

Memorandum 91-4

Subject: Study N-105 - Administrative Adjudication (Effect of ALJ Decision--revised draft)

REVISED DRAFT

Attached to this memorandum is a revised staff draft of the administrative procedure statute, reworked in light of the discussion at the Commission's November 1990 meeting. A date adjacent to a section refers to the most recent consideration or revision of the section. A Staff Note following a section raises staff issues or makes other staff observations about the section.

Also attached to this memorandum are copies of relevant letters received from the Association of California State Attorneys and Administrative Law Judges (Exhibit 1), the Fair Employment & Housing Commission (Exhibit 2), the Department of Consumer Affairs (Exhibit 3), and the Executive Committee of the State Bar Taxation Section (Exhibit 4). Their specific comments are raised in Staff Notes following the relevant sections of the draft.

The Commission has not made any initial decisions concerning the effect of the administrative law judge's decision and appeals within the agency. The Commission has asked the staff to provide a draft of Professor Asimow's recommendations on this topic in order to focus discussion for Commission review.

SCOPE OF STATUTE

The staff believes the Commission needs to give further consideration to one of the key decisions in the administrative procedure study--the effort to draw a statute that can be applied to all state agencies (with a few fundamental exceptions).

EXISTING SITUATION

The existing California Administrative Procedure Act, while it applies to a great number of state agencies, largely covers licensing decisions which constitute in the vicinity of 5% of all state administrative adjudications. The vast majority of administrative adjudications are governed by special laws of the administering agencies, such as the Workers Compensation Appeals Board, the Unemployment Insurance Appeals Board, and the Public Utilities Commission.

Adjudication in agencies not covered by the Administrative Procedure Act is subject to procedural rules of some sort. In each case, there are statutes, regulations, and unwritten practices that prescribe adjudicatory procedures. The procedures vary greatly from formal adversarial proceedings to informal meetings.

ARGUMENTS FOR BROAD SCOPE

The Commission's decision to seek to expand the scope of the Administrative Procedure Act to govern the hearing procedures of all state agencies is based on a number of factors.

Procedural rules inaccessible

The Commission has felt that the existing scheme of having different rules of administrative procedure applicable to different agencies, or in some cases having different rules applicable to the same agency depending on the type of proceeding, makes it difficult for the public and for practitioners who must deal with administrative agencies. The situation is aggravated by the fact that although the Administrative Procedure Act is readily accessible, other applicable rules of administrative procedure may not be. It is often the case that the most important elements of an agency's procedural code are not written.

Disadvantages for outsiders

The present system may confer an advantage on agency staff and specialists who often deal with the agency or are former staff members or agency heads. They are familiar with the unwritten procedures and precedents and traditional ways of resolving issues; they know about the unwritten exceptions and ways of avoiding obstacles. Such a system

disfavors inexperienced advocates and the clients they represent, particularly community or public interest organizations that do not have access to the few experts in the procedure of a particular agency.

Inconsistent application

Uncodified procedures may be arbitrarily or unevenly applied because staff members may adhere to them or make exceptions to them as they feel is proper. In many cases, staff members would like to improve agency procedure, but agency heads resist changes or ignore established procedure. Since no one is certain precisely what is expected or required, it is often difficult to decide what procedure or behavior is appropriate under the circumstances.

Judicial review

When each agency has its own procedural law, the quality of judicial review is degraded. For example, when a court engages in judicial review of agency action and a procedural issue is drawn into question, the court has recourse only to precedents relating to that agency, if there are any. Even though the same problem is clearly dealt with by the Administrative Procedure Act and there is a well developed scheme of precedents relating to that problem, the court must reinvent an appropriate independent result.

PROBLEMS

The Law Revision Commission has recognized that in order to have an Administrative Procedure Act adequate to govern the hearing procedures of all state agencies, it is necessary that the act be sufficiently flexible to accommodate all the variant types of proceedings engaged in by the agencies. Of course, there may be special cases where a limited exception is warranted or a special procedure is necessary. These should constitute the exception rather than the rule.

This concept is fine in theory, and the staff endorses it wholeheartedly. In practice, however, achieving both flexibility and uniformity appears to the staff to be a difficult task indeed.

When the Commission first decided to draw a single administrative procedure act, we were warned by a number of major agencies that their proceedings were so different in kind from other administrative

agencies that it would be impossible to extend the administrative procedure act to them without crippling their operations. The Commission sought to reassure the doubters by pointing out that we would be adapting the administrative procedure act to better suit the needs of all agencies. Moreover, if we are unable to make a particular provision work for a specific agency, we can adopt a limited exception for that agency. Or, if an agency's needs are so different that most of the general act is inapplicable, we could except that agency completely. But these would be rare exceptions, since we would build enough flexibility into the statute, in terms of variety of available formal and informal procedures, that most agencies would find a suitable manner of operation under it.

Complexity

We have now begun the hard work of drafting actual statutory procedures for the agencies to live under, and it is already apparent to the staff that this approach will yield a very complex combination of statutory and regulatory provisions. For even such simple matters as the times within which agency actions must be taken, we've had to build in variations to recognize the special demands of different agencies, either because of the need for quick action or because of the demands of lengthy, complex, multi-party administrative determinations.

This concern is expressed well in the letter from the Fair Employment & Housing Commission:

We have a general observation to make about the process to date. As we understand it from the discussion at the November 30th meeting, the goal of the CLRC in undertaking a revision of the current APA system is to provide greater uniformity in the procedural rules governing administrative adjudication by the various state agencies. This would give the private practitioner more of an "even playing field" with the Departments in that the rules would not be so esoteric.

There appears to be a basic contradiction, however, between this goal and Professor Asimow's recommendations. In his attempt to create one model APA which all administrative agencies--including the current non-APA ones--would use, he has had to build in much flexibility in order to cover all situations. In doing so, he has created a system which is potentially more complex and varied than the current one. Currently, all APA agencies must follow--without deviation--the procedures set forth in the APA. Non-APA agencies have, of course, their own procedures. But under Asimow's recommendations, even APA agencies--such as ourselves--would have more discretion than we currently have

to choose the procedure which fits our situation best. And, presumably, each agency would spell out in its regulations which variation of the theme it has chosen.

Our agency, for one, would appreciate having more discretion than we do now and we applaud Professor Asimow's efforts to create a more flexible system. But these efforts seem counter to the goal which led to the CLRC study in the first place. Under the Asimow APA, the private practitioner would not only have to go to the Government Code to look at the APA, but he/she would then have to find the regulations of each particular agency in order to find which of the discretionary models that agency has adopted. This seems potentially more confusing to the private practitioner and would continue to give Department prosecutors a significant advantage.

Of course, the tendency towards too much variability can be combated by a provision limiting the discretion of agencies that work through the Office of Administrative Hearings (governed by the current Administrative Procedure Act). But this makes for a complex statutory system, witness the current draft of Section 642.710 (proposed and final decisions):

(b) If the presiding officer is not the agency head, the presiding officer shall make a proposed decision within 30 days after the case is submitted or such other time as the agency by regulation requires. The agency may not require another time if the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

Gumbersome procedures

A more serious concern is that unnecessary features and complications may be added to the administrative adjudication process for all agencies in order to respond to or deal with special problems or needs of a few agencies. The Public Utilities Commission has written to us that the task the Law Revision Commission has undertaken is a daunting one. "As our comments demonstrate, it is extraordinarily difficult to craft uniform procedures which fit the needs and responsibilities of every state agency which conducts administrative hearings. More importantly, some of the changes suggested would have an extremely disruptive and unfair impact on the current procedures of the CPUC." The Fair Employment & Housing Commission likewise questions the wisdom of crafting general rules to address special problems, pointing out that "FEHC may be in a unique position as an APA agency

which really does not belong within the current structure. The solution may be to figure out what to do with the FEHC rather than create new rules which all of the other agencies feel are unnecessary." And the Occupational Safety and Health Appeals Board has noted that if it were forced under the general administrative procedure act, that "would carry with it danger of future change, based on perceived problems or needs of other, dissimilar agencies, without sufficient concern for how the change may impact our particular OSHAB proceedings."

Specialization

The staff also believes we need critically to examine one of the major assumptions of a uniform administrative procedure act. We believe that uniformity is desirable so that a practitioner can represent the public before any agency without having to be a specialist in the procedure of that agency and so that the agency and specialists will not have an insider advantage over the public and general practitioners. But is specialization a consequence of nonuniform rules? Are there liable to be general practitioners appearing before the Workers Compensation Appeals Board or the Public Employment Relations Board?

Specialization probably results to some extent from the economics of law practice itself, which precludes an occasional foray into a field that demands a high volume on a low margin in order to be profitable. This may be particularly true in specialty practices such as workers compensation, which is recognized by the State Bar as such.

Specialization probably also results from the nature of the substantive law involved, more than from the intricacies of the particular administrative procedure used. This point has been made to the Commission in correspondence from the Agricultural Labor Relations Board:

The underlying aim of making administrative adjudication less confusing and more accessible to parties and practitioners would be frustrated by placing the ALRB under the APA.

The Agricultural Labor Relations Act came into being in 1975 and extended to agricultural employees the collective bargaining rights which industrial workers had enjoyed under the National Labor Relations Act since 1935. The Legislature believed that the best way to do that was to pattern the

ALRA--both substantively and procedurally--on the NLRA. That was a wise and deliberate decision: The parties and participants who appear before us are labor organizations, employers, and attorneys whose background and experience is with labor law, not with general administrative law. As such, they are much more at home with a statutory structure based on the NLRA and with procedures drawn from the NLRB. Furthermore, that structure and those procedures are rooted in, and have evolved out of, the substantive law of collective bargaining. Not so with the APA. Its origin and focus ... is with proceedings arising out of proposed license revocations and petitions for licenses.

Since our procedures are clear and accessible to our constituencies and since they bear a logical and organic relationship to the substantive provisions of our Act, nothing would be gained and much would be lost by demolishing them and substituting procedures designed for different constituencies with different problems.

The Commission has received extensive correspondence from the State Bar Taxation Section, which also is involved in a specialty area. The Section has long taken the position that taxation differs in a unique way from other areas of administrative procedure, and that taxation issues should be adjudicated in a judicial tax court, rather than the current Franchise Tax Board/State Board of Equalization setup. After many unsuccessful efforts to move taxation dispute resolution further away from the administrative process, the Executive Committee of the State Bar Section is now taking the attitude that "if you can't lick 'em, join 'em", and is urging that taxation administrative adjudication be brought more in line with general administrative procedures in a number of respects. See the letter from John S. Warren of Los Angeles, attached to this memorandum as Exhibit 4. But even with this new direction, both the state taxation agencies and the tax specialists would have major concerns with adoption of many of the standard administrative procedures for taxation disputes. We have previously received a copy of a 30-page critique of the 1981 Model State APA prepared by the American Bar Association Taxation Section, along with their own 30-page draft of a Model State Tax Procedure Act as an alternative.

Other factors

Other factors also suggest further Commission consideration of the concept of drafting an administrative procedure act that can be applied to all state agencies. The effort to include all agencies under the

umbrella of the administrative procedure act will slow the project substantially, with problems needing to be ironed out for one agency after another. The entire act may be skewed to accommodate special concerns of an agency, only to have that agency at the end of the process opt out of the act, leaving only uninvolved agencies subject to the limitations built into the act.

Cost

To the extent new requirements are imposed on agencies, there will be a state cost involved that may make it difficult if not impossible to obtain enactment. The Association of California State Attorneys and Administrative Law Judges has brought the cost factor to our attention with respect to administrative adjudication personnel:

If timelines are in place, language needs to be included in the new APA to require departments to hire sufficient administrative law judges to conduct the hearings in a timely manner in a normal workday. As has been the case with some agencies, the workload far exceeds the staffing of ALJ's to meet all the timelines. This not only creates problems, but also develops a statute which is ripe for violation.

The Department of Consumer Affairs is similarly concerned:

It appears from those portions of the proposed statute which have already been drafted that the length, cost and complexity of agency adjudicative proceedings will be greatly increased. We would urge the commission to consider the cost impact of the proposed procedures, particularly in these times of serious fiscal constraint.

STAFF RECOMMENDATION

The staff recommends that the Commission give further consideration to its decision to attempt to draw an administrative procedure act that would encompass all state agencies. The major question we must weigh is whether a complex statute that may be varied by agency regulation is really an improvement over the existing situation. Under existing law there is a single unvarying Administrative Procedure Act that applies to a wide variety of smaller agencies, particularly licensing agencies, while the larger specialty agencies such as Unemployment Insurance Appeals Board, Workers'

Compensation Appeals Board, State Board of Equalization, and Public Utilities Commission have their own procedures tailored to their special needs.

The staff has asked Professor Asimow for his counsel on this question. Professor Asimow's perspective is that our current approach to provide a basic administrative procedure act and allow regulatory variation of specific aspects of the basic procedure is a sound one. The types of hearings held by different agencies are sufficiently diverse that the agencies must be allowed to tailor their proceedings. But the statute-plus-regulations approach is far better than the existing situation because it makes the rules accessible. Under the existing situation many agencies have their own special procedures, some of which may be statutory, some in regulations, some in written form that may or not be readily available, and some unwritten. Moreover, there may be different hearing procedures even within agencies that are subject to the Administrative Procedure Act for some of their hearings; other hearings of the agencies may employ a variety of divergent procedures. The need for standardization and accessibility outweighs the other considerations that may favor the status quo.

ALTERNATIVES

The staff sees several different approaches we can take:

(1) Continue our effort to draft a uniform statute, recognizing the need to allow for flexibility. The end product may well turn out to be a manageable statute-plus-regulations scheme. After all, other states and the federal government have single administrative procedure statutes, presumably with necessary regulatory variation in procedures for individual agencies.

(2) Continue our effort to draft a uniform statute, after writing out a few key agencies. If we can determine that procedures of certain agencies necessarily are so different from the norm that they are causing the statute to be skewed or have too much variability in it, we could excise those and end up with a better basic statute. The

problem, of course, is to determine which agencies might be in this category without having first worked through the statute and seen whether it will fit.

(3) Attempt to improve the existing Administrative Procedure Act for agencies covered by it unencumbered with special provisions, options, and regulations. When we have completed that task, we can look to see whether any agencies not now covered by the act can or should be brought under it (and conversely, whether any agencies now covered should be excluded from it). Agencies brought under the act could be brought under the act as is, or special provisions could be added if necessary to adapt the act to fit the needs of those agencies. For agencies not brought under the act, we could see whether any of the desirable features of the act should be incorporated in their statutes.

One problem with the third approach is that it is potentially even more time-consuming than the first. It may take a substantial amount of time simply to work our way through the Administrative Procedure Act in light of all the types of proceedings it now applies to. Then, we would need to study the procedures of individual agencies not covered by the act, not to mention the non-APA procedures of agencies some of whose hearings are covered by the act and some not.

AFTERTHOUGHT

At the outset of the administrative procedure study the staff was satisfied that a uniform act, with a few necessary exemptions, would be achievable. Our first actual statutory drafts, however, have provided such an opportunity for variation from the norm that the staff has become concerned this may foreshadow an administrative procedure act that is an extraordinarily complex amalgam of statutes and regulations. Having now raised the matter for Commission reconsideration, and having again worked through the arguments pro and con, we are not sure other approaches are better. They may well be worse. Perhaps we need to continue the present approach a while longer before concluding it needs to be altered.

The Commission needs to hear from its consultants, and other knowledgeable and experienced persons, on this matter.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary



ASSOCIATION OF CALIFORNIA STATE ATTORNEYS
AND ADMINISTRATIVE LAW JUDGES

CA LAW REV. COMMISSION

JAN 07 1991

RECEIVED

January 3, 1991

Nathaniel Sterling, Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D
Palo Alto, CA 94303

Dear Nat:

This letter is to confirm my verbal presentation at the November 30, 1990 meeting of the California Law Revision Commission in Los Angeles. These comments addressed memorandum 90-129, regarding the effect of ALJ decisions relative to a new Administrative Procedures Act.

