

Appendix A

History of Administrative Adjudication

Introduction Adjudicate means to make an official decision resolving a dispute. Administrative adjudication is the process in which an administrative agency hears the evidence in a case and decides on a matter, avoiding the use of the cumbersome formal legal system.

Administrative Agencies within Our Legal System

Administrative agencies within our legal system Perhaps the most significant legal trend of the last century has been the rise of powerful and expansive administrative agencies. As a result, the average person is more directly and frequently affected by the administrative process than by the judicial process. Many citizens go through life without ever being a party to a lawsuit, but the administrative process affects nearly every person daily.

What the administrative process protects against The pervasive effects of administrative agencies can quickly be appreciated by considering some examples of what the administrative process protects against: air and water pollution; false advertising; unreasonableness in the rates, schedules, and services of airlines, railroads, and buses; excessive prices for electricity, gas, telephone, and other utilities; unwholesome meat and poultry or other deceptive practices; adulteration of food and drugs; inadequate safety in appliances; unfair labor practices; uncompensated injuries relating to employment; subminimum wages; and physically unsafe means of public transportation, bridges, and elevators.

Our daily involvement with administrative agencies The preceding list, containing only a few of the numerous examples, demonstrates the exceedingly far-reaching involvement of administrative agencies in our daily lives. California has more than 100 State agencies and municipal bodies, each playing its part in the administrative process.

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History of Administrative Adjudication, Continued

Development of Due Process

Concept	The concepts embodied in the phrase “due process of law” are not new. As early as 1215 they were clearly expressed in the Magna Carta (Latin for the ‘Great Charter’), a document signed by King John of England guaranteeing he would not execute or jail his subjects, nor seize their property unless done according to the “law of the land.” In time, this concept grew to be called “due process” and became one of the cornerstones of American law.
Procedural due process	As a result of the phenomenal growth of administrative agencies, several dramatic developments in constitutional law have occurred, particularly in the area of “procedural due process.” Although much has been written concerning procedural due process, the term is often used with little understanding of its origin and tremendous impact upon the activities of governmental agencies.
“Due process of law” today	Due process of law is embodied in the language of the Fifth and Fourteenth Amendments of the United States (U.S.) Constitution, which provide that neither the federal government nor the states shall “deprive any person of life, liberty, or property, without due process of law.” In its most elementary sense, due process means an orderly proceeding adapted to the nature of the case, in which the individual receives adequate notice of a proposed governmental action and has the opportunity to be heard and defend their conduct. In essence, due process is fundamental fairness.
Court’s primary focus	<p>Initially, the primary focus of the court in the area of due process related to judicial proceedings. But certain U.S. Supreme Court decisions, such as <i>Goldberg v. Kelley</i> (1970), <i>Morrissey v. Brewer</i> (1972), and <i>Wolff v. McDonnell</i> (1974), established that due process is in no way limited to judicial proceedings, but extends to every case in which an individual may be deprived of life, liberty, or property, whether the proceeding is judicial or administrative. The due process clause has as its fundamental goal the protection of citizens from arbitrary governmental interference with their guaranteed constitutional rights.</p> <p>Prior to 1970, the U.S. Supreme Court was reluctant to recognize due process protections unless a case involved the deprivation of a “right.” If the</p>

Continued on next page

History of Administrative Adjudication, Continued

Court's primary focus,
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deprivation consisted of what the Court termed a “privilege,” due process protections were not to be afforded.

***Morrissey v. Brewer* case (1972)**

Morrissey v. Brewer was a dramatic rejection of this distinction, holding that due process applies whenever an individual is being subjected to a “grievous loss.” In that case, the U.S. Supreme Court concluded the loss of conditional liberty enjoyed by a parolee was a grievous loss, therefore, the parolee was entitled to due process before being deprived of this conditional liberty.

What Process is Due?

What process is due?

Due process is often said to be a flexible concept. Its exact boundaries cannot be defined and its content varies according to the specific factual contexts in which it is considered. Thus, when any governmental agency makes a determination affecting the legal rights of an individual, the specific factual context is examined in order to determine precisely what due process protections will apply.

