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In the period from October 1967 to October 1968, the field of administrative law has continued to receive attention by the appellate courts. In the area of case law the emphasis in the past year has centered on proceedings held by the Department of Motor Vehicles arising out of the so-called implied consent law.[1] These cases have resulted in refinements in the statement of certain constitutional principles, the recognition of newer methods to promote traffic safety, and more definitive applications of administrative law concepts.

In the field of legislation, although many statutes were passed affecting administrative agencies, most of the enactments deal with the substantive problems with which par-

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1. Cal. Vehicle Code § 13353.

ticular agencies are concerned. As such, they are not proper subjects for this article, which is intended to give a somewhat comprehensive review of the developments in administrative law generally.

The legislature, by enactment of an administrative discovery bill, and by a reworking of the statutes relating to access to public records attempted in 1968 to provide methods in the proper setting for obtaining information from state agencies. It is in this field of access to information that the legislature has perhaps had its greatest impact on administrative law throughout this last year.

Legislation

Administrative Discovery

For a number of years, the question of availability of discovery in administrative law has been open to debate. In an unreported superior court case, attempts at taking a deposition of persons complaining to the Real Estate Commissioner were denied.[2] The Administrative Procedure Act[3] has clearly provided that depositions are available in administrative proceedings governed by that act,[4] only where there is a showing that a witness sought to be deposed will be unable or cannot be compelled to attend at the time and place of the hearing, and accordingly, most attempts at depositions fail.

In the landmark case of *Shively v. Stewart*,[5] the California Supreme Court had before it a proceeding in mandamus in which two doctors, accused of performing or arranging for the abortions of several women, requested the following from the administrative agency: (1) the statements of the abortees and their husbands; (2) all statements made by the doctors in the hands of the Board of Medical Examiners, including copies of hospital records, billings, etc.; and (3) the investigation reports made by the investigators for the board. The

2. Labat v. Real Estate Commissioner, San Francisco Superior Court No. 525696.

3. Cal. Government Code §§ 11500 et seq.

4. Cal. Government Code § 11511.

5. 65 Cal.2d 475, 55 Cal. Rptr. 217, 421 P.2d 65 (1966). See also *Cal Law —Trends and Developments 1967*, p. 318.

court, noting the existence of discovery in most civil and criminal practice and the seriousness of the matter, rendered its decision and order whereby it made available the statements of the abortees and their husbands, and the statements of the doctors. Curiously enough, in ordering the issuance of the peremptory writ of mandate, the court confined itself to the first two categories and did not order the board to make available a subpoena duces tecum for the latter purpose, commenting that the investigation reports themselves were not available except on a showing of good cause. *Shively* also has been interpreted as not permitting either the taking of depositions of witnesses or interrogatories of the agency administrators.[6]

After *Shively*, attempts were made to enact administrative discovery legislation, some codifying *Shively*, some narrower and some broader.[7]

In 1968, at the early meetings of the Senate Judiciary Committee, the Committee indicated that parties interested in producing a discovery bill should come together, work out their differences and give the legislature the benefit of a bill fully explored by those most interested. Accordingly, throughout the spring of 1968, representatives from the Attorney General's Office, the State Bar, the Department of Alcoholic Beverage Control, the Office of Administrative Procedure, and the Department of Professional and Vocational Standards met and drafted Senate Bill 833. The bill was produced and introduced by Senator Stephens from the Senate Judiciary Committee, and was then enacted as Chapter 808 of the Statutes of 1968. The law, in essence, is a records discovery law.

It was realized by all parties participating that perhaps one of the hallmarks of administrative law is expeditious and easily understood process. Accordingly, the statute was an attempt to give the parties to an administrative proceeding as much information as possible in the simplest possible way. The information was made available as a matter of right

6. Everett v. Gordon, 266 Cal. App. 2d —, 72 Cal. Rptr. 379 (1968).

7. See *Cal Law—Trends and Developments 1967*, p. 319.

and upon request with no showing of good cause required. A layman could ask for the information as well as a lawyer, and since proceedings before administrative agencies may find respondents unrepresented by council, the bill amended section 11504 of the Government Code to advise the parties to the proceedings through the statement to respondent of the right to discovery and further required that copies of the pertinent sections of the Government Code embodying the discovery procedure accompany the statement to respondent.

