

California's Approach to the Improvement of Administrative Procedure

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THE last session of the California Legislature made provision for an investigation into the procedure of California's administrative boards and agencies. This was done by a general statute directing the Judicial Council of California to undertake a thorough examination of administrative procedure and the judicial review of administrative action in this state. The Council was then instructed to report back to the 1945 session of the Legislature with recommendations and suggestions for both legislative action and action by the various boards. The statute specifically referred to the investigations made elsewhere and asked that the findings of other groups be examined and adapted to the problems existing in this state.¹

In carrying out the task assigned to it by the Legislature, the Judicial Council entered a field new to it but one which was by no means virgin territory.² Activity in this direction was already under way in California, and the recent experience of other states and the federal government in this field was available. In addition, the Council had the background of a recently completed revision of procedure in the California appellate courts which furnished a pattern for the organization of this work.³ It is the purpose of this article to discuss briefly the technique used by the Council in carrying out this assign-

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¹ Cal. Stats. 1943, c. 991; DEERING'S GENERAL LAWS (1944), Act. 40.

² A prior delegation, in identical terms, had been made by the Legislature in 1941 but action thereon was postponed because no funds were provided for the technical staff necessary to carry out this assignment. See NINTH REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA (1943) 5. The 1941 Legislature also provided for the publication of all administrative rules and regulations and created a state agency, the Codification Board, to supervise this work. Cal. Stats. 1941, c. 628; CAL. POL. CODE, §§720-725.4. See also Cal. Stats. 1943, c. 1060; DEERING'S GENERAL LAWS (1944), Act 41.

³ In 1941 the Legislature enacted CAL. CODE CIV. PROC., §961 and CAL. PEN. CODE, §1247k which conferred upon the Judicial Council the power to provide for appellate procedure by rule. The Council's rule-making power was carried out with the assistance of a research staff under the direction of Mr. B. E. Witkin, draftsman of the new rules on appeal which became effective on July 1, 1943. See Witkin, *New California Rules on Appeal* (1944) 17 So. CALIF. L. REV. 79, 232.

ment and to compare the basic theory underlying the Council's proposals with the theories followed elsewhere.

I

It was the middle of 1943 before the statute committing this task to the Judicial Council became effective. A committee of the Council was appointed and a research staff selected.⁴ It was first necessary to make a general survey of the statutes under which California's numerous state agencies have been created over a period of some seventy years. Upon the basis of this investigation certain general categories of the state's administrative agencies became apparent. The agencies vary both in the nature of the task performed and in the extent of the power conferred. From a functional standpoint the agencies in this state seem to present all possible variations, from those whose sole duty is to assemble facts and report upon them to those which themselves have the power to render awards in favor of one private citizen and against another. In carrying out their duties the agencies have various combinations of power, including both the power to make rules and regulations establishing general standards of conduct and the power to make orders and determinations affecting particular matters and based upon evidence. From the organizational standpoint California's administrative agencies present a similarly complex problem. Large numbers of agencies are created and controlled by such local governmental units as the counties and chartered cities. Most frequently, the state agencies are created by the Legislature and are fully subject to its control. Some of them, however, are immune to legislative control in differing degrees because their delegation of power comes directly from the Constitution or from an initiative act concerning which the Legislature has only a limited power.⁵ Even where the Legislature apparently has full control over

⁴ The Judicial Council's Committee on the Administrative Agencies Survey consists of the chairman, Justice John T. Nourse, presiding justice of the District Court of Appeal, First District, Division One; Judge C. J. Goodell, judge of the Superior Court for the City and County of San Francisco; and Judge Maurice T. Dooling, Jr., judge of the Superior Court for the County of San Benito.