Several factors must be weighed in order to determine whether the U.S. Constitution requires that a particular procedural protection be applied in a given proceeding, including the nature of the protection, the character of the proceeding, the interests of the parties, and the burden of implementing the procedural protection in that proceeding.

Within the framework of due process, each administrative agency in California must adopt specific procedures which are in accord with the statutory provision governing that agency.

Role of the Hearing Officer in a Disciplinary Hearing

Introduction

Administrative hearings were created to relieve the courts of the burden of adjudicating thousands of actions, disputes, and other proceedings, and in many respects, have become an extension of our American judicial system. The administrative Hearing Officer occupies a primary position in this process and shoulders substantial responsibility.

Continued on next page

History of Administrative Adjudication, Continued

Hearing Officer's responsibilities

Although not occupying the judge's chair in the traditional courtroom setting, the Hearing Officer serves similarly to a judge. Resolving conflicts and dispensing decisions, the Hearing Officer's function is often indistinguishable from that of their judicial counterpart. These individuals are the keystone of the administrative law system, rendering judgments and decisions affecting the rights and obligations of everyone.

In many instances, Hearing Officers act as both judge and jury by determining the relevant facts in a particular case and rendering a decision based on the appropriate laws, rules, and regulations. Hearing Officers should make clear to the parties at the beginning of the hearing that they may ask questions to make sure they have the information they need to make a decision. If the Respondent is not represented by legal counsel, there may be a greater need for the Hearing Officer to clarify and develop the issues to be decided, identify or admit evidence, clarify the Respondent's own questions and witnesses' responses to them, and elicit material facts. At all times, the Hearing Officer should make sure that their language, tone, and manner remain neutral.

U.S. Supreme Court opinion on administrative adjudication

Hearing Officers should heed the guidance of the U.S. Supreme Court when it noted that administrative adjudication (the Hearing process) should be simple, flexible, and adaptable to a variety of problems. These guidelines should be adhered to, as hearings are conducted within the appropriate standards of due process of law. Not only the Hearing Officer's attitude and conduct, but the procedures and the entire hearing process should make the persons involved feel that they are heard and treated fairly.

Who can and should be the Hearing Officer?

The Hearing Officer can be anyone the Commissioner feels is qualified by training or experience to act in the capacity of a Hearing Officer, has no conflicts of interests with either party in the matter, and can be fair and impartial. The Hearing Officer should be someone who can understand and is familiar with the elements of the law(s) or regulation(s) alleged to have been violated, has good analytical skills, can write well, is willing to make written findings of fact based on the evidence introduced at the hearing, can apply the facts to the violation(s) alleged, document how those facts show the alleged violation(s) occurred, and write a well-reasoned Proposed Decision.

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History of Administrative Adjudication, Continued

Demeanor of the Hearing Officer

To a great extent, the demeanor of the Hearing Officer sets the tone of a hearing. The Hearing Officer assures that the hearing proceeds properly, is recorded accurately, that all relevant evidence is received, and that all persons present are encouraged to speak freely about the issues under consideration. Not only must the hearing be “fair” it must have the appearance of being fair.

The Hearing Officer should assume a calm, neutral, and business- like posture. All participants should be put at ease by being received in a respectful and courteous manner. Many of the people who may appear at an administrative hearing are doing so for the first time in their lives. It is not uncommon for them to be somewhat bewildered and confused or nervous.

The Hearing Officer should give assistance to these people by explaining the hearing and questions to be decided. The hearing should be conducted in a patient, but deliberate fashion. While still conforming to certain formal requirements, the CAC administrative civil penalty hearing process is more informal than pursuing an action in court. The informality of the hearing should be readily apparent to all parties.

Hearing Officer’s obligation

The Hearing Officer’s obligation to the State, the County, and the Respondent is to be impartial, make written findings of fact based on the evidence, and decide whether a violation occurred based on the evidence presented in the hearing.

The Hearing Officer must be always above reproach, be unbiased, and focus upon the particular issues at hand.

Impartiality

Assuming the position of a Hearing Officer means adopting a role of impartiality. A Hearing Officer must be sensitive to the way in which words and conduct affect others. Often, it is merely an innocent act of friendship which may create the suspicion of bias.

