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Local Adaptation of the California Administrative Procedure Act —A Plea for Research and Study

by HENRY A. DIETZ*

THE subject of this article is so broad and of such importance that the writer approaches it with trepidation. As the distinguished and redoubtable Dean Prosser says in his casebook on torts, speaking of the relation between authority of law and privilege: "The defense of legal authority is a subject for a course, a casebook and a text in itself. It can only be touched upon here."[1] Certainly the subject matter of this article far transcends that of the ordinary law review article. We will nevertheless touch upon some problems, pose some questions and make some suggestions. It is hoped that interest will be whetted, thought provoked, investigation and research begun.

Two questions are immediately apparent: Is there a need for uniformity in local administrative proceedings, and should research and surveys be begun so that firm conclusions may be drawn? Based upon experience and observation, the writer answers these questions with an unqualified "yes." In large measure, each county, city or other local agency has its own informal, non-prescribed method of conducting proceedings. Few local agencies have administrative rules or regulations, reliance for guidance more often than not being sought in the almost abominable Roberts, *Rules of Order*. Further, if definitive answers to these questions are not sought now, it is not an unreasonable prediction that the problems unsolved will haunt the California courts, legislators, administrators, administrative agencies and lawyers for years to come.

In 1945, acting on a report submitted by the Judicial Council,[2] the Legislature of California adopted an Administrative Procedure Act,[3] applying only to certain enumerated state agencies and not to local agencies.[4] The Act is divided into three chapters: Chapter 4

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[1] PROSSER & SMITH, CASES ON TORTS 155 (3d ed. 1963).

[2] TENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA (1944).

[3] CAL. GOV. CODE §§ 11370-528. For some excellent articles a decade after its enactment, see 44 CALIF. L. REV. 189-339 (1956).

[4] CAL. GOV. CODE §§ 11370-528, 11500(a), 11523. Allen v. Humboldt County Board of Supervisors, 220 A.C.A. 890, 34 Cal. Rptr. 232 (1963).

provides for the Office of Administrative Procedure; Chapter 4.5 deals with judicial review and procedure for adoption, filing and publication of each agency's rules and regulations, and provides for the California Administrative Register and Code; and Chapter 5 sets forth the rules of procedure for administrative adjudication. The procedure for judicial review by writ of mandate is found in the Code of Civil Procedure.[5]

Originally the legislature established the Office of Administrative Procedure within the Department of Professional and Vocational Standards as a relatively loose member of that agency, but in 1963 it was transferred to the newly established Department of General Services. The reason for the transfer was to avoid what the military would call "command influence," the practitioner "agency oriented decisions," and courts and writers "incompatible functions," or the need for "separation of functions."[6] The transfer was an attempt to resolve one of the basic problems of fairness in the administration of justice by state administrative agencies in California.

A procedure act of scope and depth could not, of course, be immediately enacted to more efficiently administer the work of local agencies. Nor would an immediate attempt to make a redrafted version of the California Administrative Procedure Act applicable to local administrative agencies be feasible. Because of the complex problems involved, the preparation of such an act will require years of study, which should begin now.

The Office of Administrative Procedure is required to conduct continuing studies in the field of administrative law.[7] Although the studies emanating from this office will have primary application to the problems confronted by state agencies, they also will be an invaluable aid in the search for solutions to the administrative law problems peculiar to local agencies. What follows is designed to call attention to some of the problems involved in formulating a policy for local administrative procedure.

The Hearing Officer

The touchstone of fairness under the California Administrative Procedure Act is the hearing officer system.[8] This is the essential element protecting the administrative hearing against bias and influ-

[5] CAL. CODE CIV. PROC. § 1094.5.

[6] For a complete discussion of this problem see 2 DAVIS, ADMINISTRATIVE LAW §§ 13.01-.11 (1958).

[7] CAL. GOV. CODE § 11370.5.

[8] See CAL. GOV. CODE §§ 11502, 11512.

ence. There is but one master, the conscience of the hearing officer. But where will the local agency obtain qualified hearing officers? From the state? The state is undermanned now. Who is going to pay for them? Can Inyo County, with its small population and meager tax base, support the cost of a hearing officer in every case requiring a hearing, be it the dismissal of an employee, a zoning board hearing, revocation of one of the various types of licenses, or a hearing by the board of supervisors sitting as a board of equalization? It would appear not. Nor would it appear that many counties could sustain such a cost burden. Can the system of costs, under which the Office of Administrative Procedure furnishes officers by so-called equitable apportionment among the state agencies, be adapted to local agencies? A whole new set of problems is apparent. Nevertheless, the hearing officer system is probably the fairest yet devised and should be a goal, unless some suitable substitute is found. And it is to be noted that the hearing officer problem is only one facet of the added personnel and expense problems in any mandatory enactment.