⁵ CAL. CONST., art. XX, §22 provides, in part: "The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this State . . . and shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals." *Ibid.*, art. XXIV, §2 provides, with respect to the State Personnel Board, that "the adoption

state agencies variations exist as to the kind of power which it can delegate, depending upon the applicability of the separation-of-powers clause of the California Constitution to the particular agency.⁶

This background is given because it has an important bearing upon the way in which the Council approached its assignment in the field of administrative procedure. The problems presented were so involved that a careful selection and treatment of them was required if specific recommendations were to be offered to the 1945 Legislature. In addition, various groups were active in this field and it was important that there be as little duplication and overlapping of effort as possible. Consequently a conference was called by the Chairman of the Judicial Council, Chief Justice Phil S. Gibson, in San Francisco in October 1943. Representatives of a number of state agencies, the Attorney General's office, the Codification Board, and the State Bar of California were present. A number of steps were agreed upon at this conference in order to eliminate duplication of effort. The Attor-

of rules and regulations, the creation and adjustment of classifications and grades, and dismissals, demotions, suspensions and other punitive action for or in the State civil service shall be and remain the duty of the board and a vote of a majority of the members of said board shall be required to make any action with respect thereto effective." Similarly, the Chiropractic Law, DEERING'S GEN. LAWS (1944), Act 4811, which contains no provision for amendment, is subject to article IV, section 1 of the Constitution prohibiting the Legislature from amending such a statute.

In situations such as the ones enumerated the Legislature's power is limited by constitutional provisions which might prevent it from applying certain of the proposals advanced by the Judicial Council for the improvement of administrative procedure.

⁶ With respect to the Railroad Commission and the Industrial Accident Commission the Legislature has plenary power, unlimited by any provision of the Constitution. CAL. CONST., art. XII, §23; art. XX, §21. Thus, full judicial power can be conferred upon these agencies and finality given to their determinations. *Live Oak W. U. Assn. v. Railroad Comm.* (1923) 192 Cal. 132, 219 Pac. 65; *Western Metal Supply Co. v. Pillsbury* (1916) 172 Cal. 407, 156 Pac. 491. At the opposite end of the scale, no part of the judicial power can be conferred upon ordinary state agencies because of the separation-of-powers clause. Thus, the Legislature cannot attribute any finality to the acts of most state agencies. *Laisne v. Cal. St. Bd. of Optometry* (1942) 19 Cal. (2d) 831, 123 P. (2d) 457.

Several agencies occupy an indeterminate position somewhere between these extremes. The constitutional delegation of power to the State Board of Equalization with respect to liquor licenses has already been mentioned, *supra* note 5. More finally might be accorded under this broad grant of discretionary power by the Constitution than could be given to a delegation by the Legislature. Similarly, CAL. CONST., art. IV, §25a ratifies and confirms the provisions of the act creating the California Horse Racing Board, one of which is: "The action of the board in revoking or suspending a license issued under this chapter is final, except that the propriety of such action is subject to review, upon questions of law only, by the superior court. . . ." CAL. BUS. & PROF. CODE, §19463; Cal. Stats. 1933, c. 769, §9.

ney General's office, which had undertaken to revise the rules of procedure of certain state agencies, concluded that this work should await the completion of the Judicial Council's recommendations to the Legislature. The Codification Board, which is charged with the responsibility of publishing the rules and regulations of administrative boards in this state,⁷ determined to arrange its publishing schedule so that procedural rules would not be printed which might be superseded by legislation proposed by the Judicial Council. And the State Bar of California, whose committee on administrative agencies and tribunals had been working in the field of administrative procedure for several years, decided to devote its efforts to assisting the Council in the formulation of proposals for submission to the Legislature.

The next problem was the selection by the Committee of the Judicial Council of the precise kind of administrative action to which it should devote its attention during the year and three months available prior to the meeting of the 1945 Legislature. It was important that a cohesive group of administrative agencies be selected in which the Council could hope to complete its work prior to that time.⁸ From the general survey of state agencies previously made it was apparent that the kind of function which has most often been delegated to administrative agencies by the Legislature is the so-called licensing function, which involves the power to regulate and discipline certain activities or occupations. In addition to the fact that they furnish the largest single category of state administrative agencies, there was also the fact that the decisions of such agencies have been challenged frequently before the California courts in recent years. The Committee determined, therefore, that the numerous statutes under which the state's licensing agencies had been created and the rules which they had adopted to govern their own procedure should be carefully analyzed. This was done and public hearings were then scheduled at

⁷ *Supra* note 2.

