#N-101

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12/12/89

First Supplement to Memorandum 90-6

Subject: Study N-101 - Administrative Adjudication (Structural Issues--comments on consultant's study)

Attached to this supplementary memorandum as Exhibits 1 to 22 are copies of letters we have received commenting on our consultant's study of procedural issues in administrative adjudication. We anticipate additional letters from persons who were unable to comment by our December 8 deadline. The additional letters will be attached to a second supplementary memorandum circulated in advance of the January Commission meeting.

The staff analysis of the consultant's study and the comments received on it will appear in Memorandum 90-6.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

STATE OF CALIFORNIA—STATE AND CONSUMER SERVICES AGENCY GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF FAIR EMPLOYMENT & HOUSING

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November 7, 1989

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

Dear Mr. Sterling:

Thank you for sharing with me Professor Asimow's background study concerning structural issues in administrative adjudication. I would appreciate receiving copies of future reports and tentative regulations.

Responding from the perspective of the executive of an enforcement (rather than regulatory or licensing) agency, my observations are as follows:

1. On balance, separation of adjudicatory functions from investigative is desirable. It is true that this can lead to policy and interpretive differences (as it has between the Fair Employment and Housing Commission and the Department of Fair Employment and Housing) but the even-handedness (both perceived and actual) of such a process substantially enhances the enforcement agency's position.

2. The study is silent on investigative discovery powers available to agencies. Perhaps this issue will be discussed in the future. There are a variety of discovery tools available to administrative agencies which vary according to statute, and, in some cases, according to the stage a process has reached. An example is the processing of complaints alleging discrimination under the Fair Employment and Housing Act. During investigation, prior to the issuance of an accusation, the Department of Fair Employment and Housing has extensive discovery power (subpoenas, interrogatories, depositions, requests to produce) and the parties have none. After the issuance of an accusation, the Department's powers are limited to those currently provided in the Administrative Procedures Act.

I look forward to the review of future reports and recommendations.

Sincerely,

EARL E. SULLAWAY
Deputy Director
Enforcement Division

EES:sd

State of California

Department [redacted]
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Memorandum

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

Date : November 8, 1989

File No.

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Anthony M. Summers
Supervising Deputy Attorney General
From : Office of the Attorney General - San Diego

Subject: Administrative Adjudication: structural issues

I have reviewed the background study prepared by Professor Michael Asimow relating to structural issues in administrative adjudication. I generally concur with his conclusions. These comments are simply intended to clarify the existing situation with respect to the California Coastal Commission, which Professor Asimow discusses at Pages 73 and 74.

In Footnote 156, Professor Asimow identifies the problem that there is presently no clear statutory authority under which the Coastal Commission is authorized to conduct review at the agency head level on the basis of a record compiled by others, or to delegate appellate authority to review units below the level of the agency heads, or to split multi-member agency heads into panels for conducting adjudicatory hearings. On the contrary, with respect to the Coastal Commission, Public Resources Code section 30315 requires a majority of the appointed membership of the Commission to constitute a quorum, and requires any actions taken by the Commission to be approved by a majority vote of the members present at the meeting. While this statute does not, per se, preclude assignment of cases to hearing officers or panels of the Commission, it would require the Commission itself to review decisions proposed by hearing officers or panels. There is no reason to suppose that such review would be any more efficient than the present system where a proposed decision is prepared by the agency staff prior to the hearing.

The Coastal Commission has attempted to deal with its enormous workload by establishing various levels of administrative hearings roughly analogous to those proposed by Professor Asimow. This is accomplished partially based upon statute (see, Public Resources Code section 30624 and 30624.7) and partially by regulation (see Title 14, California Code of Regulations section 13100-13103). Under the abbreviated procedures, an administrative permit is issued by the executive director and is heard by the Coastal Commission itself only if one third of the appointed members of the Commission so request. A consent calendar item is treated in a single, brief hearing involving

numerous other items and no individual item is heard separately unless three members of the Commission so request. More important matters are placed on a regular calendar for an individual hearing.

I point this out to show that there is some practical precedent in California, even within a single agency, for a system similar to that proposed by Professor Asimow.

In the last portion of Footnote 156, Professor Asimow notes some of the difficulties which arise from the practice of an initial adjudicatory hearing being held before the agency en banc. Those comments are quite accurate. Nevertheless, it should be recognized that the legislature has resisted changes in this system despite the fact that the problems have been called to its attention. In short, it appears to be a conscious legislative decision to provide applicants with the right to a hearing before the full Coastal Commission, at least on the more important matters which the Commission hears.

Finally, the background study notes: ". . . if the Commission came under the APA, it would have to prohibit outsider ex parte contacts with the Commissioners such as are now tolerated." (Page 74). For two years running, the legislature has declined to prohibit ex parte contacts at the Coastal Commission, despite having bills before it introduced by Assemblyman Freedman and supported by the Office of the Attorney General. Perhaps this exemplifies the problems of piecemeal reform which Professor Asimow discusses beginning at Page 10 of the study.

Please keep me on the mailing list for future reports and tentative recommendations.

ANTHONY M. SUMMERS
Supervising Deputy Attorney General

AMS:sam

cc: Professor Michael Asimow

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November 10, 1989

California Law Revision Commission
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Re: Comments On "Administrative Adjudication: Structural Issues," By Professor Asimow (October 1989)

Dear Commissioners:

My compliments to the Commission and Professor Asimow for his excellent paper.

I am writing to support the view of having ALJs handle all administrative hearings and issue proposed decisions that involve adverse parties or substantial adjudicatory functions of any kind. In particular, I believe that an ALJ should be used in instances where now one member of a board may be appointed as a hearing officer to hear and recommend a proposed decision to his board. It is my impression that under those circumstances, the board cannot fully consider the proposed decision impartially. The hearing officer obviously has some desire to push his or her proposed decision through the board, and the other members of the board may wish to accommodate the proposed decision issued by another board member (for reasons that may extend anywhere from friendship to the need for reciprocity). I do not attribute any evil motive of any kind to any member of any board that now has hearing proceedings conducted by a member who issues a proposed decision. I am concerned about human nature, the need for appearance of justice and the chances for misuse.

Thank you again for this opportunity to comment on Professor Asimow's excellent paper. I will look forward to seeing other parts of this study and your recommendations.

Very truly yours,

Burton J. Gindler

BJG:rs

cc: Professor Michael Asimow
UCLA Law School
Los Angeles, CA 90024

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November 13, 1989

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Re: Administrative Adjudication: Structural Issues (Michael Asimow)

Gentlemen:

I have reviewed with interest the October, 1989 study of Professor Asimow. I do specifically request that all future reports and tentative recommendations be forwarded to me for comment.

I am most interested in the second phase of the study regarding finality of A.L.J. decisions and mandatory rather than discretionary Judicial Review.

Premised upon almost 20 years of administrative practice with specialized expertise before the Department of Alcoholic Beverage Control, it is my conclusion that the legislative scheme which removed jurisdiction from the Superior Court on administrative mandamus and replaced that review with the Alcoholic Beverage Control Appeals Board, effectively vested the Department of Alcoholic Beverage Control with totally unchecked discretion. If the Department is dissatisfied with the decision of the A.L.J., it merely ignores it. The ABC Appeals Board then generally rubber stamps the Department's decision since it is not staffed by attorneys and is thus highly politicized. Any review thereafter is solely by discretionary writ and the courts have proven most reluctant to intervene in disputes between what is perceived to be a solitary, independent businessman and a vast government bureaucracy.

It is therefore my recommendation that the decision of the A.L.J. be final with review as a matter of right by administrative mandamus in the Superior Court. I look forward to receiving the next phase of your study.

Very truly yours,

LAW OFFICES OF JOSHUA KAPLAN

Joshua Kaplan

JK:lr

STATE OF CALIFORNIA—STATE AND CONSUMER SERVICES AGENCY GEORGE DEUKMEJIAN, *Governor*

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November 14, 1989

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

Dear Mr. Sterling:

Thank you for the opportunity to comment on the first phase of Professor Asimow's study of administrative procedure. The comments below reflect my own personal opinion and not the official posture of the Office of Administrative Hearings, State of California. Before becoming Director of the Office of Administrative Hearings, I served as an Administrative Law Judge with the Office for approximately nine years and before that tried cases before the Office as a Deputy Attorney General.

Overall, I felt the first phase report was very thorough, accurate and insightful. Even in those areas where I have personal disagreement with Professor Asimow about the direction in which the Law Revision Commission should proceed, I feel Professor Asimow has offered compelling reasons for his position.

The page references that follow refer to pages of the first phase report, including footnotes found on pages cited. Beginning on page 32, Professor Asimow discusses what, in his view, would be the negative consequences of delegating final decision making authority to an administrative adjudicatory body. He argues for what is characterized as the "case-by-case adjudication" system. However, most administrative agencies (a notable exception is the Fair Employment and Housing Commission) do not issue precedential decisions and such cases, therefore, do not provide a basis for communication of the agency's interpretation of a statute or rule except in the particular case decided. More important, by virtue of general case law in California, administrative adjudicators, like courts of record, must defer to agency interpretation of statutes or rules implemented by the agency unless such interpretation is clearly erroneous.

Agency interpretation is rarely articulated for the first time during the course of an administrative hearing. This is because, as Professor Asimow suggests, the failure to apprise those affected by the regulatory agency before they act would constitute a violation of substantive due process.

With respect to the exercise of discretion in the area of the imposition of penalties, discussed on page 34, it has been my experience that agency members have no monopoly on the ability to recognize the interest underlying the regulatory scheme and balance that interest against the rights of those regulated to develop an effective and equitable penalty. In fact, the administrative adjudicator is generally the only person who has had an opportunity to observe the demeanor of the violator, an important advantage in the determination of who is fit to continue as licensee and whether restrictive conditions are likely to be observed. At present, the Office of Administrative Hearings employs "guidelines" issued by various regulatory agencies which set out the agency's view of the range of penalties which ought to be imposed for specified violations. The latitude within such guidelines reflects the recognition that the circumstances under which violations occur vary significantly, and that generally the best person to determine which penalty among those within the range suggested by the agency is appropriate is the administrative adjudicator. Further, with the frequency with which administrative adjudicators sit on particular types of cases, they, like judges who hear criminal cases day in and day out, become the real "experts" in penalty assessment.

