

RESOLUTION 5-03-04

DIGEST

Administrative Procedures Act: Dispositive Motions in Administrative Hearings
Amends Government Code section 11506 to allow motions to dismiss and/or strike in administrative proceedings.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

Identical to Resolution 11-12-03, which was disapproved.

Reasons:

This resolution amends Government Code section 11506 to allow motions to dismiss and/or strike in administrative proceedings. This resolution should be disapproved because it risks depriving parties of a full and fair hearing on the merits and could result in abuse of the administrative process.

Under the administrative procedures at issue, the respondent may submit a "notice of defense" in which the respondent may object to the accusation on various grounds. (Gov. Code §11506(a)(2), (a)(3).) Theoretically, a hearing officer could treat such objections as the equivalent of a demurrer or motion to strike and, because such motions address only questions of law, rule prior to the hearing. However, no clear authority allowing a hearing officer to treat a "notice of defense" in this manner presently exists.

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 record" and dismiss the accusation for "fail[ure] to present a triable issue of fact." Thus, instead of merely creating a demurrer or motion to strike equivalent, this resolution would create a motion for summary adjudication/judgment equivalent, that is, a pre-hearing ruling on the merits. This is problematic because parties to the administrative process are not guaranteed the right to pre-hearing discovery. (*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 302.) Without full and/or timely access to facts sufficient to raise triable issues or to establish lack of such facts, both sides might lose the right to a full and fair hearing.

Also, given the limited discovery often available in administrative proceedings, it is conceivable that defense counsel would routinely file such pre-hearing motions as a matter of due diligence and/or to obtain pre-hearing discovery of the agency's case, even in the absence of any reasonable expectation of prevailing on the motion. This would result in abuse of the process and a significant increase in the expenditure of resources by respondents, agencies, and the administrative law courts.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates recommends that legislation be sponsored to amend California Government Code section 11506, part of the Administrative Procedures Act, to read as follows:

1 §11506

2 (a) Within 15 days after service of the accusation the respondent may file with the
3 agency a 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
6 upon which the agency may proceed.

7 (3) Object to the form of the accusation on the ground that it is so indefinite or
8 uncertain that 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,
12 compliance with the requirements of a regulation would result in a material violation of
13 another regulation enacted by another department affecting substantive rights.

14 (b) Within the time specified respondent may file one or more notices of defense
15 upon any or all of these grounds but all of these notices shall be filed within that period
16 unless the agency in its 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
18 a notice of defense, and the notice shall be deemed a specific denial of all parts of the
19 accusation not expressly admitted. Failure to file a notice of defense shall constitute a
20 waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless
21 grant a hearing. Unless objection is taken as provided in paragraph (3) of subdivision (a),
22 all objections to the form of the accusation shall be deemed waived.

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

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

42 remaining contested issues pursuant to section 11517 of this Code.
43 ~~(e)~~(f) As used in this section, “file,” “files,” “filed” or “filing” means “delivered or
44 mailed” to the agency as provided in Section 11505.

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

PROPONENT: 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: Will provide 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 proposed resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Joel Bruce Douglas, Bonne, Bridges, Mueller, O’Keefe & Nichols, P.C., 3699 Wilshire Boulevard, Tenth Floor, Los Angeles CA 90010, 213738-5834, fax 213/738-5888, jdouglas@bonnebridges.com

RESPONSIBLE FLOOR DELEGATE: Joel Bruce Douglas

COUNTERARGUMENT

SANTA CLARA COUNTY BAR ASSOCIATION

This resolution is ill advised. Administrative procedures are intended to be informal enough for claimants to represent themselves. Motion practice is an inappropriately arcane and legalistic procedure to insert into administrative claims.

Many agencies have procedures in place to weed out meritless claims, without a complex motion procedure. Perhaps a more appropriate step would be to amend the specific agency's procedures that have irritated proponent rather than burdening all agencies with an unwieldy policy in the Administrative Act.

For these reasons, Santa Clara County Bar Association opposes Resolution 5-03-04.