The Association of California State Attorneys and Administrative Law Judges (ACSA) represents all of the rank-and-file administrative law judges in the State of California, as well as hearing officers, staff counsels, deputy commissioners, and the workers' compensation judges. ACSA is in support of the recommendations by Professor Asimow to provide greater recognition of an ALJ's decision, in particular, with regards to credibility of witnesses. We feel that the ALJ who conducts the hearing is in the best position to evaluate the credibility of a witness during the hearing.

Professor Asimow proposed that if the recommendations of the ALJ are not to be followed, the governing body overturning that decision should be required to provide a substantive analysis of the rationale why the ALJ determination is rejected. A rule such as this incorporated into a new Administrative Procedures Act would assist tremendously in providing real due process for the citizens of California. It would also help relieve the courts of the unnecessary congestion caused by the appeal of decisions of ALJ's which have many times been modified by upper management.

Additionally, ACSA is in support of the footnote at Section 640.260, wherein Professor Asimow suggests that an appropriate agency be authorized to implement a volunteer system for ALJ's to work outside their agency. ACSA would support the Office of Administrative Hearings coordinating such a voluntary program and would be anxious to work with Director Engeman in the establishment of such a program.

Headquarters	660 J Street, Suite 480	Sacramento, California 95814	(916) 442-2272
Los Angeles	505 North Brand Boulevard, Suite 780	Glendale, California 91203	(818) 246-0653
San Francisco	1390 Market Street, Suite 925	San Francisco, California 94102	(415) 861-5960

Telefax: Headquarters: (916) 442-4182

Los Angeles: (818) 247-2348

San Francisco: (415) 861-5360

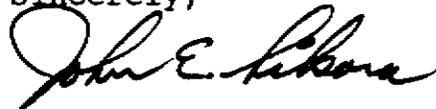
Nathaniel Sterling
January 3, 1991
Page 2

The following issue was not addressed but warrants some discussion. The timelines for decisions and trial determinations are items which may need further review. If timelines are in place, language needs to be included in the new APA to require departments to hire sufficient administrative law judges to conduct the hearings in a timely manner in a normal workday. As has been the case with some agencies, the workload far exceeds the staffing of ALJ's to meet all the timelines. This not only creates problems, but also develops a statute which is ripe for violation.

An additional concept which should be included in any revised Administrative Procedures Act is the declaration to avoid or prohibit ex parte contacts with the ALJ.

This brief summary is designed to chronicle the information relayed verbally at the November 30, 1990 meeting and discuss a couple of additional items. We look forward to working with the Commission throughout the development of this process.

Sincerely,



John E. Sikora
Labor Relations Consultant

cc: Administrative Law Adjudication Ad Hoc Committee

FAIR EMPLOYMENT & HOUSING COMMISSION

1390 MARKET STREET, SUITE 410
SAN FRANCISCO, CALIFORNIA 94102
(415) 557-2325

CA LAW REV. COMMISSION**JAN 10 1991****RECEIVED**

January 7, 1991

Edwin K. Marzec
Chairperson
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Administrative Adjudication: Effect of ALJ Decision
Memorandum 90-129 (NS)

Dear Mr. Marzec:

Our agency, the Fair Employment and Housing Commission (FEHC), submitted a memo to the CLRC regarding the above-referenced study and Prudence Poppink, Commission counsel, attended the CLRC meeting on November 30, 1990. (Our November 30th memo is attached to this letter.) The FEHC is very interested in this topic and would like to be informed of all future CLRC meetings on this issue and to receive copies both of any draft APA revisions and of any further studies, reports or recommendations by Professor Asimow.

In our November 30, 1990, memo, we promised further commentary on Professor Asimow's recommendations and on the draft statute revising the APA. This letter contains our comments on both issues.

First, however, we have a general observation to make about the process to date. As we understand it from the discussion at the November 30th meeting, the goal of the CLRC in undertaking a revision of the current APA system is to provide greater uniformity in the procedural rules governing administrative adjudication by the various state agencies. This would give the private practitioner more of an "even playing field" with the Departments in that the rules would not be so esoteric.

There appears to be a basic contradiction, however, between this goal and Professor Asimow's recommendations. In his attempt to create one model APA which all administrative agencies -- including the current non-APA ones -- would use, he has had to build in much flexibility in order to cover all situations. In doing so, he has created a system which is potentially more complex and varied than the current one. Currently, all APA agencies must follow -- without deviation -- the procedures set

forth in the APA. Non-APA agencies have, of course, their own procedures. But under Asimow's recommendations, even APA agencies -- such as ourselves -- would have more discretion than we currently have to choose the procedure which fits our situation best. And, presumably, each agency would spell out in its regulations which variation of the theme it has chosen.

Our agency, for one, would appreciate having more discretion than we do now and we applaud Professor Asimow's efforts to create a more flexible system. But these efforts seems counter to the goal which led to the CLRC study in the first place. Under the Asimow APA, the private practitioner would not only have to go to the Government Code to look at the APA, but he/she would then have to find the regulations of each particular agency in order to find which of the discretionary models that agency has adopted. This seems potentially more confusing to the private practitioner and would continue to give Department prosecutors a significant advantage.

Asimow Recommendations

With respect to the specific recommendations contained in Professor Asimow's report of August 13, 1990, we have the following observations:

1. Credibility Determinations of the ALJ

We had commented earlier on Professor Asimow's recommendation regarding the effect to be given an ALJ's credibility findings and will not repeat those comments here. Additionally, it appeared from the written and oral comments from the other agencies that we all have quite similar concerns and that Professor Asimow was willing to incorporate these concerns in a substantial revision of his recommendation regarding giving "great weight" to the ALJ's credibility findings. We will be anxious to see and comment on those revisions. 1/

1/ On this point, we recommend that Professor Asimow consider more carefully the requirement in the Washington statute, cited in footnote 57 of his August 1990 study. This requirement is that the agency "give due regard to the [ALJ's] opportunity to observe the witnesses." In our mind, this appropriately acknowledges the ALJ's superior opportunity to observe the demeanor of the witnesses without taking away the agency's ultimate power to decide the cases.

One point was raised, however, at the November 30th meeting on which we would like to follow up. Many of the agencies expressed puzzlement and skepticism over whether there existed a current problem regarding adoption of the proposed decisions and/or of the credibility findings of the ALJ's. The response of Professor Asimow and of several of the Commissioners was that, indeed, there was a problem and that they were aware of at least one agency which "routinely" and "as a matter of course" rejected the ALJ's proposed decisions and/or credibility findings.

We presume that Professor Asimow and the Commissioners were referring by these remarks to our agency, the FEHC. Although it is true that the FEHC does, indeed, reject a large number of the proposed decisions it receives from OAH, it does not do so "routinely" or "as a matter of course." The FEH Commissioners themselves review each proposed decision and discuss what course of action they wish to take. There are many reasons for their rejection of so many proposed decisions and we would be more than happy to sit down with you, your staff, and Professor Asimow to explain to you those reasons.

More important, however, is the possibility that the FEHC may be in a unique position as an APA agency which really does not belong within the current structure. The solution may be to figure out what to do with the FEHC rather than create new rules which all of the other agencies feel are unnecessary. We have given this issue much thought and have several ideas which we would like to discuss with you and Professor Asimow at some point.

2. Allowing agencies to delegate the initial hearing to hearing officers for preparation of an initial decision

We have no quarrel with this recommendation, although, as stated above, we have had a problem with the quality of the initial decisions. We agree that it is both ineffective and impossible for a quorum of most commissions and boards to hear the individual cases themselves.

3. Allowing agencies the option of delegating final decision-making authority to the hearing officer or of retaining this power themselves

Again, we have no problem with the recommendation except for our general observation above that this would increase,

rather than decrease, the options available to each agency and would make it more, rather than less, difficult for the private practitioner to know the rules of any particular game being played. Under this recommendation, the FEHC would choose to retain its final decision-making authority and, from the tone of the discussion on November 30th, it appears that this would be the choice of the agencies represented there. It would be interesting to learn which agencies, if any, would actually want to give up this authority. If there are none, then, of course, this recommendation would appear unnecessary.

One other concern we have is that, to the extent options do become available, all of them are deemed equally valid. We have this concern because, under the current APA, an agency has full statutory authority to reject a proposed decision and write its own decision. (Gov. Code, §11517, subd. (c).) Yet the FEHC has been continually chastised over the years for exercising its statutory right to do this very thing and has been led to believe that this option is somehow less valid than that of adopting the proposed decisions.

4. Requiring receipt of the proposed decision by the parties and an opportunity to file briefs with the agency before the agency considers summary adoption of the proposed decision

We also have no problem with this recommendation. We currently send out to the parties a copy of the proposed decision as soon as we receive it. We do not ask the parties to file briefs at this time but we often receive communications from one or both parties urging us to adopt or reject the proposed decisions and have contemplated formalizing this practice.

Again, our situation is different from the other APA agencies. The FEHC never summarily approves a proposed decision without a review of the record.

5. Reconsideration

We agree with most of Professor Asimow's recommendations regarding reconsideration. We agree that some form of reconsideration should be retained so that problems can be resolved short of litigation. We agree that a fixed number of days from a fixed starting point is preferable but our decisions are never effective "immediately" and thus we do not have the problem he refers to in his study. Similarly, we agree that reconsideration should never be made a

prerequisite for judicial review. And we have no problem with a requirement that an agency prepare a statement of reasons if reconsideration is granted. We would not, however, be in favor of allowing a party to petition to the ALJ for reconsideration of a proposed decision. Requiring the parties to file briefs with the agency upon receipt of the proposed decision should be sufficient input to the agency of the strengths/weaknesses of the proposed decision.

The CLRC has, however, apparently rejected most of Asimow's recommendation and, in its draft APA statute, has limited reconsideration to "correction of mistakes and clerical errors." (Section 642.760.) In our judgment, this seems too narrow a restriction. It has been our experience that reconsideration is a useful vehicle which has, on occasion, given us a second look at an issue from a new perspective. In these days of congested courts, it would appear expeditious to retain as much action at the administrative law level as possible.

One aspect of Professor Asimow's study and the resultant APA draft statute has puzzled us. There is no discussion in his study about the pros and cons of amending Government Code section 11517, subdivision (b) to increase the options available to an agency for dealing with a proposed decision. Currently, an agency's only option, short of remand, is to adopt the proposed decision in its entirety (with the sole exception of being able to reduce the penalty) or reject it. Section 642.770 of the draft APA statute retains these limited options. The FEHC receives many proposed decisions which, with very slight modification, would be adoptable. Because of the APA, however, the FEHC must reject the entire proposed decision, allow the parties an opportunity to submit further argument, and then reissue the decision with the modifications.

Particularly if the APA were to be amended, per Professor Asimow's recommendation, to provide for briefs after the proposed decision has been issued and served but before the agency acts on the decision, it would seem appropriate to allow the agency more discretion to revise the proposed decision. The parties will, in essence, have had their "further opportunity to argue" the case and there seems little purpose to so narrowly circumscribe the agency's options at this point.

The ALRB has statutory authority to "modify or set aside, in whole or in part any finding or order made or issued by it." (Labor Code, §1160.3) In practice, the ALRB either 1) affirms the proposed decision; 2) affirms it with modifications; 3)

affirms to the extent consistent with its decision; or 4) reverses the proposed decision. Similarly, the regulations of the Public Employees Relations Board (PERB) allow the board to "affirm, modify or reverse the proposed decision, order the record reopened for the taking of further evidence, or take such other action as it considers proper." (Cal. Code of Regs., tit. 7, §32320.) It is these types of options which, in our judgment, would lead to the adoption/modification of an increased number of proposed decisions.

Again, we would be delighted to meet and talk to you about this problem since, for the FEHC, it has been a major stumbling block to the adoption of more proposed decisions.

DRAFT APA STATUTE

Recognizing that the draft APA statute will be amended time and time again, we have confined ourselves to only a few comments on the draft that was circulated for the November 30th meeting.

1. Section 642.840 (Review Procedure)

We are opposed to the language in this section which would require the agency to give each party opportunity to submit both a written brief and to present oral argument. Mandatory oral argument seems unnecessary and extraordinarily time consuming in the vast majority of cases.

2. Section 642.830 (Initiation of Review)

The FEHC opposes the requirement that a notice of review of a proposed decision indicate the issues for review. The FEHC practice is to review the entire decision in light of the record. Such a notice would merely circumscribe the agency's scope of review and make it cumbersome to fix errors detected after the notice was issued.

3. Section 642.850 (Final Order or Remand)

The FEHC opposes the provision of this section which requires identification of the differences between the proposed and final decisions. In an extensive modification from the proposed decision, this would be a time consuming and wasteful task.

Edwin K. Marzec
Page 7
January 7, 1991

4. Section 642.810 (Availability of Review)

We agree strongly with the retention of the power of the agency to review a proposed decision on its own motion.

5. Sections 642.770 (Adoption of Proposed Decision) and 642.830 (Initiation of Review)

As mentioned at the November 30th meeting, the time lines in these two sections are contradictory. In section 642.770, the agency may summarily adopt a proposed decision within 30 days of issuance, but in section 642.830, the parties have 100 days to tell the agency whether or not to adopt the proposed decisions. Thus, under these timelines, a party may very well be briefing an issue which has long been decided by the agency.

These are only some preliminary comments. We are anxious to see any revisions of the draft APA statute and any further reports from Professor Asimow. We expect to remain active in this process.

Thank you for your consideration of our comments.

Sincerely,



Steven C. Owyang
Executive and Legal Affairs Secretary

SCO/wp:awh

cc: Professor Michael Asimow
Nathaniel Sterling

FAIR EMPLOYMENT & HOUSING COMMISSION

**Memorandum**

To : Roger Arnbergh, Chairman
California Law Revision
Commission

Date : November 30, 1990

Subject: Memorandum 90-129;
ADMINISTRATIVE
ADJUDICATION: EFFECT
OF ALJ DECISION

From : Steven C. Owyang *SCO/ROK*
Executive and Legal Affairs Secretary

The Fair Employment and Housing Commission (FEHC) is that state agency which interprets and enforces California's civil rights laws. The FEHC is an agency currently governed by the Administrative Procedure Act (APA). Unlike many other APA agencies, however, the FEHC is statutorily empowered "to establish a system of published opinions which shall serve as precedent in interpreting and applying the provisions of [the Fair Employment and Housing Act]." (Gov. Code, §12935, subd. (h).)

Because of this mandate, the FEHC is vitally interested in Professor Michael Asimow's recommendations regarding the APA and the effect/weight to be given proposed decisions written by administrative law judges.

Last year, the FEHC had commented extensively on Professor Asimow's earlier report "Administrative Adjudication: Structural Issues." We had been led to understand that because we had submitted comments on that report, we would be kept informed by the Law Revision Commission of further developments on these issues. We heard nothing, however, about the current study and recommendations until we received a letter from the Public Employment Relations Board on November 13, 1990.

Because of this lack of notice, the FEHC has not had time to meet and develop a thoughtful response to the Asimow recommendations and the draft APA statute. The FEHC, however, would like to submit a response, both in writing and orally at a future Law Revision Commission meeting if possible. The FEHC plans to discuss this issue at its next scheduled meeting on December 4, 1990, and will submit formal written comments as soon thereafter as possible.

Preliminarily, however, the FEHC can say that it is concerned about Professor Asimow's fifth recommendation, which would require ALJ's to identify findings based substantially on credibility. It would also require reviewing courts to give

"great weight" to these credibility findings, even if they have been modified or reversed by the agency.

An initial concern is that the recommendation requires the ALJ to identify those findings which are based in credibility, but it does not require the ALJ to explain the reason for the designation. This will make it very difficult, if not impossible, for the agency or the courts to challenge those findings with such a "credibility" label. This recommendation, therefore, cedes great power to the ALJ and effectively deprives an agency of its ability to perform its statutory mandate to decide these cases.

