergency orders, see Bus. & Prof. Code §§ 494 (order for interim suspension of licensee), 6007(c) (attorney), 10086(a) (real estate licensee); Educ. Code §§ 66017 (immediate suspension of disruptive student, teacher, staff member, or administrator), 94319.12 (emergency suspension of approval of private postsecondary institution to operate); Fin. Code § 8201(f) (immediate removal of officer or employee of savings association); Food & Agric.

Code §§ 56535-56537 (farm products licenses); Health & Safety Code §§ 1550.5 (community care facilities), 1569.50 (residential care facilities for the elderly), 1596.886 (child daycare facilities); Pub. Util. Code § 1070.5 (trucking license); Veh. Code § 11706 (DMV licenses of manufacturers, transporters, and dealers).

§ 11460.20. Agency regulation required

11460.20. (a) An agency may issue an emergency decision for temporary, interim relief under this article if the agency has adopted a regulation that provides that the agency may use the procedure provided in this article.

(b) The regulation shall elaborate the application of the provisions of this article to an emergency decision by the agency, including all of the following:

(1) Define the specific circumstances in which an emergency decision may be issued under this article.

(2) State the nature of the temporary, interim relief that the agency may order.

(3) Prescribe the procedures that will be available before and after issuance of an emergency decision under this article. The procedures may be more protective of the person to which the agency action is directed than those provided in this article.

(c) This article does not apply to an emergency decision, including a cease and desist order or temporary suspension order, issued pursuant to other express statutory authority.

Comment. Section 11460.20 requires specificity in agency regulations that adopt an emergency decision procedure. Notwithstanding this article, a statute on emergency decisions, including cease and desist orders and temporary suspension orders, applicable to a particular agency or proceeding prevails over the provisions of this article. Section 11415.20 (conflicting or inconsistent statute controls).

§ 11460.30. When emergency decision available

11460.30. (a) An agency may only issue an emergency decision under this article in a situation involving an

immediate danger to the public health, safety, or welfare that requires immediate agency action.

(b) An agency may take only action under this article that is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies issuance of an emergency decision.

(c) An emergency decision issued under this article is limited to temporary, interim relief. The temporary, interim relief is subject to judicial review under Section 11460.80, and the underlying issue giving rise to the temporary, interim relief is subject to an adjudicative proceeding pursuant to Section 11460.60.

Comment. Section 11460.30 is drawn from 1981 Model State APA § 4-501(a)-(b). The emergency decision procedure is available only if the agency has adopted an authorizing regulation. Section 11460.20.

The authority for an emergency decision to avoid immediate danger to the public health, safety, or welfare includes avoiding adverse effects on the environment, such as to fish and wildlife.

§ 11460.40. Emergency decision procedure

11460.40. (a) Before issuing an emergency decision under this article, the agency shall, if practicable, give the person to which the agency action is directed notice and an opportunity to be heard.

(b) Notice and hearing under this section may be oral or written, including notice and hearing by telephone, facsimile transmission, or other electronic means, as the circumstances permit. The hearing may be conducted in the same manner as an informal hearing.

Comment. Section 11460.40 applies to the extent practicable in the circumstances of the particular emergency situation. The agency must use its discretion to determine the extent of the practicability, and give appropriate notice and opportunity to be heard accordingly. For the conduct of a hearing in the manner of an informal hearing, see Section 11445.40 (procedure for informal hearing).

By regulation the agency may prescribe the emergency notice and hearing procedure. *Cf.* Transitional Rules of Procedure of the State Bar,

Rules 789-798 (proceedings re involuntary transfer to inactive status upon a finding that the attorney's conduct poses a substantial threat of harm to the public or the attorney's clients). The regulation may be more protective of the person to which the agency action is directed than the provisions of this article. Section 11460.20 (agency regulation required).

§ 11460.50. Emergency decision

11460.50. (a) The agency shall issue an emergency decision, including a brief explanation of the factual and legal basis and reasons for the emergency decision, to justify the determination of an immediate danger and the agency's emergency decision to take the specific action.

(b) The agency shall give notice to the extent practicable to the person to which the agency action is directed. The emergency decision is effective when issued or as provided in the decision.

Comment. Section 11460.50 is drawn from 1981 Model State APA § 4-501(c)-(d). Under this section the agency has flexibility to issue its emergency decision orally, if necessary to cope with the emergency.

§ 11460.60. Completion of proceedings

11460.60. (a) After issuing an emergency decision under this article for temporary, interim relief, the agency shall conduct an adjudicative proceeding under a formal, informal, or other applicable hearing procedure to resolve the underlying issues giving rise to the temporary, interim relief.

(b) The agency shall commence an adjudicative proceeding under another procedure within 10 days after issuing an emergency decision under this article, notwithstanding the pendency of proceedings for judicial review of the emergency decision.

Comment. Section 11460.60 is drawn from 1981 Model State APA § 4-501(e). If the emergency proceedings have rendered the matter completely moot, this section does not direct the agency to conduct useless follow-up proceedings, since these would not be required in the circumstances.

§ 11460.70. Agency record

11460.70. The agency record consists of any documents concerning the matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.

Comment. Section 11460.70 is drawn from 1981 Model State APA § 4-501(f).

§ 11460.80. Judicial review

11460.80. (a) On issuance of an emergency decision under this article, the person to which the agency action is directed may obtain judicial review of the decision in the manner provided in this section without exhaustion of administrative remedies.

(b) Judicial review under this section shall be pursuant to Section 1094.5 of the Code of Civil Procedure, subject to the following provisions:

(1) The hearing shall be on the earliest day that the business of the court will admit of, but not later than 15 days after service of the petition on the agency.

(2) Where it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(3) A party, on written request to another party, before the proceedings for review and within 10 days after issuance of the emergency decision, is entitled to appropriate discovery.

(4) The relief that may be ordered on judicial review is limited to a stay of the emergency decision.

Comment. Section 11460.80 is drawn from Section 11529(h) (interim suspension of medical care professional).

Article 14. Declaratory Decision

§ 11465.10. Application of article

11465.10. Subject to the limitations in this article, an agency may conduct an adjudicative proceeding under the declaratory decision procedure provided in this article.

Comment. Article 14 (commencing with Section 11465.10) creates, and establishes all of the requirements for, a special proceeding to be known as a "declaratory decision" proceeding. The purpose of the proceeding is to provide an inexpensive and generally available means by which a person may obtain fully reliable information as to the applicability of agency administered law to the person's particular circumstances.

It should be noted that an agency not governed by this chapter nonetheless has general power to issue a declaratory decision. This power is derived from the power to adjudicate. See, e.g., M. Asimow, Advice to the Public from Federal Administrative Agencies 121-22 (1973).

The declaratory decision procedure provided in this article applies only to decisions subject to this chapter, including a hearing under Chapter 5 (formal hearing). See Sections 11410.50 (application where formal hearing procedure required), 11501 (application of chapter). See also Section 11410.10 (application to constitutionally and statutorily required hearings).

§ 11465.20. Declaratory decision permissive

11465.20. (a) A person may apply to an agency for a declaratory decision as to the applicability to specified circumstances of a statute, regulation, or decision within the primary jurisdiction of the agency.

(b) The agency in its discretion may issue a declaratory decision in response to the application. The agency shall not issue a declaratory decision if any of the following applies:

(1) Issuance of the decision would be contrary to a regulation adopted under this article.

(2) The decision would substantially prejudice the rights of a person who would be a necessary party and who does not

consent in writing to the determination of the matter by a declaratory decision proceeding.

(3) The decision involves a matter that is the subject of pending administrative or judicial proceedings.

(c) An application for a declaratory decision is not required for exhaustion of the applicant's administrative remedies for purposes of judicial review.

Comment. Subdivisions (a) and (b) of Section 11465.20 are drawn from 1981 Model State APA § 2-103(a). For the procedure by which an interested person may petition requesting adoption, amendment, or repeal of a regulation, see Sections 11347-11347.1. Unlike the model act, issuance of a declaratory decision under Section 11465.20 is discretionary with the agency, rather than mandatory.

Under subdivision (a), a declaratory decision may determine whether the subject of the proceeding is or is not within the agency's primary jurisdiction. See Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 302-03, 109 P.2d 942 (1941); United Ins. Co. of Chicago v. Maloney, 127 Cal. App. 2d 155, 157-58, 273 P.2d 579 (1954).

Subdivision (b)(2) prohibits an agency from issuing a declaratory decision that would substantially prejudice the rights of a person who would be a necessary party, and who does not consent to the determination of the matter by a declaratory decision proceeding. A necessary party is one that is constitutionally entitled to notice and an opportunity to be heard — a flexible concept depending on the nature of the competing interests involved. Horn v. County of Ventura, 24 Cal. 3d 605, 612, 617, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979). Such a person may refuse to give consent because in a declaratory decision proceeding the person might not have all of the same procedural rights the person would have in another type of adjudicative proceeding to which the person would be entitled.

Subdivision (c) makes clear that application for a declaratory decision is not a necessary part of the administrative process. A person may seek judicial review of an agency action after other administrative remedies have been exhausted; the person is not required to seek declaratory relief as well. Nothing in this subdivision authorizes judicial review without exhaustion of other applicable administrative remedies.

§ 11465.30. Notice of application

11465.30. Within 30 days after receipt of an application for a declaratory decision, an agency shall give notice of the

application to all persons to which notice of an adjudicative proceeding is otherwise required, and may give notice to any other person.

Comment. Section 11465.30 is drawn from 1981 Model State APA § 2-103(c). See also Section 11440.20 (notice).

§ 11465.40. Applicability of rules governing administrative adjudication

11465.40. The provisions of a formal, informal, or other applicable hearing procedure do not apply to an agency proceeding for a declaratory decision except to the extent provided in this article or to the extent the agency so provides by regulation or order.

Comment. Section 11465.40 is drawn from 1981 Model State APA § 2-103(d). It makes clear that the specific procedural requirements for adjudications imposed by the formal hearing procedure or other applicable hearing procedure on an agency when it conducts an adjudicative proceeding are inapplicable to a proceeding for a declaratory decision unless the agency elects to make some or all of them applicable.

Regulations specifying precise procedures available in a declaratory proceeding may be adopted under Section 11465.70. The reason for exempting a declaratory decision from usual procedural requirements for adjudications is to encourage an agency to issue a decision by eliminating requirements it might deem onerous. Moreover, many adjudicative provisions have no applicability. For example, cross-examination is unnecessary since the application establishes the facts on which the agency should rule. Oral argument could also be dispensed with.

Note that there are no contested issues of fact in a declaratory decision proceeding because its function is to declare the applicability of the law in question to facts furnished by the applicant. The actual existence of the facts on which the decision is based will usually become an issue only in a later proceeding in which a party to the declaratory decision proceeding seeks to use the decision as a justification of the party's conduct.

Note also that the party requesting a declaratory decision has the choice of refraining from filing such an application and awaiting the ordinary agency adjudicative process.

A declaratory decision is, of course, subject to provisions governing judicial review of agency decisions and for public inspection and indexing of agency decisions. See, e.g., Sections 6250-6268 (California

Public Records Act). A declaratory decision may be given precedential effect, subject to the provisions governing precedent decisions. See Section 11425.60 (precedent decisions).

§ 11465.50. Action of agency

11465.50. (a) Within 60 days after receipt of an application for a declaratory decision, an agency shall do one of the following, in writing:

(1) Issue a decision declaring the applicability of the statute, regulation, or decision in question to the specified circumstances.

(2) Set the matter for specified proceedings.

(3) Agree to issue a declaratory decision by a specified time.

(4) Decline to issue a declaratory decision, stating in writing the reasons for its action. Agency action under this paragraph is not subject to judicial review.

(b) A copy of the agency's action under subdivision (a) shall be served promptly on the applicant and any other party.

(c) If an agency has not taken action under subdivision (a) within 60 days after receipt of an application for a declaratory decision, the agency is considered to have declined to issue a declaratory decision on the matter.

Comment. Subdivision (a) of Section 11465.50 is drawn from 1981 Model State APA § 2-103(e). The requirement that an agency dispose of an application within 60 days ensures a timely agency response to a declaratory decision application, thereby facilitating planning by affected parties.

Subdivision (b) is drawn from 1981 Model State APA § 2-103(f). It requires that the agency communicate to the applicant and to any other parties any action it takes in response to an application for a declaratory decision. This includes each of the types of actions listed in paragraphs (1)-(4) of subdivision (a). Service is made by personal delivery or mail or other means to the last known address of the person to which the agency action is directed. Section 11440.20 (notice).

The decision by an agency not to issue a declaratory decision is within the absolute discretion of the agency and is therefore not reviewable.

Subdivision (a)(4). See also Section 11465.20 & Comment (declaratory decision permissive).

§ 11465.60. Declaratory decision

11465.60. (a) A declaratory decision shall contain the names of all parties to the proceeding, the particular facts on which it is based, and the reasons for its conclusion.

(b) A declaratory decision has the same status and binding effect as any other decision issued by the agency in an adjudicative proceeding.

Comment. Section 11465.60 is drawn from 1981 Model State APA § 2-103(g). A declaratory decision issued by an agency is judicially reviewable; is binding on the applicant, other parties to that declaratory proceeding, and the agency, unless reversed or modified on judicial review; and has the same precedential effect as other agency adjudications.

A declaratory decision, like other decisions, only determines the legal rights of the particular parties to the proceeding in which it was issued.

The requirement in subdivision (a) that each declaratory decision issued contain the facts on which it is based and the reasons for its conclusion will facilitate any subsequent judicial review of the decision's legality. It also ensures a clear record of what occurred for the parties and for persons interested in the decision because of its possible precedential effect.

§ 11465.70. Regulations governing declaratory decision

11465.70. (a) The Office of Administrative Hearings shall adopt and promulgate model regulations under this article that are consistent with the public interest and with the general policy of this article to facilitate and encourage agency issuance of reliable advice. The model regulations shall provide for all of the following:

(1) A description of the classes of circumstances in which an agency will not issue a declaratory decision.

(2) The form, contents, and filing of an application for a declaratory decision.

(3) The procedural rights of a person in relation to an application.

(4) The disposition of an application.

(b) The regulations adopted by the Office of Administrative Hearings under this article apply in an adjudicative proceeding unless an agency adopts its own regulations to govern declaratory decisions of the agency.

(c) This article does not apply in an adjudicative proceeding to the extent an agency by regulation provides inconsistent rules or provides that this article is not applicable in a proceeding of the agency.

Comment. Section 11465.70 is drawn from 1981 Model State APA § 2-103(b). An agency may choose to preclude declaratory decisions altogether.

Regulations should specify all of the details surrounding the declaratory decision process including a specification of the precise form and contents of the application; when, how, and where an application is to be filed; whether an applicant has the right to an oral argument; the circumstances in which the agency will not issue a decision; and the like.

Regulations also should require a clear and precise presentation of facts, so that an agency will not be required to rule on the application of law to unclear or excessively general facts. The regulations should make clear that, if the facts are not sufficiently precise, the agency can require additional facts or a narrowing of the application.

Agency regulations on this subject will be valid so long as the requirements they impose are reasonable and are within the scope of agency discretion. To be valid these rules must also be consistent with the public interest — which includes the efficient and effective accomplishment of the agency's mission — and the express general policy of this article to facilitate and encourage the issuance of reliable agency advice. Within these general limits, therefore, an agency may include in its rules reasonable standing, ripeness, and other requirements for obtaining a declaratory decision.

Article 15. Conversion of Proceeding

§ 11470.10. Conversion authorized

11470.10. (a) Subject to any applicable regulation adopted under Section 11470.50, at any point in an agency proceeding the presiding officer or other agency official responsible for the proceeding:

(1) May convert the proceeding to another type of agency proceeding provided for by statute if the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of a party.

(2) Shall convert the proceeding to another type of agency proceeding provided for by statute, if required by regulation or statute.

(b) A proceeding of one type may be converted to a proceeding of another type only on notice to all parties to the original proceeding.

Comment. Section 11470.10 is drawn from 1981 Model State APA § 1-107(a)-(b). A reference in this section to a "party," in the case of an adjudicative proceeding means "party" as defined in Section 11405.60, and in the case of a rulemaking proceeding means an active participant in the proceeding or one primarily interested in its outcome. Agency proceedings covered by this article include a rulemaking proceeding as well as an adjudicative proceeding. The conversion provisions may be irrelevant to some types of proceedings by some agencies, and in that case this article would be inapplicable.

Under subdivision (a)(1), a proceeding may not be converted to another type that would be inappropriate for the action being taken. For example, if an agency elects to conduct a formal hearing in a case where it could have elected an informal hearing initially, a subsequent decision to convert to an informal hearing would be appropriate under subdivision (a)(1).

The further limitation in subdivision (a)(1) — that the conversion may not substantially prejudice the rights of a party — must also be satisfied. The courts will have to decide on a case-by-case basis what constitutes substantial prejudice. The concept includes both the right to an appropriate procedure that enables a party to protect its interests, and freedom of the party from great inconvenience caused by the conversion in terms of time, cost, availability of witnesses, necessity of continuances and other delays, and other practical consequences of the conversion. Of course, even if the rights of a party are substantially prejudiced by a conversion, the party may voluntarily waive them. Section 11415.40.

It should be noted that the substantial-prejudice-to-the-rights-of-a-party limitation on discretionary conversion of an agency proceeding from one type to another is not intended to disturb an existing body of law. In certain situations an agency may lawfully deny an individual an adjudicative proceeding to which the individual otherwise would be

entitled by conducting a rulemaking proceeding that determines for an entire class an issue that otherwise would be the subject of a necessary adjudicative proceeding. See Note, *The Use of Agency Rulemaking To Deny Adjudications Apparently Required by Statute*, 54 Iowa L. Rev. 1086 (1969). Similarly, the substantial prejudice limitation is not intended to disturb the existing body of law allowing an agency, in certain situations, to make a determination through an adjudicative proceeding that has the effect of denying a person an opportunity the person might otherwise be afforded if a rulemaking proceeding were used instead.

Subdivision (a)(2) makes clear that an agency must convert a proceeding of one type to a proceeding of another type when required by regulation or statute, even if a nonconsenting party is prejudiced thereby. Under subdivision (b), however, both a discretionary and a mandatory conversion must be accompanied by notice to all parties to the original proceeding so that they will have a fully adequate opportunity to protect their interests.

Within the limits of this section, an agency should be authorized to use procedures in a proceeding that are most likely to be effective and efficient under the particular circumstances. Subdivision (a) allows an agency this flexibility. For example, an agency that wants to convert a formal hearing into an informal hearing, or an informal hearing into a formal hearing, may do so under this provision if the conversion is appropriate and in the public interest, if adequate notice is given, and if the rights of the parties are not substantially prejudiced.

Similarly, an agency called on to explore a new area of law in a declaratory decision proceeding may prefer to do so by rulemaking. That is, the agency may decide to have full public participation in developing its policy in the area and to declare law of general applicability instead of issuing a determination of only particular applicability at the request of a specific party in a more limited proceeding. So long as all of the standards in this section are met, this section would authorize such a conversion from one type of agency proceeding to another.

While it is unlikely that a conversion consistent with all of the statutory standards could occur more than once in the course of a proceeding, the possibility of multiple conversions in the course of a particular proceeding is left open by the statutory language. In an adjudication, the prehearing conference could be used to choose the most appropriate form of proceeding at the outset, thereby diminishing the likelihood of a later conversion.

§ 11470.20. Presiding officer

11470.20. If the presiding officer or other agency official responsible for the original proceeding would not have authority over the new proceeding to which it is to be converted, the agency head shall appoint a successor to preside over or be responsible for the new proceeding.

Comment. Section 11470.20 is drawn from 1981 Model State APA § 1-107(c). It deals with the mechanics of transition from one type of proceeding to another.

§ 11470.30. Agency record

11470.30. To the extent practicable and consistent with the rights of parties and the requirements of this article relating to the new proceeding, the record of the original agency proceeding shall be used in the new agency proceeding.

Comment. Section 11470.30 is drawn from 1981 Model State APA § 1-107(d). It seeks to avoid unnecessary duplication of proceedings by requiring the use of as much of the agency record in the first proceeding as is possible in the second proceeding, consistent with the rights of the parties and the requirements of the applicable statute governing the hearing procedure.

§ 11470.40. Procedure after conversion

11470.40. After a proceeding is converted from one type to another, the presiding officer or other agency official responsible for the new proceeding shall do all of the following:

(a) Give additional notice to parties or other persons necessary to satisfy the statutory requirements relating to the new proceeding.

(b) Dispose of the matters involved without further proceedings if sufficient proceedings have already been held to satisfy the statutory requirements relating to the new proceeding.

(c) Conduct or cause to be conducted any additional proceedings necessary to satisfy the statutory requirements

relating to the new proceeding, and allow the parties a reasonable time to prepare for the new proceeding.

Comment. Section 11470.40 is drawn from 1981 Model State APA § 1-107(e).

§ 11470.50. Agency regulations

11470.50. An agency may adopt regulations to govern the conversion of one type of proceeding to another. The regulations may include an enumeration of the factors to be considered in determining whether and under what circumstances one type of proceeding will be converted to another.

Comment. Section 11470.50 is drawn from 1981 Model State APA § 1-107(f). Adoption of regulations is permissive, rather than mandatory.

IV. Administrative Adjudication: Formal Hearing

Gov't Code §§ 11500-11530 (chapter heading amended). Administrative adjudication: formal hearing

CHAPTER 5. ADMINISTRATIVE ADJUDICATION*:* *FORMAL HEARING*

§ 11500 (amended). Definitions

11500. In this chapter unless the context or subject matter otherwise requires:

(a) "Agency" includes the state boards, commissions, and officers ~~enumerated in Section 11501 and those~~ to which this chapter is made applicable by law, except that wherever the word "agency" alone is used the power to act may be delegated by the agency, and wherever the words "agency itself" are used the power to act shall not be delegated unless the statutes relating to the particular agency authorize the delegation of the agency's power to hear and decide.