Section 11507.5 was added by this statute to the Government Code to provide that the discovery law would provide the exclusive right and method of discovery as to any proceedings governed by that chapter. Obviously, the intent of the legislature and the authors of the bill was to forestall any more experimentation in this area and to make it clear that the legislative procedure was exclusive.

The statute added section 11507.6 to the Government Code, which section contains the most important provision of the act. It provides that after the initiation of an administrative proceeding, a party, upon written request made to any other party prior to the hearing and within 30 days after service of the initial pleading or within 15 days after service of any additional pleadings, is entitled (1) to obtain the names and addresses of witnesses to the extent known by the other party, including, but not limited to those, intended to be called to testify at the hearing and (2) to inspect and make copies of any of the following in the possession or custody or control of the other parties:

> (a) A statement of a person, other than the respondent, named in the initial administrative pleading, or in any additional pleading, when it is claimed that the act or omission of the respondent as to such person is the basis for the administrative proceeding;
>
> (b) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;
>
> (c) Statements of witnesses then proposed to be called by the party and of other persons having personal knowl-

edge of the acts, admissions or events which are the basis for the proceeding, not included in (a) or (b) above;

(d) All writings, including but not limited to reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence;

(e) Any other writing or thing which is relevant and which would be admissable in evidence;

(f) Investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, to the extent that such reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, admissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his investigation, or (3) contain or include by attachment any statement or writing described in (a) to (e), inclusive, or summary thereof.

It may be noted the first class of information subject to inspection, (a) above, embodies the first class of material which was to be made discoverable by *Shively*, i.e., the statements of the abortees and their husbands. Normally we can classify these people as the victims or persons sought to be protected by the law. In a disciplinary case involving an action against a contractor, for example, it would include any statements made by any of the other contracting parties with whom the contractor contracted or owed a duty as a contractor. In the case of a liquor licensee involving serving of liquor to a minor, it would include the statement of the named minor.

The statement pertaining to the subject matter of the proceeding made by any party to any other party or person in (b) above, essentially involves the second class of material made available in the *Shively* case and includes the admissions of the parties. The language of the act is broad enough to include, in the case of a third party accusation or third party protest to the issuance of a license, the admissions of the third

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party, thus allowing the protestants to get the admissions of the persons seeking the license.

With respect to investigatory reports, the third kind of discoverable material involved in the *Shively* case, the act intended to make these investigation reports available so long as they contained matters which were otherwise discoverable under the other provisions of the act so that the investigation report may not be a shelter which would keep the matter hidden. Also, where the investigators were percipient witnesses to the events material to the case, their investigation reports would be made available to any other witnesses. The act intended, however, to restrict access to those parts of the investigation report which were nothing more than opinions of the investigator, or were analyses of other witnesses. It was believed that there would be an area of confidence between the investigator and his supervisor and, except to the extent that the investigation would otherwise cover discoverable material, the investigator should be free to express his recommendations knowing that his investigation report would not be the subject of discovery. In this respect, the act recognizes the usual privileges against disclosure, including the rules involving the attorney's work product.

The matter of enforcement of discovery rights has been considered. In *Shively*, the supreme court perhaps, more by *ipse dixit* than by sound reasoning, held that the courts provided the best and sole forum to decide discovery rights. In doing so it completely disregarded the concept of administrative remedies. The framers of the legislation in question have more or less followed the supreme court's lead, for it was thought that if there is going to be any controversy over discovery, it should be quickly resolved. It was further thought that there probably would be little chance of getting a bill passed which denied access to the courts prior to the final adjudication of the case. Accordingly, section 11507.7 was added to the Government Code to provide that a person who does not get the discovery sought can, within 15 days after the respondent party first evidenced his failure to comply or within 30 days after the request for discovery was made and the party has failed to reply to the request, whichever

period is longer, file in the superior court in the county where the proceeding is pending, a petition to compel discovery. The court, if satisfied from the reading of the petition that it sets forth good cause for relief, must issue an order to show cause directed to the respondent party; otherwise the court must enter an order denying the petition. Theoretically, the superior court is charged with the duty to consider the petition thoughtfully and it is expected that the order to show cause should not automatically issue merely because the petition seeks it.