⁸ This selection involved a consideration of both the function performed and the organizational structure of the agency. With respect to the former, it was thought that the nature of the Judicial Council was such that its most useful recommendations could be made in the field of formal administrative adjudication. This eliminated, for the present at least, the quasi-legislative regulatory agencies and informal administrative proceedings. With respect to the structure of the agency, it was necessary to omit from the present investigation agencies created under special constitutional provisions not applicable to the general group of state agencies, e.g., the Railroad Commission and the Industrial Accident Commission.

which representatives of the different licensing agencies were requested to appear before the Committee. A total of twenty-one state agencies appeared at these hearings, which were conducted during the months of January, February, March and April 1944.⁹ A stenographic transcript of each hearing was prepared and thereafter the material was reviewed by the staff and assembled for the use of the Committee. These hearings were attended by representatives of the Attorney General's staff, the State Bar of California and the Department of Professional and Vocational Standards, as well as by representatives of each of the agencies. A detailed list of questions was asked covering all phases of administrative licensing and disciplining, and the answers furnished a valuable picture of the present-day operation of many of our state licensing agencies.

A sufficient cross-section of existing procedure had been secured by April, in the Committee's judgment, so that tentative conclusions could be framed. The staff was then instructed to examine and summarize the case law in California, the results of similar investigations in other states and law review comment relating to the problems involved. This work was completed during the months of May, June and July. During this period, also, staff members attended various hearings throughout the state for the purpose of securing first-hand information concerning the conduct of administrative hearings under existing practice. The Committee determined about this time that an "administrative procedure act" should be drafted for submission to the Legislature. This act would set forth the minimum requirements of fair play which all licensing agencies would be required to observe. This decision placed an additional limitation upon the Committee's work. Many administrative functions which seemingly come within the licensing category actually involve nothing more than a permit for tax purposes or a mere registration or recordation of individuals engaged in a particular business rather than continuous, disciplinary supervision. Such "licensing" proceedings and the infor-

⁹ The following agencies appeared: Board of Medical Examiners, Board of Dental Examiners, Board of Pharmacy, Board of Nurse Examiners, Board of Chiropractic Examiners, Board of Osteopathic Examiners, Board of Optometry, Board of Funeral Directors and Embalmers, Contractors State License Board, Board of Barber Examiners, Board of Cosmetology, Board of Registration for Civil Engineers, Board of Accountancy, Board of Architectural Examiners, Board of Examiners in Veterinary Medicine, Structural Pest Control Board, Yacht and Ship Brokers Commission, Bureau of Furniture and Bedding Inspection, Commissioner of Corporations, Insurance Commissioner, Real Estate Commissioner.

mal, investigatory proceedings which are part of the process of issuing licenses could not be covered by the same provisions, the Committee concluded, as the formal proceedings in which a licensing agency exercises its discretionary power to discipline the members of a given profession or vocation. These informal proceedings the Committee did not attempt to cover by its draft.

During the summer months the Committee met frequently, on the average of a day or two a week, for the purpose of analyzing and discussing particular problems involved in the administrative procedure statute. In addition to drafting an administrative procedure act, the Committee framed certain other legislative proposals which are included in the Council's report. As each portion of the draft was completed, it was sent to the members of the Judicial Council. When the proposals were completed a meeting of the full Council was called for September 14 and 15, 1944. At this meeting the Council debated the proposals which had been previously circulated and agreed upon certain amendments and omissions. As modified, the proposals were tentatively approved for inclusion in the Judicial Council's report to the 1945 Legislature. But the Council determined to submit these proposals to all interested groups throughout the state prior to a final preparation of the Council's report.

By October 15 over 400 copies of the proposals and 200 copies of a supporting appendix¹⁰ had been distributed to the state agencies, state and local bar associations and other interested groups. This material was sent to all state agencies whose functions might come within the purview of the act, including those not yet consulted as well as those which had already appeared before the Committee. It was sent to the office of the Attorney General, to the Codification Board and to the office of the Legislative Counsel. Thereafter conferences were scheduled by the Committee with each of the state agencies which had not previously appeared before the Committee whose functions seemed to be within the field sought to be covered by the

¹⁰ In the appendix an attempt was made to bring together, under appropriate topic headings, the information on existing practices which the Committee had assembled, the case law and statutory provisions in California, a summary of recommendations and suggestions made as a result of similar studies elsewhere and a summary of periodical and textbook comment upon the problems involved. Though this was compiled primarily for the use of the Council, it furnishes a useful reference work upon problems of administrative procedure.

act.¹¹ Numerous comments and suggestions were received as a result of this intensive examination of the Council's tentative proposals, particularly from committees of the State Bar of California and of local bar associations. In the light of public discussion and suggestion, the Council revised its proposals at a meeting held early in December 1944. Thereafter the report was submitted to the Legislature and to the Governor in accordance with the terms of the statute authorizing the work.