(b) "Party" includes the agency, the respondent, and any person, other than an officer or an employee of the agency in his or her official capacity, who has been allowed to appear or participate in the proceeding.

(c) "Respondent" means any person against whom an accusation is filed pursuant to Section 11503 or against whom a statement of issues is filed pursuant to Section 11504.

(d) "Administrative law judge" means an individual qualified under Section 11502.

(e) "Agency member" means any person who is a member of any agency to which this chapter is applicable and includes any person who himself or herself constitutes an agency.

~~(f) "Adjudicatory hearing" means a state agency hearing which involves the personal or property rights of an individual, the granting or revocation of an individual's~~

~~license, or the resolution of an issue pertaining to an individual. However, the procedures governing such a hearing shall include, but not be limited to, all of the following:~~

~~(1) Testimony under oath.~~

~~(2) The right to cross-examination and to confront adversary witnesses.~~

~~(3) The right to representation.~~

~~(4) The issuance of a formal decision.~~

~~For purposes of this subdivision, an "adjudicatory hearing" shall not be required to include any informal factfinding or informal investigatory hearing. However, nothing in this subdivision shall be construed to prohibit an agency from providing an interpreter during any such informal hearing.~~

~~(g) "Language assistance" means oral interpretation or written translation of a language other than English into English or of English into another language for a party who cannot speak or understand English or who can do so only with difficulty.~~

Comment. Subdivision (a) of Section 11500 is amended to reflect the deletion of the enumeration of agencies formerly found in Section 11501. The application of this chapter to the hearings of an agency is determined by the statutes relating to the agency. Section 11501.

Former subdivision (f) is superseded by Sections 11410.10 (application to constitutionally and statutorily required hearings), 11410.20 (application to state), 11405.50 ("decision" defined), 11425.50 (decision), and 11435.15 (language assistance).

Former subdivision (g) is superseded by Section 11435.05 ("language assistance" defined).

§ 11501 (amended). Application of chapter

11501. (a) This chapter applies to any agency as determined by the statutes relating to that agency.

(b) ~~The enumerated agencies referred to in Section 11500 are:~~

~~Accountancy, State Board of~~

~~Air Resources Board, State~~

~~Alcohol and Drug Programs, State Department of~~
~~Architectural Examiners, California Board of~~
~~Attorney General~~
~~Auctioneer Commission, Board of Governors of~~
~~Automotive Repair, Bureau of~~
~~Barbering and Cosmetology, State Board of~~
~~Behavioral Science Examiners, Board of~~
~~Boating and Waterways, Department of~~
~~Cancer Advisory Council~~
~~Cemetery Board~~
~~Chiropractic Examiners, Board of~~
~~Security and Investigative Services, Bureau of~~
~~Community Colleges, Board of Governors of the California~~
~~Conservation, Department of~~
~~Consumer Affairs, Department of~~
~~Contractors' State License Board~~
~~Corporations, Commissioner of~~
~~Court Reporters Board of California~~
~~Dental Examiners of California, Board of~~
~~Education, State Department of~~
~~Electronic and Appliance Repair, Bureau of~~
~~Engineers and Land Surveyors, State Board of Registration for Professional~~
~~Fair Political Practices Commission~~
~~Fire Marshal, State~~
~~Food and Agriculture, Director of~~
~~Forestry and Fire Protection, Department of~~
~~Funeral Directors and Embalmers, State Board of~~
~~Geologists and Geophysicists, State Board of Registration for~~
~~Guide Dogs for the Blind, State Board of~~
~~Health Services, State Department of~~
~~Highway Patrol, Department of the California~~

~~Home Furnishings and Thermal Insulation, Bureau of~~
~~Horse Racing Board, California~~
~~Housing and Community Development, Department of~~
~~Insurance Commissioner~~
~~Labor Commissioner~~
~~Landscape Architects, State Board of~~
~~Medical Board of California, Medical Quality Review Committees and Examining Committees~~
~~Motor Vehicles, Department of~~
~~Nursing, Board of Registered~~
~~Nursing Home Administrators, Board of Examiners of~~
~~Optometry, State Board of~~
~~Osteopathic Medical Board of California~~
~~Pharmacy, California State Board of~~
~~Podiatric Medicine, Board of~~
~~Psychology, Board of~~
~~Public Employees' Retirement System, Board of Administration of the~~
~~Real Estate, Department of~~
~~San Francisco, San Pablo and Suisun, Board of Pilot Commissioners for the Bays of~~
~~Savings and Loan Commissioner~~
~~School Districts~~
~~Secretary of State, Office of~~
~~Social Services, State Department of~~
~~Statewide Health Planning and Development, Office of~~
~~Structural Pest Control Board~~
~~Tax Preparers Program~~
~~Teacher Credentialing, Commission on~~
~~Teachers' Retirement System, State~~
~~Transportation, Department of, acting pursuant to the State Aeronautics Act~~
~~Veterinary Medicine, Board of Examiners in~~

~~Vocational Nurse and Psychiatric Technician Examiners of the State of California, Board of~~

This chapter applies to an adjudicative proceeding of an agency created on or after July 1, 1997, unless the statutes relating to the proceeding provide otherwise.

(c) Chapter 4.5 (commencing with Section 11400) applies to an adjudicative proceeding required to be conducted under this chapter, unless the statutes relating to the proceeding provide otherwise.

Comment. Section 11501 is amended to make this chapter the default procedure, absent a contrary statute, for agencies created after the operative date of the amendment.

This chapter is supplemented by the general provisions on administrative adjudication found in Chapter 4.5 (commencing with Section 11400), which apply to proceedings under this chapter. See subdivision (c). See also Section 11410.50 (application where formal hearing procedure required). Thus if an agency is required by statute to conduct a hearing under this chapter, the agency may, unless a statute provides otherwise, elect to use alternative dispute resolution or the informal hearing procedure or other appropriate provisions of Chapter 4.5. Likewise, the general provisions of Chapter 4.5 restricting ex parte communications, regulating precedent decisions, and the like, apply to a hearing under this chapter. See also Section 11502 (use of administrative law judges under Chapter 4.5).

The enumeration of agencies formerly found in subdivision (b) is deleted as obsolete. The application of this chapter to the hearings of an agency is determined by the statutes relating to the agency. See also Section 11500(a) ("agency" defined).

§ 11501.5 (repealed). Language assistance; provision by state agencies

~~11501.5. (a) The following state agencies shall provide language assistance at adjudicatory hearings pursuant to subdivision (d) of Section 11513:~~

~~Agricultural Labor Relations Board~~

~~State Department of Alcohol and Drug Abuse~~

~~Athletic Commission~~

~~California Unemployment Insurance Appeals Board~~

~~Board of Prison Terms~~
~~State Board of Barbering and Cosmetology~~
~~State Department of Developmental Services~~
~~Public Employment Relations Board~~
~~Franchise Tax Board~~
~~State Department of Health Services~~
~~Department of Housing and Community Development~~
~~Department of Industrial Relations~~
~~State Department of Mental Health~~
~~Department of Motor Vehicles~~
~~Notary Public Section, office of the Secretary of State~~
~~Public Utilities Commission~~
~~Office of Statewide Health Planning and Development~~
~~State Department of Social Services~~
~~Workers' Compensation Appeals Board~~
~~Department of the Youth Authority~~
~~Youthful Offender Parole Board~~
~~Bureau of Employment Agencies~~
~~Department of Insurance~~
~~State Personnel Board~~
~~Board of Podiatric Medicine~~
~~Board of Psychology~~

~~(b) Nothing in this section shall be construed to prevent any agency other than those listed in subdivision (a) from electing to adopt any of the procedures set forth in subdivision (d), (e), (f), (g), (h), or (i) of Section 11513, except that the State Personnel Board shall determine the general language proficiency of prospective interpreters as described in subdivisions (d) and (e) of Section 11513 unless otherwise provided for as described in subdivision (f) of Section 11513.~~

Comment. Former Section 11501.5 is restated in Section 11435.15 (application of article).

§ 11502 (amended). Administrative law judges

11502. *(a)* All hearings of state agencies required to be conducted under this chapter shall be conducted by administrative law judges on the staff of the Office of Administrative Hearings. *This subdivision applies to a hearing required to be conducted under this chapter that is conducted under the informal hearing or emergency decision procedure provided in Chapter 4.5 (commencing with Section 11400).*

(b) The Director of the Office of Administrative Hearings has power to appoint a staff of administrative law judges for the office as provided in Section 11370.3 ~~of the Government Code~~. Each administrative law judge shall have been admitted to practice law in this state for at least five years immediately preceding his or her appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

Comment. Section 11502 is amended to make clear that where use of an administrative law judge employed by the Office of Administrative Hearings is required for an adjudicative proceeding under this chapter, such use is also required in informal and emergency proceedings under Chapter 4.5 (administrative adjudication: general provisions). An administrative law judge employed by the Office of Administrative Hearings is not required for a declaratory decision or for alternative dispute resolution under Chapter 4.5.

§ 11502.1 (repealed). Health planning unit

~~11502.1. There is hereby established in the Office of Administrative Hearings a unit of administrative law judges who shall preside over hearings conducted pursuant to Part 1.5 (commencing with Section 437) of Division 1 of the Health and Safety Code. In addition to meeting the qualifications of administrative law judges as prescribed in Section 11502, the administrative law judges in this unit shall have a demonstrated knowledge of health planning and certificate-of-need matters. As many administrative law~~

~~judges as are necessary to handle the caseload shall be permanently assigned to this unit. In the event there are no pending certificate of need of health planning matters, administrative law judges in this unit may be assigned to other matters pending before the Office of Administrative Hearings. Health planning matters shall be given priority on the calendar of administrative law judges assigned to this unit.~~

Comment. Section 11502.1 is not continued. The requirement that health facilities and specialty clinics apply for and obtain certificates of need or certificates of exemption is indefinitely suspended. Health & Safety Code § 439.7 (1984 Cal. Stat. ch. 1745, § 14).

§ 11503 (no change). Accusation

11503. A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

Note. No change is recommended in Section 11503. It is set out here for completeness.

§ 11504 (no change). Statement of issues

11504. A hearing to determine whether a right, authority, license or privilege should be granted, issued or renewed shall be initiated by filing a statement of issues. The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by

producing proof at the hearing, and in addition any particular matters which have come to the attention of the initiating party and which would authorize a denial of the agency action sought. The statement of issues shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief. The statement of issues shall be served in the same manner as an accusation; provided, that, if the hearing is held at the request of the respondent, the provisions of Sections 11505 and 11506 shall not apply and the statement of issues together with the notice of hearing shall be delivered or mailed to the parties as provided in Section 11509. Unless a statement to respondent is served pursuant to Section 11505, a copy of Sections 11507.5, 11507.6 and 11507.7, and the name and address of the person to whom requests permitted by Section 11505 may be made, shall be served with the statement of issues.

Note. No change is recommended in Section 11504. It is set out here for completeness.

§ 11504.5 (no change). References to accusations include statements of issues

11504.5. In the following sections of this chapter, all references to accusations shall be deemed to be applicable to statements of issues except in those cases mentioned in subdivision (a) of Section 11505 and Section 11506 where compliance is not required.

Note. No change is recommended in Section 11504.5. It is set out here for completeness.

§ 11505 (amended). Service on respondent

11505. (a) Upon the filing of the accusation the agency shall serve a copy thereof on the respondent as provided in subdivision (c). The agency may include with the accusation

any information which it deems appropriate, but it shall include a post card or other form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under Section 11506. The copy of the accusation shall include or be accompanied by (1) a statement that respondent may request a hearing by filing a notice of defense as provided in Section 11506 within 15 days after service upon ~~him~~ *the respondent* of the accusation, and that failure to do so will constitute a waiver of ~~his~~ *the respondent's* right to a hearing, and (2) copies of Sections 11507.5, 11507.6, and 11507.7.

(b) The statement to respondent shall be substantially in the following form:

Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the agency within 15 days after the accusation was personally served on you or mailed to you, (here insert name of agency) may proceed upon the accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled Notice of Defense, or by delivering or mailing a notice of defense as provided by Section 11506 of the Government Code to: (here insert name and address of agency). You may, but need not, be represented by counsel at any or all stages of these proceedings.

If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Section 11507.6 in the possession, custody or control of the agency, you may contact: (here insert name and address of appropriate person).

The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the agency *or, if an administrative law judge has been assigned to the hearing,*

the Office of Administrative Hearings, within 10 working days after you discover the good cause. Failure to ~~notify the agency~~ *give notice* within 10 days will deprive you of a postponement.

(c) The accusation and all accompanying information may be sent to *the* respondent by any means selected by the agency. But no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil actions. Service by registered mail shall be effective if a statute or agency rule requires *the* respondent to file ~~his~~ *the respondent's* address with the agency and to notify the agency of any change, and if a registered letter containing the accusation and accompanying material is mailed, addressed to *the* respondent at the latest address on file with the agency.

Comment. Section 11505 is amended to correct the portion of the statement to the respondent relating to postponement of the hearing. See Section 11524 (continuances).

§ 11506 (amended). Notice of defense

11506. (a) Within 15 days after service ~~upon him~~ of the accusation the respondent may file with the agency a notice of defense in which ~~he~~ *the respondent* may:

(1) Request a hearing.

(2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed.

(3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that ~~he~~ *the respondent* cannot identify the transaction or prepare ~~his~~ *a* defense.

(4) Admit the accusation in whole or in part.

(5) Present new matter by way of defense.

(6) Object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation enacted by another department affecting substantive rights.

(b) Within the time specified respondent may file one or more notices of defense upon any or all of these grounds but all such notices shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice.

~~(b)~~ *(c)* The respondent shall be entitled to a hearing on the merits if ~~he~~ *the respondent* files a notice of defense, and ~~any such~~ *the* notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file ~~such~~ *a* notice *of defense* shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing. Unless objection is taken as provided in paragraph (3) of subdivision (a), all objections to the form of the accusation shall be deemed waived.

~~(c)~~ *(d)* The notice of defense shall be in writing signed by or on behalf of the respondent and shall state ~~his~~ *the respondent's* mailing address. It need not be verified or follow any particular form.

~~(d) Respondent may file a statement by way of mitigation even if he does not file a notice of defense.~~

(e) As used in this section, "file," "files," "filed," or "filing" means "delivered or mailed" to the agency as provided in Section 11505.

Comment. Section 11506 is amended to delete the statement by way of mitigation. A default may be cured pursuant to Section 11520, and evidence in favor of mitigation may be made as a defense.

§ 11507 (no change). Amended accusation

11507. At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be

notified thereof. If the amended or supplemental accusation presents new charges the agency shall afford respondent a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record.

Note. No change is recommended in Section 11507. It is set out here for completeness.

§ 11507.3 (added). Consolidation and severance

11507.3. (a) When proceedings that involve a common question of law or fact are pending, the administrative law judge on the judge's own motion or on motion of a party may order a joint hearing of any or all the matters at issue in the proceedings. The administrative law judge may order all the proceedings consolidated and may make orders concerning the procedure that may tend to avoid unnecessary costs or delay.

(b) The administrative law judge on the judge's own motion or on motion of a party, in furtherance of convenience or to avoid prejudice or when separate hearings will be conducive to expedition and economy, may order a separate hearing of any issue, including an issue raised in the notice of defense, or of any number of issues.

Comment. Section 11507.3 is drawn from Code of Civil Procedure Section 1048. Subdivision (a) is sufficiently broad to enable related cases brought before several agencies to be consolidated in a single proceeding. See also Section 13 (singular includes plural).

§ 11507.5 (no change). Discovery provisions exclusive

11507.5. The provisions of Section 11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter.

Note. No change is recommended in Section 11507.5. It is set out here for completeness.

§ 11507.6 (amended). Discovery

11507.6. After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after such service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing, and (2) inspect and make a copy of any of the following in the possession or custody or under the control of the other party:

(a) A statement of a person, other than the respondent, named in the initial administrative pleading, or in any additional pleading, when it is claimed that the act or omission of the respondent as to such person is the basis for the administrative proceeding;

(b) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;

(c) Statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in (a) or (b) above;

(d) All writings, including, but not limited to, reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence;

(e) Any other writing or thing which is relevant and which would be admissible in evidence;

(f) Investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, to the extent that such reports (1) contain the names and addresses of witnesses or of persons having

personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his or her investigation, or (3) contain or include by attachment any statement or writing described in (a) to (e), inclusive, or summary thereof.

For the purpose of this section, "statements" include written statements by the person signed or otherwise authenticated by him or her, stenographic, mechanical, electrical or other recordings, or transcripts thereof, of oral statements by the person, and written reports or summaries of such oral statements.

Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.

~~(g) In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant as provided for under subdivision (j) of Section 11513. This subdivision is intended only to limit the scope of discovery; it is not intended to affect the methods of discovery allowed under this section.~~

Comment. Former subdivision (g) of Section 11507.6 is restated in Section 11440.40 (evidence of sexual conduct).

§ 11507.7 (amended). Motion to compel discovery

11507.7. (a) Any party claiming ~~his~~ *the party's* request for discovery pursuant to Section 11507.6 has not been complied with may serve and file ~~a verified petition~~ *with the administrative law judge a motion* to compel discovery ~~in the~~ superior court for the county in which the administrative

~~hearing will be held~~, naming as respondent the party refusing or failing to comply with Section 11507.6. The ~~petition~~ *motion* shall state facts showing the respondent party failed or refused to comply with Section 11507.6, a description of the matters sought to be discovered, the reason or reasons why ~~such~~ *the* matter is discoverable under ~~this~~ *that* section, *that a reasonable and good faith attempt to contact the respondent for an informal resolution of the issue has been made*, and the ground or grounds of respondent's refusal so far as known to ~~petitioner~~ *moving party*.

(b) The ~~petition~~ *motion* shall be served upon respondent party and filed within 15 days after the respondent party first evidenced ~~his~~ failure or refusal to comply with Section 11507.6 or within 30 days after request was made and the party has failed to reply to the request, *or within another time provided by stipulation*, whichever period is longer. ~~However, no petition may be filed within 15 days of the date set for commencement of the administrative hearing except upon order of the court after motion and notice and for good cause shown. In acting upon such motion, the court shall consider the necessity and reasons for such discovery, the diligence or lack of diligence of the moving party, whether the granting of the motion will delay the commencement of the administrative hearing on the date set, and the possible prejudice of such action to any party.~~

(c) ~~If from a reading of the petition the court is satisfied that the petition sets forth good cause for relief, the court shall issue an order to show cause directed to the respondent party; otherwise the court shall enter an order denying the petition. The order to show cause shall be served upon the respondent and his attorney of record in the administrative proceeding by personal delivery or certified mail and shall be returnable no earlier than 10 days from its issuance nor later than 30 days after the filing of the petition.~~ *The hearing on the motion to*

compel discovery shall be held within 15 days after the motion is made, or a later time that the administrative law judge may on the judge's own motion for good cause determine. The respondent party shall have the right to serve and file a written answer or other response to the ~~petition and order to show cause~~ *motion before or at the time of the hearing*.

(d) ~~The court may in its discretion order the administrative proceeding stayed during the pendency of the proceeding, and if necessary for a reasonable time thereafter to afford the parties time to comply with the court order.~~

~~(~~e~~)~~ Where the matter sought to be discovered is under the custody or control of the respondent party and the respondent party asserts that ~~such~~ *the* matter is not a discoverable matter under the provisions of Section 11507.6, or is privileged against disclosure under ~~such~~ *those* provisions, the ~~court~~ *administrative law judge* may order lodged with it ~~such~~ matters ~~as are~~ provided in subdivision (b) of Section 915 of the Evidence Code and examine ~~such~~ *the* matters in accordance with ~~the~~ *its* provisions ~~thereof~~.

~~(f) The court~~ *(e) The administrative law judge* shall decide the case on the matters examined ~~by the court~~ in camera, the papers filed by the parties, and such oral argument and additional evidence as the ~~court~~ *administrative law judge* may allow.

~~(g)~~ *(f)* Unless otherwise stipulated by the parties, the ~~court~~ *administrative law judge* shall no later than ~~30~~ *15* days after the ~~filing of the petition file~~ *hearing make* its order denying or granting the ~~petition, provided, however, the court may on its own motion for good cause extend such time an additional 30 days~~ *motion*. The order ~~of the court~~ shall be in writing setting forth the matters ~~or parts thereof the petitioner~~ *the moving party* is entitled to discover under Section 11507.6. A copy of the order shall forthwith be served by mail by the ~~clerk~~

administrative law judge upon the parties. Where the order grants the ~~petition~~ *motion* in whole or in part, ~~such~~ *the* order shall not become effective until 10 days after the date the order is served ~~by the clerk~~. Where the order denies relief to the ~~petitioning~~ *moving* party, the order shall be effective on the date it is served ~~by the clerk~~.