Additionally, since the ALJ's labeling of a fact as "credibility based" will determine whether it is to be given "great weight" or not, there will be disputes over the correctness of this label in the first place. And, again, practically speaking, the agency is at a serious disadvantage in being able to challenge the ALJ's designation. Indeed, even the CLRC staff sees problems with this and states, in its comments on page 15 of the draft statute that

Given this situation, the staff wonders whether this provision may do more harm than good, leading to battles over the weight to be given the [ALJ's] identification, in addition to the inevitable battles over the weight to be given the findings themselves.

A third and critical concern with this recommendation is that, in most instances, the ALJ is really in no better position to determine "credibility" than is the agency itself. The FEHC already defers to the fact that the ALJ sits at the hearing and observes the demeanor of the witnesses. But demeanor is only one of many factors determining the credibility of a witness and, as to the other factors, an agency is probably as competent as an administrative law judge to make such a determination. For instance, inconsistencies in testimony, prior inconsistent or consistent statements, and the existence of bias or motive are credibility factors which can be as easily ascertained by a review of the record as by the judge.

This are just a few preliminary thoughts on Professor Asimow's recommendations and the draft statute; we hope to flesh out these ideas in a later submission. The ramifications of the suggested proposals are many and significant and we strongly urge you to continue to take public testimony from as diverse a group as possible before deciding on a course of action.

Thank you for your attention to our views.



1020 N STREET, SACRAMENTO, CA 95814
(916) 322-5252



February 21, 1991

CA LAW REV. COMMISSION

FEB 25 1991

RECEIVED

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

RE: Study N-105--Administrative Adjudication

Dear Mr. Arnebergh and Members of the Commission:

This is intended to express the interest of the Department of Consumer Affairs and its constituent licensing agencies in the study referenced above. The department sent representatives to the commission's meeting in November 1990 and intends to continue this practice at all meetings where the above study is to be discussed. We would appreciate it if your staff would continue to send the department notice of those meetings as well as a copy of the material to be discussed at the meeting.

At this juncture, given the fact there is only a partial preliminary draft available, it is not clear how the proposed procedures will fully impact our agencies. Thus, we do not intend to comment extensively on the draft itself at this time.

However, we do wish to identify for you certain broad concerns we have with some of the recommendations and with portions of the draft attached to memorandum 90-129, dated October 10, 1990.

First, we would point that both proposed sections 610.400 (defining the term "order") and 640.010 are so broad as to require adjudicative proceedings in many matters for which adjudicative proceedings are not currently required and should not be required. Indeed, these provisions could require adjudicative proceedings for matters that are administrative in nature.

Second, it appears from those portions of the proposed statute which have already been drafted that the length, cost and complexity of agency adjudicative proceedings will be greatly increased. We would urge the commission to consider the cost impact of the proposed procedures, particularly in these times of serious fiscal constraint. For example, the requirement of briefs and oral arguments prior to an agency acting on a proposed decision lengthens the proceedings and increases the costs both

ROGER ARNEBERGH
February 21, 1991
Page Two

to the agency and to the subject of the proceedings. If procedures are made more complex, it will be more difficult for licensees to represent themselves without counsel, it will be more costly for them to be represented by counsel, and the proceedings will take longer to complete than is currently the case.

Third, the department has reservations about the recommendation that the credibility findings of an administrative law judge be given great weight. If the commission eventually offers a formal legislative proposal to this effect, we would urge that the term "credibility" be defined more narrowly and be limited in its scope to witness demeanor, the only factor affecting witness credibility which is based on actual observation of the witness. Further, it would seem important to require the administrative law judge to explain fully why a finding is based on demeanor and to identify precisely the basis for that determination so that an agency head can make an informed decision when acting upon the proposed decision.

We look forward to working with the commission during the course of this project and will be providing further comments in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Marschner", with a long horizontal flourish extending to the right.

JEFF MARSCHNER
Deputy Director
Legal Affairs

cc: All Agencies

LAW OFFICES OF
LOEB AND LOEB
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
1000 WILSHIRE BOULEVARD, SUITE 1800
LOS ANGELES, CALIFORNIA 90017
TELEPHONE (213) 688-3400
TELECOPIER (213) 688-3460
CABLE ADDRESS "LOBAND"
TELEX 67-3106

JAN 07 1991

RECEIVED

JOSEPH P. LOEB
(1883-1874)
EDWIN J. LOEB
(1886-1870)
MORTIMER H. HESS
(1889-1868)

NEW YORK OFFICE
230 PARK AVENUE
NEW YORK, N. Y. 10169
(212) 692-4800
TELECOPIER (212) 692-4990
TELEX 127400

WRITER'S DIRECT DIAL NUMBER:

CENTURY CITY OFFICE
10100 SANTA MONICA BOULEVARD
LOS ANGELES, CALIFORNIA 90067
(213) 262-2000
TELECOPIER (213) 262-2192
TELEX 67-3106

(213) 688-3404

January 2, 1991

Mr. Nathaniel Sterling
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94303-4739

Re: Administrative Adjudication

Dear Mr. Sterling:

You and I corresponded about a year ago regarding the adjudicative functions of the State Board of Equalization. I have now read the second report of Professor Asimow which is entitled "*Appeals Within the Agency: The Relationship Between Agency Heads and ALJs*," and I have some observations to offer as to how his recommendations would relate to that board.

You will recall that early in 1989 the board took a significant step toward bringing its hearing procedures for business tax cases into closer conformity with the Administrative Procedure Act. Its hearing officers now act more like administrative law judges, but apparently the board is not willing to delegate to them anything more than an investigatory role. That is a role which is adequately performed now by audit supervisors. (Board practice allows for district office conferences between taxpayer, field auditor, and audit supervisor.) Hearing officers should be given more of a judgmental role. They should have the authority to weigh the evidence and reach conclusions of fact which the board should not routinely reopen by granting a full rehearing. After the hearing officer's decision is made, further review by the board itself should be confined to the record made before the hearing officer. If the board finds the record to be inadequate, it would be

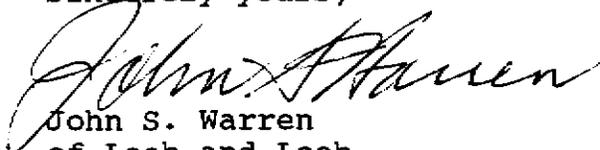
Mr. Nathaniel Sterling
January 2, 1991
Page 2

better to remand the case to hearing officer rather than conducting a rehearing *en banc*. The board members' desire to be accessible to their voting constituents is probably the reason for their unwillingness to cut off the factual inquiry at the hearing officer level, as Asimow notes at page 8 of the report. Such indulgences, however, are costly, time consuming, and inefficient.

I have looked at the Sales and Use Tax Law, the principal business tax statute administered by the board, and I find that full delegation of the hearing function is clearly authorized. Section 6562 deals with petitions for redetermination of a tax deficiency determination and provides that "the board shall reconsider the determination and, if the person has so requested in his petition, shall grant the person an oral hearing." However, Section 7052 provides that the Board "may designate representatives to conduct hearings, prescribe regulations, or perform any other duties imposed by this part or other laws of this State upon the board." Therefore, I would urge the Commission to recommend to the Board that it not routinely grant *en banc* rehearings in business tax cases.

Turning to the board's appellate function in income and franchise tax cases, there has so far been no movement by the board toward the APA model. I am enclosing a copy of my paper that was published in the Fall 1990 issue of the State Bar Tax Section News. In it I describe the shortcomings of the present system and propose some reforms, including bringing the appeal process into closer conformity with the APA by converting the board's lawyers from law clerks to ALJs, delegating the hearing responsibility to them, and confining the board's function to a review of the record and the ALJ's decision. This approach has been endorsed by the Executive Committee of the Taxation Section, and I hope the Commission will keep it in mind during its deliberation on the whole subject of administrative adjudication.

Sincerely yours,


John S. Warren
of Loeb and Loeb

JSW:fb1 WAJ10897.L01

Enclosure

cc: Terry L. Polley, Esq.
Chair, State Bar Taxation Section

Michael Asimow

Tax Section News

Tax Dispute Resolution in California— Is There A Better Way?

John S. Warren
Partner, Loeb and Loeb
Los Angeles, California

"The most elementary principles of human conduct indicate the necessity of some highly qualified independent tribunal or agency which will impartially examine and decide controversies arising between government and taxpayers in revenue cases." Randolph Paul, TAXATION IN THE UNITED STATES

There is much to be admired in the design and administration of the California tax system. Many innovations in tax theory and policy have been developed here and copied in other states, and the level of professionalism in our tax agencies is unsurpassed anywhere. In the area of tax dispute resolution, however, California compares very poorly with other states in fulfilling the requirement so eloquently expressed by Randolph Paul. While other states have been updating and perfecting their dispute resolution procedures,¹ California continues to muddle along with rickety structures built a half century or more ago that are unable to cope with the ever-increasing volume and complexity of tax controversies.

Many efforts have been made, as early as 1946² and as recently as 1989,³ to effect reforms in the system. Most of these have been proposals to establish a judicial tax court, a goal that is almost an article of faith in the Taxation Sections of both the American Bar Association and the State Bar of California. The Little Hoover Commission and Governor Deukmejian's Tax Reform Advisory Commission have also rec-

ommended a tax court for California. Each time, however, the campaign has floundered on the same obstacles: administrative cost, opposition of the Judicial Council to specialized courts, the necessity of a constitutional amendment, opposition of state and local fiscal officers to allowing access to court before payment of an assessment, and the thorny problem of whether accountants would be admitted to practice before the court.

The premise of this paper is that the tax bar should lower its sights and try for more modest reforms. Even a billy goat will learn after butting its head against a stone wall a few times that it only makes sense to try a different route. For us that route may be to reform the administrative review procedures in tax matters to make them more credible and efficient.

For this kind of analysis, California taxes can be put into four categories: income and franchise taxes (administered by the Franchise Tax Board and reviewed by the State Board of Equalization referred to herein as "SBE"), business taxes, i.e., sales and use taxes, vehicle fuel taxes, private railroad car tax, alcohol and cigarette taxes,

and insurance tax (administered and reviewed by the SBE), state assessed property taxes (administered and reviewed by the SBE), and locally assessed property taxes (administered by county assessors and tax collectors and reviewed by assessment appeals boards in larger counties and by the board of supervisors in smaller counties). There is demonstrable need for improvement in each category; but this paper will concentrate on administrative adjudication of income and franchise tax cases, tracing the history, pointing out the present problems, and proposing some reforms.

Historical Background

The present system is not the result of design but rather of a series of historical accidents. When the original Bank and Corporation Franchise Tax Act was enacted in 1929, there was a struggle between the State Controller and the SBE as to which office would administer the new tax. The issue was settled by placing the administration with a Franchise Tax Commissioner appointed by a committee consisting

Continued on page 2

Inside...

<i>Editor's Comment</i>	4
<i>Report of the State Bar Subcommittee on Tax procedure and Litigation</i>	5
<i>Upcoming Events</i>	5
<i>California's View of ERISA Benefits in Bankruptcy</i>	7
<i>Franchise Tax Board Announcements</i>	14
<i>Local Bar Reports</i>	20
<i>The Definition of a "Financial Corporation" Under Revenue and Taxation Code Section 23183</i>	21

Tax Dispute Resolution in California— Is There a Better Way?

Continued from page 1

of the State Controller, the Director of Finance, and the Chairman of the SBE. As a concession to the SBE, it was given an appellate review function over the acts of the Franchise Tax Commissioner. When the original Personal Income Tax Law was enacted in 1935, the SBE again sought to capture the administration of the law but ended up with only the same appellate function that it had in franchise tax cases.

In 1949 the office of Franchise Tax Commissioner was abolished and replaced by the Franchise Tax Board (herein referred to as "FTB"), consisting of the same three officers who formerly had the power to appoint the Commissioner. This created an anomaly of overlapping boards, with

two of the three-member FTB being also members of the five-member SBE. Thus since 1949 there has been no truly independent appellate review with respect to any of the state taxes.

In the original Retail Sales Tax Act of 1933 and in the Bank and Corporation Franchise Tax Act as amended in 1933, there were provisions allowing the taxpayer to apply to the California Supreme Court for a writ of certiorari to obtain court review of a decision of the SBE. (The Franchise Tax Commissioner was also allowed to seek a writ if the SBE's decision were unfavorable to him, but this authority was repealed in 1935.) Had this procedure been allowed to continue, it would have been possible to obtain prompt judicial determinations of important tax issues and to build a body of authoritative case law for the guidance of taxpayers and tax agencies.⁴

However, the Supreme Court invalidated the procedure in *Standard Oil Co. v. State Board of Equalization*.⁵ On its own initiative and not at the urging of the SBE, the Court ruled that under the separation of powers principle of the state constitution, certiorari may lie only to review the acts of an officer or agency holding judicial powers, and judicial powers can be conferred only by the constitution and not by the legislature. Ever since this decision, judicial review of state tax cases has been obtainable only by a suit for refund which must be commenced in Superior Court where it must be tried *de novo*.

Present Problems

The SBE issues written opinions in taxpayer appeals from actions of the FTB, and these opinions can constitute a valuable body of authority for the guidance of taxpayers and practitioners. Today, however, it can take a very long time for decisions to be obtained, and as described below there are increasing doubts about the credibility of decisions once rendered. Furthermore, the long administrative review process should accomplish more than it does in preparing a case for possible court review.

1. **Time Delay.** There are signs that the SBE is losing the ability to cope with its appellate caseload. Just how bad the situation has become is revealed by a staff report prepared pursuant to the speed-up directive in the 1988 Taxpayers Bill of Rights.⁶ The case inventory was 259 appeals in 1970 and had increased to 1,662 in 1988. The reported statistics on disposition time for

small cases were not too bad, but the cases involving issues of interest to the tax bar (such as unitary apportionment issues in the franchise tax and residence issues in the personal income tax) move painfully slow.

The SBE's hearing procedure regulations⁷ provide for an exchange of briefs followed by a hearing, after which the appeal is taken under submission and a written opinion and order determining the appeal are rendered. In the more difficult cases, it is not unusual for the whole process to take five years or more. (The staff report admitted that one case in the 1988 inventory was nine years old.) The SBE is very indulgent in allowing the parties extensions of time to file briefs and also allowing the FTB to file another brief after the appellant's reply brief, but otherwise it is not chargeable with the time taken to brief the case. Once briefed, however, the case may sit for a year or more before being called for hearing before the SBE, and two more years may pass before the opinion is rendered. In other words, it is not uncommon for the board to consume three years in performing its part of the work.

The actual work on the case is done not by the board members themselves but by a group of attorneys in the SBE legal division. These attorneys study the briefs and prepare a written summary for the board members prior to the hearing, and after the hearing they write the proposed opinion. It is apparent that the board members generally accept the opinion as proposed. Dissenting opinions are unknown, and there is only one case in recent memory where there was a split vote on the decision (but still no dissenting opinion).⁸ In other words, the real decision makers are the staff attorneys, and it is obvious that there are not enough of them, or they do not have adequate support services, to keep up with the caseload increase, let alone cutting into the backlog.

2. **Credibility.** The overlapping membership of the FTB and the SBE is one cause for skepticism about the objectivity of the SBE's appeal decisions. Another cause lies in the fact that in a deficiency case, an SBE decision in favor of the taxpayer ends the matter; the FTB cannot go on to court and must cancel the proposed assessment.⁹ Therefore, in a close case involving a large amount of tax, the SBE may be inclined to rule for the FTB and let the taxpayer exercise his privilege of paying the assessment and going on to court in a suit for refund.