The order to show cause is to be served upon the party by certified mail, and the order is returnable no earlier than 10 days after the date issued and no later than 30 days after the filing of the petition. During the time the matter is pending in the courts, the administrative proceeding is stayed if a copy of the order to show cause is filed with the Office of Administrative Procedure forthwith upon issuance. If it is contended that any matter sought is not discoverable under the law or is privileged, the court may order the matter filed for *in camera* examination by the court. The decision of the court is not reviewable by appeal, but rather by a mandamus proceeding in the appellate court.

It is clear that the statute provides the party seeking discovery with the right to obtain tangible matter; but neither depositions nor interrogatories are available. Because of its placement these discovery provisions will affect only those proceedings governed by the Administrative Procedure Act.

Access to Public Records—The California Public Records Act

Next in importance to the provisions of the administrative discovery statute are the provisions of Chapter 1473, California Statutes of 1968, regulating access to public records. This chapter adds section 6250 to 6260 (Chapter 3.5 of Division 7 of Title 1) to the Government Code and amends and repeals other provisions of the various codes. The addition to the code is entitled the "California Public Records Act."

The statute defines public records and provides for the public's right of access to them. Section 6252 is added to the Code to define state agency, local agency, person and public records. Public records are defined to include papers, maps, magnetic or paper tapes, photographic films, prints, magnetic or punch cards, discs, drums or other documents containing information relating to the conduct of the public's business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristic. Apparently, the statute was looking ahead, not only considering the printed word but also considering information stored in memory banks and other apparatus which are part of computerized and data processing systems. The statute, by addition of section 6253 to the Code, makes public records open to inspection at all times during office hours of the state or local agency and states further that every citizen has the right to inspect any public record, except as otherwise provided in the bill. The agency may, however, adopt regulations stating the procedures to be followed in making these records available in accordance with the section.

There are certain records which are not required to be disclosed. They follow somewhat expected patterns and are covered by Government Code section 6254 subsections (a) through (m).

Subsection (a) precludes disclosure of intra or inter-agency memoranda not retained by the public agency in the regular course of business, provided the public interest in withholding such records fairly outweighs the public interest in disclosure.

Among other matters precluded from disclosure by the statute are: recordings pertaining to pending litigation; disclosures constituting invasion of personal privacy, such as medical files; trade secrets; investigations of the Attorney General's Office and Justice Department; and confidential tax information, as well as many other matters which by nature are confidential.

In order for an agency to withhold any of its records, section 6255 of the Code provides that agencies shall demonstrate that the records are exempt under the express provisions

of the chapter or that on the facts of the particular case, the public interest served by not making the record public clearly outweighs the public interest served by disclosure.

Section 6256 provides that any person may receive a copy of an identifiable public record or shall be provided with a copy of all information contained therein. Computer data shall be provided in a form determined by the agency. Section 6257 allows the agency to recoup the cost of making a copy of an identifiable record or for producing information in the form of a certified copy of such a record.

A person who is aggrieved by any action of an agency by withholding the information may, under section 6258, institute proceedings in any court of competent jurisdiction to enforce the right to receive a copy of the public record.

As in the case of the administrative discovery statute, if there is a question of the confidentiality or the right to see the particular document, the court may have the document presented to it and examine the record *in camera* if permitted by subdivision (b) of section 915 of the Evidence Code. Section 6260 of the Government Code indicates that the provisions of the chapter shall not be deemed to affect in any manner the status of judicial records as the same existed prior to the effective date of the section, nor to affect the rights of litigants, including parties to administrative proceedings, under the discovery laws of the state.