II

The actual method by which the proposed legislation for improving California's administrative procedure was drafted has been described in some detail. It is believed to be a sound development in the legislative process. It is a technique which has been used widely in other states,¹² particularly with respect to the complicated problems of revising administrative procedure.¹³ It would extend this article unduly to compare the conclusions reached by the Judicial Council's report in detail with those which have been reached by other similar investigations, and in fact the Council's report to the Legislature furnishes the best source for such a detailed comparison. But it might prove useful to examine briefly certain differences be-

¹¹The following agencies appeared at the conferences which were scheduled after the release of the tentative draft of the Council's proposals: Department of Social Welfare, State Mineralogist, Department of Education, Department of Motor Vehicles, Athletic Commission, Labor Commissioner, Fish and Game Commission, State Personnel Board, State Board of Equalization, Department of Agriculture, Department of Public Health, State Fire Marshal, Collection Agency License Board, California Horse Racing Board.

¹²In many states the judicial council has been utilized for the purpose of preparing the groundwork which underlies legislation involving the administration of justice. See HANDBOOK, NATIONAL CONFERENCE OF JUDICIAL COUNCILS (1942) 178-187. In New York a separate agency has been created, the Law Revision Commission, to which the task of preparing studies and recommendations for legislation in complicated fields has been delegated. See Shientag, *A Ministry of Justice in Action: The Work of the New York State Law Revision Commission* (1937) 22 CORN. L. Q. 183; Stone and Pettee, *Revision of Private Law* (1940) 54 HARV. L. REV. 221.

¹³A partial list of the jurisdictions and groups by which such work has been done follows: United States, Attorney General's Committee on Administrative Procedure, Conference of Commissioners on Uniform State Laws; New York, report on administrative adjudication by Commissioner Robert M. Benjamin; Ohio, Administrative Law Commission; Illinois, Administrative Practice and Review Commission; Minnesota, Revisor of Statutes; North Dakota, Code Revision Commission. In addition, of course, the American Bar Association and the various state bar associations have been actively engaged in the preparation of legislative proposals in this field.

tween the basic theory underlying the Judicial Council's proposals and the theories expressed in the studies made elsewhere. For this purpose the report of the Attorney General's Committee, the Benjamin report in New York, the report of the Ohio Administrative Law Commission and the statute proposed by the Conference of Commissioners on Uniform State Laws will be considered.

After a two-year investigation the Attorney General's Committee on Administrative Procedure rendered its report early in 1941. This report contained elaborate recommendations and a detailed analysis of the operation of federal administrative agencies. It was accompanied by two bills, later introduced in Congress, which expressed the conclusions of the majority and minority of the committee. The majority bill limited itself to the establishment of an Office of Federal Administrative Procedure, certain general requirements as to administrative rule-making, provision for hearing commissioners to aid in administrative adjudication and provision for declaratory administrative rulings.¹⁴ The minority bill, while approving the suggestions incorporated in the majority bill, went further and attempted to prescribe a fairly detailed "code of administrative procedure" to be applied to the federal agencies.¹⁵ The majority of the committee suggested that the minority's theory of a "code" was unacceptable because of the dilemma presented: either the "code" would be so rigid that all agencies could not comply with it if their proper functions were to be performed, or the "code" would be framed with such flexibility that the supposed "standards of fair procedure" would be illusory and susceptible of varying interpretations by different administrative officials.

This conflict in theory has not been resolved. In 1942 the Benjamin Report on Administrative Adjudication in New York was published, concluding a three-year study in that state. It was the conclusion of that report that it was impossible to draft legislative standards of fair procedure which would have any general applicability,¹⁶ even in the limited field of administrative adjudication as contrasted with the general field of administrative procedure attempted to be covered by the "code" of the minority of the Attorney General's

¹⁴ REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941) 191-202.

¹⁵ *Ibid.* at 203-247. Committee hearings were held but neither bill was enacted.

¹⁶ BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 24-36.