Tax Section News

Editor:

Garth Gartrell
Luce, Forward, Hamilton
and Scripps
110 West 'A' Street, Suite 1700
San Diego, CA 92101
(619) 699-2548

Assistant Editors:

June Summers
1970 Scott Street
San Francisco, CA 94115
(415) 931-3594

Patricia A. Hughes
Hoffman, Saban & Brucker
10880 Wilshire Blvd.,
Suite 1200
Los Angeles, CA 90024
(213) 470-6010
FAX (213) 470-6735

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered and is not engaged in rendering legal or professional services. If legal advice or expert assistance is required, the services of a competent professional person should be sought.

When the FTB loses before the SBE, it has to abandon that particular assessment, but it doesn't necessarily abandon the legal issue. On several occasions the FTB has laid back for a few years and then brought another case before the SBE involving the same issue with a different taxpayer, and it has succeeded in persuading the SBE to overrule the old precedent.¹⁰ The FTB then applies the new decision to all taxpayers for all open years. Affected taxpayers, who may have relied on the earlier precedent in their tax planning, must then either capitulate or undertake the burden of litigating the issue in court. This disrespect for *stare decisis* is bound to foster a growing public cynicism about the credibility of SBE appeal decisions.

In earlier times there were relatively few instances where a taxpayer went on to court after losing before the SBE, and the same result was generally reached in the court case. Recently, however, the number of cases going on to court has increased, and the tide seems to be running against the SBE.¹¹ This may cause a further decline in the credibility of SBE decisions.

3. Inadequate Preparation of Cases for Court. The time delay, the perception that the SBE is biased toward the FTB, and the uncertainty that the SBE will follow its own precedents are persuasive reasons for a taxpayer to forego an appeal to the SBE and instead take his tax dispute directly to court. This is unfortunate for it puts on the taxpayer the burden of paying the tax before he can get what he considers to be an independent review of his dispute with the FTB, and it adds to court congestion. Moreover, if the taxpayer does decide to take the SBE appeal route first and then desires to go on to court, he might hope that the appeal process will have served the purpose of fixing the facts and narrowing the issues; but he is likely to be disappointed.

In the appeal process the taxpayer and the FTB each set forth their version of the facts in their respective briefs to the SBE. If the taxpayer makes additional factual allegations in his reply brief, the hearing regulations allow the FTB to file a supplemental brief to respond to those allegations, thereby contributing to the time delay.¹² If there is still a discrepancy in the statement of facts, testimony and other evidence may be introduced at the hearing before the SBE. However, the hearing schedule usually allows only 20 or 30 minutes for each case, and the board

members do not have the training or experience that would qualify them as triers of fact. In sum, there is no orderly or reliable procedure for fixing the facts of the case.

When the SBE eventually issues its opinion, it will set forth its own version of the facts; but if the taxpayer goes on to court he may find that the FTB will not stipulate to the facts recited by the SBE. Protracted discovery proceedings and a lengthy trial may then become necessary. Once again the SBE appeal process will have failed to contribute anything to the reduction of court congestion.

Proposals for Change

Some of the problems with the existing system, such as the anomaly of overlapping boards, could be corrected only by extreme government reorganization, and this may be too political for the State Bar to propose.¹³ There are other steps, however, that could be taken within the existing agency alignments and could be quite beneficial.

1. Adopt a Pro-settlement Policy. There is no better way to control caseload growth than to have a pro-settlement policy. Certainly the Internal Revenue Service has learned this: the stated mission of the IRS Appeals Office is "to resolve tax controversies, without litigation, on a basis which is fair to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service."¹⁴

Tax practitioners have learned from experience that it is generally more difficult to settle a case with the FTB than with the IRS. The FTB rarely if ever proposes a settlement, and it often brushes off taxpayers' settlement overtures with the excuse that it lacks statutory authority to make settlements. To overcome this resistance, the State Bar sponsored and obtained passage of a liberal settlement authority bill in 1988,¹⁵ but it was preempted by the subsequently enacted Taxpayers Bill of Rights which limits the FTB's settlement authority to cases involving not more than \$5,000.¹⁶ The State Bar bill has been reintroduced but at this writing appears to be dead for this session.¹⁷ In any event, achieving caseload reduction through settlements will require more than enactment of a settlement authority bill; it will require a cultural change in the FTB legal staff.

Just as in the federal practice,

settlement negotiations should take into account the hazards of litigation. Furthermore, just as the IRS recognizes that published rulings are not binding on a court of law, the hazards of litigation standard should allow the FTB to settle a case notwithstanding any published SBE opinion on the issue involved, for such opinions are not binding on a court of law. An even more obvious imperative is that any court decision supporting the taxpayer, even if it is an unpublished opinion, should be given great weight in settlement negotiations, for what can be better evidence of a litigation hazard than the fact that the FTB has already lost the issue before at least one court?

If a case is not settled at the protest level and goes on appeal to the SBE, that board should likewise recognize its mission to be fair resolution of tax controversies without litigation. It should at least consider the possibility of bringing the parties together in a settlement that will avoid litigation. This would be a particularly appropriate mission for those SBE members who are at the same time FTB members. Here again, unpublished court opinions should be regarded as settlement motivators.

2. Allow the FTB to Sue. As previously noted, the Franchise Tax Commissioner was once allowed to seek court review of an adverse SBE decision, but that provision was later repealed. More recently, a bill was introduced to allow the FTB to go on to court. The bill was supported by the Taxation Section, opposed by one or more SBE members, and did not pass. SBE opposition was based on the notion that a taxpayer should not be forced to win his case twice.

The argument in support of allowing court access to the FTB is that it would improve the credibility of SBE opinions by removing two of the deleterious influences mentioned above, viz., the possible SBE bias toward the FTB in large deficiency cases and the FTB's back-door way of overcoming adverse precedents. It may be harsh to put the burden of litigation on the taxpayer who wins in the SBE the first time around, but it is even harsher to impose litigation on a number of taxpayers who are mousetrapped when the SBE overrules itself the second time around.¹⁸ Sufficient protection against FTB harassment of taxpayers could be assured by including in the legislation a minimum dollar amount that would have to be involved in the case.

As an alternative to legislation allow-
Continued on page 4

Tax Dispute Resolution in California— Is There a Better Way?

Continued from page 3

ing court access, the FTB could adopt the practice of publishing nonacquiescence in SBE decisions with which it continues to be in disagreement, similar to the Commissioner of Internal Revenue's practice with respect to certain Tax Court decisions, so that taxpayers would be warned that an SBE decision may not be a reliable precedent and could guide themselves accordingly. The Taxation Section urged this approach in a 1988 letter to the FTB chairman, but no meaningful response has been received.

3. **Bring the Appeal Process into Closer Conformity with the Administrative Procedure Act.** The portions of California's Administrative Procedure Act dealing with adjudication¹⁹ provide for a formal, trial-type hearing conducted by an administrative law judge ("ALJ") who writes a proposed decision which the agency heads can adopt, modify, or reject. Only agencies performing a licensing function are now

within the scope of the Act, but there are two instances where a similar procedure has been established for tax matters.

One of these is the unemployment insurance tax. There is in the Employment Development Department an Appeals Division consisting of the Unemployment Insurance Appeals Board and a staff of ALJs.²⁰ They are involved mostly with benefit appeals, but they do also adjudicate tax disputes between employers and the Director.²¹ The Director, as well as the taxpayer, can appeal to the Appeals Board from the ALJ's decision; and if the Appeals Board rules against the Director, he can go on to court in a mandamus proceeding.²²

The other example is within the SBE itself. Last year the board announced a new approach to the handling of business tax disputes. The hearing function was transferred from the legal staff to a separate Appeals Unit which reports direct to the board's Executive Director. In other words the lawyers who hear protests are no longer the same lawyers who give legal advice to the audit staff. The Appeals Unit attorney conducts an informal hearing and writes a proposed decision. Either the taxpayer or the Department of Business Taxes can then request a hearing before the SBE, but the Appeals Unit attorney will not participate in that

hearing. Thus the Appeals Unit and its attorney hearing officers act in a way that is quite comparable to the Appeals Division and its ALJs in the Employment Development Department.

How could this pattern be adapted to income and franchise tax appeals and what would be the advantages? The SBE staff attorneys who are the real decision makers could be elevated to ALJs (or hearing officers if ALJ is too grandiose a title). They would conduct a hearing of the appeal (which should be a formal, on-the-record hearing as in unemployment insurance taxes rather than an informal conference as in business taxes) and they would write a decision. Either the taxpayer or the FTB would be able to request that the decision be reviewed by the SBE. There would not be another hearing; the SBE would simply review the record and approve, modify, or reject the opinion. If the SBE thought more factual inquiry was necessary, it would remand the case to the ALJ.

This procedure should speed up the review process. Eliminating the SBE hearing would eliminate the present long wait to get on the board's hearing calendar and would reduce the time the board members need to devote to the appeal function. The ALJs would be better qualified to take evidence than the non-lawyer board members (although they might have to be given some additional training in trial procedure and the law of evidence), and taxpayers would have the opportunity to confront the true decision maker. The case would be better prepared for possible future court review. Indeed, consideration might be given to bringing court review within section 1094.5 of the Code of Civil Procedure, i.e., the parties would go to court on the record made before the ALJ unless the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or was improperly excluded at the hearing, in which case the court could either admit the evidence or remand the case. Such a procedure could be an important contribution to relieving court congestion.

The existing group of SBE lawyers working on appeals may not be sufficient in numbers or experience to take over the hearing function. If more people are needed, they could be recruited from the group of attorneys who presently hear protests in the FTB. It is even possible that this approach could lead eventually to a merger of the protest and appeal proceedings into the same

Editor's Comment

John Warren has been the articulate voice of reason and a leader in the development of tax policy and law in the State of California. For the last three years we have been extremely fortunate to have his wisdom imparted on an official basis through his membership on the Executive Committee of the State Bar Taxation Section. As his term expires, John has written a thoughtful article suggesting ways to substantially improve the process of tax advocacy in the State of California.

John and others have been consistently frustrated by the failure of sweeping but necessary proposals to revamp the State's antiquated tax advocacy process. Rather than continuing his shouts at ears that will not listen, John has proposed numerous compromises and less sweeping adjustments designed

to deal with the practical problems facing taxpayers while still meeting the interests of public administrators. Let us hope that this distinguished and thoughtful voice of reason is finally heard.

Thomas Schoettle has authored an article which discusses creditors' rights to assets of qualified retirement plans. Several seemingly innocuous developments have caused much concern in federal bankruptcy courts outside of California and it is now less certain that retirement benefits are as protected as previously thought.

This addition also reprints a well written piece by Eric Coffill of the Franchise Tax Board. Mr. Coffill's paper presents a compendium of existing case law on the definition of "financial corporation" for purposes of the State Franchise Tax.

type of one-step administrative review as now exists in the Internal Revenue Service.

Forecasting administrative costs of a new program can be tricky, but in this case it would seem that the cost increase should be modest, and that there might even be a saving in the long run. Positions would be filled mainly with existing personnel. SBE members would be freed to devote more time to their other duties. Credibility of appeal decisions should improve, and this in combination with faster disposition of appeals may attract more taxpayers to utilize the appeal procedure instead of going directly to court. Those cases going from appeal to court can be handled more expeditiously. Thus there would be cost savings in the court system that would offset to some extent the cost increases that might be imposed on the SBE.

If California wishes to explore this kind of reform, much could be learned by studying the experience of other states which have a system very much like this. New York in particular should be studied for it is closest to California in size of revenue system, and it overhauled its administrative adjudication system in 1987.²³

4. Provide an Incentive for Rapid Disposition of Appeals. There is one more thing which might be done, either in combination with the foregoing reforms or alone. California judges are required to render their decision within 90 days after a case is taken under submission or their pay will be stopped.²⁴ Subjecting members of the SBE to such a penalty might be too draconian. A better idea might be the taxpayer relief measure fashioned in Michigan when it was having a delay problem with its Board of Tax Appeals. Taxpayers were allowed an abatement of interest if the board did not render a decision within 20 days after the filing of the parties' last reply brief.²⁵

Footnotes

1. Six have tax courts (HI, OR, NJ, IN, AZ and DC) and 21 have independent boards of review. In property tax, 19 states allow appeal from local boards to a state board before going to court.
2. See Call, "Why We Need a Court of Tax Appeals," 21 St.Bar Journal 102 (1946), and Gibson "The Tax Court Amendment Should Be Defeated," *id.* at 106.
3. See Koch, "State Tax Court Bill Moves Forward in Senate," Tax Section News, Vol. 15, No. 1 (Spring 1989).
4. For an example of this procedure see *Matson Navigation Co. v. State Board of Equalization*, 3 Cal.2d 1 (1935).

5. 6 Cal.2d 557 (1936). See also *Carson Estate Co. v. State Board of Equalization*, 6 Cal.2d 779 (1936), a franchise tax case.
6. Rev. & Tax.C. §21010.
7. 18 Cal. Code of Regulations §§5021-5037.
8. *Appeal of Standard Oil Co. of California*, CCH Cal. Tax Cases §400-383 (1983).
9. In a refund case the FTB can reopen the issue before the State Board of Control. *First Federal Savings and Loan Assn. v. State Board of Control*, 53 Cal.App.2d 391 (1942). It can perhaps also pay the refund ordered by the SBE and then bring a court action to recover an erroneous refund. Rev. & Tax. C. §§19052(b), 26072(b).
10. *Guettler*, CCH Cal. Tax Cases ¶200-212, and *Meltzer*, ¶200-213 (1953), were overruled by *Heubiel*, ¶204-882 (1973); *Shaffer Rentals*, ¶204-337 (1970) by *Douglas Furniture* ¶400-646 (1984); *Signal Oil & Gas*, ¶204-376 (1970) by *Envirocal*, ¶401-678 (1989); *Wynn Oil*, ¶206-303 (1980) by *Meadows Realty*, ¶401-795 (1990); and *Joyce, Inc.*, ¶203-523 (1968) by *Finnigan Corp.*, ¶401-797 (1990).
11. *Hugo Neu-Proter International Sales Corp.*, ¶400-444 (1982); *Douglas Furniture*, ¶400-646 (1984); *Mole-Richardson Co.*, ¶400-652, (1984), and *Trails End, Inc.*, ¶401-150, 401-225 (1986) have been overruled by Court of Appeal decisions, and *Valley Sportswear*, ¶400-451 (1984) by a Superior Court decision.
12. 18 Cal. Code of Regs. 5027.
13. Bills to replace the FTB and the SBE with a Department of Revenue or to merge the FTB into the SBE have been introduced from time to time but have not progressed very far: e.g., S.B. 1395 (Kopp) and S.B. 1052 (Alquist) of 1989.
14. Internal Revenue Manual 8631(1).
15. A.B. 2359, Ch. 901.
16. Rev. & Tax.C. §21015.
17. A.B. 4296, approved in Assembly but voted down in Senate Revenue and Taxation Committee 8/7/90.
18. The overruling of *Shaffer Rentals* (footnote 10) has led to a small flood of refund suits filed by taxpayers who had thought that family ownership was sufficient for combining corporations.
19. Govt. C. §§11,500-11528.
20. Unemp. Ins. C. §§401 et seq.
21. *Id.* §§1221-1224.
22. *Tieburg v. Superior Court*, 243 Cal.App.2d 277 (1966).
23. See Comeau, "New York Tax Tribunal and Draft Regulations," 6 Journal of State Taxation 165 (1987).
24. Cal. Const., Art. VI, §19; Govt. C. §68210, 71610.
25. *Holloway Sand and Gravel Co., Inc. v. Dept. of Treasury*, 393 N.W.2d 921 (1986); *The Cross Co., Inc. v. Dept. of Treasury*, CCH Mich. Tax Cases ¶201-384.