Treatment of Electronic Data Processing Systems

An area which should be the focus of legislation in the years to come is that of computers and data processing, given the great technological advancements prevalent in that area today.

The legislature really has not fully come to grips with treating the data processing systems material in the same way that it has, for example, microfilming.[8] In 1968, the legislature, by Chapter 1062, amended section 1806 of the

8. Cal. Government Code §§ 12263, 12264.

Vehicle Code and made its first attempt at providing for the admissibility of information stored in electronic data processing systems by providing as follows:

> At its discretion the department may file and maintain these accident reports and abstracts by electronic recording and storage media and after transcribing electronically all available data from the accident reports and abstracts of conviction may destroy the original documents, except in cases where this code requires mandatory action against a person's driving privilege upon the receipt of such abstracts or reports. Notwithstanding any other provisions of law, the recorded facts from any electronic recording and storage device maintained by the department shall constitute evidence of such facts in any administrative actions instituted by the department. [Department of Motor Vehicles]

It will be interesting to see how this section, although relating to admissibility in administrative proceedings conducted by the Department of Motor Vehicles only, will operate in practice, there being very little experience in California at the present time with regard to the admissibility of data stored in electronic devices. The method of assuring the authenticity and completeness of the records should attract the curiosity of the profession, because the matter of retrieved data being presented in evidence will be of interest to all litigants in the future, whether they are administrative agencies, public or private entities, or individuals.

Case Law—Procedure

Judicial Review of Administrative Decisions

Methods of Review. Judicial review of the adjudicatory decisions of most administrative agencies, state or local, is provided for in section 1094.5 of the Code of Civil Procedure. During the year there has been some spotlight on other methods of judicial review available because of special circumstances. In *Eye Dog Foundation v. State Board of Guide Dogs*

for the Blind,[9] the court was presented with an appeal from a declaratory relief judgment. Apparently, a party may secure a declaration as to his right under a particular statute, including a determination of whether the statute is constitutional where the declaratory action is brought prior to the institution of any administrative action by the agency. The court held that the subsequent bringing of disciplinary proceedings against the plaintiff did not require the plaintiff to exhaust his administrative remedies before maintaining an action in court. The sequence of events is important because where the administrative proceeding precedes the filing of the civil action, the plaintiff will have to exhaust his administrative remedies before he may petition the courts.[10]

Being somewhat vexed by the time consumed in reviewing decisions of the Department of Alcoholic Beverage Control, the legislature in 1967 enacted provisions in the Business and Professions Code to remove the superior court from the process of reviewing the decisions of that department. Accordingly, the court of appeal and the supreme court now have jurisdiction over such matters. *Samson Market Co. v. Kirby*,[11] was one of the first cases to arise under the new legislation.[12] Although the case was not one in which judicial review in the usual sense was sought from a quasi-judicial determination of the department, it is instructive in that it shows quite clearly that whether review is sought from such a decision or relief is sought in the courts to compel the Department of Alcoholic Beverage Control to do any particular act with respect to its operations, the superior courts no longer have control and that any relief sought, including mandate, must come from the appellate courts.

Scope of Review—Independent Judgment Test v. Substantial Evidence Rule. On the question of scope of review, the courts have generally continued to observe the existing

9. 67 Cal.2d 536, 63 Cal. Rptr. 21, 432 P.2d 717 (1967).

10. 67 Cal.2d at 543, 544, 63 Cal. Rptr. at 26, 27, 432 P.2d at 722–723; Walker v. Munro, 178 Cal. App.2d 67, 2 Cal. Rptr. 737 (1960).

11. 261 Cal. App.2d 577, 68 Cal. Rptr. 130 (1968), app. dismd. 393 U.S. 11, 21 L.Ed.2d 18, 89 S.Ct. 49.

