

RESOLUTION 11-12-2003

DIGEST

Administrative Proceedings: Dispositive Motions

Amends Government Code section 11506 to provide for certain pre-hearing motions in administrative hearings.

RESOLUTION COMMITTEE RECOMMENDATION

DISAPPROVE

History:

None known.

Reasons:

This resolution amends Government Code section 11506 to provide for certain pre-hearing motions in administrative hearings. This resolution should be disapproved because it might improperly inject a summary-judgment-like motion into the administrative hearing process and so deprive parties of a hearing on the merits.

The administrative process is not the same as the judicial process. The Administrative Procedures Act (“APA”) (Gov. Code, § 11400 et seq.) governs the two general types of administrative proceedings—informal and formal. Agencies adopt some, or all, of either set of procedures for its own proceedings. This resolution affects only the formal procedures, set forth at sections 11500 through 11529. These formal procedures have been adopted by such agencies as the Air Resources Board and the Department of Alcohol and Beverage Control. Neither the formal, nor the informal, APA procedures govern State Bar hearings. (Bus. & Prof. Code, § 6001; see *In re Rose* (2000) 22 Cal.4th 430, 439.) Under the formal procedures, within 15 days after service of the accusation, the respondent may submit a “notice of defense” that, among other things, the accusation does not state acts or omissions on which an agency may proceed or that the accusation is so uncertain the respondent cannot form a defense. (Gov. Code, § 11506, subs. (a)(2), (a)(3).) Theoretically a hearing officer could treat this as the equivalent to a demurrer or motion to strike and, since those motions address only questions of law, rule prior to the hearing. This would encourage agencies to draft more focused accusations, aid citizens in their dealings with the agencies’ enforcement arms and generally help administrative courts control their dockets. However, there is presently no clear authority allowing a hearing officer to treat a “notice of defense” in this manner.

In seeking to codify such authority, however, this resolution goes too far. It invites the administrative hearing officer to base his or her decision “on the evidentiary records” and dismiss “for fail[ure] to present a triable issue of fact.” Instead of creating a right to demurrer or motion to strike equivalents, this resolution would create a right to a summary judgment equivalent—a motion that is decided on the facts. This is problematic because under the APA due process does not guarantee the right to discovery. (*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267.) The scope of pre-hearing discovery in administrative actions is governed entirely by statute and the individual agency’s discretion. (*Cimarusti v. Superior Court* (2000) 79 Cal.App.4th 799, 809; California Administrative Hearing Practice (Cont. Ed. Bar) 2d ed., § 1.70). Thus, in some agency actions neither side will learn the other’s facts until the day of the hearing. Though section 11506 gives only respondents the right to bring such motions, without access to facts sufficient to raise triable issues or to establish “lack of facts,” both sides might lose the right to a full and fair hearing. Moreover, even when a particular agency does allow discovery, because section 11506 requires such summary-judgment-like motions be filed not less than 15 days after the accusation is served, neither side will have sufficient time to fully gather facts and brief the issues. Again, both sides might lose the right to a full and fair

hearing.

SECTION/COMMITTEE REPORT

OFFICE OF THE CHIEF TRIAL COUNSEL, STATE BAR

Recommend: **DISAPPROVE**

Reasons:

The Conference is considering a proposal which would allow motions to dismiss in administrative cases. This proposal would not directly apply to State Bar Court cases, but would apply to all other licensing cases. Although it would not directly apply to attorney disciplinary cases, we are concerned the legislation would establish a precedent which would later be applied to State Bar matters.

We agree that licensees should be permitted to seek dismissals on the ground that the charges fail to state a cause of action. However, we oppose this proposal insofar as it would establish a summary judgment procedure. In our experience, such motions would rarely be successful and the benefits of having such a procedure would be far outweighed by the expenditure of resources that would be necessary to respond to countless paper-intensive motions.

If such a procedure were established, we would expect these motions would become commonplace. Defense counsel would file summary judgment motions as a matter of due diligence (with no real expectation of winning) or to obtain cheap discovery of the agency's case. The licensing agency would need to respond by filing declarations from the complaining parties, thus placing additional burdens on the agency and the victims of the licensee's misconduct. The procedure would also place additional burdens on the administrative law courts.