Upcoming Events

For information, please contact
William Norman, Ord & Norman
1901 Avenue of the Stars
Los Angeles, CA 90067
(213) 282-9900

February 2, 1991 1:00 pm - 5:00 pm	<i>Estate Planning and Trust</i>	McGeorge School of Law Sacramento
February 23, 1991 9:00 am - 3:30 pm	<i>New Developments in Estate and Gift Tax Planning</i>	Los Angeles San Diego San Francisco Sacramento
March 2, 1991 9:00 am - 4:30 pm	<i>Intercompany Pricing in Cross Border Transactions</i> - Joint with IFA U.C. School of Law and International Tax and Business Journal	Berkeley
March 9, 1991 9:00 am - 4:30 pm	<i>Intercompany Pricing in Cross Border Transactions</i> - Joint with IFA U.C. School of Law and International Tax and Business Journal	Marina del Rey
March 14, 1991 3:00 pm - 6:30 pm	<i>Tax Litigation Workshop</i> (Mock Trial)	Los Angeles

#N-100

ns103

DIVISION 3.3. ADMINISTRATIVE PROCEDURE ACT

PART 1. GENERAL PROVISIONS

CHAPTER 1. SHORT TITLE AND DEFINITIONS

Article 1. Short Title

§ 600. Short title

Article 2. Definitions

- § 610.010. Application of definitions
- § 610.190. Agency
- § 610.250. Agency head
- § 610.280. Agency member
- § 610.310. Decision
- § 610.370. Local agency
- § 610.460. Party
- § 610.520. Person
- § 610.660. Regulation
- § 610.680. Reviewing authority
- § 610.770. State

CHAPTER 2. APPLICATION OF DIVISION

- § 612.010. Application of division to state
- § 612.020. Application of division to local agencies
- § 612.030. Application of division notwithstanding exemption
- § 612.040. Election to apply division

CHAPTER 3. PROCEDURAL PROVISIONS

- § 613.010. Service
- § 613.020. Mail

PART 4. ADJUDICATIVE PROCEEDINGS

CHAPTER 1. GENERAL PROVISIONS

Article 1. Availability of Adjudicative Proceedings

§ 640.010. When adjudicative proceeding required

Article 2. Office of Administrative Hearings

- § 640.210. Definitions
- § 640.220. Office of Administrative Hearings
- § 640.230. Administrative law judges
- § 640.240. Hearing personnel

- § 640.250. Assignment of administrative law judges
- § 640.260. Voluntary temporary assignment of hearing personnel
- § 640.270. Regulations
- § 640.280. Cost of operation
- § 640.290. Study of administrative law and procedure

CHAPTER 2. FORMAL ADJUDICATIVE HEARING

Article 1. General Provisions

- § 642.010. Applicable hearing procedure

Article 2. Presiding Officer

- § 642.210. Designation of presiding officer by agency head
- § 642.220. OAH administrative law judge as presiding officer

Articles 3-6. [Not Yet Drafted]

Article 7. Decision

- § 642.710. Proposed and final decisions
- § 642.720. Form and contents of decision
- § 642.730. [Not yet drafted]
- § 642.740. [Not yet drafted]
- § 642.750. Adoption of proposed decision
- § 642.760. Time proposed decision becomes final
- § 642.770. Service of decision on parties
- § 642.780. Correction of mistakes in decision

Article 8. Administrative Review of Decision

- § 642.810. Availability of review
- § 642.820. Limitation of review
- § 642.830. Initiation of review
- § 642.840. Review procedure
- § 642.850. Decision or remand
- § 642.860. Procedure on remand

ADMINISTRATIVE MANDAMUS

Code Civ. Proc. § 1094.5 (amended). Administrative mandamus

CONFORMING REVISIONS AND REPEALS

ADMINISTRATIVE PROCEDURE ACT

SECTION 1. Division 3.3 (commencing with Section 600) is added to Title 1 of the Government Code, to read:

DIVISION 3.3. ADMINISTRATIVE PROCEDURE ACT

PART 1. GENERAL PROVISIONS

CHAPTER 1. SHORT TITLE AND DEFINITIONS

Article 1. Short Title

§ 600. Short title

04/27/90

600. (a) This division, and Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2, constitute and may be cited as the Administrative Procedure Act.

(b) A reference in any other statute or in a rule of court, executive order, or regulation of an administrative agency to the hearing provisions of the Administrative Procedure Act, or to Chapter 4 (commencing with Section 11370) or Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, means this division.

Comment. Section 600 restates a portion of former Section 11370. A reference in another statute or in a regulation to the rulemaking provisions of the Administrative Procedure Act continues to refer to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2.

References to the "1981 Model State APA" in Comments to sections in this division mean the Model State Administrative Procedure Act (1981) promulgated by the National Conference of Commissioners on Uniform State Laws, from which a number of the provisions of this division are drawn.

Staff Note. *This section is drafted in a complex way because we anticipate that the new administrative procedure act will be drafted and enacted in separate phases, beginning with administrative adjudication and judicial review.*

Article 2. Definitions

§ 610.010. Application of definitions

04/27/90

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

Comment. Section 610.010 restates the introductory portion of former Section 11500.

§ 610.190. Agency

04/27/90

610.190. "Agency" means a board, commission, department, 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 subject to any provision of this division, 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 610.190 supersedes former Section 11500(a). It is drawn from 1981 Model State APA § 1-102(1). The intent of the definition is to subject as many governmental units as possible to the provisions of this division. 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 bureau, committee, council, division, or office.

The last sentence of the section is in part derived from federal APA § 551(1), 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 difficulties in ascertaining which is the agency in any situation where an administrative unit is within or subject to the jurisdiction of another such body.

§ 610.250. Agency head

11/30/90

610.250. "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 610.250 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 whom the final legal authority over its operations is vested.

The last portion is drawn from former Section 11500(a), relating to use of the term "agency itself" to refer to a nondelegable power to act. An agency may delegate the power of the agency head to review a proposed decision in an administrative adjudication. Section 642.820 (limitation of review); see also Section 610.680 ("reviewing authority" defined).

§ 610.280. Agency member 11/30/90

610.280. "Agency member" means a member of the body that constitutes the agency head and includes a person who alone constitutes the agency head.

Comment. Section 610.280 continues the substance of former Section 11500(e) ("agency member" defined).

§ 610.310. Decision 11/30/90

610.310. "Decision" means an agency action of particular applicability that determines a legal right, duty, privilege, immunity, or other legal interest of a specific person.

Comment. Section 610.310 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 particular applicability because they are addressed to named or specified persons. More than one identified person may be the subject of a decision. Section 13 (singular includes plural). "Person" includes legal entity and governmental subdivision. Section 610.520 ("person" defined); see also Section 17.

A decision includes every agency action that determines any of the legal rights, duties, privileges, or immunities of a particular identified individual or individuals. This is to be compared to the Section 610.660 definition stating that a regulation is an agency statement establishing law or policy of general applicability, that is, applicable to all members of a described class. The primary operative effect of the definition of decision is in Part 4 (commencing with Section 640.010), governing adjudicative proceedings.

Consistent with the definition in this section, rate making and licensing determinations of particular applicability, addressed to named or specified parties such as a certain utility company or a certain licensee, are decisions subject to the adjudication provisions of this statute. Cf. federal APA § 551(4), defining all rate making as rulemaking. On the other hand, rate making and licensing actions of general applicability, addressed to all members of a described class of providers or licensees, are regulations under this statute, subject to its rulemaking provisions. See the Comment to Section 610.660 ("regulation" defined).

Staff Note. The Commission must address issues involving proceedings that are adjudicative/rulemaking hybrids. Included in this matter are decisions that have precedential or stare decisis

effect and proceedings that result in both a decision and a regulation or determination of general application. Unemployment Insurance Appeals Board Decisions under Unemployment Insurance Code Section 409 might fall into this category.

The staff has discussed this matter with Professor Asimow, who suggests that precedential decisions should be subject to the same procedure as nonprecedential decisions, just as court decisions follow the same procedure regardless of the precedent that may be set in the case. He would not subject precedential administrative decisions to the rulemaking process. To make this relationship clear, we could add to this section a sentence that "Nothing in this section limits the precedential effect of a decision."

The Public Utilities Commission is concerned that this statute could force the PUC to use rulemaking procedures in adjudicatory cases involving more than one utility. "It would be wholly inappropriate for the CPUC to be limited to rulemaking procedures in the many complex cases it handles each year which affect more than one utility or address a ratemaking issue of general application to all utilities." We have added to the Comment language to make clear that an adjudicatory decision may involve more than one named utility. This may not resolve the PUC's concern that it currently issues Orders Instituting Investigation, which may investigate any aspect of a utility or class of utilities. These orders are not conducted according to rulemaking procedures, but are conducted as adjudicatory proceedings with full hearing procedures. It is not our intent here to disrupt the way the PUC conducts its investigations or to impose rulemaking procedures where they are not required. When we begin work on rulemaking, we should review the scope or application of the statute to make sure it doesn't purport to cover investigations.

The Department of Consumer Affairs is concerned that the definition in this section, when read with Section 640.010 (when adjudicative proceeding is required), is so broad as to require adjudicative proceedings in many matters for which adjudicative proceedings are not currently required and should not be required. "Indeed, these provisions could require adjudicative proceedings for matters that are administrative in nature." It is difficult for the staff to respond to this point, since they give us no specific instances of the types of matters they have in mind. We do note, however, that our draft envisions informal, as well as formal, adjudicative proceedings, which may solve their problem. Also, Section 640.010 limits the requirement of an adjudicative proceeding to decisions "for which a hearing or other adjudicative proceeding is required by the federal or state constitution or by statute". This would completely seem to answer their concern.

§ 610.370. Local agency

04/27/90

610.370. "Local agency" means a county, city, district, public authority, public agency, or other political subdivision or public corporation in the State of California other than the state.

Comment. Section 610.370 is new. Local agencies are not governed by this division, subject to exceptions. See Section 612.020 (application of division to local agencies). See also Section 610.770 ("state" defined).

§ 610.460. Party

11/30/90

610.460. "Party", in an adjudicative proceeding, includes the agency that is taking action, the person to whom the agency action is directed, and any other person named or allowed to intervene in the proceeding.

Comment. Section 610.460 continues the substance of former Section 11500(b); see also 1981 Model State APA § 1-102(6). 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. This section is not intended to address the question whether a person is entitled to judicial review. "Person" includes legal entity and governmental subdivision. Section 610.520 ("person" defined); see also Section 17.

Staff Note. The Commission has not yet reviewed the rules governing who may appear and participate in a proceeding, and whether this is done by "intervention" or by another procedure. This section is subject to further revision in that connection.

§ 610.520. Person

04/27/90

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

Comment. Section 610.520 supplements the definition of "person" in Section 17. 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 whom rights under this division 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, petition an agency for the adoption of a regulation, and will be accorded all the other rights that a person will have under the division.

§ 610.660. Regulation

04/27/90

610.660. "Regulation" has the meaning provided in Section 11342.

Comment. Section 610.660 incorporates the definition of regulation in the rulemaking provisions of the Administrative Procedure Act. Subdivision (b) of Section 11342 provides:

"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency. "Regulation" does not mean or include legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization, or any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.

Staff Note. The staff has replaced the "rule" terminology of the previous drafts with "regulation" terminology, for consistency with the existing rulemaking provisions of the Administrative Procedure Act, as suggested at the December 1990 Commission meeting. We have not reviewed the substance of the regulation definition in Section 11342 for now, since we are dealing with regulations only indirectly. When we do review it, we will replace this cross reference with a full definition.

We note that the existing definition is generally consistent with 1981 Model State APA § 1-102(10) ("Rule" means an agency statement of general applicability that implements, interprets, or prescribes (a) law or policy, or (b) the organization, procedure, or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing regulation.)

§ 610.680. Reviewing authority

11/30/90

610.680. "Reviewing authority" means the agency head and includes the person or body to which the agency head has delegated its review authority pursuant to Section 642.820 (limitation of review).

Comment. Section 610.680 is new. It is intended for drafting convenience.

§ 610.770. State

04/27/90

610.770. "State" means the State of California and includes any agency or instrumentality of the State of California, whether in the executive department or otherwise.

Comment. Section 610.770 supplements Section 18 ("state" defined). This division applies to state agencies other than the Legislature, the courts and judicial branch, the Governor and Governor's office, and the University of California. See Section 612.010 (application of division to state) and Comment; see also Section 610.190 ("agency" defined). It does not apply to local agencies. See Section 612.020 (application of division to local agencies); see also Section 610.370 ("local agency" defined).

Staff Note. This definition may be refined or elaborated, or the application provisions may be revised, during the course of the study as we learn about the functions of various public entities that may be state/local hybrids.

If not refined or elaborated, it will be deleted in reliance on Section 18 (defining "state").

CHAPTER 2. APPLICATION OF DIVISION

§ 612.010. Application of division to state

07/27/90

612.010. Except as otherwise expressly provided by statute:

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

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

(c) This division does not apply to the University of California.

Comment. Section 612.010 supersedes former Section 11501. Whereas former law specified agencies subject to the Administrative Procedure Act, Section 612.010 reverses this statutory scheme and applies this division to all state agencies unless specifically excepted. The intent of this statute is to subject as many state governmental units as possible to the provisions of this division.

Subdivision (a) is drawn from 1981 Model State APA § 1-103(a). Agency functions exempt from this division are [to be drafted].

Subdivision (b) supersedes Section 11342(a). It is drawn from 1981 Model State APA § 1-102(1). Note that exemptions from the division 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 division, 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.")

Subdivision (c) 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, free of legislative control, and independent in administration of its affairs). Nothing in this section precludes the University of California or any other exempt agency of the state from electing to be governed by this division. See Section 615.030.

Staff Note. The exemptions for the judicial branch and the Governor's office have not yet been reviewed to determine whether they are appropriately extended beyond the courts and the Governor for purposes of administrative rulemaking.

§ 612.020. Application of division to local agencies 04/27/90

612.020. (a) This division does not apply to a local agency except to the extent this division is made applicable by statute.

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

Comment. Section 612.020 is drawn from 1981 Model State APA § 1-102(1). See also Section 610.370 ("local agency" defined). 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.

This division is made applicable by statute to local agencies in a number of instances, including:

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

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

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

Staff Note. This draft does not include a general provision that school districts are covered. Cf. Gov't Code § 11501. School districts are only covered with respect to functions expressly made applicable by statute. *Henry George School of Social Science v. San Diego Unified School District*, 183 Cal. App. 2d 82, 6 Cal. Rptr. 661 (1960); cf. *Bertch v. Social Welfare Dept.*, 45 Cal. 2d 524, 289 P. 2d 485 (1955). These functions are mentioned in the Comment.

§ 612.030. Application of division notwithstanding exemption NEW

612.030. Notwithstanding a general exemption of an agency or an agency's functions from application of this division, a specific agency action is subject to this division to the extent the action is governed by another statute to which this division is applicable.

Comment. Section 612.030 is new. Even though some agencies and agency functions may be declared exempt from application of the Administrative Procedure Act, the exemption is not unqualified. If a general statute governs an agency action and the Administrative Procedure Act is applicable under the statute, the agency's action is subject to the Administrative Procedure Act notwithstanding the apparent exemption of the agency or its functions. Thus, such agency actions as [list to be compiled, e.g., discharge of employees] are subject to the Administrative Procedure Act notwithstanding a general exemption of the agency or its functions from the act.

§ 612.040. Election to apply division 04/27/90

612.040. Notwithstanding any other provision of this chapter, an agency may, by regulation, ordinance, or other appropriate action, adopt this division 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 division.

Comment. Section 612.040 is new. An agency may elect to apply this division even though the agency would otherwise be exempt (Sections 612.010 (application of division to state) and 612.020 (application of division to local agencies)) or the particular action taken by the agency would otherwise be exempt (Section 640.010 (adjudicative proceedings; when required; exceptions)).

CHAPTER 3. PROCEDURAL PROVISIONS

§ 613.010. Service 11/30/90

613.010. (a) If this division requires that an order or other writing be served on a party, the writing shall be delivered personally to the party or sent by mail to the party at the party's last known address or, if the party has an attorney of record in the proceeding, to the party's attorney.