Respecting the discussion of an independent ALJ corps, there is indeed the need for specialization in certain areas such as workers' compensation cases and rate setting matters. However, the need for such specialization does not necessarily preclude the incorporation of such functions into a central panel structure. As a matter of fact, among those states employing a central panel, the inclusion of workers' compensation hearings is the rule rather than the exception. The State of Washington and the State of Colorado are examples. The State of New Jersey's central panel also hears rate setting cases. By all accounts, the incorporation of such functions with groups of ALJs assigned primary responsibility in the areas of specialization provides both specialization and independence, the hallmark of a central panel. In addition, such a structure provides flexibility for the adjudicative body which may cross-train ALJs to assist in areas outside their own area of specialty. Such cross-training and the opportunity to hear a greater variety of

cases might combat typical "burnout" syndrome among judges assigned to the same type of case daily.

I look forward to receipt of the next phase of Professor Asimow's study and recommendations of the Commission. I understand by submission of these comments, my name will not be stricken from the list of persons to whom future reports will be sent.

On a personal note, you were my research and writing instructor when I was a first-year law student at University of California, Davis. Yours was among the most practical and worthwhile instruction I received during law school. I am happy to see that you have continued with the Law Revision Commission and have attained the position of Assistant Executive Secretary.

Very truly yours,

KARL S. ENGEMAN
Director

KSE:ap

California Medical Association
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November 15, 1989

CAL LAW REV. COMM'N
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RECEIVED

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

Re: Administration and Adjudication: The Structural Issues

Dear Gentlepersons,

Thank you for forwarding a copy of a study prepared for the California Law Review Commission by Professor Michael Asimow to us for review. As a professional association representing 34,000 plus physician members, we are vitally interested in any proposal to modify California's Administrative Procedure Act.

The California Medical Association is extremely concerned that the administrative process in California be conducted fairly, appropriately, and in a manner which ensures that a risk a physician, or indeed, any member of the public, is erroneously deprived of a right is not unduly high. Therefore, the Association fully supports a full predeprivation hearing consistent with the requisite safeguards of due process. The Association would oppose any amendment to the APA which would deprive the people of this state that right. Because the study is only in a preliminary form, we are unable to ascertain the degree to which possible modifications to the APA would affect that right. Accordingly, we would greatly appreciate receiving further recommendations and studies prepared for or by the Commission.

With respect to the first phase of Professor Asimow's study, we would like to make a few points. First, in reaching the conclusion that adjudicatory functions should not necessarily be separated from regulatory functions, the author observes that it is not always "feasible or practical to solve every problem through rulemaking." While perhaps this statement is true in the abstract, California's APA is unique in that it requires that all "regulations" which are broadly defined, to be promulgated through the rulemaking procedures of the APA, thereby guaranteeing public participation in the adoption of rules. Case by case rulemaking of general application through adjudication at an agency level should not be tolerated under this scheme. Indeed, varying interpretations of a rule (which constitute regulations in and of themselves) as applied to different individuals, violate not only the existing APA, but also the equal protection clause of the Constitution.

Moreover, the California Medical Association strongly believes that ALJ decisions should be made available to the public and indexed and digested appropriately. The availability

of such decisions is critical to properly informing the public of the agency's interpretation of rules and to ensure consistency in the application of the rules. For the same reasons, we support the adoption of uniform guidelines for disciplinary penalties. With sufficient guidelines from the Legislature, the dangers of combining adjucatory and regulatory functions within an agency are reduced.

Thank you for your attention to this matter. We look forward to receiving further studies with respect to this matter.

Very truly yours,

Astrid G. Meghrigian
CMA Legal Counsel

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November 21, 1989

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

Re: Administrative Adjudication: Structural Issues

Dear Mr. Sterling:

We appreciate the opportunity to submit comments concerning Professor Michael Asimow's study of structural issues in administrative adjudication. We are partners in the law firm of Landels, Ripley & Diamond in San Francisco. We represent clients in formal and informal adjudication as well as rulemaking proceedings before various boards and agencies in California.

Professor Asimow's report fully and fairly addresses the debate in the field on the issues presented. We would add only that consideration be given to the following:

1. From our vantage point as practicing litigation and counseling attorneys representing clients in agency proceedings, a modernized, uniform Administrative Procedures Act would enhance lawyer and client knowledge of and hence accessibility to agency practices, particularly those that are informal and unwritten. We do not, for example, oppose informal, ex parte contacts with an agency per se. Our frustration lies with: (1) ensuring that we have found the right door to make such contacts which often are a useful means of conveying significant information to an agency engaged in ongoing regulatory enforcement and compliance actions, and (2) ensuring that a written record of such contacts are made and preserved in the event that formal adjudication or rulemaking proceedings are subsequently initiated. Importantly, a complete record for judicial review will also be available.

2. The issues of separation of the adjudicating functions and the independence of administrative law judges have been long debated. We lean toward independent but specialized administrative law judges, an alternative not really addressed in the article. That preference, however, is simply a personal preference. On these two issues, the report fairly addresses the debate in the field.

3. The most interesting aspect of the proposal is its effort to address, through rules on adjudication, matters which have been the subject of informal agency action. Formal adjudications have had their own body of governing law and standards. By contrast, informal agency actions affecting private rights, which constitute the vast majority of governmental actions affecting private individuals, have been handled in the different agencies at various levels and through various methods at varying degrees of formality.

The advantage of standardizing agency procedures affecting individuals is that it would produce a clearer course of action for pursuit and resolution of informal agency action. The potential disadvantage, however, may be that it would result in less of the give and take needed for sound agency decisions on these individual matters. We think the Commission would be wise to have an experimental or pilot program comparing the two systems in selected contexts before making across-the-board changes.

Finally, we would recommend that the Commission consider alternative dispute resolution mechanism as part of the administrative adjudication structure.

Very truly yours,

Sanford Svetcov

Charlotte Uram

cc: Professor Michael Asimow
UCLA School of Law
Los Angeles, CA 90024

State of California - Health and Welfare Agency

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
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November 27, 1989

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

Re: Comments on Administrative Adjudication: Structural Issues.

Gentlemen:

Thank you once again for the opportunity to comment on Professor Asimow's study. I had the opportunity to review the August 25, 1989 draft and I sent comments on the draft directly to Professor Asimow. He has addressed the thrust of those comments in the current study. Our differences, however, over whether the agency or the adjudicator should have the final say still remain. I have attached a copy of the comments.

To those comments I wish to add a related concern. In his discussion on the independence of administrative law judges, Professor Asimow states on page 42 that the case for independent ALJs in benefit disbursing agencies such as Workers' Compensation Appeals Board and Unemployment Insurance Appeals Board is relatively weak. He states in support of this that the parties to disputes adjudicated by UIAB are external to it. Thus, the UIAB possesses no built-in conflict of interest. I wish to point out that it is precisely because the UIAB is independent of the agency, which in this case is the Employment Development Department, that there is no built-in conflict of interest. Far from being a relatively weak case, this independence is central to the integrity of the system. (Incidentally, the EDD is by statute a party to every UIAB case.)

I understand that in the overall scope of the study, these concerns are relatively minor. As I mentioned to Professor

Asimow, I find the study to be insightful and thought-provoking discussion of some of the structural issues facing administrative adjudication in California.

Very truly yours,

TIM McARDLE, CHIEF COUNSEL

TM:pm

Attach.

7

State of California - Health and Welfare Agency

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
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September 26, 1989

Michael Asimow
Professor of Law
UCLA Law School
Los Angeles, CA 90024

Re: Comments on Preliminary Draft, Administrative Adjudication: Structural Issues.

Dear Professor Asimow:

Thank you for the opportunity to review your preliminary draft. I found it to be an insightful and thought-provoking discussion of some of the structural issues facing administrative adjudication in California. While I found much to praise in the draft and very little to quarrel with, I must share my disagreement in one key area.

On page 23 you state that you believe final adjudicatory decisions should be made by the agency rather than a third party adjudicator (I assume the other two parties are the agency and the petitioner/appellant). While the agency certainly has the expertise and the resources to develop regulations, resolution of disputes involving the application of those regulations, in my view, must be left to the adjudicator. The fundamental due process considerations are far more important than the practical difficulties which you pose. The issue of correct and consistent decisions can be addressed by a system of agency regulations and adjudicatory decisions designated as precedents. Policy differences will emerge, but resolution should not be left to the agency which is, after all, one of the parties to the dispute which gave rise to the difference in the first place. While they may not be captives of the regulated, agencies, like any bureaucracy, public or private, <u>are</u> institutionally biased and cannot be relied upon consistently to render fair and impartial decisions. I believe that leaving the final word with the agency raises the question of why bother to have an adjudication system in the first place.

As both the agency and the adjudicators are part of the executive branch, policy differences are susceptible to resolution at the administrative level. For those that are not, the judiciary is the appropriate forum. A reviewing court would owe deference to neither side. The Employment Development Department occasionally litigates CUIAB decisions and the lack of deference has never proved to be a problem for the court.

Giving the agency the final word raises practical problems of its own. To illustrate, EDD recently adopted a regulation - actually, it renumbered an existing regulation and added two examples - which had the effect of overruling two CUIAB precedent decisions. (The Board opposed the regulation at hearing and is considering other challenges, but that is another story.) The problem that has been created is that there now exist two conflicting authorities. EDD has declared to its field offices that they shall follow the regulation. However, Section 409 of the U.I. Code provides that the Appeals Board and its ALJ's (and EDD) are controlled by Board precedents except as modified by judicial review. Thus, the precedents continue to be the authority that the Board and its ALJ's are following. Not incidentally, the Board historically has taken the position that it has the inherent authority to declare invalid EDD regulations, and has done so on three occasions in precedent decisions.

All of this is not simply a battle over turf. Providing due process of law, including an impartial and independent decision maker, is the essence of administrative adjudication transcending matters of a purely practical nature. In my view, giving the agency the final decision violates this fundamental consideration and undermines the entire process.