12. Cal. Business & Professions Code § 23090.5.

rules and have applied some of those rules to novel situations. Perhaps one of the best recapitulations of the rules defining the scope of judicial review is contained in *Beverly Hills Federal Savings & Loan Assn. v. Superior Court.*[13] There the court noted that prior to 1936, the substantial evidence rule was invoked to review the decisions of any administrative agency, but since that time and by virtue of *Standard Oil Co. v. Board of Equalization,*[14] the writ of certiorari was abolished with respect to state-wide administrative agencies exercising mere legislatively delegated powers. The court noted that after the *Standard Oil* case the courts evolved the limited trial de novo which was not a complete retrial of the case before the administrative agency but rather a qualified form of review with the superior court exercising its independent judgment on the evidence presented to the agency. The court noted too that the matter of the limited trial de novo or the independent judgment cases was limited to the situation where the agency was not exercising constitutionally given powers and where a vested right was involved. Hence, in a case where a vested right was not involved, the independent judgment test did not apply, and the scope of review of the evidence was limited to ascertaining whether the action of the agency was supported by substantial evidence. The court noted that there had been those kinds of cases over the years where a state-wide administrative agency's decision would be reviewed by the substantial evidence rule where a vested right was not involved. Among the situations involving a nonvested right would be the denial of a permit, as in *McDonough v. Goodcell,*[15] and the application for old age benefits, as in *Bertch v. Social Welfare Department.*[16]

In the *Beverly Hills Savings* case, mandamus action was filed not by the applicant for a license, but rather by one who was protesting the issuance of the license. The court held that such a person had no vested right to prevent the other individual from getting the license and hence the scope of re-

13. 259 Cal. App.2d 306, 66 Cal. Rptr. 183 (1968).

14. 6 Cal.2d 557, 59 P.2d 119 (1936).

15. 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205 (1939).

16. 45 Cal.2d 524, 289 P.2d 485 (1955).

view was the substantial evidence test. The court, however, went further and in applying the doctrine to the case, determined that all that the petitioner was entitled to was to have the court determine whether the commission's action was supported by substantial evidence in light of the whole record, and this meant that the petitioner was not entitled to various forms of discovery sought in the trial court.[17] The court noted further that substantial evidence did not mean that the superior court had to review the entire record to determine whether there was substantial evidence, but rather that the substantiality of the evidence is determined by isolating and considering only the evidence supporting the administrative action in accordance with the usual rule applied in reviewing the decisions of trial courts by the appellate courts. This being the rule, the court then held that where the protestant complained that there was evidence *dehors* the record which was considered by the commissioner, if the evidence were favorable to the decision, it could not be considered since it was outside the record, and if the evidence were not favorable to the decision it could only raise a conflict in the evidence.

The court in *County of Madera v. Holcomb*,[18] determined that a limited trial de novo was not available to a petitioner for public assistance who sought review of the Welfare Department's decision denying him aid, there being no vested right of review which would warrant a trial de novo, as the court pointed out in the *Beverly Hills* case.

The matter of the limited trial de novo or independent judgment test does not apply to agencies exercising powers granted to them by the State Constitution. Thus when the court is confronted with a decision involving the Department of Alcoholic Beverage Control, an agency created by Article XX, section 22 of the Constitution, the courts are dealing with an agency that has constitutional power to adjudicate its

17. In light of § 11507.5 added to the Government Code by Chapter 808 of California Statutes of 1968, it would appear that discovery would not be available in the superior court on review of any agency's decision where the agency was operating pursuant to the Administrative Procedure Act (Cal. Gov. Code §§ 11500–11523).

18. 259 Cal. App.2d 226, 66 Cal. Rptr. 428 (1968).

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cases. The court's scope of review then is to determine whether there is substantial evidence to support the decision of the agency. Where the Constitution has vested in the agency discretion to determine whether good cause exists for the revocation of the license, the agency, not the court, determines whether good cause exists for denying or revoking a given license on the grounds that its issuance would be contrary to public welfare and morals. The court, however, determines whether the agency acted arbitrarily in making this decision. Thus, in *Kirby v. Alcoholic Beverage Control Appeals Board*,[19] the court determined that the department acted properly in denying a license to a liquor establishment in proximity to a school.