~~(h) The order of the superior court shall be final and not subject to review by appeal. A party aggrieved by such order, or any part thereof, may within 15 days after the service of the superior court's order serve and file in the district court of appeal for the district in which the superior court is located, a petition for a writ of mandamus to compel the superior court to set aside or otherwise modify its order. Where such review is sought from an order granting discovery, the order of the trial court and the administrative proceeding shall be stayed upon the filing of the petition for writ of mandamus, provided, however, the court of appeal may dissolve or modify the stay thereafter if it is in the public interest to do so. Where such review is sought from a denial of discovery, neither the trial court's order nor the administrative proceeding shall be stayed by the court of appeal except upon a clear showing of probable error.~~

~~(i) Where the superior court finds that a party or his attorney, without substantial justification, failed or refused to comply with Section 11507.6, or, without substantial justification, filed a petition to compel discovery pursuant to this section, or, without substantial justification, failed to comply with any order of court made pursuant to this section, the court may award court costs and reasonable attorney fees to the opposing party. Nothing in this subdivision shall limit the power of the superior court to compel obedience to its orders by contempt proceedings.~~

Comment. Section 11507.7 is amended to provide for proceedings to compel discovery before the administrative law judge rather than the superior court. An order of the administrative law judge compelling

discovery is enforceable by certification to the superior court of facts to justify the contempt sanction. Sections 11455.10-11455.20. A court judgment of contempt is not appealable. Code Civ. Proc. §§ 1222, 904.1(a). The administrative law judge may also impose monetary sanctions for bad faith tactics, which are reviewable in the same manner as the decision in the proceeding. Section 11455.30.

§ 11508 (amended). Time and place of hearing

11508. (a) The agency shall consult the office, and subject to the availability of its staff, shall determine the time and place of hearing. The hearing shall be held in San Francisco if the transaction occurred or the respondent resides within the First or Sixth Appellate District, in the County of Los Angeles if the transaction occurred or the respondent resides within the Second or Fourth Appellate District~~, and~~ *other than the County of Imperial or San Diego,* in the County of Sacramento if the transaction occurred or the respondent resides within the Third or Fifth Appellate District*, and in the County of San Diego if the transaction occurred or the respondent resides within the Fourth Appellate District in the County of Imperial or San Diego*.

(b) Notwithstanding subdivision (a):

(1) If the transaction occurred in a district other than that of respondent's residence, the agency may select the county appropriate for either district.

(2) The agency may select a different place nearer the place where the transaction occurred or the respondent resides.

(3) The parties by agreement may select any place within the state.

(c) The respondent may move for, and the administrative law judge has discretion to grant or deny, a change in the place of the hearing. A motion for a change in the place of the hearing shall be made within 10 days after service of the notice of hearing on the respondent.

Comment. Subdivision (a) of Section 11508 is amended to recognize creation of a branch of the Office of Administrative Hearings in San Diego.

Subdivision (c) codifies practice authorizing a motion for change of venue. See 1 G. Ogden, California Public Agency Practice § 33.02[4][d] (1994). Grounds for change of venue include selection of an improper county and promotion of the convenience of witnesses and ends of justice. *Cf.* Code Civ. Proc. § 397. In making a change of venue determination the administrative law judge may weigh the detriment to the moving party of the initial location against the cost to the agency and other parties of relocating the site. Failure to move for a change in the place of the hearing within the 10 day period waives the right to object to the place of the hearing.

§ 11509 (amended). Notice of hearing

11509. The agency shall deliver or mail a notice of hearing to all parties at least 10 days prior to the hearing. The hearing shall not be prior to the expiration of the time within which the respondent is entitled to file a notice of defense.

The notice to respondent shall be substantially in the following form but may include other information:

You are hereby notified that a hearing will be held before [here insert name of agency] at [here insert place of hearing] on the ___ day of, 19__, at the hour of ___, upon the charges made in the accusation served upon you. *If you object to the place of hearing, you must notify the presiding officer within 10 days after this notice is served on you. Failure to notify the presiding officer within 10 days will deprive you of a change in the place of the hearing.* You may be present at the hearing. You have the right to be represented by an attorney at your own expense. You are not entitled to the appointment of an attorney to represent you at public expense. You are entitled to represent yourself without legal counsel. You may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books,

documents or other things by applying to [here insert appropriate office of agency].

Comment. Section 11509 is amended to include notification of the right to seek change of venue. See Section 11508 (time and place of hearing).

§ 11510 (repealed). Subpoenas

~~11510. (a) Before the hearing has commenced, the agency or the assigned administrative law judge shall issue subpoenas and subpoenas duces tecum at the request of any party for attendance or production of documents. Subpoenas and subpoenas duces tecum shall be issued in accordance with Sections 1985, 1985.1, 1985.2, and 1985.3 of the Code of Civil Procedure. After the hearing has commenced, the agency itself hearing a case or an administrative law judge sitting alone may issue subpoenas and subpoenas duces tecum.~~

~~(b) The process issued pursuant to subdivision (a) shall be extended to all parts of the state and may be served in person in accordance with Sections 1987 and 1988 of the Code of Civil Procedure. A subpoena or subpoena duces tecum may also be delivered by certified mail return receipt requested or by messenger. Service by messenger shall be effected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to his or her date of birth and his or her driver's license number or Department of Motor Vehicles identification number, or, the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender shall make a written notation of the acknowledgment. A subpoena issued and acknowledged pursuant to this section shall have the same force and effect as a subpoena personally served. Failure to comply with a subpoena issued and acknowledged pursuant to this section may be punished as a contempt and~~

~~the subpoena may so state. A party requesting a continuance based upon the failure of a witness to appear in court at the time and place required for his or her appearance or testimony pursuant to a subpoena, shall prove to the court that the party has complied with this section. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law. No witness shall be obliged to attend unless the witness is a resident of the state at the time of service.~~

~~(c) All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the state or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpoena, except the parties, shall receive mileage in the same amount and under the same circumstances as prescribed by law for witnesses in civil actions in a superior court. Witnesses appearing pursuant to subpoena, except the parties, who attend hearings at points so far removed from their residences as to prohibit return thereto from day to day, shall be entitled, in addition to fees and mileage, to a per diem compensation of three dollars ($3) for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing. Fees, mileage, and expenses of subsistence shall be paid by the party at whose request the witness is subpoenaed.~~

Comment. Former Section 11510 is superseded by Sections 11450.10-11450.40 (subpoenas).

§ 11511 (amended). Depositions

11511. On verified petition of any party, an *administrative law judge or, if an administrative law judge has not been appointed, an* agency may order that the testimony of any material witness residing within or without the ~~State~~ *state* be taken by deposition in the manner prescribed by law for depositions in civil actions. The petition shall set forth the nature of the pending proceeding; the name and address of the

witness whose testimony is desired; a showing of the materiality of ~~his~~ *the* testimony; a showing that the witness will be unable or can not be compelled to attend; and shall request an order requiring the witness to appear and testify before an officer named in the petition for that purpose. *The petitioner shall serve notice of hearing and a copy of the petition on the other parties at least 10 days before the hearing.* Where the witness resides outside the ~~State~~ *state* and where the *administrative law judge or* agency has ordered the taking of ~~his~~ *the* testimony by deposition, the agency shall obtain an order of court to that effect by filing a petition therefor in the superior court in Sacramento County. The proceedings thereon shall be in accordance with the provisions of Section 11189 ~~of the Government Code~~.

Comment. Section 11511 is amended to extend to the administrative law judge the authority to order a deposition, and to provide for notice of the petition.

§ 11511.5 (amended). Prehearing conference

11511.5. (a) On motion of a party or by order of an administrative law judge, the administrative law judge may conduct a prehearing conference. The administrative law judge shall set the time and place for the prehearing conference, and ~~the agency~~ shall give reasonable written notice to all parties.

(b) The prehearing conference may deal with one or more of the following matters:

(1) Exploration of settlement possibilities.

(2) Preparation of stipulations.

(3) Clarification of issues.

(4) Rulings on identity and limitation of the number of witnesses.

(5) Objections to proffers of evidence.

(6) Order of presentation of evidence and cross-examination.

(7) Rulings regarding issuance of subpoenas and protective orders.

(8) Schedules for the submission of written briefs and schedules for the commencement and conduct of the hearing.

(9) *Exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.*

(10) Motions for intervention.

(11) Exploration of the possibility of using alternative dispute resolution provided in Article 5 (commencing with Section 11420.10) of, or the informal hearing procedure provided in Article 10 (commencing with Section 11445.10) of, Chapter 4.5, and objections to use of the informal hearing procedure.

(12) Any other matters as shall promote the orderly and prompt conduct of the hearing.

(c) *The presiding officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in and to hear the entire proceeding while it is taking place.*

(d) With the consent of the parties, the prehearing conference may be converted immediately into alternative dispute resolution or an informal hearing. With the consent of the parties, the proceeding may be converted into alternative dispute resolution to be conducted at another time. With the consent of the agency, the proceeding may be converted into an informal hearing to be conducted at another time subject to the right of a party to object to use of the informal hearing procedure as provided in Section 11445.30.

(e) The administrative law judge shall issue a prehearing order incorporating the matters determined at the prehearing conference. The administrative law judge may direct one or more of the parties to prepare a prehearing order.

Comment. Subdivision (a) of Section 11511.5 is amended to reflect the practice of the administrative law judge, rather than the agency, giving the required notice.

Subdivision (b)(9) is not intended to provide a new discovery procedure. If a party has not availed itself of discovery within the time periods provided by Section 11507.6, it should not be permitted to use the prehearing conference as a substitute for statutory discovery. The prehearing conference is limited to an exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.

Subdivision (b)(10) implements Section 11440.50 (intervention).

Subdivision (c) is a procedural innovation drawn from 1981 Model State APA § 4-205(a) that allows the presiding officer to conduct all or part of the prehearing conference by telephone, television, or other electronic means, such as a conference telephone call. While subdivision (c) permits the conduct of proceedings by telephone, television, or other electronic means, the presiding officer may of course conduct the proceedings in the physical presence of all participants.

Subdivision (d) is drawn from 1981 Model State APA § 4-204(3)(vii), expanded to include alternative dispute resolution.

§ 11511.7 (added). Settlement conference

11511.7. (a) The administrative law judge may order the parties to attend and participate in a settlement conference. The administrative law judge shall set the time and place for the settlement conference, and shall give reasonable written notice to all parties.

(b) The administrative law judge at the settlement conference shall not preside as administrative law judge at the hearing unless otherwise stipulated by the parties. The administrative law judge may conduct all or part of the settlement conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in and to hear the entire proceeding while it is taking place.

Comment. Under Section 11511.7 a settlement conference may, but need not, be separate from the prehearing conference (at which exploration of settlement issues may occur).

Attendance and participation in the settlement conference is mandatory. Communications made in settlement negotiations are protected. Section 11415.60 (settlement).

§ 11512 (amended). Presiding officer

11512. (a) Every hearing in a contested case shall be presided over by an administrative law judge. The agency itself shall determine whether the administrative law judge is to hear the case alone or whether the agency itself is to hear the case with the administrative law judge.

(b) When the agency itself hears the case, the administrative law judge shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law; the agency itself shall exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the administrative law judge. When the administrative law judge alone hears a case, he or she shall exercise all powers relating to the conduct of the hearing. *A ruling of the administrative law judge admitting or excluding evidence is subject to review in the same manner and to the same extent as the administrative law judge's proposed decision in the proceeding.*

(c) An administrative law judge or agency member shall voluntarily disqualify himself or herself and withdraw from any case in which ~~he or she cannot accord a fair and impartial hearing or consideration~~ *there are grounds for disqualification, including disqualification under Section 11425.40. The parties may waive the disqualification by a writing that recites the grounds for disqualification. A waiver is effective only when signed by all parties, accepted by the administrative law judge or agency member, and included in the record*. Any party may request the disqualification of any administrative law judge or agency member by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a

~~fair and impartial hearing cannot be accorded~~ *the administrative law judge or agency member is disqualified*. Where the request concerns an agency member, the issue shall be determined by the other members of the agency. Where the request concerns the administrative law judge, the issue shall be determined by the agency itself if the agency itself hears the case with the administrative law judge, otherwise the issue shall be determined by the administrative law judge. No agency member shall withdraw voluntarily or be subject to disqualification if his or her disqualification would prevent the existence of a quorum qualified to act in the particular case, *except that a substitute qualified to act may be appointed by the appointing authority*.

(d) The proceedings at the hearing shall be reported by a ~~phonographic reporter. However, upon the consent of all the parties, the proceedings may be reported electronically~~. *stenographic reporter or electronically, as determined by the administrative law judge. If the administrative law judge selects electronic reporting of proceedings, a party may at the party's own expense require stenographic reporting.*

(e) Whenever, after the agency itself has commenced to hear the case with an administrative law judge presiding, a quorum no longer exists, the administrative law judge who is presiding shall complete the hearing as if sitting alone and shall render a proposed decision in accordance with subdivision (b) of Section 11517 ~~of the Government Code~~.

Comment. Subdivision (b) of Section 11512 is amended to overrule any contrary implication that might be drawn from the language of subdivision (b).

Grounds for disqualification under subdivision (c) include bias, prejudice, or interest of presiding officer (Section 11425.40) and receipt of ex parte communications (Section 11430.60). A waiver of disqualification is a voluntary relinquishment of rights by the parties. The administrative law judge need not accept a waiver; the waiver is effective only if accepted by the administrative law judge. The provision for appointment of a substitute for an agency member is drawn from 1981

Model State APA § 4-202(e). In cases where there is no appointing authority, e.g., the agency member is an elected official, the "rule of necessity" still applies and the agency member shall not withdraw or be disqualified. See 1 G. Ogden, California Public Agency Practice § 36.14 (1994).

Subdivision (d) is amended to liberalize use of electronic reporting.

§ 11513 (amended). Evidence

11513. (a) Oral evidence shall be taken only on oath or affirmation.

(b) Each party shall have these rights: to call and examine witnesses, to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence against him or her. If respondent does not testify in his or her own behalf he or she may be called and examined as if under cross-examination.

(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but *over timely objection* shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. *An objection is timely if made before submission of the case or on reconsideration or other administrative review.*

(e) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the

~~hearing, and irrelevant and unduly repetitious evidence shall be excluded.~~

(f) The presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

~~In any proceeding under subdivision (i) or (j) of Section 12940, or Section 19572 or 19702, alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not admissible at hearing unless offered to attack the credibility of the complainant, as provided for under subdivision (o). Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose.~~

~~(d) The hearing, or any medical examination conducted for the purpose of determining compensation or monetary award, shall be conducted in the English language, except that a party who does not proficiently speak or understand the English language and who requests language assistance shall be provided an interpreter. Except as provided in subdivision (k), interpreters utilized in hearings shall be certified pursuant to subdivision (e). Except as provided in subdivision (k), interpreters utilized in medical examinations shall be certified pursuant to subdivision (f). The cost of providing the interpreter shall be paid by the agency having jurisdiction over the matter if the administrative law judge or hearing officer so directs, otherwise the party for whom the interpreter is provided.~~

~~The administrative law judge's or hearing officer's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the party in need of the interpreter to pay, except~~

~~with respect to hearings before the Workers' Compensation Appeals Board or the Division of Workers' Compensation relating to workers' compensation claims. With respect to these hearings, the payment of the costs of providing an interpreter shall be governed by the rules and regulations promulgated by the Workers' Compensation Appeals Board or the Administrative Director of the Division of Workers' Compensation, as appropriate.~~

~~(e) The State Personnel Board which shall establish, maintain, administer, and publish annually an updated list of certified administrative hearing interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to subdivision (g). Any interpreter so listed may be examined by each employing agency to determine the interpreter's knowledge of the employing agency's technical program terminology and procedures. Court interpreters certified pursuant to Section 68562, and interpreters listed on the State Personnel Board's recommended lists of court and administrative hearing interpreters prior to July 1, 1993, shall be deemed certified for purposes of this subdivision.~~

~~(f) The State Personnel Board shall establish, maintain, administer, and publish annually, an updated list of certified medical examination interpreters it has determined meet the minimum standards in interpreting skills and linguistic abilities in languages designated pursuant to subdivision (g). Court interpreters certified pursuant to Section 68562 and administrative hearing interpreters certified pursuant to subdivision (e) shall be deemed certified for purposes of this subdivision.~~

~~(g) The State Personnel Board shall designate the languages for which certification shall be established under subdivisions (e) and (f). The languages designated shall include, but not be limited to, Spanish, Tagalog, Arabic, Cantonese, Japanese,~~

~~Korean, Portuguese, and Vietnamese until the State Personnel Board finds that there is an insufficient need for interpreting assistance in these languages. The language designations shall be based on the following:~~

~~(1) The language needs of non-English-speaking persons appearing before the administrative agencies, as determined by consultation with the agencies.~~

~~(2) The cost of developing a language examination.~~

~~(3) The availability of experts needed to develop a language examination.~~

~~(4) Other information the board deems relevant.~~

~~(h) Each certified administrative hearing interpreter and each certified medical examination interpreter shall pay a fee, due on July 1 of each year, for the renewal of his or her certification. Court interpreters certified under Section 68562 shall not pay any fees required by this section.~~

~~(i) The State Personnel Board shall establish and charge fees for applications to take interpreter examinations and for renewal of certifications. The purpose of these fees is to cover the annual projected costs of carrying out this section. The fees may be adjusted each fiscal year by a percent that is equal to or less than the percent change in the California Necessities Index prepared by the Commission on State Finance. If the amount of money collected in fees is not sufficient to cover the costs of carrying out this section, the board shall charge and be reimbursed a pro rata share of the additional costs by the state agencies that conduct administrative hearings.~~

~~(j) The State Personnel Board may remove the names of people from the list of certified interpreters if the following conditions occur:~~

~~(1) A person on the list is deceased.~~

~~(2) A person on the list notifies the board that he or she is unavailable for work.~~

~~(3) A person on the list does not submit a renewal fee as required by subdivision (h).~~

~~(k) In the event that interpreters certified pursuant to subdivision (e) cannot be present at the hearing, the hearing agency shall have discretionary authority to provisionally qualify and utilize other interpreters. In the event that interpreters certified pursuant to subdivision (f) cannot be present at the medical examination, the physician provisionally may utilize another interpreter if that fact is noted in the record of the medical evaluation.~~

~~(*l*) Every state agency affected by this section shall advise each party of their right to an interpreter at the same time that each party is advised of the hearing date or medical examination. Each party in need of an interpreter shall also be encouraged to give timely notice to the agency conducting the hearing or medical examination so that appropriate arrangements can be made.~~

~~(m) The rules of confidentiality of the agency, if any, that may apply in an adjudicatory hearing, shall apply to any interpreter in the hearing or medical examination, whether or not the rules so state.~~

~~(n) The interpreter shall not have had any involvement in the issues of the case prior to the hearing.~~

~~As used in subdivisions (d) and (e), the terms "administrative law judge" and "hearing officer" shall not be construed to require the use of an Office of Administrative Hearings' administrative law judge or hearing officer.~~

~~(o) Evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is presumed inadmissible absent an offer of proof establishing its relevance and reliability and that its probative value is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.~~

~~(p) For purposes of this section "complainant" means any person claiming to have been subjected to conduct which constitutes sexual harassment, sexual assault, or sexual battery.~~

~~(q) This section shall become operative on July 1, 1995.~~

Comment. The "irrelevant and unduly repetitious" standard formerly found in Section 11513 is replaced in subdivision (f) by the general standard of Evidence Code Section 352.

The unnumbered paragraph formerly located between subdivisions (c) and (d) is restated in Section 11440.40(a).

Former subdivisions (d)-(n) are restated in Sections 11435.20-11435.65.

Former subdivision (o) is restated in Section 11440.40(b).

Former subdivision (p) is restated in Section 11440.40(c).

Former subdivision (q) is deleted as obsolete.

§ 11513.5 (repealed). Ex parte communications

~~11513.5. (a) Except as required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any party, including employees of the agency that filed the accusation, with any person who has a direct or indirect interest in the outcome of the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.~~

~~(b) Unless required for the disposition of ex parte matters specifically authorized by statute, no party to an adjudicative proceeding, including employees of the agency that filed the accusation, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, may communicate directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any person serving as~~

~~administrative law judge, without notice and opportunity for all parties to participate in the communication.~~

~~(c) If, before serving as administrative law judge in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subdivision (d).~~

~~(d) An administrative law judge who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication, and shall advise all parties that these matters have been placed on the record. Any person desiring to rebut the ex parte communication shall be allowed to do so, upon requesting the opportunity for rebuttal within 10 days after notice of the communication.~~

~~(e) The receipt by an administrative law judge of an ex parte communication in violation of this section may provide the basis for disqualification of that administrative law judge pursuant to subdivision (c) of Section 11512. If the administrative law judge is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order by the disqualified administrative law judge.~~

Comment. Subdivisions (a) and (b) of former Section 11513.5 are restated in Section 11430.10 (ex parte communications prohibited), omitting the prohibition on the presiding officer communicating with others. The limitation on communications with a person who presided at a previous stage of the proceeding is applied as between the presiding officer and agency head in Section 11430.80. Subdivision (c) is restated in Section 11430.40 (prior ex parte communication) but is limited to communications received during the pendency of the proceeding.

Subdivision (d) is restated in Section 11430.50 (disclosure of ex parte communication). Subdivision (e) is restated in Section 11430.60 (disqualification of presiding officer).

§ 11514 (no change). Affidavits

11514. (a) At any time 10 or more days prior to a hearing or a continued hearing, any party may mail or deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with a notice as provided in subdivision (b). Unless the opposing party, within seven days after such mailing or delivery, mails or delivers to the proponent a request to cross-examine an affiant, his right to cross-examine such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after request therefor is made as herein provided, the affidavit may be introduced in evidence, but shall be given only the same effect as other hearsay evidence.