On another note, when we met on September 7, you asked for the names of attorneys who practice before administrative agencies. I neglected to mention a well-respected Sacramento firm, Turner and Sullivan, which practices before several agencies. Richard Turner would be a good contact (916-441-1116). In the case of agency attorneys, Ralph Hilton is the Chief Counsel at EDD and Lance Rideout is the Tax Counsel (916-445-5676).

Again, thanks for the opportunity to comment on your draft. Please continue to keep us involved.

Very truly yours,

TIM McARDLE, CHIEF COUNSEL
TM:pcp
cc Robert L. Harvey
Michael A. DiSanto

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November 28, 1989

California Law Revision Commission
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Dear Commissioners:

re: Administrative Adjudication -- Structural Issues

Many thanks for sending the background report by Professor Michael Asimow.

The report presents an excellent analysis of the issues. As regards the judgment calls based on this analysis, I strongly support Professor Asimow's conclusions, with the two exceptions noted below.

My first disagreement -- and the only serious one -- concerns the possibility of expanding the jurisdiction of the central panel of Administrative Law Judges. Professor Asimow indicates basic satisfaction with the current limitations on the types of cases for which the Office of Administrative Hearings furnishes ALJs to preside over hearings for agencies. He proposes not to expand the jurisdiction of OAH significantly (p. 3, item iii, summarizing discussion at pp. 39-49).

In my opinion, the jurisdiction of OAH should be expanded radically, so that ALJs from the Office will conduct virtually all hearings for virtually all state agencies. I respectfully urge you to solicit testimony from people in some of the states that have broad-jurisdiction central panels of ALJs. Those states have found solutions to the types of problems mentioned in Professor Asimow's report. I am particularly impressed by the fact that no state, having adopted a broad-jurisdiction central panel, has repealed the system or significantly reduced the jurisdiction of the central panel.

My other disagreement is a minor one. In discussing conference hearings (pp. 68-76), Professor Asimow notes that the 1981 Model State APA gives no right of participation to non-parties. He then mentions some types of California agency proceedings in which the conference format would be generally suitable, but in which non-party participation would be useful. He suggests that the California APA could adopt the 1981 Model Act's provisions on the conference hearing (with no right to participation by non-parties), and that any California agency could, by rule, provide additional features, such as non-party participation in conference hearings before that agency (p. 74, n. 157).

If a state adopts the 1981 Model State APA, with its four types of hearings, I do not think an agency should be encouraged or even allowed to adopt rules creating hybrid types of hearings in addition to those contained in the APA. If agencies could create hybrids without limit, many of the benefits of a single comprehensive code of procedure would be lost.

If hybrids are required, I would prefer to have them created case-by-case. If a matter does not fit squarely within the statutory provisions for a conference hearing, the matter should be docketed as a formal hearing, and a pre-hearing conference should be convened. The presiding officer at the pre-hearing conference can then issue an appropriate order to regulate the course of the proceedings, in view of all of the circumstances as well as the views expressed by the parties. The presiding officer may even convert the proceeding from a formal hearing to a conference hearing, in which case the pre-hearing conference may itself turn into the conference hearing; see 1981 Model State APA, Sec. 1-107. My approach may sound cumbersome, but in the long run it may better fulfill the policy of providing a reasonably uniform set of procedures statewide, with flexibility available when needed case-by-case.

I look forward to receiving future reports.

Sincerely,

L. Harold Levinson
Professor of Law

cc: Professor Michael Asimow
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STATE OF CALIFORNIA—STATE AND CONSUMER SERVICES AGENCY GEORGE DEUKMEJIAN, *Governor*

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December 4, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D2
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Re: Administrative Adjudication
Structural Issues -- Report
of Professor Asimow.

Sirs:

I have been an Administrative Law Judge with the Office of Administrative Procedure (OAH) for the past twenty-six (26) years. During that time I have heard and decided many thousands of cases under the Administrative Procedure Act (APA). The Law Revision Commission has a unique opportunity to correct a major inequity that currently exists under the APA.

The most critical major flaw in the current APA is that it does not provide a fair opportunity for a Respondent to secure an impartial determination of his dispute. I refer specifically to Government Code §11517(c) which permits an agency which has filed an Accusation or Statement of Issues to "non-adopt" the Proposed Decision tendered by the independent Administrative Law Judge, and to decide the matter on the transcript. This provision, affirmed by the Courts, has often led lay and professional persons to believe, with just cause, that the OAH provides them with a "Kangaroo Court", in that the agency acts as both prosecutor and the ultimate judge.

Professor Asimow asserts that permitting agency heads to decide administrative cases permits the agency "to make law through the process of case by case adjudication" (See Asimow report at p.32). Case by case adjudication does not provide a licensee with sufficient advance information so that he can select a proper course of action. It prevents licensees from knowing in advance that their activity is lawful or unlawful, so that they will not be unwittingly drawn into violative conduct. A licensee would have a much better idea of what an agency requires of him by examining rules the agency promulgates which circumscribes his conduct.

Removal of the decision making process from the agency is imperative if the basic concept of fairness is to have any meaning in administrative proceedings. In any quasi-judicial proceeding in which rights may be granted, restricted or removed, basic fairness is critical, and it can never be achieved if the agency which seeks to grant or deny such rights, also controls all aspects of the proceeding.

If you fail in the recognition of this classical problem, your study will be remembered for what it did not do, rather than what it accomplished.

Sincerely,

MILFORD A. MARON
Presiding Judge

MAM:btm

STATE OF CALIFORNIA—STATE AND CONSUMER SERVICES AGENCY GEORGE DEUKMEJIAN, *Governor*

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December 5, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94303-4739

Re: Administrative Adjudication
Structural Issues -- Report
of Professor Asimow.

To the Commission Members:

I am an Administrative Law Judge with the Office of Administrative Hearings. I hear and decide cases under the Administrative Procedure Act (APA). The Law Revision Commission now has an opportunity to correct what has become an unworkable, and very often unjust, system as is currently provided for in the APA. However, the position advocated by Professor Asimow in his report would not correct the most critical flaw, but would, in fact, exacerbate it.

The major flaw in the current APA is that it does not provide a fair opportunity for Respondents to obtain an impartial decision of their cases. Government Code §11517(c) allows an Agency which has filed an Accusation or Statement of Issues and prosecutes the same to non-adopt the proposed decision written by an independent Administrative Law Judge. This represents a startling denial of due process and has substantially eroded the public confidence in obtaining a fair hearing over fundamental rights. If an Agency doesn't like the proposed decision, it will elect to non-adopt and decide the matter on a transcript of the proceedings. The decision to non-adopt is made before the transcript is available. The "final" decision as then written by the Agency is not based on a weighing of evidence, since the Agency did not hear the evidence and cannot weigh the same. Often an Administrative Law Judge will decide that an Agency witness is not credible. The Agency doesn't care about and cannot consider credibility if it decides an issue based on a transcript.

Professor Asimow, in advocating the right of Agency heads to decide cases, said such power gives an opportunity "to make law through the process of case by case adjudication" (See Asimow report at p.32). Professor Asimow goes on to claim that "an Agency lacking adjudicatory power would be required to adopt rules that flesh out the concepts" of what is meant by such terms a "unprofessional conduct" (id. at p.32). Aside from the fact that requiring an Agency to adopt rules which more specifically define what the Agency requires of a licensee is a good thing, Professor Asimow totally misses the concept of what Agency adjudication means to the average licensee in terms of "policy considerations" -- nothing. A licensee does not read agency decisions and so would have no way of knowing why an Agency ruled a particular way on a particular case. A licensee would, however, have a much better idea of what an Agency requires by reading rules the Agency promulgates.

Professor Asimow further argues that Agency heads are appropriate adjudicators because of their "constant exposure to the problems of regulating a particular industry, and their superior back-up support from staff advisers" (id. at p.35). This is nonsense. Agency heads, as political appointees, change with alarming regularity. However, ALJ's who have permanent civil service status, hear literally hundreds of cases from the Agencies and themselves have a wealth of experience. The sine qua non of a fair hearing is to have each party present their evidence, which <u>includes</u> all of the vast resources at the command of an Agency head, and let a third party decide the issue. This is exactly how civil and criminal cases are conducted. Expert witnesses testify constantly on issues to be decided. The Agency is certainly free to call its own expert witness in any given case.

It should be noted that Professor Asimow himself recognizes that the fairest way to conduct an administrative hearing is to permit a neutral ALJ to decide a case. At a meeting of the Administrative Law Committee of the Los Angeles County Bar Association held on April 13, 1989, Professor Asimow, in speaking to the Committee members, stated that while taking away the decision making function from Agency heads would insure fairness, the Agency heads would "never agree" to give up such authority, so that the best way to proceed was to come up with a "politically acceptable" alternative. This shocking disclosure not only reveals a lack of understanding on Professor Asimow's part of what is meant by "due process", but also reveals the bias (Agency oriented) with which he conducted his investigation and prepared his report.

While the report advocates use of the 1981 Act as a "starting point" (id. at p.21), it should be noted that in the past nine years, only 3 states have adopted the same, and none of those states has anywhere near the complex licensing issues we are facing in California. The Model Act is not the place to start. The APA as presently constituted is the place.

Removal of the decision making process from the Agency is imperative if the concept of due process is to have any significance in administrative hearings. Whether Administrative Law Judges should be given the power to write "final decisions" (subject to review by the Superior Court) or whether an independent administrative review panel is more appropriate, is something the Law Revision Commission will have to decide. However, one thing must always be borne in mind. In any proceeding in which rights may be granted or taken away, due process is critical. Due process can never be granted when the Agency which prosecutes an action also acts as the judicial officer.

Sincerely,

RALPH B. DASH
Administrative Law Judge

RBD:btm

CAROL AGATE
750 South Spaulding Avenue
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(213) 932-0725

December 5, 1989

California Law Review Commission
4000 Middlefield Road, Ste. D-2
Palo Alto, CA 94303-4739

Re: Administrative Adjudication, comments

There is little to criticize in this report. After having heard the preliminary comments of Professor Asimow several months ago, I am pleasantly surprised at the realistic approach taken in this report.