The benefits resulting from such a procedure would be minimal because very few cases would qualify for summary judgment. In the State Bar context, very few cases are dismissed (perhaps two or three per year-Statewide). With few or possibly no exceptions, these cases involve disputed factual issues which could not have been resolved without a trial. Thus, for purposes of State Bar proceedings, a summary judgment procedure would result in very few dismissals or perhaps no dismissals, despite a large outlay of resources. We believe that the same result would obtain for other types of licensing proceedings.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Government Code section 11506 to read as follows:

- 1 §11506
- 2 (a) Within 15 days after service of the accusation the respondent may file with the agency a
- 3 notice of defense in which the respondent may:
- 4 (1) Request a hearing.
- 5 (2) Object to the accusation upon the ground that it does not state acts or omissions upon
- 6 which the agency may proceed.
- 7 (3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that
- 8 the respondent cannot identify the transaction or prepare a defense.
- 9 (4) Admit the accusation in whole or in part.
- 10 (5) Present new matter by way of defense.

11 (6) Object to the accusation upon the ground that, under the circumstances, compliance with
12 the requirements of a regulation would result in a material violation of another regulation enacted by
13 another department affecting substantive rights.

14 (b) Within the time specified respondent may file one or more notices of defense upon any or
15 all of these grounds but all of these notices shall be filed within that period unless the agency in its
16 discretion authorizes the filing of a later notice.

17 (c) The respondent shall be entitled to a hearing on the merits if the respondent files a notice
18 of defense, and the notice shall be deemed a specific denial of all parts of the accusation not
19 expressly admitted. Failure to file a notice of defense shall constitute a waiver of respondent's right
20 to a hearing, but the agency in its discretion may nevertheless grant a hearing. Unless objection is
21 taken as provided in paragraph (3) of the subdivision (a), all objections to the form of the accusation
22 shall be deemed waived.

23 (d) The notice of defense shall be in writing signed by or on behalf of the respondent and
24 shall state the respondent's mailing address. It need not be verified or follow any particular form.

25 (e) Respondent may bring a motion to dismiss or strike some or all of the allegations or
26 causes set forth in the accusation based on any or all of the objections or affirmative defenses raised
27 in the notice of defense, including lack of jurisdiction, statute of limitations, failure to allege
28 sufficient facts upon which discipline may be based and indefiniteness and uncertainty of the
29 allegations in the accusation. In ruling on such motion, the administrative law judge may deny or
30 grant the motion in whole or in part, allow the agency reasonable leave to amend or it may determine
31 on the evidentiary record presented by motion and opposition, in light of the governing standard of
32 proof for the agency, that dismissal of some or all of the causes for discipline alleged in the
33 accusation fail to present a triable issue of fact and should thus be summarily dismissed. A proposed
34 decision by the administrative law judge, as described in section 11517 of this Code, may be issued
35 at the time of the hearing on the motion if dispositive of the accusation. In those cases where
36 contested issues remain to be determined, those allegations or causes ruled dismissed on motion shall
37 be deemed established at the hearing on the remaining contested issues, and shall be included as
38 findings and conclusions of law in the proposed decision which the administrative law judge issues
39 at the conclusion of the hearing on the remaining contested issues pursuant to section 11517 of this
40 Code.

41 ~~(e)~~(f) As used in this section, "file," "files," "filed," or "filing" means "delivered or mailed"
42 to the agency as provided in Section 11505.

(Proposed new language underlined; language to be deleted stricken.)

PROPOSER: Los Angeles County Bar Association

STATEMENT OF REASONS

Existing Law: Presently there is no clear authority for disposition of clearly meritless allegation or causes presented on accusation.

This Resolution: Provides the administrative law judges the authority to early dispose of matters where the disposition early on is a foregone conclusion. While perhaps introducing more law and motion than ordinarily encountered in these proceedings, on balance these motions will clear the docket of matters that should not be proceeding to hearing, to the cost and energy saving of all involved, and will discourage the bringing of highly questionable accusations that bog down the system as every case must go the distance to reach a disposition.

The Problem: The policy of most of the administrative law judges of the Office of Administrative Hearings is to deal with pleadings and claims, which either do not state a clear cause for discipline, or due

to compelling evidence which cannot be reasonably ignored cannot credibly meet the agency's burden of establishing a basis for discipline based on "clear and convincing evidence to a reasonable certainty" (that is, evidence on the point which would "command the unhesitating assent of all reasonable persons"), in his or her proposed decision, issued after a full hearing on the merits of the entire case. Thus, even where the administrative law judge, sitting as trier of fact and law, has come to the early conclusion that the accusation as a matter of law lacks the basis or uncontradicted evidence to support discipline, the judge will still go through the motions of putting both the complaining agency and respondent licensee through a complete hearing before making the findings and ruling in a proposed decision.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

This resolution will introduce more law and motion than is ordinarily appropriate in administrative proceedings. Furthermore, by allowing administrative law judges broad powers of dismissal before any discovery occurs, it could discourage the bringing of meritorious accusations in cases where information is concealed and substantial discovery may be necessary to prove the accusation.