The Hearing Officer must not engage in *ex parte* communications with persons involved on one side or the other. An *ex parte* communication is a written or verbal communication during the pendency of a proceeding regarding any issue in the proceeding, without notice and opportunity for all parties to participate in the communication. Not only do *ex parte* communications violate the concept of fundamental fairness, they give the appearance of favoritism.

Continued on next page

History of Administrative Adjudication, Continued

Impartiality,
(continued)

It is highly inappropriate for the Hearing Officer to form or express any opinion on factual matters connected with the hearing until all the evidence is admitted. A chance remark by the Hearing Officer may show a conclusion has been formed prior to hearing all the evidence.

The Hearing Officer must always avoid any inclination to be or appearance of being either partisan to, or an advocate for a particular position, listening with patience and fairness to all the testimony. Nor should the Hearing Officer be influenced by sympathy, passion, or prejudice towards any of the parties. All the evidence should be heard and evaluated before the Hearing Officer begins the decision-making process.

Bias

The importance of the Hearing Officer's impartiality cannot be over emphasized.

A Hearing Officer who is believed to be biased may be challenged. Bias is only found where the Hearing Officer has some type of personal involvement with the Respondent's case, or where some other circumstance exists which may prejudice the case. The fact that the Hearing Officer conducted a hearing involving the same Respondent sometime in the past is not sufficient to establish a finding of bias. However, if the Hearing Officer has formed opinions which would preclude objectivity towards this person as a result of prior contacts with the Respondent, the Hearing Officer should disqualify themselves.

Additionally, if the Hearing Officer has any personal interest in the outcome of a particular case or a close friendship with any of the parties, inferences of bias and prejudice may exist; the Hearing Officer should postpone the hearing and ask that another Hearing Officer be appointed. If you have questions about whether or not an individual should be a Hearing Officer in a particular case, please contact your local counsel.

The burden of proof in allegations of bias is the responsibility of the person making a claim of bias.

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History of Administrative Adjudication, Continued

Proper decorum

Proper County Advocate and Respondent decorum in the hearing room includes the following:

- Supporting the authority and the dignity of the hearing by manifesting an attitude of professional respect toward the Hearing Officer, each other, witnesses, and others in the hearing room.
 - When the hearing is in session, addressing the Hearing Officer, not the other party, on all matters relating to the case.
 - Not engaging in behavior or tactics purposefully calculated to irritate or annoy the Hearing Officer or the other party.
 - Comply promptly with all orders and directives of the Hearing Officer, however the County Advocate has a duty and the Respondent has the right to have the record reflect adverse rulings or potential prejudicial conduct. The County Advocate and Respondent have the right to make respectful requests for reconsideration of adverse rulings.
 - The County Advocate should be punctual.
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Preparing for the hearing

To be fully prepared, the Hearing Officer should carefully review all material submitted prior to the hearing, note the contested issues, and consider the pertinent rules and regulations involved in the case. This review must be made with an open mind, realizing that a rush to judgment may result in an erroneous conclusion. This review should inform the Hearing Officer of the issues and serve as a guide to the conduct of the hearing. The Hearing Officer must remain objective while gathering and considering all evidence presented in the fact-finding stage.

Selecting a hearing room

The location of the hearing is important to the overall hearing process. The hearing site should be suitable to the process. The hearing room should be quiet and private enough to maintain confidentiality. A noisy, well-trafficked area is not appropriate for a hearing.

Conduct and control of the hearing

The Hearing Officer has three basic duties with respect to the conduct and control of the hearing:

1. Gather all relevant evidence relating to the matters in controversy.
 2. Evaluate all evidence admitted into the hearing.
 3. Write a sound and well-reasoned Proposed Decision which is supported by evidence.
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History of Administrative Adjudication, Continued

Opening the hearing

The Hearing Officer determines the tone of the hearing. A friendly, relaxed atmosphere is essential to maintaining informality in administrative hearings. The Hearing Officer should introduce themselves and others present to the parties at the beginning of the hearing. The name and position of each person present in the hearing room should be ascertained so that the parties can be referred to by name during the hearing. The Hearing Officer should refrain from appearing overly friendly with staff or any party to prevent any appearance of bias or favoritism. All participants in the hearing should be treated in a similar manner and with respect.