As a UIAB ALJ, I agree that a centralized corps would have to be made up of specialized panels. I simply do not see unemployment insurance cases being handled concurrently with lower volume cases. However, I wonder whether it would be feasible to permit inter-agency loans of ALJs when the caseload warrants it.

At the UIAB, we do have the problem of the appearance of bias because so much of our work is done in hearing rooms located in the Employment Development Department offices. I constantly have to educate claimants who use "you" to include the department and me. The location, however, does have the convenience of being able to obtain documents, and sometimes personnel, whose relevance is not evident until the hearing.

I have recently returned from a week at the National Judicial College, where the trend toward centralized panels was a major topic of discussion. California, of course, is seen as a state with a centralized panel. I question whether we can centralize any further than we have.

I would appreciate continuing to receive the commission's reports.

Sincerely,

Carol Agate

STATE OF CALIFORNIA
GEORGE DEUKMEJIAN, Governor

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

December 7, 1989

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

Re: Administrative Adjudication: Structural Issues

The following are the comments of the Legal Division of the California Public Utilities Commission (CPUC) on Professor Asimow's study for the Law Revision Commission.

We agree with Professor Asimow that legislation should not require the separation of the adjudicatory function from other CPUC functions. We concur that such a separation of functions could impede CPUC policymaking. We similarly agree that legislation should not require the CPUC to use ALJs from an independent panel. As Professor Asimow points out, the CPUC requires highly specialized ALJs and often relies on its ALJs to work out the changes that the Commission will make to the ALJ's proposed decision.

We also agree with Professor Asimow that there is a need for an array of adjudicatory hearing procedures with varying degrees of formality. However, we are uncertain just how Professor Asimow's proposal would interact with existing statutes that require, for example, "an opportunity to be heard as provided in the case of complaints" (Public Utilities Code Sec. 1708), and whether the less formal procedures would be available in such situations.

We are unable to agree at this time with Professor Asimow's recommendation that a new comprehensive administrative procedure act (APA) should cover the adjudications of all state agencies. Professor Asimow has reserved the details of his proposal for a new APA for later phases of his study. Until we have had an opportunity to review the details of the proposed APA, we cannot evaluate the desirability of subjecting the CPUC to an APA designed primarily to cover the adjudications conducted by other state agencies. Much of the CPUC's work involves setting rates for utilities and other policy-making functions. This contrasts with the benefit determinations and disciplinary proceedings that are the main work of many other agencies.

Moreover, it is not clear to us which proceedings of the CPUC would or should be considered adjudications, and therefore within the scope of the proposed new APA. Professor Asimow points out that California case law has described the CPUC's ratemaking function as "legislative" rather than adjudicative.

Nevertheless, Professor Asimow recommends that "individualized ratemaking" be defined as adjudication. (Asimow study at 74.) It appears that Professor Asimow would consider ratemaking for a class of utilities to be rulemaking, subject to a different set of procedures that have not yet been spelled out. Thus we are unclear as to how his proposal would handle a single proceeding in which, for example, the Commission sets rates for the Pacific Bell telephone company (which shares its revenues with smaller, independent telephone companies) and also revises the revenue-sharing procedures applicable to the whole class of independent telephone companies.

We hope that further phases of Professor Asimow's study will explain in greater detail what kinds of proceedings are "adjudications", so that we can better analyze their potential impact on the work of the CPUC. We would also like to suggest as a topic for possible study the question of whether, even within an adjudication, different procedures might be available for the determination of "legislative" and "adjudicative" facts.

We thank you for this opportunity to comment on the first phase of Professor Asimow's study and would appreciate the opportunity to comment on later phases as well.

Sincerely yours,

Janice E. Kerr
General Counsel

cc: Commissioners
Wes Franklin, Acting Executive Director
Mary Carlos, Chief Administrative Law Judge

Turner & Sullivan

December 7, 1989

Michael Asimow
Professor of Law
c/o The California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Dear Professor Asimow:

This firm specializes in administrative and government law. Both Mr. Sullivan and I are former Deputy Attorneys General, who practiced administrative law while in the Attorney General's office for several years. Since leaving that office, we have by and large restricted our practice to administrative law. Ms. Christiansen, Mr. Sullivan, myself and other members of this firm have published many articles on administrative law and have written chapters in California Administrative Mandamus, published by CEB, and the new Matthew Bender volumes on Public Agency Practice. I repeat this abbreviated curriculum vitae on our firm only to indicate that we are extremely interested, obviously, in the practice of administrative law, and for that reason heartened by your study on administrative adjudication. We want to commend you and your colleagues for your intense research and insight into the administrative adjudicative process, and the conclusions you have drawn, most of which we very much support.

In particular, we agree that a new APA should establish procedural rules for all adjudications conducted by state agencies where on-the-record hearings are required. We further agree that "adjudication" should be broadly defined to cover most any agency action that determines the legal rights or interests of one or more persons. We agree that the APA should prescribe appropriate agency procedures in all cases of adjudication.

On the fundamental issue of separation of the adjudicatory function from other agency functions, we wish to make the following observations:

1. There should not be an "administrative law court" for all the reasons stated in your report.

2. There must be a better defined internal separation of the prosecutorial and adjudicative functions. We discuss this further below.

3. We urge that decisions by administrative law judges be final insofar as the decisions set out findings of facts.

We think it violates due process for findings of fact made by the person who sees and hears the witnesses' testimony to be overturned by agency members who neither attend the hearing, hear the witnesses, observe their demeanor, have a sense for the byplay and presence at the hearing, and who may reverse such findings in secret session and with the advice of those who perform the prosecutorial function. We do not base this view on the appearance of bias or unfairness. We could cite examples where unfairness and unfair contacts actually occur. Let me give you one recent and most troubling example. The Board of Accountancy brought an accusation against four accountants and their employer, KMG Main Hurdman, for gross negligence, essentially. A 23-day hearing before an administrative law judge resulted in a decision on the gross negligence issues entirely in favor of all respondents and specifically finding that no gross negligence occurred. In other words, the agency failed to carry its burden of proof.

Thereafter, the Board of Accountancy non-adopted the judge's decision, and after considering the matter, come to completely opposite fact findings, ruling that all respondents were guilty of gross negligence. None of the agency members attended even one day of the hearing. (We had many other grave doubts about procedural irregularities that occurred during this process, but there are simply too many to review in this letter.) The agency would not grant a stay of its decision, so to prevent the decision from becoming effective and having our clients' licenses revoked, we filed a petition for writ of administrative mandamus. To avoid the court hearing on the petition, the Board of Accountancy then, on its on motion, granted reconsideration. It then issued an "order after reconsideration" vacating all of its previous findings of gross negligence and remanding the case to the administrative law judge for a new hearing on all issues. In other words, the case had to be tried in its entirety again, the Board now having been "educated" in the first hearing. After further procedural efforts, and with the handwriting on the wall, the clients simply gave up and, after an enormous sum of money was paid to the Board of Accountancy for "enforcement costs," the matter was settled. Here is an example of a case where conflicting functions were combined

and the line between prosecution and adjudication entirely blurred. In our view, the Board of Accountancy, the adjudicator, decided what it wanted as a penalty in this case and set about to get it with absolutely no appreciation that the functions of prosecutor and judge had become one and the same.

Unless we can fashion an internal separation that really does keep these conflicting roles apart, we have an adjudicative structure which not only has the appearance of unfairness to many, but which can indeed and in reality be unfair. There are other ways in which the intended line between functions can be and is breached. We know that agency enforcement personnel on occasion (some would say frequently) talk to agency members (the judges) about cases prior to their filing and, on occasion, after they have been filed. In some instances, Deputy Attorneys General serve as liaison between adjudicatory agencies and the Attorney General's office. These deputies sit in with these agencies when they are in executive session deciding cases prosecuted by other members of the Attorney General's office (sometimes the prosecuting deputy and the "liaison" deputy are in offices only a few feet apart). As defense counsel, we wouldn't mind the same privilege but having one of my law partners sit in with the agency when it discusses the case in which I was just involved would be perceived as an absolute conflict of interest.

4. With respect to sanctions, it is our experience that the experience of the administrative law judges combined with guidelines set out in regulations by the agencies allow for fairly good consistency in assessing the penalty if cause for discipline is established. Our view is that only in cases where the respondent claims the penalty assessed by the administrative law judge is harsh or excessive, should there be an appeal to the agency. This will result in very few requests for reconsideration under the APA.

How to separate the prosecutorial and judicial functions internally by statute will be very difficult, but we think the effort should be made.

We have many other comments about your excellent study, but the time available to us now simply does not permit us to comment in more detail. We would, however, like to continue to receive future reports and tentative recommendations on the

subject of administrative adjudication. Please put us on the mailing list. We appreciate this opportunity to make these comments, and hope we may continue to share our views and experience.

Very truly yours,

TURNER & SULLIVAN
A Professional Corporation

RICHARD K. TURNER
ROBERT J. SULLIVAN
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JOHN K. VAN DE KAMP
Attorney General

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December 7, 1989

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

Dear Mr. Sterling:

Re: ADMINISTRATIVE ADJUDICATION: STRUCTURAL ISSUES

The Attorney General has designated us to participate in this study on administrative procedure. John Huntington is the Assistant Attorney General in charge of the Licensing Section which deals most extensively with Administrative Law and the California Administrative Procedure Act. Ron Russo is the Supervising Deputy Attorney General in charge of the Licensing Section in the Los Angeles Office.

We have examined Professor Asimow's study on Administrative Adjudication: Structural Issues. We find the study to be extremely thorough, scholarly, and well balanced. Whether one agrees or disagrees with any position, the pros and cons of each issue are fairly and clearly set forth. In general, we are in agreement with the conclusions expressed by Professor Asimow as summarized on pages 2 and 3 of his study.