Even where the scope of review requires use of the substantial evidence test, the supreme court, in *Huntley v. Public Utilities Commission*,[20] determined that the findings of the administrative agency may not be final on constitutional questions although this does not mean that the court should disregard the weight properly to be attached to findings of an agency after a hearing and the taking of evidence. Accordingly, where the Public Utilities Commission had modified and approved schedules requiring record-method subscribers to include in the recording the names of the individuals responsible for the message, the court held this ruling violative of First Amendment freedoms.

As the court in the *Beverly Hills Savings* case indicated, the interest of the petitioner will determine essentially the type of review obtainable. Likewise, in *Artigues v. California Department of Employment*,[1] the court of appeal had to define the right to unemployment benefits provided by the Unemployment Insurance Act in order to determine whether these were property rights within the meaning of the term as used in cases requiring a limited trial de novo. The court held the petitioner had such a claim. The case also stands for the proposition

19. 261 Cal. App.2d 119, 67 Cal. Rptr. 628 (1968).

20. 69 Cal.2d 67, 69 Cal. Rptr. 605, 442 P.2d 685 (1968). For further discussion of this case, see Leahy, CONSTITUTIONAL LAW, in this volume.

1. 259 Cal. App.2d 409, 66 Cal. Rptr. 390 (1968).

that although the trial court may engage in a limited trial de novo and exercise its independent judgment as to what facts are based on the evidence in the record, the court cannot ignore the undisputed facts in the record. A judgment rendered contrary to the undisputed facts in the record will bring about a reversal in such a case.

Again, following along the lines of *Beverly Hills Federal Savings & Loan Assn. v. Superior Court*, the court in *Western Airlines Inc. v. Schutzbank*,[2] indicated that where there was no vested right involved, the scope of review required the court to look for substantial evidence. This meant only that the trial court could not exercise its independent judgment as to the evidence and that the findings of the agency must be upheld if supported by credible and competent evidence. For reasons not clearly defined in the opinion, the petitioner was able to convince the trial court that out of the single issue of whether there was substantial evidence to support the findings of the commissioner, two issues could be developed. One of these was whether there was substantial evidence to support the findings; the other was whether the order was supported by the entire record. Because of the so-called "twin issue" and in spite of the language in *Western Air Lines v. Sobieski*,[3] to which petitioner was also a party, telling the trial court that it could only look for substantial evidence, the petitioner argued to the court of appeal that the trial court was not bound by the findings and could make its own findings contrary to the commissioner's. Support was sought in such cases as *Yakov v. Board of Medical Examiners*,[4] and *Moran v. Board of Medical Examiners*.[5] For these cases to apply, however, the law would have to be changed so as to give the trial court power to redetermine the weight of the evidence in a case where no vested rights are involved. The point having been so clearly spelled out in *Sobieski*, it seems

2. 258 Cal. App.2d 218, 66 Cal. Rptr. 293 (1968). For further discussion of this case, see Bader, BUSINESS ASSOCIATIONS, in this volume.

3. 191 Cal. App.2d 399, 12 Cal. Rptr. 719 (1961).

4. 68 Cal.2d 67, 64 Cal. Rptr. 785, 435 P.2d 553 (1968).

5. 32 Cal.2d 301, 196 P.2d 20 (1948).

incredible that it would be the subject of extensive litigation in *Western Airlines Inc. v. Schutzbank*.

The rule was stated in *Thompson v. City of Long Beach*,[6] that a trial court, in a case where it is reviewing according to the substantial evidence test, is bound to disregard the evidence contrary to that received in support of the findings of the agency. The court in *Ferguson v. Kern County Water Agency*,[7] relied on such a rule when dealing with a local administrative agency to which the scope of review was the substantial evidence test. This rule was also involved in *DeLucia v. County of Merced*,[8] where the petitioner attempted to get a trial de novo to settle questions of fact before the superior court where the appellate court indicated that the taxpayer had no such right. The only issue properly before the trial court was whether there was evidence of sufficient substantiality before the local agency to justify its findings.