The Trial-Type Hearing

The California legislature has specifically designated those agencies which are to conduct proceedings under the Act.[9] A hearing may be required when one of the designated agencies 1) revokes, suspends, limits or conditions a right, authority, license or privilege;[10] and 2) grants, issues or revokes a right, authority, license or privilege.[11] Stated more broadly, a hearing may be required upon refusal to grant a right or revocation of a right.

Whether an administrative proceeding has satisfied the guarantee of due process of law has been one of the most troublesome and slippery areas of administrative law. Professor McCormick says in his text on evidence: "One ventures the assertion the 'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof.'"[12] Paraphrased to apply to administrative law, it could be said that, "The requirement of the opportunity to be heard in an administrative agency action is one of the slipperiest areas of administrative proceedings, surpassed only by its first cousin, the admissibility of evidence in such proceedings."

Obviously, a full trial-type hearing should not be required at the local level for all changes in status of rights, authorities, licenses or

[9] CAL. GOV. CODE § 11501.
[10] CAL. GOV. CODE § 11503.
[11] CAL. GOV. CODE § 11504.
[12] MCCORMICK, EVIDENCE 639 (1959).

privileges, any more than it is required at the federal or state level. The difficult problem is determining when a full hearing, partial hearing, or no hearing at all is required. For instance, it is recognized by the courts that there is a difference between the type of hearing required for revocation of a license to practice medicine and of the right to run a pool hall. In the former it is almost universally required that there be a full trial-type hearing; in the latter there can be summary revocation.[13] Problems of due process and of the right to be heard exemplify the many problems that face the governing bodies who must distinguish, categorize and standardize requirements for hearings at the local level. For example, in California a board of supervisors, when acting as a county board of equalization to determine questions relating to the equalization of tax assessments,[14] is considered to be a quasi-judicial body.[15] The tax assessor, when valuing property for taxation, exercises judicial functions.[16] Should a full trial-type hearing be granted in these cases? The two most discussed cases with respect to state and local taxes and hearings are *Londoner v. Denver*[17] and *Bi-Metallic Investment Co. v. Colorado*.[18] In the *Londoner* case the Denver Board of Public Works assessed the plaintiff's lands for the cost of paving a street and gave him opportunity to file written complaints and objections, but not to be heard. The Supreme Court held this was not enough. *Bi-Metallic* was a suit by a real estate owner to enjoin state officers from increasing the valuation of all taxable property in Denver by forty per cent, without giving the plaintiff an opportunity to be heard. The Supreme Court unanimously held that a hearing was not necessary: "The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes . . . are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard."[19]

Professor Davis says: "The principle that distinguishes the Bi-Metallic case from the Londoner case is that a party in a tax or

[13] For an excellent short discussion of the licensing problem see GELLHORN & BYSE, ADMINISTRATIVE LAW CASES 759-67 (4th ed. 1960). For a detailed discussion of the requirement of the opportunity to be heard, see 1 DAVIS, ADMINISTRATIVE LAW § 7.01-.20 (1958).

[14] See Universal Consolidated Oil Co. v. Byram, 25 Cal. 2d 353, 356, 153 P.2d 746 (1944).

[15] Eastern-Columbia, Inc. v. Los Angeles County, 61 Cal. App. 2d 734, 143 P.2d 992 (1943).

[16] Younger v. Santa Cruz County, 68 Cal. 241, 9 Pac. 103 (1885).

[17] 210 U.S. 373 (1907).

[18] 239 U.S. 441 (1915).

[19] *Id.* at 445.

assessment case has a right to be heard when official action is based upon 'individual grounds' but not necessarily when official action is based upon general grounds, that is, when the facts are adjudicative but not when they are legislative."[20] Later Supreme Court cases tend to confirm this principle.

Should we include our local boards of equalization and our assessors in an administrative procedure act for local agencies? Can the counties afford it?