We do feel compelled to make a comment on two points. In discussing the Medical Board on page 27 of the study at footnote 55, it is indicated that when the process is working too slowly or there is institutional bias, it may be appropriate to separate the adjudication from the law enforcement function. There has been a great deal of publicity concerning the Medical Board which might lead one to draw such a conclusion. When the facts are carefully analyzed, one finds that the Medical Board's cases which tend to be more complex, litigated more vigorously and at higher levels, are processed in roughly the same manner as those for any other agency in the Department of Consumer

Affairs. At page 30 at footnote 57, it is stated "it takes from six to ten years to revoke a physician's license." These cases are processed by this office and we seriously question this statement. It is true that a case traveling through the appellate courts more than one time can consume a number of years. At most, this should be considered an aberration. Neither the Medical Board nor any other agency can control the time expended in the appellate process.

Thank you for allowing us to comment on this study.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General

John M. Huntington

JOHN M. HUNTINGTON
Assistant Attorney General

Ron Russo

RON RUSSO
Supervising Deputy Attorney General

JMH:RR:mac

STATE OF CALIFORNIA—STATE AND CONSUMER SERVICES AGENCY GEORGE DEUKMEJIAN, *Governor*

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December 7, 1989

California Law Revision Commission
4000 Middlefield Road, Suite D2
Palo Alto, CA 94303-4739

Re: Administrative Adjudication
Structural Issues -- Asimow
Report, dated October 24, 1989

Members of the Commission,

Please accept this letter as my comments on the above study. I received a copy of the study about three weeks ago, and due to the tight time constraints my remarks will be long and disjointed (and also incomplete).

In December of 1988, before the study was approved, I appeared before you with a plea that whatever was done or proposed to be done be absolutely fair, appear absolutely fair, and absolutely provide for the independence of the Administrative Law Judge.

Unfortunately, the report and its proposals neither accomplish nor recommend accomplishment of any of these goals.

I am in my seventeeth year and one of the senior members of the "central panel corps" of ALJ's on the staff of the Office of Administrative Hearings. As such, I am familiar with much of the organic law of some 60 State agencies and numerous local agencies, as well as the California Administrative Procedure Act, as it was and now is, having worked daily with those laws for more than 35% of their existence. The inference from the report is that since the Judicial Council Tenth Biennial Report only studied licensing functions and licensing was generally subjected to the Act that the work of the "central panel" has been essentially limited to those cases and therefore suffers an impediment in adjudicating cases relating to social programs, employee programs, labor programs, etc. Such assertions display a lack of knowledge of the breadth of functions that are, and have been required, of OAH; as well as a lack understanding of the expansion over the years of areas covered by A.P.A. adjudications.

In addition to licensing cases, the "central panel" hears all Public Employee Retirement System cases for the State as well as contract local agencies (including retirements for disability which may have companion Workers Comp. cases); all State Teacher Retirement cases; tenured teacher discipline and school district lay off procedures, for several thousand school districts and junior colleges; Developmental Services Cases and Audits; Alcohol and Drug Program Audit Appeals; Fair Employment; Fair Housing; Fair Political Practices; Airport Noise Variances; Hospital Certificates of Need; Boxer/Manager contract arbitrations; Conservation Department recycling program citations; Health Services Toxic Waste cases; Real Estate, Subdivision Map Act Cease and Refrain cases; Commission on State Mandates; and numerous local agency cases of all types, by contract.

In the past, O.A.H. has supplied ALJ's from its staff for State Personnel Board cases; to hear Agriculture Labor Relations Board cases, and as well as OSHA cases, while those new agencies either got approval or geared-up to hire Agency ALJ's; to train and supervise those hearing examiners or hearing officers (now ALJs) who hear Social Welfare cases, as well as Developmental disability cases; to hear cases in Department of Benefit Payments' Medi-Cal claims and audit appeals; to hear tenure track appeals for the State Colleges and Universities; as well as some student discipline cases. Recently several adjudicating agencies have accepted former O.S.H.A., ALJ's; and in the past, OAH judges have come from U.I.A.B. and vice versa.

To assert that a "central panel" concept is not workable or efficient because of some perceived lack of skill or special knowledge is a bug bear of those sold on the status quo. The skills and knowledge required are those of an <u>adjudicator</u> - not those of an <u>attorney specialist.</u>

As recently as June of this year, The American Bar Association expressed its support of a bill in the U.S. Senate which would create a "centralized corps" of Federal ALJs. The current administration understandably sees no problems and is opposed. Irrespective of whether the bill passes (or how the ABA may have felt 10 years ago about the Federal Act or the Model State Act) the importance is that the Bar is now convinced that the independence and impartiality of the adjudicator is more important than being a "team player" under agency control, or a "super specialist". At essentially the same time, Congressional Budget Office study showed that the Senate Bill would cut costs by $20,000,000.00.

"Efficiency" is one of the report's criteria, along with "accuracy" and "acceptability", for determining whether or not to separate formal adjudication from the legislative, executive, and policy making functions of State agencies. Prof. Asimow gives dictionary definitions for each of those criteria, and acknowledges that "acceptability" is necessary for justice and fairness. He then junks the "appearance of fairness" as overwhelmed by the arguments he believes support the other two criteria; and rejects "actual unfairness" by summarily rejecting the views of consumer and environmental advocates and the idea of industry captive regulators; and says that actual unfairness no doubt exists, but he sees no reason to control this injustice, because it is not the "norm". I do not believe that requiring 51% injustice is an acceptable standard.

Thus in the formal trial type adjudication of the most important, complex, and far reaching issues, justice and fairness are unworthy of support. Paradoxically however, in supporting the need for his (part IV) expanded definition of adjudication and scope of the A.P.A., to cover the most trivial State actions, he urges such expansion as "the only effective means by which a person can be protected from governmental injustice and abuse of discretion." I suppose that with a "heads I win, tails you lose" concept of substantial justice and due process this makes sense, but it is not an argument that the Commission should concur in or deem acceptable.

While rejecting purportedly unprovable characterizations which justify splitting-off adjudication, Mr. Asimow readily accepts the unprovable characterizations that purportedly support his arguments for efficiency and accuracy. He quickly leaves the dictionary definition of efficiency by equating it to the maintenance of the status quo; and asserts the need for the "special expertise" of agency staff or commission members.

Relating solely to advocacy trials, the notion that because "A" owns a pharmacy, knows the governor, and is willing to work for expenses a couple of days a week, "A" possesses a unique ability as an adjudicator is a myth that should not be perpetuated.

The qualifications of an adjudicator and the requirements of justice are well known to this Commission. In a formal trial type adjudication, the idea of "special expertise" being necessary, desirable or even useful in deciding controverted facts, ruling on evidence, or determining well addressed legal issues is a cliche universally indulged in to justify condoning the absence of the appearance of fairness, and allows a fertile field for actual unfairness to take root.

This "special expertise" is of course only utilized after trial, is essentially personal and secret, is never spread on the record, and is unchallengeable by any adequate means recognizable in the administration of justice.

In point of fact, the A.P.A., as designed in the 10th Biennial Report, envisioned a final decision after trial by an independent adjudicator. It was only an eleventh hour amendment creating Government Code Section 11517(c) (to save the Act from a threatened veto by Governor Warren, who later expanded his own view of due process) that created the aberration of the Proposed Decision, non-adoption, further argument and agency final decision. The report approves of this unbridled discretion and use of secret expertise to support consistency, which results in efficiency. The question resolves itself into whether or not, in the administration of government, it is acceptable to limit justice and fairness to have the trains run on time.

Interestingly, Professor Asimow deems the concept of a "specialized reviewing body" as excessively expensive, not really "specialized" in the right things, and would necessarily become inefficient because of future backlog; while fifty "specialized" highly paid staffs in fifty different individual agencies and commissions would be smart, fast, and won't be backlogged.

Similarly, somewhere along the line, the dictionary definition of accuracy, to wit: "in accordance with fact" became "in accordance with fact to be contained in a future unexpressed policy of the regulator/prosecutor". And this is justified by some perceived need of the regulator, who was not smart enough, fast enough, or specialized enough to express the policy; hence the overwhelming need to preserve the uncodified "important" right to "make law" on a case by case basis through adjudication.

Whatever is the Federal law or law in other jurisdictions, in exercising their trial type adjudicatory function, the A.P.A. agencies in California grant, revoke, suspend, deny, fine, limit and otherwise act upon the privileges, rights, liberties, immunities and property of persons.

They have not made and do not "make law" in "case by case adjudication". The decisions are not published, are rarely reported, are not precedential (except FEHC) and are never presented at trial in a fashion which indicates that the agency is desirous of "making new law" in this trial.

The ability of a prosecutor/adjudicator to change a decision after a full and fair trial results only in excessive delay, extra cost, inefficiency, and most significantly an unfair advantage to the regulatory power and its panoply of "experts".

For example, set aside for a moment the appearance of fairness. Put the case that after a trial, the agency failed to sustain its burden. By accommodating itself of the options to not adopt, to buy a transcript and re-write (after losing in a full and fair hearing and getting the considered decision of a non-aligned Judge, with finding of fact, determination of issues, and an order) to create a different final decision, accomplishes two things (both of which are actually and overtly unfair). It requires the other side to accept the cost and burden of appeal; and more importantly changes the burden of persuasion in that appeal in the reviewing court from the agency (who lost) to the regulated party (who won).

As was perceived from the August 1988 proposal and subsequent actions and comments, the consultant possesses a fundamental bias that history and facts have not swayed. He has become an apologist for the Federal System with which he is the most familiar, and the Model State Act to which he obviously contributed through his colleague, Professor Abrams.

To continue to tout that almost ten year old camel, which is unaccepted by over 90% of the States, as a "state of the art" horse that California can buy cheap, solves few problems relating to administrative adjudication in California; and to push it as a "starting point" when it becomes more and more apparent that is the proposed "end product" is disingenuous.

California is a unique State. It has a long and expansive history of administrative adjudication to study, improve, polish, and build on. I urge that we use that history to base a genuine state of the art statute upon, in California and for California; and leave the hobgoblin of uniformity for those that don't have such a base.

Very truly yours,

ROBERT A. NEHER
Administrative Law Judge

RAN:btm

P.S. I trust that the length and nature of these comments (and the efficiency of the U.S. Postal Service) will not keep me off your mailing list.