At the outset, identify the hearing as to time, date, and location, and explain the procedures to be utilized in the hearing and discuss them with the parties. Remain mindful of the duty to develop a good record of the hearing.

Taking testimony

Frequently, a Hearing Officer will wish to take notes as testimony is given. Such notes may be useful while drafting a Proposed Decision, but should be done in such a manner as to not give the Hearing Officer the appearance of being inattentive to the testimony itself. The participants in the hearing should feel that the Hearing Officer is in control of the hearing and is developing the hearing in a purposeful manner.

The Hearing Officer should not interfere with the case by making extraneous comments or observations, by calling attention to collateral or irrelevant matters, or by breaking into testimony before an answer is completed. A sequential story obtained in an orderly fashion is the straightest and shortest line between the opening and closing of the hearing.

While gathering evidence in the hearing, great care must be exercised in the use of the Hearing Officer's questioning power. By asking leading questions or nodding sympathetically, the Hearing Officer may inadvertently suggest that a particular line or argument or evidence is persuasive or decisive. The manner of questioning should encourage all persons to speak freely about the issues under consideration.

The Hearing Officer's approach to evidence gathering may be affected by the presence of an attorney. If the Respondent is represented by an attorney, the attorney should assume the primary role of organizing and developing the Respondent's case, and eliciting relevant testimony. The Hearing Officer's own questioning is generally limited to areas not covered by counsel, but which are germane to the matters at issue. As discussed earlier, where a

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History of Administrative Adjudication, Continued

**Taking
testimony,
(continued)**

Respondent is not represented by legal counsel, there may be a greater need for the Hearing Officer to clarify and develop the issues to be decided, identify or admit evidence, clarify the Respondent's own questions and witnesses' responses to them, and elicit material facts. In either case, at all times the Hearing Officer should make sure that their language, tone, and manner remain neutral.

**Disruptions
during the
hearing**

It is not unusual for a participant in a hearing to become angry or frustrated, and behave in a persistently disruptive manner. Verbal attacks on other participants will sometimes occur among the parties to a hearing. If such a tense situation develops, it is incumbent upon the Hearing Officer to maintain a deliberate calmness and attempt to diffuse the situation. Fairness or justice cannot be achieved in a hearing in which the parties are merely venting their hostilities. When facing difficult situations, the Hearing Officer should take extra care to discuss the issues and focus upon relevant evidence.

The Hearing Officer should immediately caution participants that proper order must always be maintained and insist on an orderly development of the testimony. A brief recess may be useful to allow participants to regain their composure and allow the hearing to continue in a calmer and more orderly fashion. At such times, the Hearing Officer should display firmness, lack of emotional involvement, and make clear a determination to be neutral and impartial.

Under no circumstances should one person be allowed to verbally abuse or badger another. If the conduct of one or more participants is continuously inappropriate, the Hearing Officer may want to exclude that person from the hearing or grant a continuance, but this should occur very rarely.

If the Hearing Officer excludes a participant from the hearing, the Hearing Officer will want to make it clear for the record and describe what disruptive behavior has transpired during the hearing, that the participant has been asked on numerous occasions to stop such behavior, and that as a result of the participant being unable to stop the disruptive behavior, has been asked to leave the hearing.

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History of Administrative Adjudication, Continued

Closing the hearing

The Hearing Officer usually extends a final opportunity to the participants of a hearing to add any last remarks to their testimony by asking if they have anything further to say before closing the hearing. This question gives witnesses a chance to complete their stories in their own way. If responses to such a question become lengthy or irrelevant to the issues in the hearing; the Hearing Officer will have to tactfully limit such answers.

The Hearing Officer's responsibilities after the hearing

After all the testimony has been presented, the Hearing Officer will begin the difficult process of evaluating the evidence and composing a Proposed Decision. The Hearing Officer should be familiar with relevant laws and regulations, thorough in describing the reasoning and evidence relied upon for their decision, and logical and clear in the expression of their opinion. Only with the fulfillment of these requirements will the role of the objective and impartial Hearing Officer be satisfactorily performed.