(b) The notice referred to in subdivision (a) shall be substantially in the following form:

The accompanying affidavit of (here insert name of affiant) will be introduced as evidence at the hearing in (here insert title of proceeding). (Here insert name of affiant) will not be called to testify orally and you will not be entitled to question him unless you notify (here insert name of proponent or his attorney) at (here insert address) that you wish to cross-examine him. To be effective your request must be mailed or delivered to (here insert name of proponent or his attorney) on or before (here insert a date seven days after the date of mailing or delivering the affidavit to the opposing party).

Note. No change is recommended in Section 11514. It is set out here for completeness.

§ 11515 (no change). Official notice

11515. In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.

Note. No change is recommended in Section 11515. It is set out here for completeness.

§ 11516 (no change). Amendment of accusation after submission of case

11516. The agency may order amendment of the accusation after submission of the case for decision. Each party shall be given notice of the intended amendment and opportunity to show that he will be prejudiced thereby unless the case is reopened to permit the introduction of additional evidence in his behalf. If such prejudice is shown the agency shall reopen the case to permit the introduction of additional evidence.

Note. No change is recommended in Section 11516. It is set out here for completeness.

§ 11517 (amended). Decision in contested cases

11517. (a) If a contested case is heard before an agency itself, ~~the~~ *all of the following provisions apply:*

(1) The administrative law judge who presided at the hearing shall be present during the consideration of the case and, if requested, shall assist and advise the agency. ~~Where a contested case is heard before an agency itself, no~~

(2) No member thereof who did not hear the evidence shall vote on the decision.

(3) The agency shall issue its decision within 100 days of submission of the case.

(b) If a contested case is heard by an administrative law judge alone, he or she shall prepare within 30 days after the case is submitted a proposed decision in ~~such~~ *a* form that ~~it~~ may be adopted as the decision in the case. ~~The agency itself may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision.~~

~~Thirty~~

Failure of the administrative law judge to deliver a proposed decision within the time required does not prejudice the rights of the agency in the case. Thirty days after receipt of the proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney. *The filing and service is not an adoption of a proposed decision by the agency. The agency itself may do any of the following:*

(1) Adopt the proposed decision in its entirety.

(2) Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision.

(3) Make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the agency under this paragraph is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision.

(4) Change the legal basis of the proposed decision and adopt the proposed decision with that change as the decision. Before acting under this paragraph the agency shall provide the parties an opportunity to comment on the proposed change in legal basis.

(c) If the proposed decision is not adopted as provided in subdivision (b), the agency itself may decide the case upon the record, including the transcript, *or an agreed statement of the parties,* with or without taking additional evidence, or may refer the case to the same administrative law judge *if reasonably available, otherwise to another administrative law judge,* to take additional evidence. *A copy of the record shall be made available to the parties. The agency may require payment of fees covering direct costs of making the copy.* By stipulation of the parties, the agency may decide the case upon the record without including the transcript. If the case is assigned to an administrative law judge he or she shall prepare a proposed decision as provided in subdivision (b) upon the additional evidence and the transcript and other papers which are part of the record of the prior hearing. A copy of the proposed decision shall be furnished to each party and his or her attorney as prescribed in subdivision (b). The agency itself shall decide no case provided for in this subdivision without affording the parties the opportunity to present either oral or written argument before the agency itself. If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence. *The authority of the agency itself to decide the case under this subdivision includes authority to decide some but not all issues in the case.*

(d) The proposed decision shall be deemed adopted by the agency 100 days after delivery to the agency by the Office of Administrative Hearings, unless within that time *(i)* the agency *notifies the parties that the proposed decision is not adopted as provided in subdivision (b) and* commences proceedings to decide the case upon the record, including the transcript, or without the transcript where the parties have so stipulated, or *(ii)* the agency refers the case to the

administrative law judge to take additional evidence. ~~In a case where the agency itself hears the case, the agency shall issue its decision within 100 days of submission of the case.~~ In a case where the agency *commences proceedings to decide the case upon the record and* has ordered a transcript of the proceedings, the 100-day period shall begin upon delivery of the transcript. If the agency finds that a further delay is required by special circumstances, it shall issue an order delaying the decision for no more than 30 days and specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section 11523.

(e) The decision of the agency shall be filed immediately by the agency as a public record and a copy shall be served by the agency on each party and his or her attorney.

Comment. Subdivision (a) of Section 11517 is amended to add a provision formerly located in subdivision (d).

Subdivision (b) is amended to add authority to adopt with changes. This supplements the general authority of the agency under Section 11518.5 (correction of mistakes and clerical errors in the decision). Mitigation of a proposed remedy under subdivision (b)(2) includes adoption of a different sanction, as well as reduction in amount, so long as the sanction adopted is not of increased severity. The authority in subdivision (b)(4) to adopt with change of the legal basis is subject to the proviso that the parties be afforded an opportunity to comment on the proposed change. The agency head may specify the time and manner of comment, e.g. written comment within 10 days.

Subdivision (b) is also amended to make clear that the agency is not accountable for the administrative law judge's failure to meet required deadlines. Nothing in subdivision (b) is intended to limit the authority of an agency to use its own internal procedures, including internal review processes, in the development of a decision.

Subdivision (c) requires only that the record be made available to the parties. The cost of providing a copy of the record is a matter left to the discretion of each agency as appropriate for its situation. The addition of the provision for an agreed statement of the parties in subdivision (c) is drawn from Rule 6 of the California Rules of Court (agreed statement).

Remand under subdivision (c) is required to the presiding officer who issued the proposed decision only if "reasonably" available. Thus if workloads make remand to the same presiding officer impractical, the

officer would not be reasonably available, and remand need not be made to that particular person.

The authority in subdivision (c) for the agency itself to elect to decide some but not all issues in the case is drawn from 1981 Model State APA § 4-216(a)(2)(i).

Subdivision (d) is amended to require affirmative notice of nonadoption of a proposed decision with the 100-day period. The provision formerly found in subdivision (d) giving an agency 100 days in which to issue a decision where the case is heard by the agency itself is relocated to subdivision (a) for clarity.

§ 11518 (amended). Decision

11518. ~~The decision shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference thereto.~~ Copies of the decision shall be delivered to the parties personally or sent to them by registered mail.

Comment. The first two sentences of Section 11518 are superseded by Section 11425.50 (contents of decision).

The California Public Records Act governs the accessibility of a decision to the public, including exclusions from coverage, confidentiality, and agency regulations affecting access. Gov't Code §§ 6250-6268.

§ 11518.5 (added). Correction of mistakes and clerical errors in decision

11518.5. (a) Within 15 days after service of a copy of the decision on a party, but not later than the effective date of the decision, the party may apply to the agency for correction of a mistake or clerical error in the decision, stating the specific ground on which the application is made. Notice of the application shall be given to the other parties to the proceeding. The application is not a prerequisite for seeking judicial review.

(b) The agency may refer the application to the administrative law judge who formulated the proposed

decision or may delegate its authority under this section to one or more persons.

(c) The agency may deny the application, grant the application and modify the decision, or grant the application and set the matter for further proceedings. The application is considered denied if the agency does not dispose of it within 15 days after it is made or a longer time that the agency provides by regulation.

(d) Nothing in this section precludes the agency, on its own motion or on motion of the administrative law judge, from modifying the decision to correct a mistake or clerical error. A modification under this subdivision shall be made within 15 days after issuance of the decision.

(e) The agency shall, within 15 days after correction of a mistake or clerical error in the decision, serve a copy of the correction on each party on which a copy of the decision was previously served.

Comment. Section 11518.5 is drawn from 1981 Model State APA § 4-218. "Party" includes the agency that is a party to the proceedings. Section 11500(b) ("party" defined).

The section is intended to provide parties a limited right to remedy mistakes in the decision without the need for judicial review. Instances where this procedure is intended to apply include correction of factual or legal errors in the decision. This supplements the authority in 11517 of the agency head to adopt a proposed decision with technical or other minor changes.

§ 11519 (amended). Effective date of decision; stay of execution; notification; restitution

11519. (a) The decision shall become effective 30 days after it is delivered or mailed to respondent unless: a reconsideration is ordered within that time, or the agency itself orders that the decision shall become effective sooner, or a stay of execution is granted.

(b) A stay of execution may be included in the decision or if not included therein may be granted by the agency at any time

before the decision becomes effective. The stay of execution provided herein may be accompanied by an express condition that respondent comply with specified terms of probation; provided, however, that the terms of probation shall be just and reasonable in the light of the findings and decision.

(c) If respondent was required to register with any public officer, a notification of any suspension or revocation shall be sent to ~~such~~ *the* officer after the decision has become effective.

(d) As used in subdivision (b), specified terms of probation may include an order of restitution ~~which requires the party or parties to a contract against whom the decision is rendered to compensate the other party or parties to a contract damaged as a result of a breach of contract by the party against whom the decision is rendered. In such case, the decision shall include findings that a breach of contract has occurred and shall specify the amount of actual damages sustained as a result of such breach~~. Where restitution is ordered and paid pursuant to the provisions of this subdivision, ~~such~~ *the* amount paid shall be credited to any subsequent judgment in a civil action ~~based on the same breach of contract~~.

(e) The person to which the agency action is directed may not be required to comply with a decision unless the person has been served with the decision in the manner provided in Section 11505 or has actual knowledge of the decision.

(f) A nonparty may not be required to comply with a decision unless the agency has made the decision available for public inspection and copying or the nonparty has actual knowledge of the decision.

(g) This section does not preclude an agency from taking immediate action to protect the public interest in accordance with Article 13 (commencing with Section 11460.10) of Chapter 4.5.

Comment. Subdivision (d) of Section 11519 is amended to simplify and broaden the application of the restitution provisions.

Subdivisions (e)-(g) are drawn from 1981 Model State APA § 4-220(c)-(d). They distinguish between the effective date of a decision and the time when it can be enforced.

The requirement of "actual knowledge" in subdivisions (e) and (f) is intended to include not only knowledge that a decision has been issued, but also knowledge of the general contents of the decision insofar as it pertains to the person who is required to comply with it. If a question arises whether a particular person had actual knowledge of a decision, this must be resolved in the same manner as other fact questions.

The binding effect of a decision on nonparties who have actual knowledge may be illustrated by a state law that prohibits wholesalers from delivering alcoholic beverages to liquor dealers unless the dealers hold valid licenses from the state beverage agency. If the agency issues a decision revoking the license of a particular dealer, this decision is binding on any wholesaler who has actual knowledge of it, even before the decision is made available for public inspection and copying; the decision binds all wholesalers, including those without actual knowledge, after it has been made available for public inspection and copying.

§ 11520 (amended). Defaults

11520. (a) If the respondent *either* fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the respondent to establish that ~~he~~ *the respondent* is entitled to the agency action sought, the agency may act without taking evidence.

(b) ~~Nothing herein shall be construed to deprive the respondent of the right to make any showing by way of mitigation.~~ *Notwithstanding the default of the respondent, the agency or the administrative law judge, before a proposed decision is issued, has discretion to grant a hearing on reasonable notice to the parties. If the agency and administrative law judge make conflicting orders under this subdivision, the agency's order takes precedence. The administrative law judge may order the respondent, or the respondent's attorney or other authorized representative, or*

both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of the respondent's failure to appear at the hearing.

(c) Within seven days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause. As used in this subdivision, good cause includes, but is not limited to, any of the following:

(1) Failure of the person to receive notice served pursuant to Section 11505.

(2) Mistake, inadvertence, surprise, or excusable neglect.

Comment. Subdivision (a) of Section 11520 is amended to make clear that either failure to respond or to appear is a default.

Former subdivision (b), relating to the right of a defaulting respondent to make a showing by way of mitigation, is superseded by the procedures to cure a default in subdivisions (b) and (c). The respondent may make a showing by way of mitigation as a defense in the hearing.

Subdivision (b) parallels Section 11506(c), with the addition of the provision enabling the administrative law judge to waive a default and impose costs, and requiring reasonable notice.

Subdivision (c) is drawn in part from procedures used by the Unemployment Insurance Appeals Board.

§ 11521 (no change). Reconsideration

11521. (a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of any of the applicable periods, an agency may

grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

(b) The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to an administrative law judge. A reconsideration assigned to an administrative law judge shall be subject to the procedure provided in Section 11517. If oral evidence is introduced before the agency itself, no agency member may vote unless he or she heard the evidence.

Note. No change is recommended in Section 11521. It is set out here for completeness.

§ 11522 (no change). Reinstatement of license or reduction of penalty

11522. A person whose license has been revoked or suspended may petition the agency for reinstatement or reduction of penalty after a period of not less than one year has elapsed from the effective date of the decision or from the date of the denial of a similar petition. The agency shall give notice to the Attorney General of the filing of the petition and the Attorney General and the petitioner shall be afforded an opportunity to present either oral or written argument before the agency itself. The agency itself shall decide the petition, and the decision shall include the reasons therefor, and any terms and conditions that the agency reasonably deems appropriate to impose as a condition of reinstatement. This section shall not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty.

Note. No change is recommended in Section 11522. It is set out here for completeness.

§ 11523 (amended). Judicial review

11523. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section, the petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. ~~The~~ *On request of the petitioner for a record of the proceedings, the* complete record of the proceedings, or the parts thereof as are designated by the petitioner *in the request*, shall be prepared by the Office of Administrative Hearings or the agency and shall be delivered to petitioner, within 30 days *after the request*, which time shall be extended for good cause shown, ~~after a request therefor by him or her~~, upon the payment of the fee specified in Section 69950 ~~as now or hereinafter amended~~ for the transcript, the cost of preparation of other portions of the record and for certification thereof. Thereafter, the remaining balance of any costs or charges for the preparation of the record shall be assessed against the petitioner whenever the agency prevails on judicial review following trial of the cause. These costs or charges constitute a debt of the petitioner which is collectible by the agency in the same manner as in the case of an obligation under a contract, and no license shall be renewed or reinstated where the petitioner has failed to pay all of these costs or charges. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of

the record the time within which a petition may be filed shall be extended until 30 days after its delivery to him or her. The agency may file with the court the original of any document in the record in lieu of a copy thereof. In the event that the petitioner prevails in overturning the administrative decision following judicial review, the agency shall reimburse the petitioner for all costs of transcript preparation, compilation of the record, and certification.

Comment. Section 11523 is amended to clarify how long the agency must wait for the petitioner to designate a part of the record before it may proceed on the assumption that the complete record is required. This revision is intended to reduce confusion and delay encountered in the appeal process.

§ 11524 (amended). Continuances

11524. (a) The agency may grant continuances. When an administrative law judge of the Office of Administrative Hearings has been assigned to the hearing, no continuance may be granted except by him or her or by the ~~administrative law judge in charge~~ *presiding judge* of the appropriate regional office of the Office of Administrative Hearings, for good cause shown.

(b) When seeking a continuance, a party shall apply for the continuance within 10 working days following the time the party discovered or reasonably should have discovered the event or occurrence which establishes the good cause for the continuance. A continuance may be granted for good cause after the 10 working days have lapsed if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause.

(c) In the event that an application for a continuance by a party is denied by an administrative law judge of the Office of Administrative Hearings, and the party seeks judicial review thereof, the party shall, within 10 working days of the denial,

make application for appropriate judicial relief in the superior court or be barred from judicial review thereof as a matter of jurisdiction. A party applying for judicial relief from the denial shall give notice to the agency and other parties. Notwithstanding Section 1010 of the Code of Civil Procedure, the notice may be either oral at the time of the denial of application for a continuance or written at the same time application is made in court for judicial relief. This subdivision does not apply to the Department of Alcoholic Beverage Control.

Comment. Section 11524 is amended to reflect current practice.

§ 11525 (repealed). Contempt

~~11525. If any person in proceedings before an agency disobeys or resists any lawful order or refuses to respond to a subpena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or is guilty of misconduct during a hearing or so near the place thereof as to obstruct the proceeding, the agency shall certify the facts to the superior court in and for the county where the proceedings are held. The court shall thereupon issue an order directing the person to appear before the court and show cause why he should not be punished as for contempt. The order and a copy of the certified statement shall be served on the person. Thereafter the court shall have jurisdiction of the matter. The same proceedings shall be had, the same penalties may be imposed and the person charged may purge himself of the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action before a superior court.~~

Comment. Former Section 11525 is restated in Sections 11455.10 (misconduct in proceeding) and 11455.20 (contempt), with certification authority vested in the presiding officer or agency head.

§ 11526 (amended). Voting by agency member

11526. The members of an agency qualified to vote on any question may vote by mail *or another appropriate method*.

Comment. Section 11526 is broadened to allow telephonic or other appropriate means of voting. An agency member is not qualified to vote when a contested case is heard before the agency itself if the agency member did not hear the evidence. Section 11517(a).

Under the open meeting law, deliberations on a decision to be reached based on evidence introduced in an adjudicative proceeding may be made in closed session. Section 11126(d).

§ 11527 (no change). Charge against funds of agency

11527. Any sums authorized to be expended under this chapter by any agency shall be a legal charge against the funds of the agency.

Note. No change is recommended in Section 11527. It is set out here for completeness.

§ 11528 (no change). Oaths

11528. In any proceedings under this chapter any agency, agency member, secretary of an agency, hearing reporter, or administrative law judge has power to administer oaths and affirmations and to certify to official acts.

Note. No change is recommended in Section 11528. It is set out here for completeness.

§ 11529 (amended). Interim orders

11529. (a) The administrative law judge of the Medical Quality Hearing Panel established pursuant to Section 11371 may issue an interim order suspending a license, or imposing drug testing, continuing education, supervision of procedures, or other license restrictions. Interim orders may be issued only if the affidavits in support of the petition show that the licensee has engaged in, or is about to engage in, acts or omissions constituting a violation of the Medical Practice Act or the appropriate practice act governing each allied health

profession, and that permitting the licensee to continue to engage in the profession for which the license was issued will endanger the public health, safety, or welfare.

(b) All orders authorized by this section shall be issued only after a hearing conducted pursuant to subdivision (d), unless it appears from the facts shown by affidavit that serious injury would result to the public before the matter can be heard on notice. Except as provided in subdivision (c), the licensee shall receive at least 15 days' prior notice of the hearing, which notice shall include affidavits and all other information in support of the order.

(c) If an interim order is issued without notice, the administrative law judge who issued the order without notice shall cause the licensee to be notified of the order, including affidavits and all other information in support of the order by a 24-hour delivery service. That notice shall also include the date of the hearing on the order, which shall be conducted in accordance with the requirement of subdivision (d), not later than 20 days from the date of issuance. The order shall be dissolved unless the requirements of subdivision (a) are satisfied.

(d) For the purposes of the hearing conducted pursuant to this section, the licentiate shall, at a minimum, have the following rights:

(1) To be represented by counsel.

(2) To have a record made of the proceedings, copies of which may be obtained by the licentiate upon payment of any reasonable charges associated with the record.

(3) To present written evidence in the form of relevant declarations, affidavits, and documents.

The discretion of the administrative law judge to permit testimony at the hearing conducted pursuant to this section shall be identical to the discretion of a superior court judge to

permit testimony at a hearing conducted pursuant to Section 527 of the Code of Civil Procedure.

(4) To present oral argument.

(e) Consistent with the burden and standards of proof applicable to a preliminary injunction entered under Section 527 of the Code of Civil Procedure, the ~~court~~ *administrative law judge* shall grant the interim order where, in the exercise of ~~its~~ discretion, ~~it~~ *the administrative law judge* concludes that:

(1) There is a reasonable probability that the petitioner will prevail in the underlying action.

(2) The likelihood of injury to the public in not issuing the order outweighs the likelihood of injury to the licensee in issuing the order.

(f) In all cases where an interim order is issued, and an accusation is not filed and served pursuant to Sections 11503 and 11505 within 15 days of the date in which the parties to the hearing on the interim order have submitted the matter, the order shall be dissolved.

Upon service of the accusation the licensee shall have, in addition to the rights granted by this section, all of the rights and privileges available as specified in this chapter. If the licensee requests a hearing on the accusation, the board shall provide the licensee with a hearing within 30 days of the request, unless the licensee stipulates to a later hearing, and a decision within 15 days of the date that matter is submitted, or the board shall nullify the interim order previously issued, unless good cause can be shown by the ~~division~~ *Division of Medical Quality* for a delay.

(g) Where an interim order is issued, a written decision shall be prepared within 15 days of the hearing, by the administrative law judge, including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached.

(h) Notwithstanding the fact that interim orders issued pursuant to this section are not issued after a hearing as otherwise required by this chapter, interim orders so issued shall be subject to judicial review pursuant to Section 1094.5 of the Code of Civil Procedure. The relief which may be ordered shall be limited to a stay of the interim order. Interim orders issued pursuant to this section are final interim orders and, if not dissolved pursuant to subdivision (c) or (f), may only be challenged administratively at the hearing on the accusation.

(i) The interim order provided for by this section shall be in addition to, and not a limitation on, the authority to seek injunctive relief provided for in the Business and Professions Code.

Comment. Section 11529 is amended to substitute the administrative law judge for the court in subdivision (e).

§ 11530 (repealed). Appeal of reports and forms requirements

~~11530. (a)(1) The office shall hear and render a decision on any appeal filed by a business, pursuant to subdivision (c) of Section 14775, in the event the business contests the certification by a state agency head that reporting requirements meet established criteria and shall not be eliminated.~~

~~(2) Before a business may file an appeal with the office pursuant to subdivision (c) of Section 14775, the business shall file a challenge to a form or report required by a state agency with that state agency. Within 60 days of filing the challenge with a state agency, the state agency shall either eliminate the form or report or provide written justification for its continued use.~~

~~(3) A business may appeal a state agency's written justification for the continued use of a form or report with the office.~~

~~(4) If a state agency fails to respond within 60 days of the filing of a challenge pursuant to paragraph (2), the business shall have an immediate right to file an appeal with the office.~~

~~(b) No later than January 1, 1996, the office shall adopt procedures governing the filing, hearing, and disposition of appeals. The procedures shall include, but shall not be limited to, provisions that assure that appeals are heard and decisions rendered by the office in a fair, impartial, and timely fashion.~~

~~(c) The office may charge appellants a reasonable fee to pay for costs it incurs in complying with this section.~~

Comment. Former Section 11530 is continued without change in Section 11380 (state agency reports and forms appeals).