STATE OF CALIFORNIA—STATE AND CONSUMER SERVICES AGENCY GEORGE DEUKMEJIAN, *Governor*

DEPARTMENT OF GENERAL SERVICES
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December 7, 1989

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

Re: Administrative Adjudication
Report of Michael Asimow

Ladies and Gentlemen:

I have our Presiding Judge Maron's letter to you on the above subject. I concur with all he says, but would like to add a couple of thoughts.

The power of an agency to "non-adopt" a proposed ALJ decision can effectively impair a licensee's economic ability to secure judicial review. Often respondents are without funds to proceed further after an agency's §11517(c) proceedings.

Section 11517(c) proceedings work to prolong administrative actions which are supposed to be resolved expeditiously. For example, discrimination complaints under the Fair Employment and Housing Act are meant to be brought to an early conclusion. Yet the Fair Employment and Housing Commission proceeds under §11517(c) in almost everycase before it. Sometimes parties have to wait for resolution of their problems for as long as two or three years!

In sum, if the agency head or board does not actually hear and see the evidence as it is presented, it should not find the facts in a separate proceeding based on a cold record. Insofar as the Administrative Procedure Act now allows this to occur, it should be amended to permit all parties immediate access to judicial review without intermediate "non-adoption" proceedings.

Very truly yours,

PAUL M. HOGAN
Administrative Law Judge

-40-

PMH:mh

State of California

STATE AND CONSUMER SERVICES AGENCY
CA LAW REV. COMM'N

DEC 10 1989

RECEIVED

Memorandum

To : California Law Revision Commission
4000 Middlefield Rd. - Rm. D-2
Palo Alto, CA 94303

Date : December 8, 1989

File No.:

Telephone: ATSS ( )
( )

From : Office of Administrative Hearings

445-4926

Subject: COMMENTS ON ADMINISTRATIVE ADJUDICATION: STRUCTURAL ISSUES

I wish to express my strenuous objection to Professor Asimov's fundamental premise underlying his proposal to reform the California Administrative Procedure Act, i.e., that the current California APA should be scrapped wholesale and the 1982 Model Act adopted, with modifications. Professor Asimov's premise is fatally flawed, as the intervening seven-plus years since the adoption of the Model Act have aptly demonstrated. There has been no headlong rush to adopt this alleged masterwork in the several states. On the contrary, it has been treated as a leper, shunned by nearly every significant jurisdiction conducting any reasonably large amount of administrative litigation. The wholesale rejection of the Model Act by nearly all of the states is an overwhelmingly compelling reason not to adopt it here.

The California APA was visionary when adopted and still serves extraordinarily well in most administrative adjudication situations. The good professor suggests, without a scintilla of support from those that actually practice under the act, that due to its age, its usefulness has been outlived. One would not dare to posit such an argument to replace the U.S. Constitution or other old but still quite effective system of law.

The baseline for reform of the California APA is the Act itself. There is no reasonable basis for Professor Asimov's contention that it would take "countless" bits of minor surgery to cure its ills. On the contrary, when the core of a body of law is solid and effective, with a body of law construing it that has matured in the 40 years it has existed, it is simply absurd to scrap it wholesale because it needs minor amendments. Starting with the APA itself, and making the changes needed to it in order to make it more serviceable, preserves this solid core, and builds upon its firm foundation. The finished product will be another visionary act. If the Model Act can furnish any guidance, suggestions or proposals for improvement, borrow those provisions and an outstanding hybrid will be created. Such a hybrid can-

not be obtained by using the shunned Model Act as its basis. Professor Asimov's report should be rejected on this basis, and used only to the extent that it can suggest specific and individual improvements to particular provisions of the current APA.

Stephen J. Smith

STEPHEN J. SMITH
Administrative Law Judge
Office of Administrative Hearings

SJS:jlb

State of California

STATE AND CONSUMER SERVICES AGENCY

Memorandum

To :

California Law Revision Commission
4000 Middlefield Rd. - Rm. D-2
Palo Alto, CA 94303

Date : December 8, 1989

File No.:

Telephone: ATSS ( )
( )

From : Office of Administrative Hearings

Subject: 445-4926

COMMENTS ON ADMINISTRATIVE ADJUDICATION: STRUCTURAL ISSUES

OVERALL OBSERVATIONS:

Professor Asimow has done a great deal of work already and must be commended. The following comments, however, are necessary.

Although the report correctly indicates that there is a need to update adjudicatory administrative procedure in California, it proposes no changes in the areas that generate the most concerns. Experienced practitioners are just as concerned about the existing administrative structure that allows a close relationship between adjudication and the political and policy concerns of administrative agencies, as they are about how to conduct an administrative proceeding. The latter can be learned quickly, even under the present system. The former, is largely out of their control. Its the former that raises most fairness issues. The report only suggests changes in the latter.

Providing a decent separation between adjudication and other agency actions is not novel. It is simply what we do in the larger legal system which, for example, separates prosecutors, or other parties to a legal dispute, from the person who must determine the dispute. Administrative agencies have a right and duty to affect social policy through adjudication, just as a prosecutor might. But as in the criminal system (or civil), the administrative adjudicatory scales of justice must appear and be in balance. The report doesn't recommend changes to address these concerns.

FINALITY:

A major concern for any change in existing administrative procedure is that it not make adjudication procedure more inefficient. There are many more administrative adjudications than

court decisions, including small claims. If these administrative adjudications become as encumbered as court proceedings, for example, in the area of discovery, governmental decision making will slow and both the parties' and the public's interests in quick, accurate, and fair administrative decisions will be harmed. Professor Asimow's concern for efficiency, as well as accuracy, is well placed.

The report, however, rejects ALJ final decisions on an efficiency argument, as well as an administrative discretion argument. As indicated, one of the main reasons for updating administrative procedure is to create a decent separation between administrative adjudication and other agency functions. Finality would be a step in this direction. The problem is how to create an efficient system which incorporates it (finality) but does not create cumbersome, inefficient, and costly procedures. It can be done. The Commission should not accept that it cannot be done. The Commission should ask professor Asimow to suggest ways it might be done.

CORPS CONCEPT:

This is also an important systemic change for creating a decent separation between adjudication and other agency activities. The interesting thing about reading the report in this area is that all the reasons for an expanded corps concept in California, as set forth in the report, dominate over leaving things the way they are. The report's conclusion on this issue is contrary to its discussion. It appears to read, "It's a good idea to protect impartiality and independence, but I'm not recommending it."

The Commission should be able to see the merits of a corps concept (regardless of whether it contains some specialization within the corps) without further input from professor Asimow. It should simply adopt the corps concept direction, based on the good reasons set forth in the report.

Parenthetically, the fact that not all ALJ's support a change to the corps system in California is not surprising. Similar opposition exist at the federal level, which is considering legislation to create such a corps system. It's a change. It's an unknown system for captive ALJ's. Change represents a threat to many people, including ALJ's. The merits of any proposal are often affected by such subjective responses. The comfort of ALJs, however, is not the issue.

1981 MSAPA:

California should have a more uniform system of administrative procedure. The current APA has worked well (as the report admits) as far

as its coverage goes. The Commission, however, should be concerned with the answer to the following key questions concerning the 1981 MSAPA:

1. Why hasn't the Model Act received more acceptance in the last eight years? The Commission should know the answer before accepting the Model Act as the direction for California. Professor Asimow should address this question.

2. Why shouldn't California improve the present APA and adapt it for broader coverage? It works well!

   The report takes a very uncritical look at the Model Act. Regardless of the amount of work that went into its drafting, its not necessarily better for California. To the extent it incorporates procedures based upon the federal APA, it contains several steps backward and is costly.

SUMMARY

The Commission must decide whether some fundamental changes in California's administrative adjudicative process should be made or whether the only change is to adopt the 1981 MSAPA (with modification). The latter is recommended by the report. Adopting the report's direction will require far less effort to formulate legislation. But with extra effort, California can make more fundamental and important improvements without sacrificing efficiency.

John D. Wagner

JOHN D. WAGNER
Administrative Law Judge
Office of Administrative Hearings

JDW:sw

EXHIBIT 20

THE TAXATION SECTION
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December 8, 1989

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Re: Administrative Adjudication:
Structural Issues

Ladies and Gentlemen:

The Executive Committee of the Taxation Section has received the recently released study by Professor Michael Asimow on the above subject. We are gratified that Professor Asimow has given some attention to administrative adjudication in state tax matters, for we believe that the existing procedures for tax dispute resolution in California are badly in need of improvement. Therefore, we urge the Commission to include the tax agencies in its ongoing study.

In this letter we will briefly describe the shortcomings of the present system and attempt to point the way for further study by the Commission.

Our concern is with the adjudicative functions of the State Board of Equalization in sales and use tax matters, where it is both administrator and adjudicator, and in income and franchise

tax matters, where it adjudicates taxpayer appeals from administrative actions of the Franchise Tax Board. The SBE is required to grant hearings in these matters.[1] In February of this year the SBE announced a restructuring of the sales and use tax hearing procedures whereby its hearing officers will act more like administrative law judges, i.e., they are separated from the legal staff, will conduct evidentiary hearings and will present a well-developed record and recommended decision to the Board. As far as sales and use taxes, therefore, it may be a relatively small step to bring them within the broadened APA envisioned by Professor Asimow.

It is in the area of income and franchise tax appeals where reform is more urgently needed. There is within the SBE legal staff a group of lawyers who receive and analyze the appeals and the briefs filed by the taxpayer and the FTB. They do not act as ALJs, however. They are more like law clerks for the SBE members who are the judges (but who are generally not lawyers). After all briefs are filed, the matter is set for hearing before the SBE. Some months after the hearing, a written opinion that has been prepared by the staff lawyers is signed by the board members and sent to the parties and to publishers of California tax services.[2]

The reasons why we say this system is not working well are:

1. The process is painfully slow. It can take as much as five years from the filing of an appeal to the issuance of the decision.

2. The case back log is constantly growing. The number of appeals is increasing, but the rate at which they are being decided appears to be slowing. For example, the SBE issued 65 formal opinions in 1966 and 59 in 1967, but it issued only 28 in 1988 and 28 so far in 1989. It is apparent that among the many duties of the SBE, the income and franchise tax appeal function is not receiving very high priority.