Committee. It was the conclusion of both Benjamin and the majority of the Attorney General's Committee that improvement in administrative procedure was more apt to result from the use of their studies as a manual than from the imposition of statutory standards of procedure.¹⁷

More recent investigations have tended to follow the minority of the Attorney General's Committee. A detailed procedural statute was enacted as a result of the investigations of the Ohio Administrative Law Commission. The Conference of Commissioners on Uniform State Laws has approved a model act which sets up fairly elaborate legislative requirements for administrative procedure. In addition, a bill prepared by a committee of the American Bar Association is now pending in Congress which is a logical successor to the bill proposed by the minority of the Attorney General's Committee.¹⁸ All of these proposals are based upon the theory that it is possible for the legislative branch of government to devise workable standards of administrative procedure, but a difference in theory is to be observed here also. The American Bar Association bill and the statute proposed by the Conference of Commissioners on Uniform State Laws attempt to cover all phases of administrative action and all types of administrative agencies. The Ohio statute is specifically limited to the field of licensing agencies but within that field it covers all phases of the administrative process, whether rule-making or adjudication is involved.¹⁹

The proposals offered by the Judicial Council of California do not follow the gradual education theory of the majority of the Attorney General's committee and the Benjamin report. Nor are they based upon the proposition that a single general statute can be drafted by the Legislature under which all types of administrative action and all administrative agencies can be covered. The Council's proposed statute expresses the conviction that legislative standards of fair procedure can be set up, but that they must be devised with specific reference to particular problems and functions. The administrative procedure statute proposed by the Judicial Council is intended to cover the formal, adjudicatory proceedings of state licensing and

¹⁷ *Op. cit. supra* note 14, at 191; *op. cit. supra* note 16, at 11.

¹⁸ The American Bar Association proposal is now pending in Congress as the McCarran-Sumners bill (H. R. 5081, SEN. 2030). A similarly detailed proposal was advanced by the House Select Committee to Investigate Executive Agencies. (H. R. 5237.)

¹⁹ REPORT OF THE OHIO ADMINISTRATIVE LAW COMMISSION (1942) 14-28.

disciplining agencies and provides definite legislative requirements for the kind of proceeding involved. It is a specific prescription for a specific ailment in the body politic. It is true, of course, that the underlying principles of the Council's proposals can be adapted to the action of any administrative agency. That adaptation, however, must be founded upon a careful examination and analysis of the administrative structure rather than upon *a priori* conclusions. If the California Legislature pursues the policy which it has inaugurated, a detailed "code of administrative procedure" may result. But it will be a code framed item by item and with specific reference to each kind of administrative problem. It is the Council's theory, in other words, that there is no easy legislative answer to the problems involved but that any legislative solution must be founded upon a kind of laboratory analysis and recommendation. The Council's proposals, therefore, are more modest in scope than are certain of the statutes proposed elsewhere, but they furnish the Legislature with the groundwork for far more detailed standards of fair administrative procedure than have been offered in other states.

These differences in theory should not obscure the obligation which the Council's work owes to similar studies made in other jurisdictions, though the ideas have been materially altered in adapting them to the needs of this state. For example, both the report of the Attorney General's Committee and the Benjamin Report emphasized the need for creating a permanent agency in state government which could exert a continuous pressure in the direction of improving administrative procedure. The former report contemplated that such an agency would also supervise the efforts of "hearing commissioners" who were to be trained and qualified persons used in the process of administrative adjudication. Such a provision for continuous improvement in California's administrative system has been incorporated in the Council's proposals, and the agency entrusted with that responsibility has also been given supervision over a panel of hearing officers whose services will be required in the process of administrative adjudication if the Council's proposals are adopted.

The State of California, acting through its Legislature, has undertaken the improvement of administrative procedure. In this article an attempt has been made to describe the approach which has been adopted in the solution of this problem. It is an approach which involves legislation, and the Legislature has wisely provided for an

intensive examination of the practical considerations upon which any legislation must depend. The duty of making this investigation was assigned to the Judicial Council, and in so far as the Council's proposals can be said to represent California's approach to the improvement of administrative procedure, it is an approach based upon the premise that any workable solution requires careful and precise legislative action, action which concentrates upon limited objectives and proceeds one step at a time.