CONFORMING REVISIONS

Department of Consumer Affairs

Bus. & Prof. Code § 124 (amended). Notice

124. *(a)* Notwithstanding subdivision (c) of Section 11505 of the Government Code, and *subject to subdivision (b),* whenever written notice, including a notice, order, or document served pursuant to ~~the Administrative Procedure Act (Ch.~~ *Chapter* 3.5 (commencing with Section 11340), ~~Ch.~~ *Chapter* 4 (commencing with Section 11370), and ~~Ch.~~ *Chapter* 5 (commencing with Section 11500), ~~Gov. C)~~. *of Part 1 of Division 3 of Title 2 of the Government Code,* is required to be given by any board in the department, the notice may be given by regular mail addressed to the last known address of the licentiate or by personal service, at the option of the board.

(b) A notice, order, or document served or given pursuant to Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code shall be served or given as provided in Section 11440.20 of the Government Code.

Comment. Section 124 is amended to add subdivision (b). In addition to notice by personal delivery or regular mail to the person's last known address, Government Code Section 11440.20 permits service or notice by mail delivery service, facsimile transmission, or by such other electronic means as is provided by agency regulation. The procedures to which Government Code Section 11440.20 applies include alternative dispute resolution, informal hearing, emergency decision, declaratory decision, and conversion of the proceeding to another type of proceeding. See Gov't Code § 11440.20 (introductory clause).

California State Board of Pharmacy

Bus. & Prof. Code § 4160 (technical amendment). Application of California Hazardous Substances Act

4160. (a) The California Hazardous Substances Act, Chapter 13 (commencing with Section 28740) of Division 21 of the Health and Safety Code, applies to pharmacies and pharmacists and any other person or place subject to the jurisdiction of the board.

(b) The board may enforce that act when necessary for the protection of the health and safety of the public if prior regulatory notice is given in accordance with the *rulemaking provisions of the* Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340)~~, Chapter 4 (commencing with Section 11370), and Chapter 5 (commencing with Section 11500)~~ of *Part 1 of* Division 3 of Title 2 of the Government Code~~, as amended~~). Board enforcement shall focus on those hazardous substances which relate significantly to or overlap the practice of pharmacy.

(c) "Poison," as used elsewhere in this chapter, shall reference a category of hazardous substances defined in Section 28743 of the Health and Safety Code which the board may by regulation make more specific.

Comment. Section 4160 is amended to delete the former reference to Chapter 4 (commencing with Section 11370) and Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code. The provisions for regulatory notice are contained in Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

The former reference to the statutory provisions "as amended" is omitted as surplus. See Gov't Code § 9.

Real Estate Commissioner

Bus. & Prof. Code § 10175.2 (technical amendment). Monetary penalties

10175.2. (a) If the Real Estate Commissioner determines that the public interest and public welfare will be adequately served by permitting a real estate licensee to pay a monetary penalty to the department in lieu of an actual license suspension, the commissioner may, on the petition of the licensee, stay the execution of all or some part of the suspension on the condition that the licensee pay a monetary penalty and the further condition that the licensee incur no other cause for disciplinary action within a period of time specified by the commissioner.

(b) The commissioner may exercise the discretion granted to him under subdivision (a) either with respect to a suspension ordered by a decision after a contested hearing on an accusation against the licensee or by stipulation with the licensee after the filing of an accusation, but prior to the rendering of a decision based upon the

accusation. In either case, the terms and conditions of the disciplinary action against the licensee shall be made part of a formal decision of the commissioner ~~which satisfies the requirements of Section 11518 of the Government Code~~.

(c) If a licensee fails to pay the monetary penalty in accordance with the terms and conditions of the decision of the commissioner, the commissioner may, without a hearing, order the immediate execution of all or any part of the stayed suspension in which event the licensee shall not be entitled to any repayment nor credit, prorated or otherwise, for money paid to the department under the terms of the decision.

(d) The amount of the monetary penalty payable under this section shall not exceed two hundred fifty dollars ($250) for each day of suspension stayed nor a total of ten thousand dollars ($10,000) per decision regardless of the number of days of suspension stayed under the decision.

(e) Any monetary penalty received by the department pursuant to this section shall be credited to the Recovery Account of the Real Estate Fund.

Comment. Section 10175.2 is amended to delete the former reference to Section 11518 of the Government Code. The former requirements of Government Code Section 11518 for contents of a decision are now in Government Code Section 11425.50, which applies to adjudicative proceedings of all state agencies. See Gov't Code § 11425.10.

Alcoholic Beverage Control Appeals Board

Bus. & Prof. Code § 23083 (amended). Determination of appeal

23083. *(a)* The board shall determine the appeal upon the record of the department and upon any briefs which may be filed by the parties. If any party to the appeal requests the right to appear before the board, the board shall fix a time and place for argument. The board shall not receive any evidence other than that contained in the record of the proceedings of the department.

(b) Notwithstanding Section 11425.10 of the Government Code, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to the determination.

Comment. Section 23083 is amended to add subdivision (b). Subdivision (b) makes the general administrative adjudication provisions

of the Administrative Procedure Act inapplicable to determination of an appeal by the Alcoholic Beverage Control Appeals Board. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 23083 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to determination of an appeal by the Alcoholic Beverage Control Appeals Board. *Cf.* Gov't Code § 11501 (application of chapter).

Nothing in Section 23083 excuses compliance with procedural protections required by due process of law.

State Board of Education, California Community Colleges, and California State University

Educ. Code § 232 (technical amendment). Issuance of regulations

232. The State Board of Education, the Board of Governors of the California Community Colleges, and the Trustees of the California State University shall issue regulations pursuant to Chapter 3.5 (commencing with Section 11340) ~~and Chapter 5 (commencing with Section 11500)~~ of *Part 1 of* Division 3 of Title 2 of the Government Code, commonly referred to as *the rulemaking provisions of* the Administrative Procedure Act, to implement ~~the provisions of~~ this chapter.

The Regents of the University of California may issue regulations to implement the provisions of this chapter. If the Regents of the University of California choose to issue regulations it may issue them pursuant to Chapter 3.5 (commencing with Section 11340) ~~and Chapter 5 (commencing with Section 11500)~~ of *Part 1 of* Division 3 of Title 2 of the Government Code, commonly referred to as *the rulemaking provisions of* the Administrative Procedure Act.

Comment. Section 232 is amended to delete the references to the administrative adjudication provisions of the Administrative Procedure Act. Regulations are issued pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

University of California

Educ. Code § 92001 (added). Provisions inapplicable

92001. Notwithstanding Section 11425.10 of the Government Code, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code) does not apply to a hearing conducted by the University of California.

Comment. Section 92001 makes the general administrative adjudication provisions of the Administrative Procedure Act inapplicable to hearings of the University of California. The section recognizes that the University of California enjoys a constitutional exemption. See Cal. Const. Art. 9, § 9 (University of California a public trust with full powers of government, subject to limited legislative control, and independent in administration of its affairs). Nothing in Section 92001 excuses compliance with procedural protections required by due process of law. See also Section 232 (Regents may issue regulations pursuant to rulemaking provisions of Administrative Procedure Act).

Although Section 92001 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to a hearing conducted by the University of California. *Cf.* Gov't Code § 11501 (application of chapter).

Council for Private Postsecondary and Vocational Education

Educ. Code § 94323 (amended). Notice and hearing

94323. (a) This section establishes the procedure for notice and hearing required under this chapter and, except as provided in Sections 94319.12 and 94322, may be used in lieu of other notice or hearing requirements provided in this chapter.

(b) If notice of administrative action is required by this chapter, the council shall serve notice stating the following:

(1) The action, including the penalties and administrative sanctions sought.

(2) The grounds for the action with sufficient particularity to give notice of the transactions, occurrences, violations, or other matters on which the action is based.

(3) The right to a hearing and the time period within which the party subject to the notice may request a hearing in writing. The time period shall not be less than 15 days after service of the notice unless a longer period is provided by statute.

(4) The right to be present at the hearing, to be represented by counsel, to cross-examine witnesses, and to present evidence.

(5) The administrative action set forth in the notice will be taken and shall become final if the party subject to the notice does not request a hearing in writing within the time period expressed in the notice.

(c) If a party subject to a notice provided pursuant to subdivision (b) requests a hearing in writing within 10 days of receiving the notice, the council shall schedule a hearing. The hearing shall be held in a location determined pursuant to Section 11508 of the Government Code. The council shall serve reasonable notice of the time and place for the hearing at least 10 days before the hearing. The council may continue the date of the hearing upon a showing of good cause.

(d)(1) Any party, including the council, may submit a written request to any other party before the hearing to obtain the names and addresses of any person who has personal knowledge, or who the party receiving the request claims to have personal knowledge, of any of the transactions, occurrences, violations, or other matters that are the bases of the administrative action. In addition, the requesting party shall have the right to inspect and copy any written statement made by that person and any writing, as defined by Section 250 of the Evidence Code, or thing that is in the custody, or under the control, of the party receiving the request and that is relevant and not privileged. This subdivision shall constitute the exclusive method for prehearing discovery. However, nothing herein shall affect the council's authority, at any time, to investigate, inspect, monitor, or obtain and copy information under any provision of this chapter.

(2) The written request described in paragraph (1) shall be made before the hearing and within 30 days of the service of the notice described in subdivision (b). Each recipient of a request shall comply with the request within 15 days of its service by providing the names and addresses requested and by producing at a reasonable time at the council's office or another mutually agreed reasonable place the requested writings and things. The council may extend the time for response upon a showing of good cause.

(3) Except as provided in this paragraph, no party may introduce the testimony or statement of any person or any writing or thing into evidence at the hearing if that party failed to provide the name

and address of the person or to produce the writing or thing for inspection and copying as provided by this subdivision. A party may introduce the testimony, statement, writing, or thing that was not identified or produced as required herein only if there is no objection or the party establishes that the person, writing, or thing was unknown at the time when the response was made to the written request, the party could not have informed other parties within a reasonable time after learning of the existence of the person, writing, or thing, and no party would be prejudiced by the introduction of the evidence.

(e) Before the hearing has commenced, the council shall issue subpoenas at the written request of any party for the attendance of witnesses or the production of documents or other things in the custody or under the control of the person subject to the subpoena. Subpoenas issued pursuant to this section shall be subject to ~~Section 11510~~ *Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2* of the Government Code.

(f)(1) The council shall designate an impartial hearing officer to conduct the hearing. The hearing officer may administer oaths and affirmations, regulate the course of the hearing, question witnesses, and otherwise investigate the issues, take official notice according to the procedure provided in Division 4 (commencing with Section 450) of the Evidence Code of any technical or educational matter in the council's special field of expertise and of any matter that may be judicially noticed, set the time and place for continued hearings, fix the time for the filing of briefs and other documents, direct any party to appear and confer to consider the simplification of issues by consent, and prepare a statement of decision.

(2) ~~Neither a hearing officer nor any person who has a direct or indirect interest in the outcome of the hearing shall communicate directly or indirectly with each other regarding any issue involved in the hearing while the proceeding is pending without notice and opportunity for all parties to participate in the communication. A hearing officer who receives any ex parte communication shall immediately disclose the communication to the council and all other parties. The council may disqualify the hearing officer if necessary to eliminate the effect of the ex parte communication. If~~ *In addition to the sanctions provided in Article 7 (commencing with Section 11430.10) of Chapter 4.5 of Part 1 of Division 3 of*

Title 2 of the Government Code, if the council finds that any party willfully violated, or caused the violation of, ~~this paragraph~~ *that article*, the council shall enter that party's default and impose the administrative sanction set forth in the notice provided pursuant to subdivision (b).

(g)(1) Each party at the hearing shall be afforded an opportunity to present evidence, respond to evidence presented by other parties, cross-examine, and present written argument or, if permitted by the hearing officer, oral argument on the issues involved in the hearing. The council may call any party as a witness who may be examined as if under cross-examination.

(2) Each party may appear through its representative or through legal counsel.

(3) The technical rules relating to evidence and witnesses shall not apply. However, only relevant evidence is admissible.

(4) Oral evidence shall be taken only upon oath or affirmation. The hearing shall be conducted in the English language. The proponent of any testimony to be offered by a witness who is not proficient in English shall provide, at the proponent's cost, an interpreter proficient in English and the language in which the witness will testify.

(5) The hearing shall be recorded by tape recording or other phonographic means unless all parties agree to another method of recording the proceedings.

(6)(A) At any time 10 or more days before the hearing, any party may serve on the other parties a copy of any declaration which the party proposes to introduce in evidence.

(B) The declaration shall be accompanied by a notice indicating the date of service of the notice and stating that the declarations will be offered into evidence, the declarants will not be called as witnesses, and there will be no right of cross-examination unless the party receiving the notice requests the right to cross-examine, in writing, within seven days of the service of the declarations and notice.

(C) If no request for cross-examination is served within seven days of the service of the declarations and notice described in subparagraph (B), the right to cross-examine is deemed waived and the declaration shall have the same effect as if the declarant testified orally. Notwithstanding this paragraph, a declaration may be admitted as hearsay evidence without cross-examination.

(7) Disposition of any issues involved in the hearing may be made by stipulation or settlement.

(8) If a party fails to appear at a hearing, that party's default shall be taken and the party shall be deemed to have waived the hearing and agreed to the administrative action and the grounds for that action described in the notice given pursuant to subdivision (b). The council shall serve the party with an order of default including the administrative action ordered. The order shall be effective upon service or at any other time designated by the council. The council may relieve a party from an order of default if the party applies for relief within 15 days after the service of an order of default and establishes good cause for relief. An application for relief from default shall not stay the effective date of the order unless expressly provided by the council.

(h)(1) At any time before the matter is submitted for decision, the council may amend the notice provided pursuant to subdivision (b) to set forth any further grounds for the originally noticed administrative action or any additional administrative action and the grounds therefor. The statement of the further grounds for the originally noticed administrative action, or of the grounds for any additional administrative action, shall be made with sufficient particularity to give notice of the transactions, occurrences, violations, or other matters on which the action or additional action is based. The amended notice shall be served on all parties. All parties affected by the amended notice shall be given reasonable opportunity to respond to the amended notice as provided in this section.

(2) The council may amend the notice after the case is submitted for decision. The council shall serve each party with notice of the intended amendment and shall provide the party with an opportunity to show that the party will be prejudiced by the amendment unless the case is reopened to permit the party to introduce additional evidence. If prejudice is shown, the council shall reopen the case to permit the introduction of additional evidence.

(i)(1) Within 30 days after the conclusion of the hearing or at another time established by the council, the hearing officer shall submit a written statement of decision setting forth a recommendation for a final decision ~~and explaining the factual and legal basis for the decision as to each of the grounds for the~~

~~administrative action set forth in the notice or amended notice~~. *The written statement of decision shall be made as provided in Section 11425.50 of the Government Code.* The council shall serve the hearing officer's statement of decision on each party and its counsel within 10 days of its submission by the hearing officer.

(2) The council shall make the final decision which shall be based exclusively on evidence introduced at the hearing. The final decision shall be supported by substantial evidence in the record. The council shall also issue a statement of decision ~~explaining the factual and legal basis for the final decision as to each of the grounds for the administrative action set forth in the notice or amended notice~~ *as provided in Section 11425.50 of the Government Code*. The council shall issue an order based on its decision which shall be effective upon service or at any other time designated by the council. The council shall serve a copy of the final decision and order, within 10 days of their issuance, on each party and its counsel.

(3) The council may hold a closed session to deliberate on a decision to be reached based upon evidence introduced at the hearing.

(4) The council shall serve a certified copy of the complete record of the hearing, or any part thereof designated by a party, within 30 days after receiving the party's written request and payment of the cost of preparing the requested portions of the record. The complete record shall include all notices and orders issued by the council, a transcript of the hearing, the exhibits admitted or rejected, the written evidence and any other papers in the case, the hearing officer's statement of decision, and the final decision and order.

(j) The council shall serve all notices and other documents that are required to be served by this section on each party by personal delivery, by certified mail, return receipt requested, or by any other means designated by the council.

(k)(1) Any party aggrieved by the council's final decision and order may seek judicial review by filing a petition for a writ of mandate pursuant to Section 1085 of the Code of Civil Procedure within 30 days of the issuance of the final decision and order. If review is not sought within that period, the party's right to review shall be deemed waived.

(2) The aggrieved party shall present the complete record of the hearing or all portions of the record necessary for the court's review of the council's final decision and order. The court shall deny the petition for a writ of mandate if the record submitted by the party is incomplete. The court shall not consider any matter not contained in the record. The factual bases supporting the final decision set forth in the council's statement of decision shall be conclusive if supported by substantial evidence on the record considered as a whole.

(3) The final order shall not be stayed or enjoined during review except upon the court's grant of an order on a party's application after due notice to the council and the Attorney General. The order shall be granted only if the party establishes the substantial likelihood that it will prevail on the merits and posts a bond sufficient to protect fully the interests of the students, the council, and the Student Tuition Recovery Fund, from any loss.

(*l*) The council may adopt regulations establishing alternative means of providing notice and an opportunity to be heard in circumstances in which a full hearing is not required by law.

(m) For purposes of this section, "good cause" shall require sufficient ground or reason for the determination to be made by the council.

Comment. Subdivision (e) of Section 94323 is amended to correct the reference to the provisions of Administrative Procedure Act relating to subpoenas. Subdivision (f)(2) is amended to recognize that the ex parte communications provisions of the Administrative Procedure Act apply to hearings of the council under this section. Gov't Code § 11425.10(a)(8).

Paragraphs (1) and (2) of subdivision (i) are amended to delete the requirement that the decision explain its factual and legal basis as to each of the grounds for the administrative action set forth in the notice or amended notice, and replace it with a reference to Section 11425.50 of the Government Code. This change is nonsubstantive, since Government Code Section 11425.50 requires the decision to be in writing and to include a statement of the factual and legal basis for the decision. In any event, Government Code Section 11425.50 applies to all agency adjudicative proceedings under Government Code Section 11425.10.

General Law

Evid. Code § 755.5 (technical amendment). Interpreter's presence in medical examination

755.5. (a) During any medical examination, requested by an insurer or by the defendant, of a person who is a party to a civil action and who does not proficiently speak or understand the English language, conducted for the purpose of determining damages in a civil action, an interpreter shall be present to interpret the examination in a language that the person understands. ~~Commencing January 1, 1994, the~~ *The* interpreter shall be certified pursuant to ~~Section 11513~~ *Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2* of the Government Code.

(b) The fees of interpreters ~~utilized~~ *used* under subdivision (a) shall be paid by the insurer or defendant requesting the medical examination.

(c) The record of, or testimony concerning, any medical examination conducted in violation of subdivision (a) shall be inadmissible in the civil action for which it was conducted or any other civil action.

(d) This section does not prohibit the presence of any other person to assist a party.

(e) In the event that interpreters certified pursuant to ~~Section 11513~~ *Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2* of the Government Code cannot be present at the medical examination, upon stipulation of the parties the requester specified in subdivision (a) shall have the discretionary authority to provisionally qualify and ~~utilize~~ *use* other interpreters.

Comment. Section 755.5 is amended to correct references to the Administrative Procedure Act. The former reference in subdivision (a) to January 1, 1994, is deleted as obsolete.

Public Employment Relations Board (election certification)

Gov't Code § 3541.3 (amended). Powers and duties of board

3541.3. The board shall have all of the following powers and duties:

(a) To determine in disputed cases, or otherwise approve, appropriate units.

(b) To determine in disputed cases whether a particular item is within or without the scope of representation.

(c) To arrange for and supervise representation elections which shall be conducted by means of secret ballot elections, and to certify the results of the elections.

(d) To establish lists of persons broadly representative of the public and qualified by experience to be available to serve as mediators, arbitrators, or factfinders. In no case shall these lists include persons who are on the staff of the board.

(e) To establish by regulation appropriate procedures for review of proposals to change unit determinations.

(f) Within its discretion, to conduct studies relating to employer-employee relations, including the collection, analysis, and making available of data relating to wages, benefits, and employment practices in public and private employment, and, when it appears necessary in its judgment to the accomplishment of the purposes of this chapter, recommend legislation. The board shall report to the Legislature by October 15 of each year on its activities during the immediately preceding fiscal year. The board may enter into contracts to develop and maintain research and training programs designed to assist public employers and employee organizations in the discharge of their mutual responsibilities under this chapter.

(g) To adopt, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, rules and regulations to carry out the provisions and effectuate the purposes and policies of this chapter.

(h) To hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person, and, in connection therewith, to issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any matter within its jurisdiction. *Notwithstanding Section 11425.10, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 does not apply to a hearing by the board under this chapter, except a hearing to determine an unfair practice charge.*

(i) To investigate unfair practice charges or alleged violations of this chapter, and take ~~such~~ *any* action and make ~~such~~ *any*

determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

(j) To bring an action in a court of competent jurisdiction to enforce any of its orders, decisions, or rulings, or to enforce the refusal to obey a subpoena. Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order.

(k) To delegate its powers to any member of the board or to any person appointed by the board for the performance of its functions, except that no fewer than two board members may participate in the determination of any ruling or decision on the merits of any dispute coming before it, and except that a decision to refuse to issue a complaint shall require the approval of two board members.