3. Although a pro-settlement policy would be an obvious way to reduce the caseload, the agencies aver that they lack settlement authority. A bill sponsored by the State Bar to grant

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[1] Rev. & Tax.C. §§6562, 18895, 19060, 25667, 26077

[2] The opinions are published by Mathew Bender, Commerce Clearing House and Prentice Hall, and are regarded by taxpayers and the FTB as important precedents in subsequent cases.

settlement authority equivalent to that held by the Internal Revenue Service under federal law was enacted in 1988 (Ch.901) but it was pre-empted by the "Taxpayers Bill of Rights" legislation (Ch.1573) which contains such limited settlement authority as to be actually anti-settlement.

4. The appeal process accomplishes little or nothing in the way of preparing the case for possible consideration by a court. One might think that the facts of the case would become sufficiently developed during the appeal process so that if the case goes on to court, a full stipulation of facts could be presented to the court. This seldom happens. It is more likely that the parties will find themselves spending months of pre-trial discovery and days or weeks of trial time on factual issues.

5. The Franchise Tax Board cannot go on to court if the SBE decision is adverse to it. Although at first blush this might seem to be a boon to taxpayers, it can have the opposite effect. There have been several instances where the FTB, being dissatisfied with an adverse SBE decision, was waited a few years then gone back to the SBE with another case presenting the same issue and has succeeded in persuading the SBE to overrule its prior precedent. The FTB has then applied the new rule for all taxpayers similarly situated. These unfortunate taxpayers have felt impelled to go to court, thereby creating more litigation than would have arisen if the FTB had been allowed to take the issue to court in the first instance.

6. The real decision makers are more likely to be the SBE staff lawyers than the SBE members themselves who, it is believed, generally accept the staff-prepared opinion without change. These real decision makers are totally anonymous to taxpayer-appellants, but they are well known to their fellow civil-service lawyers on the FTB legal staff. The potential for ex parte contracts is worrisome to taxpayer-appellants.

7. It is unclear whether the SBE must recognize FTB regulations as correct interpretations of the income and franchise tax statutes or can declare such regulations invalid in the course of deciding an appeal. It had done the latter, which seems odd in view of the overlapping membership of the two boards.

Over the years the Taxation Section has considered a number of ideas for improving the tax dispute resolution process. It has actively supported legislation to create a judicial tax court, most recently SB 121 and SCA 6 (Garamendi), but these proposals always seem to be prejudiced by the opposition of the Judicial Council. The Section has not taken a position on legislation to replace both the SBE and the FTB with a Department of Revenue, such as the current SB 1395 (Kopp), although we do find attractive the provisions in Senator Kopp's bill for an independent Board of Tax Appeals with a staff of ALJs. However, we do think there are less controversial reform that might be sponsored by the Commission.

Professor Asimow in his report discusses the alternatives of broadening the Administrative Procedure Act to cover all agencies having an adjudicative function or pursuing procedural reform on an agency-by-agency basis. He comes down in favor of the first alternative and commends the 1981 Model State APA for adoption by California. On these points we must demur. We think the functions of tax agencies are enough different from the functions of regulatory agencies that one comprehensive APA cannot suitably cover them both. We concede what Professor Asimow says about the difficulties of agency-by-agency reform, but we think the tax agencies must nevertheless be given some special consideration.

Shortly after the issuance of the 1981 Model APA by NCCUSL it was analyzed by the Section of Taxation in the American Bar Association and was found to be in some respects ill-suited for application to state tax agencies. The Section then drafted a Model State Tax Administrative Procedure Act which became an official ABA Legislative Recommendation in 1983. Copies of the ABA's analysis of NCCUSL's model act and the ABA's alternative model act will be furnished to you upon request.

We realize that reform of tax agency adjudication will require painstaking deliberation, but we also agree with Professor Asimow when he says that reform is not likely to occur by agency initiative. Should the commission undertake the task, and we earnestly hope that it will, the Taxation Section will be eager to assist you.

The subject of the reformation of California's tax resolution system has been reviewed by at least 18 outside agencies or legislative committees. The first such study was done in 1927 by the California Tax Commission (under the authority of the legislature). The most recent studies were completed by the Little Hoover Commission in 1979 and the Governor's Tax Reform Advisory Committee in 1985. All such studies recommended reorganization of California's tax resolution system.

The Executive Committee member who has been assigned to this subject area is John S. Warren of Los Angeles. Please send your future reports to him at 1000 Wilshire Boulevard, Suite 1800, Los Angeles, California 90017 (telephone 213/688-3404).

Very truly yours,

Howard S. Fisher,
Chair

HSF:nsr

C:LW\HSF\TAXSEC.1

STATE OF CALIFORNIA—STATE AND CONSUMER SERVICES AGENCY GEORGE DEUKMEJIAN, Governor

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Re: Comments on Asimow Report

Dear Commission Members:

I am writing in response to your solicitation of comments on Professor Michael Asimow's October 25, 1989 report "Administrative Adjudication: Structural Issues." The Commission staff and I reviewed the report and we are very interested in most of the issues raised in this and future reports and in the Law Revision Commission's actions in response.

We have no particular comments on sections IV and V of the report. Professor Asimow's discussion appears sound, but falls largely outside the FEHC's direct experience. We do, however, have several comments on sections I through III of the report.

I. The Need for a Modernized APA

We heartily endorse Professor Asimow's call for a single, comprehensive APA for statutorily required state agency adjudication. Our own experience under the existing APA confirms his arguments that occasional practitioners before the FEHC would be far more likely to be familiar and comfortable with its procedures if there were a uniform statewide procedural scheme, and that the body of precedent available to resolve difficult procedural issues would be very usefully expanded.

We also support modernization of the APA. While specific comments must await the second phase of Professor Asimow's work, and while it appears likely that we not agree in every instance with the substance of the particular reforms he suggests, the current APA plainly has numerous defects and must be substantially revised.

II. Separation of Adjudication from Regulation

The report assesses this issue by the criteria of acceptability, efficiency, and accuracy. We have comments on the discussion of each of these measures.

A. Acceptability

It is surely important that the parties who appear before an agency in its adjudicative processes perceive, both from the outcomes produced and the structure of the process, that they have been treated fairly. As the report indicates, the FEH Act separates the adjudicative from the prosecutorial function, and our experience has been that this separation is enormously important in supporting the perception that the FEH Act process is procedurally fair.

But we also believe that actual procedural fairness is even more fundamental than the parties' perception of it. That perception is, inevitably, skewed to some extent by the direct interest of the parties in the outcomes of specific cases and is therefore not an entirely reliable measure of actual fairness. It seems far more important to us that there be built into an administrative adjudicative process certain structural guarantees of fairness, even if the parties do not always believe that they work.

One of these, surely, is a true separation of prosecution from adjudication. In essential form, the adversary hearings held before the FEHC are identical to superior court trials under the FEH Act. If the plaintiffs' attorneys prosecuting those court actions were employed by, or by the same entity as, the superior court judges who hear those actions, it would be a procedural outrage that no one would tolerate; the separation of advocates from judges is a fundamental organizing principle of the adversary process. It is not clear to us why it should be any different in an administrative process that requires true adversary proceedings to accomplish its regulatory purposes.

If prosecution and adjudication are effectively separated, we do not believe that it is either necessary or sensible also to separate rulemaking from adjudication. If there is procedural unfairness--perceived or real--in a combination of rulemaking with other administrative functions, that unfairness seems to us to result most from permitting the prosecuting entity to make the substantive rules under which it prosecutes; the deck seems, at least, to be too much rigged in favor of one of the players. But that problem is avoided entirely if rulemaking authority is vested in an adjudicative entity that is wholly distinct from the prosecutor.

And it makes obvious sense to combine the rulemaking with the adjudicative function. As the report notes, rules and policy are often made through case-by-case adjudication, so there are very good reasons to combine that process with formal rulemaking and substantial disadvantages to separating the two functions. And there is, at least in our experience, no intrinsic structural unfairness in combining these functions that is nearly as significant as the conflict inherent in combining prosecution with adjudication.

B. Efficiency

It may well be true that the one-time setup costs of creating separate adjudicative bodies would be substantial. The FEHC has had no experience of this, since it existed as a distinct sub-entity with its own staff before it was separated administratively from the Department of Fair Employment and Housing.

But once those setup costs have been incurred, our experience does not suggest any particular gain or loss in efficiency from a formal separation of prosecution from adjudication. The inefficiencies--in some cases substantial inefficiencies--that have burdened the administrative process under the FEH Act have resulted much more clearly from budget limitations, procedural constraints imposed by the APA, and the usual array of administrative problems that afflict bureaucracies.

C. Accuracy

Professor Asimow argues, using the FEHC/DFEH case as support, that separation of the "law enforcement" from the "judicial" agency produces disadvantageous policy disputes between the two entities. While there may be force in this argument with regard to other administrative settings, and we do not necessarily suggest that our system would bear extrapolation across the board, we do feel that Professor Asimow has somewhat overstated the defects of the FEHC/DFEH separation and missed a fundamental advantage that it offers.

There have indeed been the "sharp conflicts over policy" between FEHC and DFEH that Professor Asimow notes, but his implication is that they dominate the relationship between the two agencies and that they have significantly undermined civil rights enforcement in California. Neither conclusion is correct.

On almost all the numerous substantive issues involved in enforcement of the FEH Act, DFEH has recognized that the Legislature vests substantive policy authority in the FEHC, and DFEH has enforced the great bulk of the rules set by the Commission through its rulemaking and adjudication functions. It is only in a relatively few substantive areas that DFEH has resisted FEHC interpretations and policy conflicts have arisen, and those conflicts do not at all typify the normal relationship between the two agencies.

What conflicts have occurred have in some cases been intense and have imposed costs in staff resources that would otherwise not have been incurred, but we simply do not agree that those costs have significantly undermined enforcement of the FEH Act, and it is difficult to respond to Professor Asimow's claim of "negative effect" (page 37) because he fails to make clear exactly what that effect is. We are the first to agree that defects remain in the FEH Act enforcement process, but they arise--as Professor Asimow seems to concede in footnote 72--from sources far more significant than the occasional policy disagreements with DFEH.