(b) For the purpose of this section, if a party is required by statute or regulation to maintain an address with the agency that is sending the writing, the party's last known address is the address maintained with the agency.

Comment. Section 613.010 is intended for drafting convenience. It supersedes provisions found in former Section [to be inserted].

Staff Note. *It is premature to decide whether many of the general rules of civil procedure should be paralleled or incorporated in the administrative procedure act. The staff suggests that for now we deal with general procedural matters on an ad hoc basis.*

§ 613.020. Mail

NEW

613.020. If this division requires that a writing be sent by mail, unless the provision specifies the form of mail, the writing may be sent by first class mail, registered mail, or certified mail, in the discretion of the sender.

Comment. Section 613.020 supersedes various provisions of former law. See, e.g., former Section 11518 (decision sent by registered mail).

Staff Note. *At the December 1990 meeting the Commission decided that notices should be sent by first class mail, but asked the staff to consider whether an agency might by regulation require a higher grade of mail. The staff's belief is that if an agency wishes to use a higher grade of service, that is fine. But we should not have a patchwork of mailing requirements depending on the type of document and the particular agency. For this reason we suggest the above provision that will allow people to use a higher service but will not penalize anyone who uses first class mail.*

Failure of a person to receive notice of a hearing sent by first class mail might be treated as the Unemployment Insurance Appeals Board does: The allegation is usually taken as prima facie evidence of good cause for failure to attend the hearing, in which case reopening is granted.

#N-105

ns98

PART 4. ADJUDICATIVE PROCEEDINGS

CHAPTER 1. GENERAL PROVISIONS

Article 1. Availability of Adjudicative Proceedings§ 640.010. When adjudicative proceeding required 04/27/90

640.010. An agency shall conduct a proceeding under this part as the process for formulating and issuing a decision for which a hearing or other adjudicative proceeding is required by the federal or state constitution or by statute.

Comment. Section 640.010 states the general principle that an agency shall conduct an appropriate adjudicative proceeding before issuing a decision. This section does not specify which type of adjudicative proceeding should be conducted. If an adjudicative proceeding is required by this section, the proceeding may be either the formal, conference, summary, or emergency adjudicative proceeding, in accordance with other provisions of this part.

This part by its terms applies only to adjudicative proceedings required by constitution or statute. However, an agency may by regulation require a hearing for a particular decision that is not constitutionally or statutorily required, and may elect to have the hearing governed by this part. See Section 612.040 (election to apply division).

Staff Note. Statutory hearings will need to be reviewed to determine whether this part will operate satisfactorily. See, e.g., Pub. Cont. Code § 4107 (Subletting and Subcontracting Fair Practices Act).

The Commission has deferred decision on the issue of applying this part to all state agency actions that affect individual rights. When the draft of this part is complete, the Commission will consider whether it should be so extended.

Article 2. Office of Administrative Hearings

§ 640.210. Definitions

11/30/90

640.210. Unless the provision or context requires otherwise, the following definitions govern the construction of this article:

(a) "Administrative law judge" means an administrative law judge employed by the Office of Administrative Hearings.

(b) "Director" means the executive officer of the Office of Administrative Hearings.

(c) "Office" means the Office of Administrative Hearings.

Comment. Subdivision (a) of Section 640.210 is new. Subdivision (b) continues former Section 11370.1 without substantive change. Subdivision (c) is new.

§ 640.220. Office of Administrative Hearings

11/30/90

640.220. (a) There is in the Department of General Services the Office of Administrative Hearings which is under the direction and control of an executive officer who shall be known as the director.

(b) The director shall have the same qualifications as an administrative law judge, and shall be appointed by the Governor subject to confirmation of the Senate.

(c) A reference in a statute to the Office of Administrative Procedure means the Office of Administrative Hearings.

Comment. Section 640.220 continues subdivisions (a) and (b) of former Section 11370.2 without substantive change.

§ 640.230. Administrative law judges

11/30/90

640.230. (a) The director shall appoint and maintain a staff of full-time administrative law judges, and may assign voluntary temporary hearing personnel pursuant to Section 640.260, sufficient to fill the needs of the various state agencies.

(b) Each administrative law judge shall have been admitted to practice law in this state for at least five years immediately preceding the appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved.

Comment. Subdivision (a) of Section 640.230 continues the first sentence of former Section 11370.3 and the second sentence of former Section 11502 without substantive change. The authority to appoint pro tempore part-time administrative law judges is continued in Section 640.260 (voluntary temporary assignment of hearing personnel).

Subdivision (b) continues the third sentence of former Section 11502 without substantive change.

§ 640.240. Hearing personnel

11/30/90

640.240. The director shall appoint hearing reporters and such other technical and clerical personnel as may be required to perform the duties of the office.

Comment. Section 640.240 continues the second sentence of former Section 11370.3 without substantive change, deleting the reference to "hearing officers" and the "shorthand" hearing reporter limitation.

§ 640.250. Assignment of administrative law judges 11/30/90

640.250. (a) The director shall assign an administrative law judge for an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the office.

(b) On request from an agency, the director may assign an administrative law judge for an adjudicative proceeding not required by statute to be conducted by an administrative law judge employed by the office.

(c) The director shall assign a hearing reporter as required.

(d) An administrative law judge or other employee assigned under this section shall be deemed an employee of the office and not of the agency to which the judge or other employee is assigned.

(e) When not engaged in conducting an adjudicative proceeding, an administrative law judge may be assigned by the director to perform other duties vested in or required of the office, including those provided in Section 640.290.

Comment. Subdivision (a) of Section 640.250 supersedes the first part of the third sentence of former Section 11370.3. Adjudicative proceedings required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings include:

[(1) A proceeding required to be conducted under the Administrative Procedure Act. Gov't Code § 11502.]

[(2) A proceeding arising under Chapter 20 (commencing with Section 22450) of Division 8 of the Business and Professions Code on request of a public prosecutor. Bus. & Prof. Code § 22460.5.]

Subdivision (b) continues the second part of the third sentence of former Section 11370.3 without substantive change.

Subdivision (c) continues the third part of the third sentence of former Section 11370.3 without substantive change.

Subdivision (d) continues the fifth sentence of former Section 11370.3 without substantive change.

Subdivision (e) continues the sixth sentence of former Section 11370.3 without substantive change.

Staff Note. Conforming changes will be needed in other statutes that now require hearings under the Administrative Procedure Act: they will be revised to require hearings by OAH personnel.

§ 640.260. Voluntary temporary assignment of hearing 11/30/90

personnel

640.260. (a) Notwithstanding Section 640.250, in response to an agency request for assignment of an administrative law judge, the director may:

(1) Designate in writing a full-time employee of an agency other than the requesting agency to serve as administrative law judge for the proceeding, but only with the consent of the employee, the employing agency, and the requesting agency. The designee must possess the same qualifications required of an administrative law judge employed by the office.

(2) If there is no designee available under paragraph (1), appoint a pro tempore part-time administrative law judge.

(b) The office may adopt, and the director may implement, regulations to establish the procedure for designation or appointment under this section.

Comment. Section 640.260 is new. It is drawn from 1981 Model State Act § 4-301(c).

Staff Note. This draft combines pro tem and voluntary transfer administrative law judges in one section, gives interdepartmental transfers a preference to pro tem appointments, eliminates the requirement that OAH judges be unavailable, and requires the consent of all affected agencies, as suggested at the November 1990 meeting.

The Association of California State Attorneys and Administrative Law Judges has written to the Commission in agreement with the concept of this section. They would support the Office of Administrative Hearings coordinating a volunteer system for ALJ's to work outside their agency and would be anxious to work with the Director of OAH in establishing such a program.

§ 640.270. Regulations

NEW

640.270. The office may adopt regulations for all of the following purposes:

(a) To establish further qualifications of administrative law judges.

(b) To establish procedures for agencies to request and for the director to assign administrative law judges.

(c) To establish procedures and adopt forms, consistent with this part and other law, to govern administrative law judges.

(d) To establish standards and procedures for the evaluation, training, promotion, and discipline of administrative law judges.

(e) To facilitate the performance of the responsibilities conferred on the office by this part.

Comment. Section 640.270 is drawn from 1981 Model State APA § 4-301(e).

Staff Note. The authority provided in this section may be useful to the director of OAH.

§ 640.280. Cost of operation 11/30/90

640.280. The total cost to the state of maintaining and operating the office shall be determined and collected by the Department of General Services in advance or upon such other basis as it may determine from the state or other public agencies for which services are provided by the office.

Comment. Section 640.280 continues former Section 11370.4 without substantive change.

§ 640.290. Study of administrative law and procedure 11/30/90

640.290. (a) The office is authorized and directed to:

(1) Study the subject of administrative law and procedure in all its aspects.

(2) Submit its suggestions to the various agencies in the interests of fairness, uniformity, and the expedition of business.

(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.

Comment. Section 640.290 continues former Section 11370.5 without substantive change. See also Section 610.190 ("agency" defined).

CHAPTER 2. FORMAL ADJUDICATIVE HEARING

Article 1. General Provisions§ 642.010. Applicable hearing procedure 11/30/90

642.010. (a) Except as otherwise provided by statute, an adjudicative proceeding is governed by this chapter.

(b) This chapter does not govern an adjudicative proceeding if any of the following is applicable:

(1) A regulation that adopts the procedures for the conference adjudicative hearing or summary adjudicative proceeding in accordance with the standards provided in this part for those proceedings.

(2) Section [to be drafted] (emergency adjudicative proceedings).

(3) Section [to be drafted] (declaratory proceedings).

Comment. Section 642.010 is drawn from 1981 Model State APA § 4-201. It declares the formal hearing to be required in all adjudicative proceedings except where otherwise provided by statute, agency regulation pursuant to this part, the emergency provisions of this part, or Section [to be drafted] on declaratory proceedings. The formal hearing is analogous to the "adjudicatory hearing" under the former Administrative Procedure Act. Former Section 11500(f). The other procedures are new.

Staff Note. This section is included merely to help show the intended structure of the new Administrative Procedure Act as it is assembled. The Commission has not yet considered, accepted or rejected, or modified any of the procedures referred to in this section.

The 1981 Model State APA establishes three procedural models for adjudication. The first, called "formal adjudicative hearing", is analogous to the standard procedures under the current California Administrative Procedure Act. The other two models are new. They are called "conference adjudicative hearing" and "summary adjudicative proceedings". In addition, emergency adjudication is authorized when necessary.

The notion of establishing more than one model adjudicative procedure is 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 Ad. L. Rev. 31, 47 (1979).

A justification for providing a variety of procedures is that, without them, many agencies will either attempt to obtain enactment of statutes to establish procedures specifically designed for such agencies, or proceed "informally" in a manner not spelled out by any

statute. 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. These results have already happened, to a considerable extent, at both the state and federal levels.

The number of available procedures in the administrative procedure act should not, however, be so large as to make the act too complicated or to create uncertainty as to which type of proceeding is applicable. The 1981 Model State APA establishes three basic types of adjudicative proceedings, as a proposed middle ground between a formal hearing only and other theoretical alternatives that could establish large numbers of models.

Article 2. Presiding Officer

§ 642.210. Designation of presiding officer by agency head 11/30/90

642.210. Except as otherwise provided by statute, any one or more of the following persons may, in the discretion of the agency head, be the presiding officer:

- (a) The agency head.
- (b) An agency member.
- (c) An administrative law judge assigned as provided in Article 1 (commencing with Section 640.210) of Chapter 1 (Office of Administrative Hearings).
- (d) Another person designated by the agency head.

Comment. Section 642.210 is drawn from 1981 Model State Act § 4-202(a). It uses the term "presiding officer" to refer to the one or more persons who preside over a hearing. If the presiding officer is more than one person, as for example when a multi-member agency sits en banc, one of the persons may serve as spokesperson, but all persons collectively are regarded as the presiding officer. See also Section 13 (singular includes plural).

Assignment of an administrative law judge under subdivision (c) is governed by subdivision (b) of Section 640.250 (assignment of administrative law judges) and Section 640.260 (voluntary temporary assignment of hearing personnel). Discretion of the agency head to designate "another person" to serve as presiding officer under subdivision (d) is subject to Section [to be drafted], on separation of functions.

One consequence of determining who shall preside is provided in Sections 642.710 and 642.810. According to Section 642.710 (proposed and final decisions), if the agency head presides, the agency head shall issue a final decision; if any other presiding officer presides, a proposed decision must be made. Section 642.810 (availability of review) establishes the general appealability of proposed decisions to the agency head.

For a statutory exception to the right of the agency head to designate the presiding officer, see Section 642.220 (OAH administrative law judge as presiding officer).

Staff Note. The statute prescribes no particular qualifications for a presiding officer.

§ 642.220. OAH administrative law judge as presiding officer 11/30/90

642.220. If an adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings, the following provisions apply:

(a) The presiding officer shall be an administrative law judge assigned as provided in Section 640.250.

(b) In the discretion of the agency head, the administrative law judge may hear the case alone or the agency head may hear the case with the administrative law judge.

(c) If the administrative law judge hears the case alone, the administrative law judge shall exercise all powers relating to the conduct of the hearing.

(d) If the agency head hears the case with the administrative law judge:

(1) The administrative law judge shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency head on matters of law.

(2) The agency head 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.

(3) The agency head shall make a final decision as provided in Section 642.710. 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 head. No agency member who did not hear the evidence shall vote.

(4) Notwithstanding any other provision of this subdivision, if after the hearing has commenced a quorum no longer exists, the administrative law judge who is presiding shall complete the hearing as if sitting alone and shall make a proposed decision as provided in Section 642.710.

Comment. Section 642.220 continues the substance of the first sentence of former Section 11512(a). It recognizes that a number of statutes require an administrative law judge employed by the Office of Administrative Hearings. Subdivision (a) makes clear that assignment of an administrative law judge in such a case is governed by Section 640.250(a) (Office of Administrative Hearings).

Subdivision (b) continues the second sentence of former Section 11512(a) without substantive change.

Subdivision (c) continues the second sentence of former Section 11512(b) without substantive change.

Subdivisions (d)(1) and (2) continue the first sentence of former Section 11512(b) without substantive change. Subdivision (d)(3) continues former Section 11517(a) with the addition of a sentence that makes clear the agency head may make a final decision in the proceeding. Subdivision (d)(4) continues former Section 11512(e) without substantive change.

Staff Note. This draft adds the first sentence to subdivision (d)(3) for purposes of clarification.

Article 7. Decision

§ 642.710. Proposed and final decisions

11/30/90

642.710. (a) If the presiding officer is the agency head, the presiding officer shall make a final decision within 100 days after the case is submitted or such other time as the agency by regulation requires.

(b) If the presiding officer is not the agency head, the presiding officer shall make a proposed decision within 30 days after the case is submitted or such other time as the agency by regulation requires. The agency may not require another time if the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings.

(c) A proposed decision becomes a final decision at the time provided in Section 642.760.

Comment. Subdivision (a) of Section 642.710 continues the substance of the second sentence of former Section 11517(d), with the addition of authority for an agency to provide a different decision period. See also 1981 Model State APA § 4-215(a).

Subdivision (b) continues the substance of the first sentence of former Section 11517(b), with the addition of limited authority for an agency to provide a different decision period.

For the form and contents of a decision, whether proposed or final, see Section 642.720.

A proposed decision may be subject to administrative review; a final decision is not. Section 642.810 (availability of review). See also Section 610.310 ("decision" defined). Errors in either a proposed decision or a final decision may be corrected under Section 642.780

(correction of mistakes in decision). A proposed decision becomes final unless it is subjected to administrative review under Article 8 (commencing with Section 642.810).

Staff Note. We have not yet examined the concept of when a case is "submitted" for purposes of this section.

During the course of the study, the Commission will review the sanctions for failure to comply with this section. In this connection, the Commission will review the time of expiration of suspension orders.