(*l*) To decide contested matters involving recognition, certification, or decertification of employee organizations.

(m) To consider and decide issues relating to rights, privileges, and duties of an employee organization in the event of a merger, amalgamation, or transfer of jurisdiction between two or more employee organizations.

(n) To take ~~such~~ *any* other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter.

Comment. Section 3541.3 is amended to make the general administrative adjudication provisions of the Administrative Procedure Act inapplicable to proceedings of the Public Employment Relations Board under this chapter, except hearings to determine unfair practice charges. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 3541.3 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to proceedings of the Public Employment Relations Board under this chapter. *Cf.* Gov't Code § 11501 (application of chapter).

Nothing in Section 3541.3 excuses compliance with procedural protections required by due process of law.

Gov't Code § 3563 (amended). Powers and duties of board

3563. This chapter shall be administered by the Public Employment Relations Board. In administering this chapter the board shall have all of the following rights, powers, duties and responsibilities:

(a) To determine in disputed cases, or otherwise approve, appropriate units.

(b) To determine in disputed cases whether a particular item is within or without the scope of representation.

(c) To arrange for and supervise representation elections which shall be conducted by means of secret ballot elections, and to certify the results of the elections.

(d) To establish lists of persons broadly representative of the public and qualified by experience to be available to serve as mediators, arbitrators, or factfinders. In no case shall ~~such~~ *the* lists include persons who are on the staff of the board.

(e) To establish by regulation appropriate procedures for review of proposals to change unit determinations.

(f) To adopt, pursuant to Chapter ~~4.5~~ *3.5* (commencing with Section ~~11371~~ *11340*) of Part 1 of Division 3 of Title 2, rules and regulations to carry out the provisions and effectuate the purposes and policies of this chapter.

(g) To hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person, and, in connection therewith, to issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any matter within its jurisdiction, except for those records, books, or papers confidential under statute. *Notwithstanding Section 11425.10, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 does not apply to a hearing by the board under this section, except a hearing to determine an unfair practice charge.*

(h) To investigate unfair practice charges or alleged violations of this chapter, and to take ~~such~~ *any* action and make ~~such~~ *any* determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

(i) To bring an action in a court of competent jurisdiction to enforce any of its orders, decisions or rulings or to enforce the refusal to obey a subpoena. Upon issuance of a complaint charging

that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order.

(j) To delegate its powers to any member of the board or to any person appointed by the board for the performance of its functions, except that no fewer than two board members may participate in the determination of any ruling or decision on the merits of any dispute coming before it and except that a decision to refuse to issue a complaint shall require the approval of two board members.

(k) To decide contested matters involving recognition, certification, or decertification of employee organizations.

(*l*) To consider and decide issues relating to rights, privileges, and duties of an employee organization in the event of a merger, amalgamation, or transfer of jurisdiction between two or more employee organizations.

(m) To take ~~such~~ *any* other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter.

Comment. Section 3563 is amended to make the general administrative adjudication provisions of the Administrative Procedure Act inapplicable to proceedings of the Public Employment Relations Board under this chapter, except hearings to determine unfair practice charges. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 3563 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to proceedings of the Public Employment Relations Board under this chapter. *Cf.* Gov't Code § 11501 (application of chapter).

Nothing in Section 3563 excuses compliance with procedural protections required by due process of law.

Milton Marks Commission on California State Government Organization and Economy

Gov't Code § 8541 (technical amendment). Enumeration of powers

8541. In carrying out its duties and responsibilities, the commission shall have all of the following powers:

(a) To meet at such times and places as it may deem proper.

(b) As a body or, on the authorization of the commission, as a subcommittee composed of one or more members, to hold hearings at such times and places as it may deem proper.

(c) To issue subpoenas to compel the attendance of witnesses and the production of books, records, papers, accounts, reports, and documents.

(d) To administer oaths.

(e) To employ, pursuant to laws and regulations governing state civil service, a secretary and such clerical, legal, and technical assistants as may appear necessary.

(f) To contract with such other agencies, public or private, as it deems necessary, for the rendition and affording of such services, facilities, studies and reports to the commission as will best assist it to carry out its duties and responsibilities.

(g) To co-operate with and to secure the co-operation of county, city, city and county, and other local law enforcement agencies in investigating any matter within the scope of its duties and responsibilities, and to direct the sheriff of any county or any marshal to serve subpoenas, orders, and other process.

(h) To certify to the superior court of any county in which proceedings are held, the facts concerning the disobedience or resistance, by any person, of any lawful order, or the refusal of any person to respond to a subpoena, to take the oath or affirmation as a witness, or to be examined, or the misconduct of any person during a hearing; and to receive the assistance of the court in enforcing orders and process, in the manner prescribed by ~~Section 11525 of this code~~ *Article 12 (commencing with Section 11455.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2*.

(i) To co-operate with every department, agency, or instrumentality in the state government; and to secure directly from every department, agency, or instrumentality full co-operation, access to its records, and access to any information, suggestions, estimates, data, and statistics it may have available.

(j) To authorize its agents and employees to absent themselves from the State where necessary for the performance of their duties.

(k) To do any and all other things necessary or convenient to enable it fully and adequately to perform its duties and to exercise the powers expressly granted it, notwithstanding any authority

expressly granted to any officer or employee of the executive branch of state government.

Comment. Section 8541 is amended to correct the reference to the Administrative Procedure Act. A number of provisions formerly found in Government Code Sections 11500-11530 are now located in general provisions on administrative adjudication, which apply to all state adjudicative proceedings. See, e.g., Gov't Code §§ 11410.20 (application to state), 11425.10 (administrative adjudication bill of rights), 11430.10-11430.80 (ex parte communications), 11450.10-11450.40 (subpoenas), 11455.10-11455.30 (enforcement of orders and sanctions).

General Law

Gov't Code § 11018 (technical amendment). Language assistance in administrative hearings

11018. Every state agency which is authorized by any law to conduct administrative hearings but is not subject to Chapter 5 (commencing with Section 11500) shall nonetheless comply with ~~subdivision (d) of Section 11513~~ *Sections 11435.20, 1435.25, and 11435.55* relative to the furnishing of language assistance at ~~any such~~ *the* hearing.

Comment. Section 11018 is amended to correct references to the Administrative Procedure Act.

State Agencies Generally

Gov't Code § 11125.7 (amended). Opportunity for public to address state body

11125.7. (a) Except as otherwise provided in this section, the state body shall provide an opportunity for members of the public to directly address the state body on each agenda item before or during the state body's discussion or consideration of the item. This section is not applicable if the agenda item has already been considered by a committee composed exclusively of members of the state body at a public meeting where interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the state body.

(b) The state body may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public comment on particular issues and for each individual speaker.

(c) This section is not applicable to closed sessions held pursuant to Section 11126.

(d) This section is not applicable to decisions regarding proceedings held pursuant to Chapter 5 (commencing with Section 11500), relating to administrative adjudication, or to the conduct of those proceedings.

(e) This section is not applicable to hearings conducted by the State Board of Control pursuant to Sections 13963 and 13963.1.

(f) This section is not applicable to agenda items which involve decisions of the Public Utilities Commission regarding adjudicatory hearings held pursuant to Chapter 9 (commencing with Section 1701) of Part 1 of Division 1 of the Public Utilities Code. ~~For the purposes of this subdivision, "adjudicatory hearing" has the same meaning as defined in subdivision (f) of Section 11500 of the Government Code~~. For all other agenda items, the commission shall provide members of the public, other than those who have already participated in the proceedings underlying the agenda item, an opportunity to directly address the commission before or during the commission's consideration of the item.

Comment. Subdivision (f) of Section 11125.7 is amended to delete the second sentence. "Adjudicatory hearing" is no longer defined in the Administrative Procedure Act.

Fair Employment and Housing Commission

Gov't Code § 12935 (amended). Functions, powers, and duties of commission

12935. The commission shall have the following functions, powers and duties:

(a) To adopt, promulgate, amend, and rescind suitable rules, regulations, and standards (1) to interpret, implement, and apply all provisions of this part, (2) to regulate the conduct of hearings held pursuant to Sections 12967 and 12980, and (3) to carry out all other functions and duties of the commission pursuant to this part.

(b) To conduct hearings pursuant to Sections 12967 and 12981.

(c) To establish and maintain a principal office within the state.

(d) To meet and function at any place within the state.

(e) To appoint an executive secretary, and any attorneys and other employees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(f) To hold hearings, subpoena witnesses, compel their attendance, administer oaths, examine any person under oath and, in connection therewith, to require the production of any books or papers relating to any matter under investigation or in question before the commission.

(g) To create or provide financial or technical assistance to any advisory agencies and conciliation councils, local or otherwise, as in its judgment will aid in effectuating the purposes of this part, and to empower them to study the problems of discrimination in all or specific fields of human relationships or in particular instances of employment discrimination on the bases enumerated in this part or in specific instances of housing discrimination because of race, religious creed, color, national origin, ancestry, familial status, disability, marital status, or sex, and to foster, through community effort or otherwise, good will, cooperation, and conciliation among the groups and elements of the population of the state and to make recommendations to the commission for the development of policies and procedures in general. These advisory agencies and conciliation councils shall be composed of representative citizens, serving without pay.

(h) With respect to findings and orders made pursuant to this part, to establish a system of published opinions which shall serve as precedent in interpreting and applying the provisions of this part. *Commission findings, orders, and opinions in an adjudicative proceeding are subject to Section 11425.60.*

(i) To issue publications and results of inquiries and research which in its judgment will tend to promote good will and minimize or eliminate unlawful discrimination. These publications shall include an annual report to the Governor and the Legislature of its activities and recommendations.

(j) Notwithstanding Sections 11370.3 and 11502, to appoint hearing officers, as it may deem necessary, to conduct hearings. Each hearing officer shall possess the qualifications established by the State Personnel Board for the particular class of position involved.

Comment. Section 12935 is amended to make findings, orders, and opinions in an adjudicative proceeding of the Fair Employment and Housing Commission subject to the precedent decision provision of the Administrative Procedure Act. Under the Administrative Procedure Act, the commission may not expressly rely on an opinion as precedent unless it has been designated as a precedent decision. Gov't Code § 11425.60

Commission on State Mandates

Gov't Code § 17533 (added). Provisions inapplicable

17533. Notwithstanding Section 11425.10, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 does not apply to a hearing by the commission under this part.

Comment. Section 17533 makes the general administrative adjudication provisions of the Administrative Procedure Act inapplicable to hearings of the Commission on State Mandates under this part. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 17533 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to proceedings of the Commission on State Mandates under this part. *Cf.* Gov't Code § 11501 (application of chapter).

Nothing in Section 17533 excuses compliance with procedural protections required by due process of law.

State Personnel Board

Gov't Code § 19582.5 (amended). Functions, powers, and duties of commission

19582.5. The board may designate certain of its decisions as precedents. ~~Precedential decisions shall not be subject to Chapter 3.5. (commencing with Section 11340) of Part 1 of Division 3.~~ *Decisions of the board are subject to Section 11425.60.* The board may provide by rule for the reconsideration of a previously issued decision to determine whether or not it shall be designated as a precedent decision. All decisions designated as precedents shall be published in a manner determined by the board.

Comment. Section 19582.5 is amended to make decisions of the State Personnel Board subject to the precedent decision provision of the

Administrative Procedure Act. Under the Administrative Procedure Act, the board may not expressly rely on a decision as precedent unless it has been designated as a precedent decision. Gov't Code § 11425.60.

The substance of the former second sentence of Section 19582.5 (precedential decisions not subject to rulemaking provisions of Administrative Procedure Act) is continued in subdivision (b) of Section 11425.60.

Municipal Hospitals

Gov't Code § 37624.2 (technical amendment). Subpoenas

37624.2. The governing body or the hearing officer, if one is appointed, shall have the same power with respect to the issuance of subpoenas and subpoenas duces tecum as that granted to any agency or hearing officer pursuant to ~~Section 11510~~ *Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2*. Any subpoena or subpoena duces tecum issued pursuant to this section shall have the same force and effect and impose the same obligations upon witnesses as that provided in ~~Section 11510~~ *Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2*.

Comment. Section 37624.2 is amended to correct references to the Administrative Procedure Act.

Judicial Council

Gov't Code § 68560.5 (technical amendment). Definitions

68560.5. As used in this article:

(a) "Court proceeding" means a civil, criminal, or juvenile proceeding, excluding a small claims proceeding, and a deposition.

(b) "Interpreter" does not include (1) an interpreter qualified under Section 754 of the Evidence Code to interpret for deaf or hard-of-hearing persons, or (2) an interpreter qualified for administrative hearings or noncourt settings under ~~Section 11513~~ *Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2*.

Comment. Section 68560.5 is amended to correct the reference to the Administrative Procedure Act.

Office of Statewide Health Planning and Development

Health & Safety Code § 443.37 (technical amendment). Review

443.37. *(a)* Any health facility affected by any determination made under this part by the office may petition the office for review of the decision. This petition shall be filed with the office within 15 business days, or within ~~such~~ *a* greater time as the office, with the advice of the commission, may allow, and shall specifically describe the matters which are disputed by the petitioner.

(b) A hearing shall be commenced within 60 calendar days of the date on which the petition was filed. The hearing shall be held before an employee of the office, ~~a hearing officer~~ *an administrative law judge* employed by the Office of Administrative Hearings, or a committee of the commission chosen by the chairperson for this purpose. If held before an employee of the office or a committee of the commission, the hearing shall be held in accordance with ~~such~~ procedures ~~as~~ the office, with the advice of the commission, shall prescribe. If held before ~~a hearing officer~~ *an administrative law judge* employed by the Office of Administrative Hearings, the hearing shall be held in accordance with Chapter 5 (commencing with Section 11500) of *Part 1 of* Division 3 of *Title 2 of* the Government Code. The employee, ~~hearing officer~~ *administrative law judge*, or committee shall prepare a recommended decision including findings of fact and conclusions of law and present it to the office for its adoption. The decision of the office shall be in writing and shall be final. The decision of the office shall be made within 60 calendar days after the conclusion of the hearing and shall be effective upon filing and service upon the petitioner.

(c) Judicial review of any final action, determination, or decision may be had by any party to the proceedings as provided in Section 1094.5 of the Code of Civil Procedure. The decision of the office shall be upheld against a claim that its findings are not supported by the evidence unless the court determines that the findings are not supported by substantial evidence.

(d) The employee of the office, the ~~hearing officer~~ *administrative law judge* employed by the Office of Administrative Hearings, the Office of Administrative Hearings, or the committee of the commission, may issue subpoenas and subpoenas duces tecum in a

manner and subject to the conditions established by ~~Section 11510~~ *Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2* of the Government Code.

Comment. Section 443.37 is amended to correct references to the Administrative Procedure Act. A hearing held in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code is also subject to Chapter 4.5 (administrative adjudication general provisions) of that part, division, and title. Gov't Code §§ 11410.50, 11501.

Note. The part in which Section 443.37 appears has a sunset provision, and is repealed on January 1, 1997. See Section 443.46. This is addressed in the operative date provision at the end of these conforming revisions.

State Department of Health Services

Health & Safety Code § 1551.5 (technical amendment). Witness fees

1551.5. ~~Notwithstanding Section 11510 of the Government Code, witnesses subpoenaed at the request of the department for a hearing conducted pursuant to this article who attend a hearing may be paid by the department witness fees and mileage as provided by Section 68093 of the Government Code.~~ In addition *to the witness fees and mileage provided by Government Code Section 11450.40*, the department may pay actual, necessary, and reasonable expenses in an amount not to exceed the per diem allowance payable to a nonrepresented state employee on travel status. The department may pay witness expenses ~~pursuant to this section~~ in advance of the hearing.

Comment. Section 1551.5 is amended to recognize that witness fees and mileage are provided by Section 11450.40 of the Government Code. Under Section 1551, hearings under this article are held in accordance with the Administrative Procedure Act. This change is nonsubstantive, since witness fees and mileage under the Administrative Procedure Act are the same as those allowed in a civil case. The general provision governing mileage and fees for a witness in a civil case is Government Code Section 68093.

Health & Safety Code § 1568.065 (technical amendment). Conduct of proceedings

1568.065. (a) Proceedings for the suspension, revocation, or denial of a license under this chapter shall be conducted in

accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the department shall have all those powers granted by the provisions. In the event of conflict between this chapter and those provisions of the Government Code, this chapter shall prevail.

(b) In all proceedings conducted in accordance with this section, the standard of proof to be applied shall be by the preponderance of the evidence.

(c) If the license is not temporarily suspended pursuant to Section 1568.082, the hearing shall be held within 90 calendar days after receipt of the notice of defense, unless a continuance of the hearing is granted by the department or the administrative law judge. When the matter has been set for hearing, only the administrative law judge may grant a continuance of the hearing. The administrative law judge may, but need not, grant a continuance of the hearing, only upon finding the existence of any of the following:

(1) The death or incapacitating illness of a party, a representative or attorney of a party, a witness to an essential fact, or of the parent, child, or member of the household of such person, when it is not feasible to substitute another representative, attorney, or witness because of the proximity of the hearing date.

(2) Lack of notice of hearing as provided in Section 11509 of the Government Code.

(3) A material change in the status of the case where a change in the parties or pleadings requires postponement, or an executed settlement or stipulated findings of fact obviate the need for hearing. A partial amendment of the pleadings shall not be good cause for continuance to the extent that the unamended portion of the pleadings is ready to be heard.

(4) A stipulation for continuance signed by all parties or their authorized representatives, including, but not limited to, a representative, which is communicated with the request for continuance to the administrative law judge no later than 25 business days before the hearing.

(5) The substitution of the representative or attorney of a party upon showing that the substitution is required.

(6) The unavailability of a party, representative, or attorney of a party, or witness to an essential fact due to a conflicting and required appearance in a judicial matter if when the hearing date

was set, the person did not know and could neither anticipate nor at any time avoid the conflict, and the conflict with request for continuance is immediately communicated to the administrative law judge.

(7) The unavailability of a party, a representative or attorney of a party, or a material witness due to an unavoidable emergency.

(8) Failure by a party to comply with a timely discovery request if the continuance request is made by the party who requested the discovery.

(d) ~~Notwithstanding Section 11510 of the Government Code, witnesses subpoenaed at the request of the department for a hearing conducted pursuant to this article who attend a hearing may be paid by the department witness fees and mileage as provided by Section 68093 of the Government Code.~~ In addition *to the witness fees and mileage provided by Government Code Section 11450.40,* the department may pay actual, necessary, and reasonable expenses in an amount not to exceed the per diem allowance payable to a nonrepresented state employee on travel status. The department may pay witness expenses pursuant to this section in advance of the hearing.

(e)(1) The withdrawal of an application for a license or a special permit after it has been filed with the department shall not deprive the department of its authority to institute or continue a proceeding against the applicant for the denial of the license or a special permit upon any ground provided by law or to enter an order denying the license or special permit upon any such ground.

(2) The suspension, expiration, or forfeiture by operation of law of a license issued by the department, or its suspension, forfeiture, or cancellation by order of the department or by order of a court of law, or its surrender, shall not deprive the department of its authority to institute or continue a disciplinary proceeding against the licensee upon any ground provided by law or to enter an order suspending or revoking the license or otherwise taking disciplinary action against the licensee on any such ground.

(f)(1) If an application for a license indicates, or the department determines during the application review process, that the applicant previously was issued a license under this chapter or under Chapter 1 (commencing with Section 1200), Chapter 2 (commencing with Section 1250), Chapter 3 (commencing with Section 1500), Chapter 3.3 (commencing with Section 1569), Chapter 3.4

(commencing with Section 1596.70), Chapter 3.5 (commencing with Section 1596.90), or Chapter 3.6 (commencing with Section 1597.30) and the prior license was revoked within the preceding two years, the department shall cease any further review of the application until two years shall have elapsed from the date of the revocation. The cessation of review shall not constitute a denial of the application for purposes of Section 1568.062, this section, or any other provision of law.

(2) If an application for a license indicates, or the department determines during the application review process, that the applicant had previously applied for a license under any of the chapters listed in paragraph (1) and the application was denied within the last year, the department shall cease further review of the application under either of the following circumstances:

(A) In cases where the applicant petitioned for a hearing, the department shall cease further review of the application until one year has elapsed from the effective date of the decision and order of the department upholding a denial.

(B) In cases where the department informed the applicant of his or her right to petition for a hearing as specified in Section 1568.063 and the applicant did not petition for a hearing, the department shall cease further review of the application until one year has elapsed from the date of the notification of the denial and the right to petition for a hearing.

(3) The department may continue to review the application if it has determined that the reasons for the denial of the application were due to circumstances and conditions which either have been corrected or are no longer in existence.

Comment. Subdivision (d) of Section 1568.065 is amended to recognize that witness fees and mileage are provided by Section 11450.40 of the Government Code. Under subdivision (a), hearings under this article are held in accordance with the Administrative Procedure Act. This change is nonsubstantive, since witness fees and mileage under the Administrative Procedure Act are the same as those allowed in a civil case. The general provision governing mileage and fees for a witness in a civil case is Government Code Section 68093.

Health & Safety Code § 1569.515 (technical amendment). Witness fees

1569.515. ~~Notwithstanding Section 11510 of the Government Code, witnesses subpoenaed at the request of the department for a hearing conducted pursuant to this article who attend a hearing may be paid by the department witness fees and mileage as provided by Section 68093 of the Government Code.~~ In addition *to the witness fees and mileage provided by Government Code Section 11450.40*, the department may pay actual, necessary, and reasonable expenses in an amount not to exceed the per diem allowance payable to a nonrepresented state employee on travel status. The department may pay witness expenses pursuant to this section in advance of the hearing.