The term "limited trial de novo" should not conjure up in the mind of the practitioner visions of introducing new evidence at the mandamus level. Traditionally, the courts have treated the matter of the limited trial de novo as being akin to a qualified review, as commented upon in the *Beverly Hills Savings* case.

A concrete application of this doctrine is found in *Shakin v. Board of Medical Examiners*,[9] where the Board of Medical Examiners, a non-constitutional agency, sought to revoke a doctor's license to practice medicine and surgery in the State of California, a vested right. The court pointed out that in order for the petitioner to be entitled to introduce additional evidence for the trial court's consideration in a mandamus proceeding, it must appear that he could not, in the exercise of diligence, have obtained and introduced such evidence to the board, or that such evidence was improperly excluded at

6. 41 Cal.2d 235 at 241, 259 P.2d 649 at 652 (1953).

7. 254 Cal. App.2d 908, 62 Cal. Rptr. 698 (1967).

8. 257 Cal. App.2d 620, 65 Cal. Rptr. 177 (1968). For a further discussion of this case, see Sabine and Goodman, STATE AND LOCAL TAXES, in this volume.

9. 254 Cal. App.2d 102, 62 Cal. Rptr. 274 (1967) citing Schoenen v. State Board of Medical Examiners, 245 Cal. App.2d 909, 913–914, 54 Cal. Rptr. 364, 367–368 (1966).

the hearing. In this connection, the announcement of the court was certainly in accord with Code of Civil Procedure section 1094.5, subdivision (d). This provision of the code was intended, and was traditionally so recognized by the courts even before the adoption of section 1094.5, to make sure that the licensee did not simply make a perfunctory or skeletal showing before the administrative agency with the expectation of making a fuller showing before the court on review. The rule is part of the concept of exhausting administrative remedies—to be discussed later—which also implies that a party present all legitimate issues before the administrative tribunal, ". . . In order to preserve the integrity of the proceeding before that body and to endow it with the dignity beyond that of mere shadow play."[10]

Of course, in those situations where the limited trial de novo rule applies and the trial court can exercise its independent judgment, the rule since *Moran v. Board of Medical Examiners,* requires the appellate court to sustain the trial court if the trial court's findings are supported by credible and competent evidence.[11]

While there have been many cases throughout the year dealing with the scope of review of adjudicatory decisions of administrative agencies, perhaps cases decided during the year that are most helpful are those dealing with review of the rule-making powers of administrative agencies because these decisions have tended to sharpen and focus the scope of review and to delineate the power and responsibility of the courts in these matters.

At the outset it should be noted that adjudicatory or quasi-judicial functions of administrative bodies can be likened to courtlike activities while rule-making or quasi-judicial functions are analogous to the dealings of a legislative body. This is an important distinction because the reviewing court's treatment of the two is quite different.

10. Harris v. Alcoholic Beverage Control Appeals Board, 197 Cal. App. 2d 182, 187, 17 Cal. Rptr. 167, 170 (1961).

11. See Yakov v. Board of Medical Examiners 68 Cal.2d 67, 64 Cal. Rptr. 785, 435 P.2d 553 (1968). (Decision of supreme court upholding judgment of trial court reversing agency.)