The Phonographic Reporter

The Administrative Procedure Act requires each hearing to be reported by a phonographic reporter.[21] This requirement is, of course, based on the fact that a person entitled to a quasi-judicial hearing is entitled to a record, and further, that the record be available for review purposes. Might not this added expense be prohibitive? And there is the practical problem of the availability of qualified reporters. There simply is not a sufficient number to be called upon. True, a record should be made if there is a full trial type hearing.[22] But should the local agencies make a complete record in all cases where the matter calls for but a speaking argument or merely a written argument?

Judicial Notice

What a boon to the lawyer if the courts could take judicial notice of local agencies' rules and regulations!

Federal courts are required to judicially notice federal administrative regulations appearing in the Federal Register.[23] In California it is provided that the courts, with respect to state departments and agencies, "shall take judicial notice of the contents of the certified copy of each regulation and of each order of repeal duly filed,"[24] and similarly of each regulation or notice of repeal printed in the California Administrative Code or California Administrative Register.[25] On the other hand, judicial notice is not taken of rules and regulations of local administrative bodies, nor until very recently of municipal ordinances. Even now judicial notice of local ordinances is

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[20] 1 DAVIS, ADMINISTRATIVE LAW § 7.04 (1958).

[21] CAL. GOV. CODE § 11512(d).

[22] See Carstens v. Pillsbury, 172 Cal. 572, 577, 158 Pac. 218 (1916); Nishkian v. Long Beach, 103 Cal. App. 2d 749, 752, 230 P.2d 156 (1951); Kwock Jan Fat v. White, 253 U.S. 454 (1920).

[23] Federal Register Act, 49 Stat. 502 (1935); 55 U.S.C. § 307 (1952).

[24] CAL. GOV. CODE § 11383.

[25] CAL. GOV. CODE § 11384.

generally limited to the area of the particular municipal court's jurisdiction.[26] The reason for the reluctance of the courts to take judicial notice of local ordinances and rules and regulations of local agencies is simply lack of adequate and easily accessible records. The reader has probably already been frustrated in an attempt to locate, if they exist at all, local administrative rules and regulations or local ordinances. If he by chance located the material, he probably became completely confounded by lack of an index or other method of locating a particular subject.

However, we should not be overly critical of local officials in this regard. It was not too long ago that prosecutions were conducted for violations of unpublished rules and regulations which were available only in the President's desk or some federal official's files.[27]

At the state level records are made accessible by statutory provisions creating the California Administrative Code and the California Administrative Register.[28] Counties, cities, and special districts, however, are woefully lacking in such provisions. Indeed, the second most

[26] People v. Cowles, 142 Cal. App. 2d Supp. 865, 867, 298 P.2d 732, 733 (1956); People v. Crittenden, 93 Cal. App. 2d Supp. 871, 877, 209 P.2d 161 (1949).

[27] In particular there had not been devised, prior to NRA, any required, authorized, or even standard method of publishing administrative rules or decisions of any sort. It is true that executive orders (and codes were to be issued as such) were filed with the Secretary of State and published every year with the Statutes at Large. But it was not uncommon for the White House to retain orders which it preferred to keep from public view. And the executive orders embodying the codes were not (in many instances) even at the White House but here and there in the desk drawers of NRA officials. Such was the case with the Petroleum Code, challenged in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). In that case the industry had used an unofficial copy published by the so-called Code Authority, a body set up under each code to assist NRA in administration. The Petroleum Code had been amended. When the brief came to be written it occurred to the brief writer to examine the originals (which were found after some difficulty). He discovered the sickening fact that by reason of a mistaken use of terms, the Code had been amended out of existence. "Section 4 is amended to read as follows" was followed by only the first paragraph of the Section. The second paragraph making violation of production quotas unlawful had been omitted. The President immediately supplied the missing provisions, thus making true the state of facts which had been assumed by all persons and all courts to have existed. Nevertheless the Supreme Court refused to treat the Code as properly before it. Those who heard and participated in the argument were struck by the almost gleeful eagerness with which the Court probed into the unsavory story (though it had previously been completely advised). A valuable consequence was the Federal Register Act, 49 Stat. 590 (1935), 44 U.S.C. §§ 301-314 (1949), which provides for publication of executive orders and rules and regulations in the daily Federal Register.

JAFFE & NATHANSON, ADMINISTRATIVE LAW CASES 61 (2d ed. 1961).