Comment. Section 1569.515 is amended to recognize that witness fees and mileage are provided by Section 11450.40 of the Government Code. Under Section 1569.51, hearings under this article are held in accordance with the Administrative Procedure Act. This change is nonsubstantive, since witness fees and mileage under the Administrative Procedure Act are the same as those allowed in a civil case. The general provision governing mileage and fees for a witness in a civil case is Government Code Section 68093.

Health & Safety Code § 1596.8875 (technical amendment). Witness fees

1596.8875. ~~Notwithstanding Section 11510 of the Government Code, witnesses subpoenaed at the request of the department for a hearing conducted pursuant to this article who attend a hearing may be paid by the department witness fees and mileage as provided by Section 68093 of the Government Code.~~ In addition *to the witness fees and mileage provided by Government Code Section 11450.40*, the department may pay actual, necessary, and reasonable expenses in an amount not to exceed the per diem allowance payable to a nonrepresented state employee on travel status. The department may pay witness expenses pursuant to this section in advance of the hearing.

Comment. Section 1596.8875 is amended to recognize that witness fees and mileage are provided by Section 11450.40 of the Government Code. Under Section 1596.887, hearings under this article are held in accordance with the Administrative Procedure Act. This change is nonsubstantive, since witness fees and mileage under the Administrative

Procedure Act are the same as those allowed in a civil case. The general provision governing mileage and fees for a witness in a civil case is Government Code Section 68093.

State Department of Alcohol and Drug Programs

Health & Safety Code § 11834.37 (technical amendment). Conduct of proceedings

11834.37. (a) Proceedings for the suspension, revocation, or denial of a license under this chapter shall be conducted in accordance with the provisions of Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the department shall have all the powers granted by those provisions. In the event of conflict between this chapter and the Government Code, the Government Code shall prevail.

(b) In all proceedings conducted in accordance with this section, the standard of proof to be applied shall be by the preponderance of the evidence.

(c) The department shall commence and process licensure revocations under this chapter in a timely and expeditious manner. ~~Notwithstanding Section 11502.1 of the Government Code, the~~ *The* Office of Administrative Hearings shall give priority calendar preference to licensure revocation hearings pursuant to this chapter, particularly revocations where the health and safety of the residents are in question.

Comment. Section 11834.37 is amended to delete the reference to former Section 11502.1 of the Government Code, which has been repealed. A proceeding conducted in accordance with the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code is also subject to the provisions of Chapter 4.5 (administrative adjudication general provisions) of that part, division, and title. Gov't Code §§ 11410.50, 11501.

Building Standards Commission

Health & Safety Code § 18949.6 (technical amendment). Building standards

18949.6. (a) The commission shall adopt regulations setting forth the procedure for the adoption of building standards and

administrative regulations that apply directly to the implementation or enforcement of building standards.

(b) Regulatory adoption shall be accomplished so as to facilitate the triennial adoption of the specified model codes pursuant to Section 18928.

(c) The regulations shall allow for the distribution of proposed building standards and regulatory changes to the public for review in compliance with the requirements of the *rulemaking provisions of the* Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340)~~, Chapter 4 (commencing with Section 11370), and Chapter 5 (commencing with Section 11500)~~ of Part 1 of Division 3 of Title 2 of the Government Code) and for the acceptance of responses from the public.

Comment. Section 18949.6 is amended to correct the reference to the Administrative Procedure Act.

Department of Toxic Substances Control

Health & Safety Code § 25149 (amended). Endangerment to health and environment

25149. (a) Notwithstanding any other provision of law, except as provided in Section 25149.5 or 25181 of this code or Section 731 of the Code of Civil Procedure, no city or county, whether chartered or general law, or district may enact, issue, enforce, suspend, revoke, or modify any ordinance, regulation, law, license, or permit relating to an existing hazardous waste facility so as to prohibit or unreasonably regulate the disposal, treatment, or recovery of resources from hazardous waste or a mix of hazardous and solid wastes at that facility, unless, after public notice and hearing, the director determines that the operation of the facility may present an imminent and substantial endangerment to health and the environment. However, nothing in this section authorizes an operator of that facility to violate any term or condition of a local land use permit or any other provision of law not in conflict with this section.

(b) The director shall, pursuant to subdivision (c), conduct the hearing specified in subdivision (a) to determine whether the operation of an existing hazardous waste facility may present an imminent and substantial endangerment to health and the environment whenever any of the following occurs:

(1) A state or federal public agency requires any person to evacuate a residence or requires the evacuation of a school, place of employment, commercial establishment, or other facility to which the public has access, because of the release of a hazardous substance from the facility.

(2) For more than five days in any month, the air emissions from the facility result in the violation of an emission standard for a hazardous air pollutant established pursuant to Section 7412 of Title 42 of the United States Code or the threshold exposure level for a toxic air contaminant, as defined in Section 39655.

(3) A state or federal public agency requires that the use of a source of drinking water be discontinued because of the contamination of the source by a release of hazardous waste, hazardous substances, or leachate from the facility.

(4) A state agency, or the board of supervisors of the county in which the facility is located, upon recommendation of its local health officer, makes a finding that the public health has been affected by a release of hazardous wastes from the facility. The finding shall be based on statistically significant data developed in a health effects study conducted according to a study design, and using a methodology, which are developed after considering the suggestions on study design and methodology made by interested parties and which are approved by the Epidemiological Studies Section in the Epidemiology and Toxicology Branch of the department before beginning the study.

(5) The owner or operator of the facility is in violation of an order issued pursuant to Section 25187 which requires one or both of the following:

(A) The correction of a violation or condition that has resulted, or threatens to result, in an unauthorized release of hazardous waste or a constituent of hazardous waste from the facility into either the onsite or offsite environment.

(B) The cleanup of a release of hazardous waste or a constituent of hazardous waste, the abatement of the effects of the release, and any other necessary remedial action.

(6) The facility is in violation of an order issued pursuant to Article 1 (commencing with Section 13300) of, or Article 2 (commencing with Section 13320) of, Chapter 5 of Division 7 of the Water Code or in violation of a temporary restraining order, preliminary injunction, or permanent injunction issued pursuant to

Article 4 (commencing with Section 13340) of Chapter 5 of Division 7 of the Water Code.

(c) Whenever the director determines that a hearing is required, as specified in subdivision (b), the director shall immediately request the Office of Administrative Hearings to assign ~~a hearing officer~~ *an administrative law judge* to conduct the hearing, pursuant to this subdivision.

(1) After ~~a hearing officer~~ *an administrative law judge* is assigned by the Office of Administrative Hearings, the director shall transmit to the ~~hearing officer~~ *administrative law judge* and to the operator of the existing hazardous waste facility, all relevant documents, information, and data that were the basis for the director's determination. The director shall also prepare a notice specifying the time and place of the hearing. The notice shall also include a clear statement of the reasons for conducting the hearing, a description of the facts, data, circumstances, or occurrences that are the cause for conducting the hearing, and the issues to be addressed at the hearing. The hearing shall be held as close to the location of the existing hazardous waste facility as is practicable and shall commence no later than 30 days following the director's request to the Office of Administrative Hearings to assign ~~a~~ ~~hearing officer~~ *an administrative law judge* to the case.

(2) The hearing specified in paragraph (1) shall be conducted in accordance with *Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, and* Sections ~~11510~~ *11511* to 11515, inclusive, ~~and Section 11525~~, of, the Government Code. The ~~hearing officer's~~ *administrative law judge's* proposed decision shall be transmitted to the director within 30 days after the case is submitted.

(3) The director may adopt the proposed decision of the ~~hearing officer~~ *administrative law judge* in its entirety or may decide the case upon the record, as provided in Section 11517 of the Government Code. The director's decision shall be in writing and shall contain findings of fact and a determination of the issues presented. The decision is subject to judicial review in accordance with Section 11523 of the Government Code.

Comment. Section 25149 is amended to reflect the repeal of Sections 11510 and 11525 of the Government Code. A number of provisions formerly found in Government Code Sections 11500-11515 are now located in general provisions on administrative adjudication, which apply

to all state adjudicative proceedings. See, e.g., Gov't Code §§ 11410.20 (application to state), 11425.10 (administrative adjudication bill of rights), 11430.10-11430.80 (ex parte communications), 11450.10-11450.40 (subpoenas), 11455.10-11455.30 (enforcement of orders and sanctions).

In paragraph (2) of subdivision (c) a reference is added to Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, relating to language assistance. This is nonsubstantive, because the language assistance provisions, formerly found in Government Code Section 11513, have been relocated in Article 8.

Health & Safety Code § 25229 (technical amendment). Decision and findings of fact

25229. (a) If, after the hearing, the director makes the decision that the subject land should not be designated a hazardous waste property or border zone property, the director shall issue that decision in writing and serve it in the manner provided in subdivision (c).

(b) If, after the hearing, the director makes the decision, upon a preponderance of the evidence, including any evidence developed at any time prior to the hearing, that the land should be designated a hazardous waste property or a border zone property, the director shall issue that decision in writing, which shall identify the subject land, or portion thereof, by street address, assessor's parcel number, or legal description and the name of the owner of record, contain findings of fact based upon the issues presented, including the reasons for this designation, the substances on, under, or in the land, and the significant existing or potential hazards to present or future public health and safety, and order every owner of the designated land to take all of the following actions:

(1) Execute before a notary a written instrument which imposes an easement, covenant, restriction, or servitude, or any combination thereof, as appropriate, upon the present and future uses of the land pursuant to Section 25230. The written instrument shall also include a copy of the director's decision.

(2) Return the executed instrument to the director within 30 days after the decision is delivered or mailed. Within 10 days after receiving the instrument, the director shall execute the written instrument and return the instrument to the owner.

(3) Record the written instrument pursuant to Section 25230 within 10 days after receiving the written instrument executed by the director, as specified in paragraph (2).

(4) Return the recorded written instrument to the director within 10 days after the owner records the instrument, as specified in paragraph (3).

(c) Copies of the determination shall be delivered or sent by certified mail to the owner of the property, the legislative body of the city or county in whose jurisdiction the land is located, and any other persons who were served pursuant to Section 25222 or who were permitted to intervene in the proceeding pursuant to Section 25226.

(d) Failure or refusal to comply with any order issued pursuant to this section shall be treated in the manner provided by ~~Section 11525~~ *Article 12 (commencing with Section 11455.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2* of the Government Code.

Comment. Section 25229 is amended to correct the reference to the Administrative Procedure Act. A number of provisions formerly found in Government Code Sections 11500-11530 are now located in general provisions on administrative adjudication, which apply to all state adjudicative proceedings. See, e.g., Gov't Code §§ 11410.20 (application to state), 11425.10 (administrative adjudication bill of rights), 11430.10-11430.80 (ex parte communications), 11450.10-11450.40 (subpoenas), 11455.10-11455.30 (enforcement of orders and sanctions).

State Water Resources Control Board

Health & Safety Code § 25299.59 (technical amendment). Procedure before board (operative until Jan. 1, 2005)

25299.59. (a) Except as specified in subdivision (b), the procedures in *Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, and in* Section 11513 of, the Government Code apply to the proceedings conducted by the board pursuant to this article.

(b) Notwithstanding subdivision (a), Sections 801, 802, 803, 804, and 805 of the Evidence Code apply to the proceedings conducted by the board pursuant to this article.

(c) This article does not require any person to pursue a claim against the board pursuant to this article before seeking any other remedy.

(d) If the board has paid out of the fund for any costs of corrective action, the board shall not pay any other claim out of the fund for the same costs.

(e) Notwithstanding Sections 25299.57 and 25299.58, the board shall not reimburse or authorize prepayment of any claim in an aggregate amount exceeding nine hundred ninety thousand ($990,000) for a claim arising from the same event or occurrence.

(f) The board may conduct an audit of any corrective action claim honored pursuant to this chapter. The claimant shall reimburse the state for any costs disallowed in the audit. A claimant shall preserve, and make available, upon request of the board or the board's designee, all records pertaining to the corrective action claim for a period of three years after the final payment is made to the claimant.

Comment. Section 25299.59 is amended to add the reference to Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, relating to language assistance. This is nonsubstantive, because the language assistance provisions, formerly found in Government Code Section 11513, have been relocated in Article 8.

State Board of Control

Health & Safety Code § 25375.5 (technical amendment). Procedure and rules of evidence (operative until July 1, 1996)

25375.5. (a) Except as specified in subdivision (b), the procedures specified in *Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, and in* Section 11513 of, the Government Code apply to the proceedings conducted by the board pursuant to this article.

(b) Notwithstanding subdivision (a), Sections 801, 802, 803, 804, and 805 of the Evidence Code apply to the proceedings conducted by the board pursuant to this article.

(c) The board may consider evidence presented by any person against whom a demand was made pursuant to subdivision (c) of Section 25372. The evidence presented by that person shall become a part of the record upon which the board's decision shall be based.

Comment. Section 25375.5 is amended to add the reference to Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of

Division 3 of Title 2 of the Government Code, relating to language assistance. This is nonsubstantive, because the language assistance provisions, formerly found in Government Code Section 11513, have been relocated in Article 8.

Local Hospital Districts

Health & Safety Code § 32154 (technical amendment). Subpoenas

32154. The board or the hearing officer, if one is appointed, shall have the same power with respect to the issuance of subpoenas and subpoenas duces tecum as that granted to any agency or ~~hearing~~ *presiding* officer pursuant to ~~Section 11510~~ *Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2* of the Government Code. Any ~~such~~ subpoena or subpoena duces tecum issued pursuant to this section shall have the same force and effect and impose the same obligations upon witnesses as that provided in ~~Section 11510~~ *Article 11 (commencing with Section 11450.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2* of the Government Code.

Comment. Section 32154 is amended to correct references to the Administrative Procedure Act.

Air Resources Board

Health & Safety Code § 40843 (technical amendment). Superior court proceedings

40843. Upon receipt of a report submitted pursuant to Section 40842, the superior court shall proceed as specified in Section ~~11525~~ *11455.20* of the Government Code.

Comment. Section 40843 is amended to correct the reference to the Administrative Procedure Act.

Occupational Safety and Health Standards Board

Lab. Code § 146 (technical amendment). Conduct of hearings

146. In the conduct of hearings related to permanent variances, the board and its representatives are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure but shall conduct the hearings in accordance with ~~the provisions of~~ *Article 8 (commencing with Section 11435.05) of*

Chapter 4.5 of Part 1 of Division 3 of Title 2 of, and Section 11513 of, the Government Code. A full and complete record shall be kept of all proceedings.

Comment. Section 146 is amended to add the reference to Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, relating to language assistance. This is nonsubstantive, because the language assistance provisions, formerly found in Government Code Section 11513, have been relocated in Article 8.

Agricultural Labor Relations Board (election certification)

Lab. Code § 1144.5 (added). Provisions inapplicable

1144.5. (a) Notwithstanding Section 11425.10 of the Government Code, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a hearing by the board under this part, except a hearing to determine an unfair labor practice charge.

(b) Notwithstanding Sections 11425.30 and 11430.10 of the Government Code, in a hearing to determine an unfair labor practice charge, a person who has participated in a determination of probable cause, injunctive or other pre-hearing relief, or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or as a supervisor of the presiding officer or may assist or advise the presiding officer in the same proceeding.

Comment. Subdivision (a) of Section 1144.5 makes the administrative adjudication provisions of the Administrative Procedure Act inapplicable to proceedings of the Agricultural Labor Relations Board under this part, except hearings to determine unfair labor practice charges. Nothing in Section 1144.5 excuses compliance with procedural protections otherwise required by due process of law. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 1144.5 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to proceedings of the Agricultural Labor Relations Board under this part. *Cf.* Gov't Code § 11501 (application of chapter).

Subdivision (b) provides a broader exception for the Agricultural Labor Relations Board than the comparable provisions in the Administrative Procedure Act. See Gov't Code §§ 11425.30(b) (when separation not required), 11430.10 (ex parte communications prohibited).

Division of Workers' Compensation — Workers' Compensation Appeals Board

Lab. Code § 4600 (technical amendment). Responsibility of employer

4600. Medical, surgical, chiropractic, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatus, including orthotic and prosthetic devices and services, that is reasonably required to cure or relieve from the effects of the injury shall be provided by the employer. In the case of his or her neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment. After 30 days from the date the injury is reported, the employee may be treated by a physician of his or her own choice or at a facility of his or her own choice within a reasonable geographic area. However, if an employee has notified his or her employer in writing prior to the date of injury that he or she has a personal physician, the employee shall have the right to be treated by that physician from the date of injury. If an employee requests a change of physician pursuant to Section 4601, the request may be made at any time after the injury, and the alternative physician or chiropractor shall be provided within five days of the request as required by Section 4601. For the purpose of this section, "personal physician" means the employee's regular physician and surgeon, licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, who has previously directed the medical treatment of the employee, and who retains the employee's medical records, including his or her medical history.

Where at the request of the employer, the employer's insurer, the administrative director, the appeals board, or a workers' compensation judge, the employee submits to examination by a physician, he or she shall be entitled to receive in addition to all other benefits herein provided all reasonable expenses of transportation, meals and lodging incident to reporting for the examination, together with one day of temporary disability

indemnity for each day of wages lost in submitting to the examination. Regardless of the date of injury, "reasonable expenses of transportation" includes mileage fees from the employee's home to the place of the examination and back at the rate of twenty-one cents ($0.21) a mile or the mileage rate adopted by the Director of the Department of Personnel Administration pursuant to Section 19820 of the Government Code, whichever is higher, plus any bridge tolls. The mileage and tolls shall be paid to the employee at the time he or she is given notification of the time and place of the examination.

Where at the request of the employer, the employer's insurer, the administrative director, the appeals board, a workers' compensation judge, an employee submits to examination by a physician and the employee does not proficiently speak or understand the English language, he or she shall be entitled to the services of a qualified interpreter in accordance with conditions and a fee schedule prescribed by the administrative director. These services shall be provided by the employer. For purposes of this section, "qualified interpreter" means a language interpreter certified, or deemed certified, pursuant to *Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, or* Section ~~11513 or~~ 68566 of, the Government Code.

Comment. Section 4600 is amended to correct the reference to the Administrative Procedure Act.

Lab. Code § 5278 (amended). Disclosure of settlement offers

5278. (a) No disclosure of any offers of settlement made by any party shall be made to the arbitrator prior to the filing of the award.

(b) ~~There shall be no ex parte communication by counsel or the parties with~~ *Article 7 (commencing with Section 11430.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code applies to a communication to* the arbitrator or a potential arbitrator ~~except for the purpose of scheduling the arbitration hearing or requesting a continuance~~.

Comment. Section 5278 is amended to make arbitration proceedings under this part subject to the ex parte communications provisions of the Administrative Procedure Act. In any event, the ex parte communications provisions of the Administrative Procedure Act would apply to arbitration proceedings under Government Code Sections 11425.10 (requirements apply to "adjudicative proceeding") and 11405.20

("adjudicative proceeding" means an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision).

Formerly subdivision (b) of Section 5278 applied to ex parte communications "with" the arbitrator or potential arbitrator. The ex parte communications provisions of the Administrative Procedure Act apply only to communications "to" the presiding officer. Gov't Code § 11430.10. Thus the arbitrator may initiate an ex parte communication with a party. See the Comment to Gov't Code § 11430.10.

The former "except" clause in subdivision (b), permitting ex parte communications for the purpose of scheduling the arbitration hearing or requesting a continuance, is continued in substance in Government Code Section 11430.20(b).

Lab. Code § 5710 (technical amendment). Depositions

5710. (a) The appeals board, a workers' compensation judge, or any party to the action or proceeding, may, in any investigation or hearing before the appeals board, cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the superior courts of this state. To that end the attendance of witnesses and the production of records may be required. Depositions may be taken outside the state before any officer authorized to administer oaths. The appeals board or a workers' compensation judge in any proceeding before the appeals board may cause evidence to be taken in other jurisdictions before the agency authorized to hear workers' compensation matters in those other jurisdictions.

(b) Where the employer or insurance carrier requests a deposition to be taken of an injured employee, or any person claiming benefits as a dependent of an injured employee, the deponent is entitled to receive in addition to all other benefits:

(1) All reasonable expenses of transportation, meals and lodging incident to the deposition.

(2) Reimbursement for any loss of wages incurred during attendance at the deposition.

(3) A copy of the transcript of the deposition, without cost.

(4) A reasonable allowance for attorney's fees for the deponent, if represented by an attorney licensed by the state bar of this state. The fee shall be discretionary with, and, if allowed, shall be set by,

the appeals board, but shall be paid by the employer or his or her insurer.

(5) A reasonable allowance for interpreter's fees for the deponent, if interpretation services are needed and provided by a language interpreter certified or deemed certified pursuant to *Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, or* Section ~~11513 or~~ 68566 of, the Government Code. The fee shall be in accordance with the fee schedule set by the administrative director and paid by the employer or his or her insurer. Payment for interpreter's services shall be allowed for deposition of a non-English-speaking injured worker, and for such other deposition-related events as permitted by the administrative director.

Comment. Section 5710 is amended to correct the reference to the Administrative Procedure Act.

Lab. Code § 5811 (technical amendment). Fees and costs

5811. (a) No fees shall be charged by the clerk of any court for the performance of any official service required by this division, except for the docketing of awards as judgments and for certified copies of transcripts thereof. In all proceedings under this division before the appeals board, costs as between the parties may be allowed by the appeals board.

(b) It shall be the responsibility of any party producing a witness requiring an interpreter to arrange for the presence of a qualified interpreter. A qualified interpreter is a language interpreter who is certified, or deemed certified, pursuant to *Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, or* Section ~~11513 or~~ 68566 of, the Government Code.