To the extent the statute may impose shorter time limits for performance of the hearing officer's duties than presently applies for some agencies, there will be pressure to increase the number of hearing officers. The Association of California State Attorneys and Administrative Law Judges states, "If timelines are in place, language needs to be included in the new APA to require departments to hire sufficient administrative law judges to conduct the hearings in a timely manner in a normal workday. As has been the case with some agencies, the workload far exceeds the staffing of ALJ's to meet all the timelines. This not only creates problems, but also develops a statute which is ripe for violation." The staff believes this is a concern the Commission should be sensitive to; however, in this particular case the statute authorizes an agency to provide a longer time, so it should not be a problem.

§ 642.720. Form and contents of decision

11/30/90

642.720. (a) A proposed decision or final decision shall be in writing and shall include all of the following:

(1) A statement explaining the factual and legal basis for the decision as to each of the principal controverted issues.

(2) The sanction, if any.

(b) The factual basis for the decision may be stated in the language of, or by reference to, the pleadings. If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify the specific evidence that is the basis for the determination.

Comment. Section 642.720 supersedes the first two sentences of former Section 11518. Under Section 642.720, the form and contents of a proposed decision and final decision are the same. Cf. former Section 11517(b) (proposed decision in form that it may be adopted as decision in case).

The requirement in subdivision (b) that a determination based on credibility be identified is derived from Rev. Code of Wash. Ann. §§ 34.05.461(3) and 34.05.464(4). A determination of this type is entitled to great weight on judicial review to the extent the statement of decision identifies the demeanor, manner, or attitude of the witness as a basis for the determination. Code Civ. Proc. § 1094.5 (administrative mandamus).

Staff Note. This revised form of decision should be adequate for default proceedings since the detail is keyed to controverted issues. The form of decision is also pared down to the point where it may also be sufficient for the perfunctory type of decision used for denial of a tax claim, for which the remedy is not administrative review but a civil trial.

This draft is not intended as a complete statute on the form and contents of the decision. There are a number of issues raised by 1981 Model State APA § 4-215 that will be reviewed at a later time. The draft of this section is complete only in the sense that it represents a tentative disposition of the relevant portion of Government Code Section 11518.

It should be noted that the statement of decision does not speak in terms of "findings", whereas the administrative mandamus statute does. See Code Civ. Proc. § 1094.5. This discrepancy will be dealt with later.

§§ 642.730-740. [Not yet drafted]

§ 642.750. Adoption of proposed decision

11/30/90

642.750. Subject to Section 642.760, within 30 days after a proposed decision is made, the agency head may summarily adopt the proposed decision in its entirety as a final decision or reduce a proposed penalty and adopt the balance of the proposed decision as a final decision. In proceedings under this section the agency head shall consider the proposed decision but need not review the record in the case.

Comment. Section 642.750 is drawn from the second sentence of former Section 11517(b). The adoption procedure provided in this section does not apply to the extent administrative review of the proposed decision is precluded, limited, or denied. See Section 642.760 (time proposed decision becomes final). It should be noted that the adoption procedure is available to an agency independent of any review procedures under Article 8 (commencing with Section 642.810) (administrative review of proposed decision).

Staff Note. This draft eliminates the requirement that the agency head consider review briefs filed by the parties, consistent with the concept that the parties do not receive advance copies of the proposed decision.

The Fair Employment & Housing Commission raises the question why the agency head should be so restricted in what it can do with the proposed decision--"Currently, an agency's only option, short of remand, is to adopt the proposed decision in its entirety (with the sole exception of being able to reduce the penalty) or reject it." FEHC notes that this scheme is unduly restrictive--they receive many proposed decisions that, with very slight modification, would be adoptable; instead, they are forced under the administrative procedure

act to reject and go into full administrative review proceedings. They note that the ALRB and PERB have authority to modify a proposed decision before adopting it. There seems little purpose to so narrowly circumscribe the agency's options at this point. "It is these types of options which, in our judgment, would lead to the adoption/modification of an increased number of proposed decisions."

The staff recommends this section be expanded in response to the FEHC suggestion, to read:

642.750. (a) Subject to Section 642.760, within 30 days after a proposed decision is made, the agency head may summarily ~~adopt~~ do any of the following:

(1) Adopt the proposed decision in its entirety as a final decision ~~or reduce~~ .

(2) Make technical and other minor changes in the proposed decision and adopt it as a final decision.

(3) Reduce a proposed penalty and adopt the balance of the proposed decision as a final decision.

(b) In proceedings under this section the agency head shall consider the proposed decision but need not review the record in the case.

§ 642.760. Time proposed decision becomes final 11/30/90

642.760. Unless adopted as a final decision under Section 642.750 or reviewed under Article 8 (commencing with Section 642.810), a proposed decision becomes a final decision at the earliest of the following times:

(a) If the agency by regulation pursuant to Section 642.820 precludes administrative review, at the time the proposed decision is made.

(b) If the agency by regulation pursuant to Section 642.820 limits administrative review, at the time limited in the regulation.

(c) If the agency head by regulation pursuant to Section 642.820 has discretion whether to grant administrative review, at the time administrative review is denied.

(d) One hundred days after the proposed decision is made, or such longer time as the agency by regulation provides.

Comment. Section 642.760 supersedes the first sentence of subdivision (d) of former Section 11517. See also 1981 Model State APA § 4-220(b).

Staff Note. This draft allows the agency, by regulation, to extend the time for review beyond one hundred days, consistent with the Commission's decision at the November meeting.

Some agencies' administrative procedure statutes contemplate that the agency head will take an affirmative act to issue a final decision rather than allowing the proposed decision to become final by default.

E.g., Pub. Util. Code § 311. Conforming changes will be required in these statutes, along with all the other conforming changes enactment of a uniform administrative procedure act will require.

The Fair Employment & Housing Commission notes that it would not exercise the option under subdivision (a) to preclude the agency head from reviewing a proposed decision. "Under this recommendation, the FEHC would choose to retain its final decision-making authority and, from the tone of the discussion on November 30th, it appears that this would be the choice of the agencies represented there." They suggest that if no agency is likely to exercise this option, it would be unnecessary to build this potential variation into the law. However, we do know that some administrative agencies already delegate final decision-making authority to their administrative law judges, for example the Department of Social Services.

§ 642.770. Service of decision on parties

REVISED

642.770. (a) The agency shall serve a copy of the decision in the proceeding on each party as follows:

(1) If the agency head is the presiding officer, the agency shall serve a copy of the final decision within 30 days after the decision is made.

(2) If the agency head is not the presiding officer and the proposed decision is adopted as a final decision or becomes a final decision within 30 days after the proposed decision is made, the agency shall serve a copy of the final decision within 30 days after the proposed decision is adopted as or becomes a final decision. If the final decision alters the proposed decision, the agency shall serve a copy of the proposed decision with the final decision.

(3) If the agency head is not the presiding officer and the proposed decision is not adopted as a final decision and does not become a final decision within 30 days after the proposed decision is made, the agency shall serve a copy of the proposed decision within 30 days after the proposed decision is made.

(b) After service, the final decision and any proposed decision are subject to Chapter 3.5 (commencing with Section 6250) of Division 7 (California Public Records Act).

Comment. Section 642.770 supersedes the third sentence of former Section 11517(b), former Section 11517(e), and the third sentence of former Section 11518. For the manner of service (including service on a party's attorney of record instead of the party), see Section 613.010.

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.

Staff Note. This section is revised in accordance with the discussion at the November Commission meeting to serve a copy of the proposed decision on the parties if it differs from the final decision. The intent of this revision is to minimize the cost of sending out proposed decisions, the great majority of which are simply adopted without change by the agency.

The staff revision also conforms to the general 30-day rule of the existing California administrative procedure act. The intent of this draft is to get the document into the parties' hands reasonably promptly before the time to make corrections or seek administrative review expires.

§ 642.780. Correction of mistakes in decision 11/30/90

642.780. (a) Within 15 days after service of a copy of a decision, a party may apply to the agency head 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 administrative or judicial review.

(b) The agency head may refer the application to the presiding officer who made the decision.

(c) The agency head 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 deemed denied if the agency head does not dispose of it within 15 days after it is made.

(d) Nothing in this section precludes the agency head, on its own motion or on motion of the presiding officer, from modifying a decision to correct a mistake or clerical error. A modification under this subdivision shall be made within 15 days after the making of the decision.

(e) The agency head shall, within 15 days after correction of a mistake or clerical error in a decision, serve a copy of the correction on each party on whom a copy of the decision was previously served.

Comment. Section 642.780 supersedes former Section 11521 (reconsideration). It is analogous to Code of Civil Procedure Section 473 and is drawn from 1981 Model State APA § 4-218. "Party" includes the agency that is a party to the proceedings. Section 610.460 ("party" defined).

The section is intended to provide parties a limited right to remedy mistakes in the proposed or final decision without the need for administrative or judicial review. Instances where this procedure is

intended to apply include correction of factual or legal errors in the proposed or final decision.

For general provisions on notices to parties, see Sections 613.010 (service) and 613.020 (mail).

Staff Note. We have redrafted this section in accordance with the discussion at the November Commission meeting to deformatize it but to require notice to parties, and to allow the presiding officer to initiate correction of errors in the decision. We are calling this procedure an "application" for now, but this terminology may be changed as we elaborate the mechanics of hearings generally.

Professor Asimow suggests that application for correction of errors might be made directly to the presiding officer rather than to the agency head. We have limited this draft to the agency head since the procedure only applies after the agency head has delivered a copy of the decision to the party. At this point, the decision is really under the jurisdiction of the agency head rather than the presiding officer. The draft does allow for referral by the agency head to the presiding officer. Subdivision (b).

The Public Utilities Commission questions the usefulness of the correction of mistakes procedure. The time allowed is too short, and the other available review procedures are adequate for correction of errors in proposed or final decisions. The staff notes that the way the statute is drawn, the agency head may ignore an application for correction if it desires, and rely on the other procedures to pick up errors. This is within the discretion of the agency. But at least some agencies have felt that the correction of errors procedure might be useful to them, in place of other more elaborate review procedures.

Article 8. Administrative Review of Decision

§ 642.810. Availability of review

11/30/90

642.810. Except as otherwise provided in this article, an agency may, and on petition by a party shall, review a proposed or final decision.

Comment. Section 642.810 is new. Review of a proposed decision is available only in an agency whose procedure involves proposed decisions; if the agency makes only a final decision, review under this article is limited to the final decision. See Section 642.710 (proposed and final decisions). The reviewability of a proposed decision may be limited or eliminated by agency regulation. Section 642.820 (limitation of administrative review).

Staff Note. The previous draft was limited to agency review of proposed decisions; the present draft extends agency review to final decisions as well. Discussion at the November meeting indicated the

need to allow for agency reconsideration of final decisions that goes beyond correction of errors. This may be particularly important where the agency has simply adopted the proposed decision without a thorough review, but is willing to reconsider the matter if a party raises an issue.

The statutory scheme provides for automatic agency review on request of a party, unless the agency has decided to limit review. We do not know how many agencies have limited review. If we find that most agencies have limited the right of automatic review, it may make more sense to reverse the statutory scheme and preclude review unless authorized by the agency. This will make the statute conform more with reality and will avoid the burden on agencies of adopting a regulation in order to overturn the automatic feature of the statute.

§ 642.820. Limitation of review

11/30/90

642.820. Except to the extent expressly limited by statute:

(a) An agency, by regulation, may preclude or limit administrative review of a proposed or final decision.

(b) An agency head, in the exercise of discretion conferred by regulation, may do any of the following with respect to administrative review of a proposed or final decision:

(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.

Comment. Section 642.820 is drawn from 1981 Model State APA § 4-216(a)(1)-(2). The introductory clause recognizes that a statute may require the agency head itself to hear and decide a specific issue. See, e.g., *Greer v. Board of Education*, 47 Cal. App. 3d 98, 121 Cal. Rptr. 542 (1975) (school board, rather than hearing officer, formerly required to determine issues under Education Code § 13443).

§ 642.830. Initiation of review

11/30/90

642.830. On service of a copy of a proposed or final decision, but not later than 30 days after service:

(a) A party may file with the agency head a petition for administrative review of the decision. The petition shall state its basis.

(b) The agency head on its own motion may give written notice of administrative review of the decision. The notice shall be served on each party and shall identify the issues for review.

Comment. Section 642.830 supersedes a portion of the first sentence of former Section 11517(d). See also 1981 Model State APA § 4-216(b)-(c). For the manner of service, see Section 613.010.

Staff Note. The previous draft provided a 100-day review period running from the date of issuance of a proposed decision. Since the parties may never see the proposed decision under the current draft, we run the review period from the date of service of the decision. Query whether 30 days is adequate review time for a party.

Subdivision (b) requires the agency head to identify the issues for review in the notice of administrative review. This requirement is opposed by the Public Utilities Commission and the Fair Employment & Housing Commission, both of which state that their practice is to review the entire decision and that "Such a notice would merely circumscribe the agency's scope of review and make it cumbersome to fix errors detected after the notice was issued." The staff sees no problem with an agency deciding to review the entire decision under this subdivision. This could be made more clear by revising the last sentence to provide that the notice "shall identify the issues for review or shall state that the entire decision is subject to review."

§ 642.840. Review procedure

11/30/90

642.840. (a) The reviewing authority shall decide the case on the record, including a transcript, prepared at the agency's expense, of such portions of the proceeding under review as the reviewing authority considers necessary. By stipulation of the parties, the reviewing authority may decide the case on the record without including the transcript. The reviewing authority may take additional evidence that, in the exercise of reasonable diligence, could not have been produced at the hearing.

(b) The reviewing authority shall allow each party an opportunity to present a brief and an oral argument.

(c) The reviewing authority may remand the matter to the presiding officer, if available, who made the proposed decision for further proceedings.

Comment. Section 642.840 continues the first, second, and fifth sentences of former Section 11517(c) except that the reviewing authority is precluded from taking additional evidence (except evidence

unavailable at the hearing before the presiding officer) and is required to receive both briefs and oral arguments. Cf. Code Civ. Proc. § 1094.5(e); see also 1981 Model State APA § 4-216(d)-(f). The reviewing authority is the agency head or person to whom the authority to review is delegated. Section 610.680 ("reviewing authority" defined).

If further proceedings are required, they may be obtained on remand under Section 642.850.

Staff Note.

Additional Evidence. This section implements Professor Asimow's recommendation that the agency on review not be permitted to hear the case de novo but must restrict itself to the record. The procedure for obtaining additional evidence is on remand to the presiding officer. Existing law requires that "If additional oral evidence is introduced before the agency itself, no agency member may vote unless the member heard the additional oral evidence."

The draft also permits the reviewing authority to take additional evidence if the evidence could not be produced at the original hearing. This is comparable to the rule in administrative mandamus.

Transcript. The draft requires the reviewing authority to decide the case on the record, including a transcript of such portions of the proceeding as the reviewing authority considers necessary. The Workers Compensation Appeals Board notes that it currently is obliged to review only a summary of evidence prepared by the presiding officer; "To require the Board to order a transcript in each of 4,000 cases would create another impossible burden on the system both in the review process and the hearing level. A transcript could not be prepared in time for the Appeals Board to meet its statutory deadline." In response to this concern, we could add a provision that "The agency may by regulation provide that the record shall include a summary of evidence prepared by the presiding officer, rather than a transcript. This paragraph does not apply if the adjudicative proceeding is required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings."

The Agricultural Labor Relations Board has a different concern with the transcript provision. They are worried that it mandates them to provide copies of transcripts of their extended hearings to all parties; they can "ill afford to pay the thousands of dollars it would cost".

Oral Argument. This section also implements Professor Asimow's suggestion that a party be entitled to present both a brief and an oral argument on review, instead of one or the other as existing law provides. A number of agencies have problems with the oral argument requirement.

The Unemployment Insurance Appeals Board notes "Given that most parties appearing before the Board are unrepresented, and given the Board's tremendous caseload, oral argument as a matter of right would be wholly impractical."