[28] CAL. GOV. CODE § 11380-427.

populous county in the state today has an up-to-date, though somewhat limited, administrative code only because of the efforts of a dedicated assistant county counsel and his equally dedicated secretary, working primarily on their own time.[29] This code is not, however, an administrative hearing procedure code, but prescribes general provisions respecting jurisdiction and internal housekeeping functions of county offices, boards and commissions. No survey to my knowledge has been made of the number of counties that have compiled such housekeeping material. Almost without doubt it is a minority, and this applies equally to local agency rules and regulations where they exist.

The doctrine of judicial notice should certainly be applied to local ordinances, rules and regulations. Referring to the mandatory requirement that courts take judicial notice of state agency rules and regulations, one eminent legal writer says: "It would seem that the same reasons of convenience which justify judicial notice of [state] administrative regulations call for judicial notice of [municipal] ordinances, subject to procedural safeguards similar to those governing notice of the law of foreign countries."[30] The suggestion is of considerable merit and is equally applicable to local administrative rules and regulations. However, would it not in the long run be desirable to study the feasibility of requiring proper codification, publication and availability of local ordinances, rules and regulations so that judicial notice could be taken of them in the same fashion as of state administrative rules and regulations?[31] Successful operation of the judicial notice doctrine requires uniform codification, publication and availability of these laws. This would be a major step forward in uniformity, orderliness and efficiency in state as well as local government in all of its branches, judicial, legislative and executive. And this is an area in which the legislature has power to act. The establishment of such a uniform procedure would solve one of the difficult problems in drafting and adopting a uniform administrative procedure act for local agencies.

Evidence

Do local administrative agencies know what is and what is not legal evidence in administrative quasi-judicial proceedings? Does the

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[29]Assistant County Counsel Robert G. Berrey drafted the present Administrative Code of San Diego County.

[30] WITKIN, CALIFORNIA EVIDENCE 62 (1958).

[31] For an excellent article on judicial notice and the need for it, see McCormick, *Judicial Notice*, 5 VAND. L. REV. 296 (1952).

school board of *X* school district know about evidence? Does the public health board of *X* city or county know about hearsay? One could go on ad infinitum with a series of questions framed as above with respect to local agencies. As a whole the answer would have to be a categorical "No."

"It is today almost hornbook law that the common-law rules of evidence are not, as such, binding upon administrative agencies, in the absence of statutory provisions that they are to control. . . ."[32]

Government Code section 11513(c) authorizes the use of hearsay evidence in proceedings under the Administrative Procedure Act as follows:

> The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purposes of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the same extent that they are now or hereafter may be recognized in civil actions and irrelevant and unduly repetitious evidence shall be excluded.

In its report to the Governor and legislature the Judicial Council gave its reasons for recommending the above-quoted section, which it indicated would in effect be a codification of then existing law.[33] Among reasons given were (1) to eliminate vagueness and (2) because evidentiary exclusionary rules, primarily devised to keep certain types of evidence from untrained lay juries, are not necessary when decision is made by experts in a particular field (the so-called expertise doctrine).

The general validity of this reasoning as to state agencies has been borne out by the operation of the Administrative Procedure Act over the past two decades. Let us apply the reasoning to the local agency. I would venture to say that most lawyers faced with administrative law evidence problems rely in large measure upon the decisions construing the Act as a guide to proper rulings and procedure, so any vagueness as to admissibility of evidence under the Act may at least be headed for reasonable clarity and standardization. However,

[32] Schwartz, *A Decade of Administrative Law 1942-1951—Evidence*, 51 MICH. L. REV. 775, 815-18 (1953).

[33] TENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 21 (1944).

has the second reason, "expertise," the same validity with respect to local agencies as it has to state agencies? Not only are state agencies in large measure composed of experts in their respective fields, but also they have the advantage of civil service staffs long trained in their fields of endeavor. Most important, with few exceptions they are bound by the provisions of the Administrative Procedure Act requiring a hearing officer trained in law and thoroughly competent to rule on the admissibility of evidence. Local boards on the other hand are generally composed of non-expert, civic-minded individuals, working without the benefit of trained staffs. The writer questions whether the administrative law doctrine of "expertise" applies to local agencies. It does not follow, however, that a standard rule on the admissibility of evidence in proceedings before local administrative agencies should not be adopted.