Interpreter fees which are reasonably, actually, and necessarily incurred shall be allowed as cost under this section, provided they are in accordance with the fee schedule set by the administrative director.

A qualified interpreter may render services during the following:

(1) A deposition.

(2) An appeals board hearing.

(3) During those settings which the administrative director determines are reasonably necessary to ascertain the validity or

extent of injury to an employee who cannot communicate in English.

Comment. Section 5811 is amended to correct a reference to the Administrative Procedure Act.

Occupational Safety and Health Appeals Board

Lab. Code § 6603 (technical amendment). Rules of practice and procedure

6603. (a) The rules of practice and procedure adopted by the appeals board shall be consistent with *Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, and* Sections 11507, 11507.6, 11507.7, ~~11510~~, 11513, 11514, 11515, *and* 11516~~, and 11525~~ of, the Government Code, and shall provide affected employees or representatives of affected employees an opportunity to participate as parties to a hearing under Section 6602.

(b) The superior courts shall have jurisdiction over contempt proceedings, as provided in ~~Section 11525~~ *Article 12 (commencing with Section 11455.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2* of the Government Code.

Comment. Section 6603 is amended to correct references to the Administrative Procedure Act. Former Section 11510 of the Government Code is superseded by Sections 11450.10-11450.40 of the Government Code (subpoenas). Former Section 11525 of the Government Code is superseded by Sections 11455.10-11455.30 of the Government Code (enforcement of orders and sanctions). Rules of practice and procedure adopted by the appeals board must be consistent with these provisions, and with all other general provisions governing administrative adjudication found in Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code.

The reference to Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, relating to language assistance, is added in subdivision (a). This is nonsubstantive, because the language assistance provisions, formerly found in Government Code Section 11513, have been relocated in Article 8.

Military Department

Mil. & Vet. Code § 105 (added). Provisions inapplicable

105. Notwithstanding Section 11425.10 of the Government Code, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a hearing conducted by the Military Department under this code.

Comment. Section 105 exempts California Military Department hearings under this code from the general administrative adjudication provisions of the Administrative Procedure Act. The hearings are a hybrid of federal and special state provisions that are unique and involve primarily matters of military classification and discipline. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 105 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to hearings of the California Military Department under this code. *Cf.* Gov't Code § 11501 (application of chapter).

Department of Corrections and Related Entities

(Part 1: Board of Prison Terms, Youth Authority, Youthful Offender Parole Board, and Narcotic Addict Evaluation Authority)

Pen. Code § 3066 (added). Provisions inapplicable

3066. Notwithstanding Section 11425.10 of the Government Code, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a parole hearing or other adjudication concerning rights of an inmate or parolee conducted by the Department of Corrections or the Board of Prison Terms.

Comment. Section 3066 makes the general administrative adjudication provisions of the Administrative Procedure Act inapplicable to a parole hearing or other adjudication of rights of an inmate or parolee conducted by the Department of Corrections or the Board of Prison Terms. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 3066 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to a parole hearing or other adjudication of rights of an inmate or parolee conducted by the Department of Corrections or the Board of Prison Terms. *Cf.* Gov't Code § 11501 (application of chapter).

Nothing in Section 3066 excuses compliance with procedural protections required by due process of law.

State Mining and Geology Board

Pub. Res. Code § 663.1 (technical amendment). Ex parte communications on matters within board's jurisdiction

663.1 (a) For the purposes of this section, "ex parte communication" means any oral or written communication between a member of the board and an interested person about a matter within the board's jurisdiction that does not occur in a public hearing, workshop, or other official proceeding, or on the official record of the proceeding on the matter.

(b) For purposes of this section, "a matter within the board's jurisdiction" means any action on a reclamation plan or financial assurance appealed pursuant to subdivision (e) of Section 2770, any review of an order setting administrative penalties pursuant to Section 2774.2, or any review of an appeal pursuant to Section 2775.

(c)(1) A board member or any person, other than a staff member of the board, department, or any other state agency, who is acting in his or her official capacity and who intends to influence the decision of the board on a matter within the board's jurisdiction, shall not conduct an ex parte communication, unless the board member or the person who engages in the communication with the board member discloses that communication in one of the following ways:

(A) The board member or the person fully discloses the communication and makes public the ex parte communication by providing a full report of the communication to the executive officer or, if the communication occurs within seven days of the next board hearing, to the board on the record of the proceeding of that hearing.

(B) When two or more board members receive substantially the same written communication or receive the same oral communication from the same party on the same matter, one of the board members fully discloses the communication on behalf of the other board member or members who received the communication and requests in writing that it be placed in the board's official record of the proceeding.

(d)(1) The board shall adopt standard disclosure forms for reporting ex parte communications which shall include, but not be limited to, all of the following information:

(A) The date, time, and location of the communication.

(B) The identity of the person or persons initiating and the person or persons receiving the communication.

(C) A complete description of the content of the communication, including the complete text of any written material that was part of the communication.

(2) The executive officer shall place in the public record any report of an ex parte communication.

(e) Communications shall cease to be ex parte communications when fully disclosed and placed in the board's official record.

(f) In addition to any other applicable penalty, a board member who knowingly violates this section is subject to a civil fine, not to exceed seven thousand five hundred dollars ($7,500). Notwithstanding any law to the contrary, the court may award attorneys' fees and costs to the prevailing party.

(g) Notwithstanding Section 11425.10 of the Government Code, the ex parte communications provisions of the Administrative Procedure Act (Article 7 (commencing with Section 11430.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to proceedings of the board under this code.

Comment. Section 663.1 is amended to make clear that the ex parte communications provisions of the Administrative Procedure Act do not apply to proceedings of the State Mining and Geology Board under this code.

State Energy Resources Conservation and Development Commission

Pub. Res. Code § 25513.3 (added). Permissible assistance or advice

25513.3. Notwithstanding Sections 11425.30 and 11430.10 of the Government Code, unless a party demonstrates other statutory grounds for disqualification, a person who has served as investigator or advocate in an adjudicative proceeding of the commission under this code may serve as a supervisor of the presiding officer or assist or advise the presiding officer in the same proceeding if the service, assistance, or advice occurs more than one year after the time the person served as investigator or advocate, provided the content of any advice is disclosed on the record and all parties have an opportunity to comment on the advice.

Comment. Section 25513.3 is added to provide an exception to the separation of functions and ex parte communications provisions of the Administrative Procedure Act necessary to ensure efficient operation of the commission.

California Coastal Commission

Pub. Res. Code § 30329 (added). Provisions inapplicable

30329. Notwithstanding Section 11425.10 of the Government Code, the ex parte communications provisions of the Administrative Procedure Act (Article 7 (commencing with Section 11430.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to proceedings of the California Coastal Commission under this division.

Comment. Section 30329 is added to make clear that the ex parte communications provisions of the Administrative Procedure Act do not apply to proceedings of the California Coastal Commission. This article continues to apply to proceedings of the Coastal Commission under the California Coastal Act.

California Integrated Waste Management Board

Pub. Res. Code § 40412 (amended). Ex parte communication

40412. (a) ~~For the purposes of this section, "ex parte communication" means any oral or written communication~~

~~concerning matters, other than purely procedural matters~~, *Subject to subdivision (c), Article 7 (commencing with Section 11430.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code applies to matters* under the board's jurisdiction which are subject to a rollcall vote pursuant to Section 40510.

(b) ~~No board member or any person, excepting a staff member of the board acting in his or her official capacity, who intends to influence the decision of a board member on a matter before the board, shall conduct an ex parte communication, except as follows:~~

~~(1)~~ If ~~an ex parte~~ *a* communication *in violation of this section* occurs, the board member shall notify the interested party that a full disclosure of the ex parte communication shall be entered in the board's record.

~~(2) Communications cease to be ex parte communications when~~

(c) It is not a violation of this section if either of the following occurs:

~~(A)~~ *(1)* The board member or the person who engaged in the communication with the board member fully discloses the communication and requests in writing that it be placed in the board's official record of the proceeding.

~~(B)~~ *(2)* When two or more board members receive substantially the same written communication, or are party to the same oral communication, from the same party on the same matter, and a single board member fully discloses the communication on behalf of the other board member or members who received the communication and requests in writing that it be placed in the board's official record of the proceeding.

Comment. Section 40412 is amended to apply the ex parte communications provisions of the Administrative Procedure Act to matters under the jurisdiction of the California Integrated Waste Management Board which are subject to a rollcall vote under Section 40510.

Pub. Res. Code § 40413 (amended). Penalties for violations

40413. *(a)* Any person who violates Section 40411 ~~or 40412~~ is punishable by a fine of not more than fifty thousand dollars ($50,000) or by imprisonment for not more than one year in the county jail or in the state prison, or by both that fine and imprisonment.

(b) In addition to the sanctions provided in Article 7 (commencing with Section 11430.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code, any person who violates Section 40412 is punishable by a fine of not more than fifty thousand dollars ($50,000) or by imprisonment for not more than one year in the county jail or in the state prison, or by both that fine and imprisonment.

Comment. Section 40413 is amended to make clear that the penalty for violating Section 40412 is in addition to the sanctions provided by the ex parte communications provisions of the Administrative Procedure Act.

Public Utilities Commission

Pub. Util. Code § 1701 (amended). Rules of procedure

1701. *(a)* All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission.

(b) Notwithstanding Section 11425.10 of the Government Code, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a hearing by the commission under this part.

Comment. Section 1701 is amended to make the general administrative adjudication provisions of the Administrative Procedure Act inapplicable to a hearing of the Public Utilities Commission under the Public Utilities Act. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 1701 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to a hearing of the Public Utilities Commission under the Public Utilities Act. *Cf.* Gov't Code § 11501 (application of chapter).

Nothing in Section 1701 excuses compliance with procedural protections required by due process of law.

State Board of Equalization

Rev. & Tax. Code § 1636 (technical amendment). Hearing officers

1636. The county board of supervisors may appoint one or more assessment hearing officers or contract with the Office of Administrative ~~Procedure~~ *Hearings* for the services of ~~a hearing officer~~ *an administrative law judge* pursuant to Chapter 14 (commencing with Section 27720) of Part 3 of Division 2 of Title 3 of the Government Code to conduct hearings on any assessment protests filed under Article 1 (commencing with Section 1601) of this chapter and to make recommendations to the county board of equalization or assessment appeals board concerning ~~such~~ *the* protests. Only persons meeting the qualifications prescribed by Section 1624 may be appointed as an assessment hearing officer.

Comment. Section 1636 is amended to correct a reference to the Office of Administrative Hearings. See Gov't Code §§ 11370.2, 27727 (Office of Administrative Hearings).

Unemployment Insurance Appeals Board

Unemp. Ins. Code § 409 (amended). Assignment and determination of cases; contents and publication of decisions

409. The chairperson shall assign cases before the board to any two members of the board for consideration and decision. Assignments by the chairperson of members to the cases shall be rotated so as to equalize the workload of the members, but with the composition of the members so assigned being varied and changed to assure that there shall never be a fixed and continuous composition of members. Except as otherwise provided, the decision of the two members assigned the case shall be the decision of the appeals board. In the event that the two members do not concur in the decision, the chairperson or another member of the board designated by the chairperson shall be assigned to the panel and shall resolve the impasse. A case shall be considered and decided by the appeals board acting as a whole at the request of any member of the appeals board.

The appeals board shall meet as a whole when the chairperson may direct to consider and pass on any matters that the chairperson may bring before it, and to consider and decide cases that present

issues of first impression or that will enable the appeals board to achieve uniformity of decisions by the respective members.

The appeals board, acting as a whole, may designate certain of its decisions as precedents. ~~Precedent decisions shall not be subject to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of the Government Code~~. The appeals board, acting as a whole, may, on its own motion, reconsider a previously issued decision solely to determine whether or not the decision shall be designated as a precedent decision. Decisions of the appeals board acting as a whole shall be by a majority vote of its members. The director and the appeals board administrative law judges shall be controlled by those precedents except as modified by judicial review.

~~The decisions of the appeals board shall contain a statement of the facts upon which the decision is based, and a statement of the decision itself and the reasons for the decision.~~ If the appeals board issues decisions other than those designated as precedent decisions, anything incorporated in those decisions shall be physically attached to and be made a part of the decisions. ~~The appeals board shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated at least annually, unless no precedent decision has been designated since the most recent update~~. The appeals board may make a reasonable charge as it deems necessary to defray the costs of publication and distribution *of its precedent decisions and index of precedent decisions*.

Comment. Section 409 is amended to recognize that decisions of the Unemployment Insurance Appeals Board are subject to Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code. Gov't Code § 11410.20 (application to state). Thus, for example, decisions of the Unemployment Insurance Appeals Board are subject to Government Code Sections 11425.50 (decision shall be in writing and include statement of factual and legal basis as to each principal controverted issue) and 11425.60 (board may not expressly rely on decision as precedent unless designated as a precedent decision; board shall maintain an index of significant legal and policy determinations made in precedent decisions). Language that duplicates provisions in Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code is deleted from Section 409. The former second sentence of the third paragraph of Section 409 (precedent decisions not subject to rulemaking provisions of Administrative

Procedure Act) is continued in substance in subdivision (b) of Section 11425.60. The last sentence of Section 409 is consistent with Government Code Section 6257 (state agency may charge fee covering direct costs of duplicating public records).

Department of Motor Vehicles

Veh. Code § 3066 (technical amendment). Hearings on protests

3066. (a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of the order, and place of hearing, and shall send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups which have requested notification by the board of protests and decisions of the board. Except in any case involving a franchisee who deals exclusively in motorcycles, the board or its secretary may, upon a showing of good cause, accelerate or postpone the date initially established for a hearing, but in no event shall the hearing be rescheduled more than 90 days after the board's initial order. For the purpose of accelerating or postponing a hearing date, "good cause" includes, but is not limited to, the effects upon, and any irreparable harm to, the parties or interested persons or groups if the request for a change in hearing date is not granted. The board, or a hearing officer designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Sections 11507.6, 11507.7, ~~except subdivision (c), 11510~~, 11511, 11513, 11514, 11515, and 11517 of the Government Code apply to these proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish that there is good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

(d) A member of the board who is a new motor vehicle dealer may not participate in, hear, comment, or advise other members upon, or decide, any matter involving a protest filed pursuant to this article.

Comment. Section 3066 is amended to correct the reference to the Administrative Procedure Act. A number of provisions formerly found in Government Code Sections 11500-11530 are now located in general provisions on administrative adjudication, which apply to all state adjudicative proceedings. See, e.g., Gov't Code §§ 11410.20 (application to state), 11425.10 (administrative adjudication bill of rights), 11430.10-11430.80 (ex parte communications), 11450.10-11450.40 (subpoenas), 11455.10-11455.30 (enforcement of orders and sanctions). See also Gov't Code § 11435.15 (language assistance requirement applicable to Department of Motor Vehicles).

Veh. Code § 11728 (technical amendment). Penalties as part of settlement agreement

11728. As part of a compromise settlement agreement entered into pursuant to Section 11707 or 11808.5, the department may assess a monetary penalty of not more than two thousand five hundred dollars ($2,500) per violation and impose a license suspension of not more than 30 days for any dealer who violates subdivision (r) of Section 11713. The extent of the penalties shall be based on the nature of the violation and effect of the violation on the purposes of this article. Except for the penalty limits provided for in Sections 11707 and 11808.5, all the provisions governing compromise settlement agreements for dealers, salesmen, and wholesalers apply to this section, *and Section 11415.60 of the Government Code does not apply*.

Comment. Section 11728 is amended to make the settlement provisions of the Administrative Procedure Act inapplicable to this section.

Veh. Code § 14112 (amended). Exemption from separation of functions

14112. *(a)* All matters in a hearing not covered by this chapter shall be governed, as far as applicable, by Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) Subdivision (a) of Section 11425.30 of the Government Code does not apply to a proceeding for issuance, denial, revocation, or suspension of a driver's license pursuant to this division. The Department of Motor Vehicles shall study the effect of that subdivision on proceedings involving vehicle operation certificates and shall report to the Legislature by December 31, 1999, with recommendations concerning experience with its application in those proceedings.

Comment. Subdivision (b) is added to Section 14112 in recognition of the personnel problem faced by the Department of Motor Vehicles due to the large volume of drivers' licensing cases. Subdivision (b) makes separation of functions requirements inapplicable in drivers' licensing cases, including license classifications and endorsements. However, the separation of functions requirements remain applicable in other Department of Motor Vehicle hearings, including schoolbus and ambulance operation certificate hearings, on which the department is required to report.

Department of Corrections and Related Entities

(Part 2: Board of Prison Terms, Youth Authority, Youthful Offender Parole Board, and Narcotic Addict Evaluation Authority)

Welf. & Inst. Code § 1778 (added). Provisions inapplicable

1778. Notwithstanding Section 11425.10 of the Government Code, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to a parole hearing or other adjudication concerning rights of a person committed to the control of the Youth Authority conducted by the Youth Authority or the Youthful Offender Parole Board.

Comment. Section 1778 makes the general administrative adjudication provisions of the Administrative Procedure Act inapplicable to a parole hearing or other adjudication of rights of a ward conducted by the Youth Authority or the Youthful Offender Parole Board. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 1778 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to a parole hearing or other adjudication of rights of a

ward conducted by the Youth Authority or the Youthful Offender Parole Board. *Cf.* Gov't Code § 11501 (application of chapter).

Nothing in Section 1778 excuses compliance with procedural protections required by due process of law.

Welf. & Inst. Code § 3158 (added). Provisions inapplicable

3158. Notwithstanding Section 11425.10 of the Government Code, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code) does not apply to a release hearing or other adjudication concerning rights of a person committed to the custody of the Director of Corrections conducted by the Narcotic Addiction Evaluation Authority.

Comment. Section 3158 makes the general administrative adjudication provisions of the Administrative Procedure Act inapplicable to a parole hearing or other adjudication of rights of a civil addict conducted by the Narcotic Addiction Evaluation Authority. Exemption of the agency's hearings from the Administrative Procedure Act does not exempt the hearings from the language assistance requirements of that act. Gov't Code § 11435.15(d).

Although Section 3158 is silent on the question, the formal hearing provisions of the Administrative Procedure Act (Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code) do not apply to a parole hearing or other adjudication of rights of a civil addict conducted by the Narcotic Addiction Evaluation Authority. *Cf.* Gov't Code § 11501 (application of chapter).

Nothing in Section 3158 excuses compliance with procedural protections required by due process of law.

Department of Developmental Services

Welf. & Inst. Code § 4689.5 (technical amendment). Conduct of proceedings

4689.5. (a) Proceeding for the termination, or denial of vendorization as a family home agency or family home pursuant to Section 4689.4 shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the State Department of Developmental Services shall have all the powers granted by Chapter 5. In the event of conflict between this section and Chapter 5, Chapter 5 shall prevail.

(b) In all proceedings conducted in accordance with this section, the standard of proof to be applied shall be a preponderance of the evidence.

(c) The hearing shall be held within 90 calendar days after receipt of the notice of defense, unless a continuance of the hearing is granted by the department or the administrative law judge. When the matter has been set for hearing, only the administrative law judge may grant a continuance of the hearing. The administrative law judge may grant a continuance of the hearing, but only upon finding the existence of one or more of the following:

(1) The death or incapacitating illness of a party, a representative or attorney of a party, a witness to an essential fact, or of the parent, child, or member of the household of that person, when it is not feasible to substitute another representative, attorney, or witness because of the proximity of the hearing date.

(2) Lack of notice of hearing as provided in Section 11509 of the Government Code.

(3) A material change in the status of the case where a change in the parties or pleadings requires postponement, or an executed settlement or stipulated findings of fact obviate the need for hearing. A partial amendment of the pleadings shall not be good cause for continuance to the extent that the unamended portion of the pleadings is ready to be heard.

(4) A stipulation for continuance signed by all parties or their authorized representatives that is communicated with the request for continuance to the administrative law judge no later than 25 business days before the hearing.

(5) The substitution of the representative or attorney of a party upon showing that the substitution is required.

(6) The unavailability of a party, representative, or attorney of a party, or witness to an essential fact due to a conflicting and required appearance in a judicial matter if when the hearing date was set, the person did not know and could neither anticipate nor at any time avoid the conflict, and the conflict with request for continuance is immediately communicated to the administrative law judge.

(7) The unavailability of a party, a representative or attorney of a party, or a material witness due to an unavoidable emergency.

(8) Failure by a party to comply with a timely discovery request if the continuance request is made by the party who requested the discovery.

(d) ~~Notwithstanding Section 11510 of the Government Code, witnesses subpoenaed at the request of the department for a hearing conducted pursuant to this section who attend a hearing may be paid by the department witness fees and mileage as provided by Section 68093 of the Government Code.~~ In addition *to the witness fees and mileage provided by 11450.40 of the Government Code*, the department may pay actual, necessary, and reasonable expenses in an amount not to exceed the per diem allowance payable to a nonrepresented state employee on travel status. The department may pay witness expenses ~~pursuant to this section~~ in advance of the hearing.

Comment. Subdivision (d) of Section 4689.5 is amended to recognize that witness fees and mileage are provided by Section 11450.40 of the Government Code. Under subdivision (a), hearings under this section are held in accordance with the Administrative Procedure Act. This change is nonsubstantive, since witness fees and mileage under the Administrative Procedure Act are the same as those allowed in a civil case. The general provision governing mileage and fees for a witness in a civil case is Government Code Section 68093.

OPERATIVE DATE

Uncodified. Operative date

(a) Except as provided in subdivision (b), this act shall be operative on July 1, 1997.

(b) If Section 443.37 of the Health and Safety Code is repealed before July 1, 1997, then Section [ ] of this act shall not become operative.