We feel strongly, too, that our separation of the prosecuting from the adjudicating and rulemaking functions, and the policy differences that this separation sometimes stimulates, has actually supported the "accuracy" of the FEH Act enforcement process in a way that Professor Asimow overlooks. The accuracy criterion is defined as "reaching a result that is factually correct and is in accordance with the public interest and with the objectives that the legislature sought to achieve in creating the regulatory scheme."

In our view, the FEH Act's fundamental objective--to provide effective remedies to prevent and eliminate discrimination--is best served by thorough and vigorous articulation of the substantive requirements of the Act. We think that this process of articulation is strengthened--both in the effectiveness of its substantive outcomes and its real and perceived fairness--by the active participation not just of employers and landlords but also of the representatives of employees and tenants. It is not enough to have the substantive positions taken by the FEHC tested only by employers and landlords; it is equally essential that the other side of the adversary setting in which the FEHC regulates be represented. By using the established means of challenging and testing FEHC positions--briefing contested issues in cases before the FEHC and seeking court review of adverse outcomes; petitioning under the

APA for different rules and contested those outcomes in court--an independent prosecutorial agency such as DFEH can do much to promote "accuracy" by pursuing policy conflicts.

This model has broken down, in our view, only in the relatively few cases in which DFEH has, in effect, cut the FEHC out of the policy-making process entirely by declining to assert jurisdiction over cases in which the FEHC has stated that jurisdiction exists. Since no such cases ever reach the Commission, the underlying policy issue is never set before it or the reviewing courts and DFEH becomes the sole arbiter of the issue. While this is not, we repeat, at all a common problem, it could probably be avoided by a clearer Legislative statement than is now in the FEH Act that the FEHC has primary policy-making authority, in the first instance, and that DFEH is mandated to enforce FEHC positions unless it actively raises its objections first with the FEHC and then in the courts.

This last comment also suggests a key distinction between the FEHC/DFEH model and the other administrative systems that Professor Asimow mentions on pages 36-38. His discussion indicates that in most of those systems it was the "law enforcement"--that is, the investigating and prosecuting--agency that was intended to have dominant control over substantive policy and that it was the separate, adjudicating entity that had improperly intruded into policy-making. That problem will not occur in a setting where--as is essentially the case with the FEHC and DFEH--the law makes clear that it is the adjudicating agency that is to control policy.

III. Independence of Administrative Law Judges

We agree in general with Professor Asimow's disinclination to recommend that specialized, non-OAH ALJ's be merged into an independent corps of generalists. While the work done for the FEHC by OAH ALJ's has improved steadily and has in some cases been excellent, our experience has taught us that accurate, knowledgeable and--above all--consistent application of a body of law as complex and esoteric as the discrimination laws we enforce is best accomplished with judges who specialize in that area. A related concern not touched on in the report is that it is often very difficult for independent generalist judges to know what law the policy-making entity would want to apply where, as is the case with the FEH Act, the law is still undeveloped in many respects. It seems very likely that specialists attached to the policy-making entity would develop a much better sense of its policy directions, and thus produce work

that is both internally consistent and far less likely to need revision by the agency.

We also think that the arguments in favor of an independent ALJ corps for agencies such as ours are particularly weak when applied to the FEHC/DFEH model. It seems that much of the force of the argument that ALJ's will appear to be biased if they are attached to the agency--and perhaps some of the ALJ's own fear that he or she will lose "independence"--derives from that fact that in most settings the prosecutorial and adjudicative functions are performed by the same agency. But if the ALJ's are attached to an entity that is separate from the prosecuting agency and is supposed to exercise control over the substantive rules under the statute, there is far less risk of real or apparent bias.

And in this latter setting, there is an important sense in which ALJ's ought not to be independent from the policy-making/adjudicative agency. As triers of fact, of course, they are due appropriate deference where the agency itself does not sit at the hearing, and we suspect, too, that a continuing relationship between the agency and its ALJ's would build confidence in their factual findings.

But as to policy issues, as the report recognizes elsewhere, it would be improper for ALJ's to exercise independent control and apply substantive rules in conflict with the policy set by the agency empowered by the Legislature to do so. There is no loss in fairness, and an enormous gain in both efficiency and accuracy, if ALJ's apply consistently the substantive rules laid down by the agency, and that outcome, as we suggested above, is far more likely to occur where ALJ's are attached and in some broad way answerable to the policy-making agency.

I hope these comments are useful to you. I would appreciate your placing us on the list to receive future reports and communications, and please feel free to contact us if you want to discuss these issues further.

Sincerely,

Steven C. Owyang
Executive and Legal Affairs Secretary

SCO/aw

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Dear Sirs:

Re: Administrative Adjudication: Structural Issues

On behalf of the Department of Real Estate, I would like to provide the following general comments on Professor Michael Asimow's background study on the California Administrative Procedure Act entitled "Administrative Adjudication: Structural Issues".

1. The Department of Real Estate is in agreement that Administrative Law Judges should not have the final say in the decision making process. We feel that such a change in final authority would impinge on the policy making authority of the executive branch of government. Under due process there is no need to transfer decision making to an independent third party as long as there are means for the courts to review the procedural context within which the decision was made and to review the record to determine if the findings are supported by the evidence.

2. For the same policy reasons listed in No. "1", we agree with the conclusion that ALJs do not have to be separated from their agencies and combined in a central pool. The ability to obtain court review of decisions and procedures will ensure due process.

3. The Department does disagree with the "maximum" approach recommended in Part IV of the study of including all government decision making which constitutes an "order" within the realm of required adjudicatory proceedings. Our objection is largely based on the definition of the term order to include anything which affects a "legal interest". We believe that this term is so imprecise that it becomes all-inclusive and would thus hamper most day to day government decision making.

   The Department disagrees with the concept that it is better to be comprehensive and then allow time, the

Legislature and the Office of Administrative Law to determine what decision making should be exempted. This solution does not provide a reasonable interim alternative. In the mean time, the maximum approach would result in many government operations being stymied with an unworkable and impractical system which would greatly increase the costs of doing government business solely to handle the adjudication of new found remedies.

Along this line there is never any practical showing of abuses in the present system; rather, there is an academic suggestion that government operates in an arbitrary manner and therefore needs further checks. The Department finds the study severely lacking in its failure to identify those "decisions" which currently provide a remedy for administrative adjudication. Such an analysis is necessary to evaluate how far the present system goes. We do not know where to go if we do not fully recognize what we have. An analysis and specification of rights given in present codes or regulations to adjudicate government decision making is necessary to substantiate any recommendations of this study. The study makes generalizations about existing law without substantiated empirical evidence. The authors may be surprised to find the extent of present adjudicatory rights if such an analysis were made.

The Department submits if the study is to be meaningful, it should instead become familiar enough with the operation and decision making at all levels of government on a day to day basis and to clearly and specifically identify where rights or opportunity adjudication presently exist before it can summarily generalize the need for the maximum approach. We believe that the maximum approach recommendation is a lazy man's way out and a reflection of distrust of government rather than taking the time and effort necessary to specifically identify where the present system fails.

At a minimum the study should identify the area of governmental decision making where policy considerations of time, cost and public protection necessitate some form of adjudication. The provision of examples where adjudication may be needed does not begin to recognize the ingenuity of the human mind and the potential for articulation of a "legal interest". Rather, human ingenuity suggests the ability to create

in ways which cannot now be anticipated. This will in turn affect the ability of government to seek exemptions either legislatively or by rule. The maximum approach will even hamper nondiscretionary decision making which affect legal interest and by slowing government decision making with considerations of legal implications and costs considerations. The Department submits that the fix to the problem should not go any further than the problem as demonstrated. The failure of the study to practically and empirically demonstrate problems necessitating a maximum approach makes it an academic argument for change in this area rather than true justification for change. The argument that current APA procedures need to be expanded or changed because the APA was enacted over 45 years ago is not legally nor empirically justified in the study. The Department is concerned about changes that are not required by due process but are advanced because of an academic notion of fairness.

4. The Department is also concerned about the practicality of suggesting that agencies rely on either the Legislature or rules as a means of opting out of or minimizing the maximum approach. This suggestion does not recognize the costly and time consuming nature of current requirements to enact laws and regulations. Nor does it reflect a true understanding of the role of the Office of Administrative Law in the rulemaking process by suggesting that this agency will somehow second guess agency policy determination: "Because OAL can review the rules, agency rules that provide inappropriately high or low levels of procedure can be identified and questioned without the need for judicial review." Again the Department submits the better approach is to expand the present list of situations where adjudication is required and specify the level of adjudication necessary.

   The Department suggests that if the study's author found fault with the Missouri AHC because it gets backlogged, wait until he sees the impact of the definition of "order" on state agencies and OAL when those agencies come knocking at OAL's door for exemptions. We believe that this will be a continuous never ending requirement for most agencies as new legal interests are created to challenge decisions as orders.

   The Department completely disagrees with the suggestion that government agencies should be able to articulate

to the Legislature and to OAL where exemptions should be granted. This would say change your ways without any demonstration that there is a problem in those ways. This is an inefficient concept. The burden should be on those advocating change to demonstrate where and how that change is needed, and that demonstration should be empirical, not academic.

5. The Department questions the practicality of providing different levels of adjudicatory proceedings. While on paper it can be suggested that less informal proceedings will save money, there is no factual support to back up this suggestion. The time and effort of preparing for a "conference hearing" may very well equal that spent in preparing for and presenting a formal adversary hearing. While this suggestion may appear practical, there is no demonstration that savings in time or ultimate costs will occur.

   In fact, by broadening the term "order", it is suggested that it is more likely that the cost of government will substantially rise, regardless of the type of forum used to adjudicate, while at the same time decision making will be hampered and delayed to avoid the necessity of the costs of a hearing. It is suggested that many decisions will be based on cost factors as opposed to sound policy. In this era of government limitations, it is unrealistic to expect the availability of increased monies to respond to enhanced rights of the public to challenge decision making. Thus, costs will become a key factor in decision making. This could lead to adverse results and inconsistent policy determinations.

Very truly yours,

Robin T. Wilson
Chief Legal Officer

RTW:et