Two Hats

The theory of separation of functions is fairness. Duties must be separated so that there can be no incompatibility of purpose, no prosecution or agency oriented interests to prevent an objective decision. At the national level agencies having their own counsel have been separated from the prosecutor in order to prevent the prosecutor from having an ex parte influence upon final decisions.[34] In California the problem has been solved under the Administrative Procedure Act by the establishment of independent hearing officers. The attorney general (who is counsel for most of the agencies bound by the Act) has been removed from the extremely difficult, delicate, and often embarrassing position of furnishing the legal advisor to the board, as well as counsel to prosecute. No such separation of functions has taken place at the local level, nor will it take place for some years to come. For instance, every district attorney exercising civil law functions and every county counsel finds himself in a delicate position when civil service employees are to be disciplined or licenses revoked. Staffs are generally not adequate in numbers, and a complete divorce of advocate from prosecutor is virtually impossible to attain. In many offices where duties have become somewhat loosely sectionalized the regular advisor to the board or commission acts as the advisor to the board in the disciplinary proceeding, and an independent deputy from another section is assigned to prosecute. Some offices reverse this process. Because of the integrity of public lawyers in this state there has been remarkably little criticism of the situation. The small offices of one,

[34] GELLHORN & BYSE, ADMINISTRATIVE LAW CASES 1018-29, 1024 (4th ed. 1960).

two or slightly more deputies, however, are placed in an intolerable position under today's procedures.

Some Suggestions

How should this problem be approached? An administrative procedure system peculiarly adapted to the agencies of the State of California has operated successfully for almost two decades. It has been so generally accepted, although not completely undamned, that some local agencies voluntarily are using state hearing officers. The state administrative agency survey was initiated by a legislative direction to the Judicial Council to conduct a study and submit a report.[35] Piecemeal legislation was also part of its beginning; in 1941 the legislature enacted sections 720 to 724.4 of the then Political Code, providing for the publication by a Codification Board of administrative rules and regulations in a California Administrative Code.[36] The plan worked successfully. Planning for procedure of local administrative agencies is fraught with greater dangers and more diverse problems than those faced in the state study. The body that spawned the California Administrative Procedure Act did not, for instance, have to concern itself with other than state agencies. A commission, board, or council dealing with local administrative agencies will be confronted with counties, cities and counties, cities, and other local agencies. It will find that it must plan for fifty-eight boards of supervisors, innumerable city governing bodies, elected officials of fifty-eight counties and innumerable cities; it will collide with hundreds of department heads of various city and county departments, each with its own concern and interest as well as political power; it will be greeted by the state legislative representatives of each of these areas. There will also be difficult problems with respect to population, tax base, budgets, numberless variations in present procedure, vast differences in areas of jurisdiction of agencies, consolidated duties and agencies, charter counties, general law counties, home rule, the bench, and the bar. But given time these are not insurmountable obstacles. If they are, we are really in a decadent stage of democratic government.

First, it would appear that the legislature should set up a carefully selected representative body to study the problem and to report its conclusions and recommendations. Annual reports should be made, but a reasonable deadline for its conclusions should be set. This body, whatever it is to be called, should primarily consist of members of

[35] Cal. Stat. 1941, ch. 1190; Cal. Stat. 1943, ch. 991; DEERING'S GENERAL LAWS, 1944, Act 40; TENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA (1944).

[36] TENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA (1944).

the bench and bar, including perhaps several public lawyers who are not only members of the bar but also highly knowledgeable in this field. Other representatives on the body should come from the governing bodies of counties and cities. Political scientists and legal educators are a fertile source of thought and research in government, and should be considered as possible members. Ample funds should be appropriated for the study, sufficient powers delegated to it to conduct its investigation, and a skilled staff made available. To go into further details here would be fruitless because the legislature in its wisdom will, in any event, do as it thinks best.

Second, piecemeal legislation should be considered, such as a uniform act requiring codification, publication and availability of local ordinances, and local agency rules and regulations.

Third, there could be set forth in one of the codes a model administrative hearing procedure, perhaps with alternative provisions, which could be adopted by cities and counties by reference. The persuasive value of this suggestion is that the opportunity for cities and counties to adopt a convenient procedure by reference would tend to create uniformity in county and city administrative hearings and yet would not eliminate home rule.

Fourth, the above suggestions are but a beginning. If this short article does not result in other articles on local administrative agency procedure in California and in wide divergences of opinion then it has failed its purpose. The subject deserves the best minds to cogitate, contemplate, meditate, muse, reflect, write and act upon it. May they.