The Public Utilities Commission believes that written comments are sufficient; "providing parties the right to oral argument is completely impossible given the CPUC's caseload and the large number of parties in

each case. Even fifty commissioners would be hard pressed to hear arguments in all such cases, let alone the five who are constitutionally authorized to make ratemaking decisions."

The Agricultural Labor Relations Board finds that oral argument is seldom necessary when an initial decision is before the Board on review. Oral argument should be discretionary with the Board rather than a matter of right.

The Workers Compensation Appeals Board states that oral argument does not work in a system where nearly 6,000 petitions for reconsideration are reviewed in some 4,000 cases. "While only a small percentage of cases are granted further proceedings, allowing oral argument before the panels of commissioners would impose an enormous burden given the fact that each commissioner reviews 8 to 10 cases per day.

The Fair Employment & Housing Commission believes that it is unnecessary to provide for both a written brief and oral argument. "Mandatory oral argument seems unnecessary and extraordinarily time consuming in the vast majority of cases."

The Department of Consumer Affairs believes this requirement would lengthen proceedings and increase the costs both to the agency and to the subject of the proceedings. "If procedures are made more complex, it will be more difficult for licensees to represent themselves without counsel, it will be more costly for them to be represented by counsel, and the proceedings will take longer to complete than is currently the case."

If we wish to keep the scheme of the existing Administrative Procedure Act, which requires either an oral or written argument but not both, we could revise subdivision (b) to require that "The reviewing authority shall allow each party an opportunity to present a brief and or an oral argument or both, in the discretion of the reviewing authority."

§ 642.850. Decision or remand

11/30/90

642.850. (a) Within 100 days after receipt of briefs and oral argument, or if a transcript is ordered, after receipt of the transcript, or such shorter time as the agency by regulation requires, the reviewing authority shall make a decision disposing of the proceeding or remand the matter to the presiding officer, if available, who made the original decision for further proceedings. The time may be waived or extended with the written consent of all parties or for good cause.

(b) A final decision or a remand for further proceedings shall be made in writing and shall include, or incorporate by express reference to the original decision, all the matters required by Section 642.720 (form and contents of decision). The final decision or remand shall

identify any difference between the original decision and the final decision or remand. A remand shall specify the ground for remand and include instructions to the presiding officer.

(c) The reviewing authority shall cause a copy of the final decision or remand for further proceedings to be served on each party.

Comment. Section 642.850 supersedes Government Code § 11517(c)-(d). It is drawn in part from 1981 Model State APA § 4-216(g)-(j). Specification of the ground for remand may include such matters as the need for additional proceedings resulting from newly discovered evidence. The reviewing authority is the agency head or person to whom the authority to review is delegated. Section 610.680 ("reviewing authority" defined). For the manner of service, see Section 613.010.

Staff Note.

Time for Disposition. The Public Utilities Commission notes that existing law recognizes the extreme complexity of their decisions by imposing no maximum time limit for issuance of a final decision on appeal. "The CPUC's cases routinely involve dozens of well-financed litigants, complex economic issues, months of hearing time and decisions several hundred pages in length. The CPUC submits that any procedure requiring a decision by a fixed date, absent a special finding which may then be appealed, will simply involve the CPUC in routine disputes about the pace of its decisionmaking process. The net result of this will simply be more delay, precisely contrary to the intended result."

The Workers Compensation Appeals Board states that while the time limitations may be appropriate for their routine cases, they would not work at all for the 10% to 20% of their cases that involve long and complex hearings. These cases take anywhere from 20 to 40 hearing days and involve initial decisions of over 100 pages. It would be impossible for adequate review to be accomplished within the time provided in the draft.

In response to these concerns, we could provide that the time allowed is 100 days "or such shorter other time as the agency by regulation requires", excepting, again, "an adjudicative proceeding required by statute to be conducted by an administrative law judge employed by the Office of Administrative Hearings."

Identification of Changes Made from Original Decision. Both the Public Utilities Commission and the Fair Employment & Housing Commission oppose the requirement that changes made on review be identified. They note that in an extensive modification, "this would be a time consuming and wasteful task." The PUC also notes that the parties that appear before it "are fully capable of comparing the proposed and final decisions for themselves."

On the other hand, the Association of California State Attorneys and Administrative Law Judges would go the opposite direction and require not only an identification of differences, but a statement of reasons. They state that the governing body overturning an ALJ decision "should be required to provide a substantive analysis of the rationale why the ALJ determination is rejected. A rule such as this

incorporated into a new Administrative Procedures Act would assist tremendously in providing real due process for the citizens of California. It would also help relieve the courts of the unnecessary congestion caused by the appeal of decisions of ALJ's which have many times been modified by upper management."

§ 642.860. Procedure on remand

11/30/90

642.860. On remand:

(a) The reviewing authority may order such temporary relief as is authorized and appropriate.

(b) The presiding officer shall prepare a proposed decision based on the additional evidence and the transcript and other papers that are part of the record of the prior hearing.

(c) The decision on remand shall be served on each party and is subject to correction and review to the same extent and in the same manner as an original decision.

Comment. Subdivision (a) of Section 642.860 is drawn from 1981 Model State APA § 4-216(g). Subdivisions (b) and (c) continue the substance of the third and fourth sentences of former Section 11517(c). For the manner of service, see Section 613.010.

ADMINISTRATIVE MANDAMUS

Code Civ. Proc. § 1094.5 (amended), Administrative mandamus 11/30/90
1094.5. ...

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, 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. In making a determination under this subdivision, the court shall give great weight to a determination of the presiding officer in the adjudicative proceeding based substantially on credibility of a witness to the extent the determination of the presiding officer identifies the demeanor, manner, or attitude of the witness as a basis for the determination.

...

Comment. Subdivision (c) of Section 1094.5 is amended to adopt the rule of Universal Camera Corp. v. N.L.R.B., 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., Lamb v. W.C.A.B., 11 Cal. 3d 274, 281, 113 Cal. Rptr. 162, 520 P.2d 978 (1974) (Workers' Compensation Appeals Board); Millen v. Swoap, 58 Cal. App. 3d 943, 947, 130 Cal. Rptr. 387 (1976) (Department of Social Services); Apte v. Regents of Univ. of Calif., 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); Labor Code § 1148 (Agricultural Labor Relations Board); [citation] (Public Employment 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, Appeals Within the Agency: The Relationship Between Agency Heads and ALJs 22-25 (August 1990).

Findings based substantially on credibility of a witness must be identified by the presiding officer in the decision made in the adjudicative proceeding. Gov't Code § 642.720(b) (form and contents of decision). 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.

Under subdivision (c), 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 (c) 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.

Staff Note. This redraft narrows the findings to which the court must give great weight to those based on demeanor, manner, and attitude. See Evid. Code § 780(a), (j). This would facilitate the basic concept applicable in administrative procedure that "The one who decides must hear." *Morgan v. United States*, 298 U.S. 468, 481 (1936). The Department of Consumer Affairs would further narrow the section so that it is limited in scope to demeanor, "the only factor affecting witness credibility which is based on actual observation of the witness."

This redraft also makes clear that the great weight standard is limited to the extent that the presiding officer identifies the demeanor, manner, or attitude of a witness as a basis for the decision. This responds to comments, such as those by the Department of Consumer Affairs, that "it would seem important to require the administrative law judge to explain fully why a finding is based on demeanor and to identify precisely the basis for that determination so that an agency head can make an informed decision when acting upon the proposed decision." See also Section 642.720 (form and contents of decision): "If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify the specific evidence that is the basis for the determination."

It should be noted that it is not just the findings of the administrative law judge that are given great weight on judicial review. If the agency head presides, the agency head's findings based on demeanor evidence would also be given great weight.

Also, this draft does not discriminate between "independent judgment" review and "substantial evidence" review. In either case the court is required to give great weight to the credibility determinations of the trier of fact.

One issue raised at the Commission's November meeting was whether an agency that was dissatisfied with the proposed decision of the presiding officer could simply have a de novo hearing at the agency head level, thereby avoiding having to give great weight to credibility determinations. It was noted that federal agencies are required to follow the Universal Camera rule of great weight; may they have a de novo hearing at the agency head level? Nothing in the federal APA precludes an agency from rehearing a case originally heard by an ALJ--"On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 USC § 557(b). Professor Asimow indicates he is not aware of any case law that precludes the agency from rehearing the witnesses nor of how this would be treated under Universal Camera.

The Fair Employment & Housing Commission has suggested an alternative to the "great weight" test, drawn from the Washington statute--the reviewing authority would be required to give due regard to the administrative law judge's opportunity to observe the witnesses. In their mind, "this appropriately acknowledges the ALJ's superior opportunity to observe the demeanor of the witnesses without taking away the agency's ultimate power to decide the cases."

#N-100

ns104

CONFORMING REVISIONS AND REPEALS

[Government Code]

Gov't Code §§ 11370-11370.5 (repealed), Office of Administrative Hearings

CHAPTER 4. OFFICE OF ADMINISTRATIVE HEARINGS

§ 11370. Administrative Procedure Act

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

Comment. Former Section 11370 is restated in Section 600 (short title).

§ 11370.1. "Director"

11370.1. As used in the Administrative Procedure Act "director" means the executive officer of the Office of Administrative Hearings.

Comment. Former Section 11370.1 is continued in subdivision (a) of Section 640.210 ("director" defined) without substantive change.

§ 11370.2. Office of Administrative Hearings

11370.2. (a) There is in the Department of General Services the Office of Administrative Hearings which is under the direction and control of an executive officer who shall be known as the director.

(b) The director shall have the same qualifications as administrative law judges, and shall be appointed by the Governor subject to confirmation of the Senate.

(c) Any and all references in any law to the Office of Administrative Procedure shall be deemed to be the Office of Administrative Hearings.

Comment. Former Section 11370.2 is continued in Section 640.220 (Office of Administrative Hearings) without substantive change.

§ 11370.3, 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 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 first sentence of former Section 11370.3 is continued in subdivision (a) of Section 640.230 (administrative law judges) and in Section 640.260 (voluntary temporary assignment of hearing personnel) without substantive change. The second sentence is continued in Section 640.240 (and other personnel), deleting the reference to hearing officers and the limitation to shorthand reporters.

The first part of the third sentence is superseded by subdivision (a) of Section 640.250 (assignment of administrative law judges). The second part is continued in subdivision (b) of Section 640.250, deleting the reference to hearing officers. The third part is continued in subdivision (c) of Section 640.250 without substantive change.

The fourth sentence is omitted as unnecessary. See Section 640.250(a) (assignment of administrative law judges) and Bus. & Prof. Code § 22460.5.

The fifth sentence is continued in subdivision (d) of Section 640.250 (assignment of administrative law judges), deleting the reference to hearing officers.

The sixth sentence is continued in subdivision (e) of Section 640.250 (assignment of administrative law judges), deleting the reference to hearing officers.

§ 11370.4. Costs

11370.4. The total cost to the state of maintaining and operating the Office of Administrative Hearings shall be determined by, and collected by the Department of General Services in advance or upon such other basis as it may determine from the state or other public agencies for which services are provided by the office.

Comment. Former Section 11370.4 is continued in Section 640.280 without substantive change.

§ 11370.5. Administrative law and procedure

11370.5. The office is authorized and directed to study the subject of administrative law and procedure 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 of control.

Comment. Former Section 11370.5 is continued in Sections 610.190 ("agency" defined) and 640.290 (study of administrative law and procedure) without substantive change.

Gov't Code §§ 11500-11528 (repealed). Administrative adjudication

CHAPTER 5. ADMINISTRATIVE ADJUDICATION

§ 11500. 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.

...

(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.

Comment. The introductory portion of former Section 11500 is restated in Section 610.010 (application of definitions).

Subdivision (a) is superseded by Sections 612.010 (application of division to state) and 610.250 ("agency head" defined). An agency may delegate the power of the agency head to review a proposed decision in an administrative adjudication. Section 642.820 (limitation of review); see also Section 610.680 ("reviewing authority" defined).

The substance of subdivision (b) is continued in Section 610.460 ("party" defined).

The substance of subdivision (e) is continued in Section 610.280 ("agency member" defined).

§ 11501. 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, State Board of
Alcohol and Drug Programs, State Department of
Alcoholic Beverage Control, Department of
Architectural Examiners, California State Board of
Attorney General
Auctioneer Commission, Board of Governors of
Automotive Repair, Bureau of
Barber Examiners, State Board of
Behavioral Science Examiners, Board of
Boating and Waterways, Department of
Cancer Advisory Council
Cemetery Board
Chiropractic Examiners, Board of
Collection and Investigative Services, Bureau of
Community Colleges, Board of Governors of the California
Conservation, Department of
Consumer Affairs, Director of
Contractors, Registrar of
Corporations, Commissioner of
Cosmetology, State Board of
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 Employment and Housing Commission
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 Examiners of the State of California, Board of
Personnel Services, Bureau of
Pharmacy, California State 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
Shorthand Reporters Board, Certified
Social Services, State Department of
Statewide Health Planning and Development, Office of
Structural Pest Control Board
Tax Preparer Program, Administrator
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

Comment. Former Section 11501 is superseded by Sections 612.010
(application of division to state) and 612.020 (application of division
to local agencies).

§ 11502. Administrative law judges

11502. 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. 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. The first sentence of former Section 11502 is superseded by Section 642.210 (designation of presiding officer by agency head). The second sentence is continued in subdivision (a) of Section 640.230 (administrative law judges) without substantive change. The third sentence is continued in subdivision (b) of Section 640.230 without substantive change.

§ 11502.1. 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 & Saf. Code § 439.7 (1984 Cal. Stats. ch. 1745, § 14).

§ 11512. 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.

(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. 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. 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.

(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.

(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. The substance of the first sentence of subdivision (a) of former Section 11512 is continued in Section 642.220(a) (where administrative law judge required). The second sentence is continued in Section 642.220(b) without substantive change.

The first sentence of subdivision (b) is continued in Section 642.220(d)(1) and (2). The second sentence is continued in Section 642.220(c).

Subdivision (e) is continued in Section 642.220(d)(3) without substantive change.

§ 11517. Decision in contested cases

11517. (a) If a contested case is heard before an agency itself, 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 member thereof who did not hear the evidence shall vote on the decision.

(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 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 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.

(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, with or without taking additional evidence, or may refer the case to the same administrative law judge to take additional evidence. 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.

(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 the agency commences proceedings to decide the case upon the record, including the transcript, or without the transcript where the parties have so stipulated, or 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 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 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 former Section 11517 is continued in Section 642.220(d)(3) with the addition of a sentence that makes clear the agency head may make a final decision in the proceeding.

The substance of the first sentence of subdivision (b) is continued in Section 642.710(b) (proposed and final orders) and is superseded by Section 642.720 (form and contents of order). The substance of the second sentence is continued in Section 642.750 (adoption of proposed order). The third sentence is superseded by Section 642.770 (delivery of order to parties).

The substance of the first and second sentences of subdivision (c) is continued in Section 642.840 (review procedure), except that the agency is precluded from taking additional evidence. The substance of the third and fourth sentences is continued in Section 642.860 (procedure on remand). The fifth and sixth sentences are superseded by Section 642.840 (review procedure).

The first sentence of subdivision (d) is superseded by Sections 642.760 (time proposed order becomes final) and 642.830 (initiation of review). The substance of the second sentence is continued in Section 642.710(a) (proposed and final orders). The substance of the third, fourth, and fifth sentences is continued in Section 642.830 (initiation of review).

The substance of subdivision (e) is continued in Section 642.770 (delivery of order to parties).

§ 11518. 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 substance of the first two sentences of former Section 11518 is continued in Section 642.720 (contents of order). The substance of the third sentence is continued in Section 642.770 (delivery of order to parties).

§ 11521. 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.

Comment. Former Section 11521 is not continued. It is superseded by Section 642.780 (correction of mistakes in order).