In *Ralph's Grocery v. Reimel*,[12] the court had before it a rule of the Department of Alcoholic Beverage Control which sought to prohibit manufacturers, importers, and wholesalers of beer from getting discounts for quantity purchases. The question was whether this rule was within the authority delegated to the department to promulgate rules that foster and encourage the orderly wholesale marketing and wholesale distribution of beer. The court held that in determining whether a specific rule falls within the coverage of the delegated power, the sole function of the court was to decide whether the department reasonably interpreted the legislative mandate. The court recognized that while final responsibility for the interpretation of the law rested with the courts, the courts could not exercise an independent judgment on what constituted promotion of orderly wholesale marketing and distribution. Hence, there is an area of discretion carved out which restricts the courts to the question of whether the action of the agency was consistent with the statutory purpose. The court noted too, that in reaching the conclusion that the rule was not arbitrary or capricious, it was not obliged to concern itself with alternative methods of regulation available to the department. The court noted that only in the field of restriction of fundamental constitutional rights would the court be concerned with the existence of such alternative methods, citing *Bagley v. Washington Township Hospital District*.[13] The plaintiff in *Ralph's Grocery* also urged that only by an explicit expression by the legislature can the agency be delegated the power to engage in price fixing. The court noted, however, that on the authority of *Wilke & Holzheiser Inc. v. Department of Alcoholic Beverage Control*,[14] the prohibition of discounts was not price fixing. This view seems clearly to undermine *Schenley Industries Inc. v. Munro*,[15] where the court struck down a similar rule relating to distilled spirits, the rule being mentioned somewhat disapprovingly by the

12. 69 Cal.2d 172, 70 Cal. Rptr. 407, 444 P.2d 79 (1968).

13. 65 Cal.2d at 501–502, 55 Cal. Rptr at 403–404, 421 P.2d at 411–412 (1966).

14. 65 Cal.2d 349, 55 Cal. Rptr. 23, 420 P.2d 735 (1966).

15. 237 Cal. App.2d 106, 46 Cal. Rptr. 678 (1965).

supreme court. Administrative regulations cannot amend or alter a statute or enlarge its scope.[16]

The question is often asked: what is the proper scope of review, i.e., need rules and regulations be supported by any factual material presented to the agency? With this question come the other questions relating to what kind of hearing the administrative agency must hold before it can adopt a rule or regulation. It has often been stated that there is no constitutional right to a hearing where an agency exercises its quasi-legislative function. Whatever procedural requirements there are for a hearing stem from the particular statute dealing with the agency rather than from any constitutional demands of due process. The case of *Rivera v. Division of Industrial Welfare*,[17] set out the rules quite well. It indicated that where the procedural requirements governing the agency's quasi-legislative hearing fall somewhere between the extremes of purely argument type hearings, which do not provide opportunity for cross-examination and do allow independent investigations outside the hearing process, and the strictly trial type of hearings, which require opportunity for cross-examination and rebuttal as well as confinement to the hearing records, such proceedings may exclude cross-examinations, need not provide access to the body of information from which the statistical compilations and summaries are drawn by the agency's staff, and may dispense with specific and detailed findings. If, however, the agency's staff brings in factual material not available to the public, the parties must be apprised of it during the hearing process, and cross-examination and rebuttal must be permitted. Thus, the statute dealing with the procedure must be analyzed to determine its nature; and by the same token, court decisions, which seem to speak in terms of rights to cross-examine and the right to see certain evidence, should not be applied across the board to every type of quasi-legislative hearing. The plaintiff should not attempt to have the reviewing court superimpose its own policy judgment but

16. Morris v. Williams, 67 Cal.2d 733, 63 Cal. Rptr. 689, 433 P.2d 697 (1967).

17. 265 Cal. App.2d —, 71 Cal. Rptr. 739 (1968).

should try to establish that the action of the agency has been arbitrary. And with respect to a quasi-legislative decision like that of the Industrial Welfare Commission, the assailant has the burden of establishing that the commission's action had no evidentiary support.

Because of the difference between the quasi-judicial process and the quasi-legislative process, it has been held that administrative mandamus, provided for in Code of Civil Procedure section 1094.5, is not available to review the decisions of agency-adopted rules and regulations. It will be noted in passing that Government Code section 11440 has specifically provided the mechanism for review of the quasi-legislative acts of administrative agencies on the state level to the extent that they are governed by the quasi-legislative portions of the Administrative Procedure Act.[18]

The question of the time to seek judicial review pursuant to Government Code section 11523 and Code of Civil Procedure section 1094.5 now seems to be settled. Although dealing with a specific section of the Business and Professions Code, the court in *Reimal v. House*,[19] indicated that the 30 days to seek review starts from the actual effective date of the decision of the agency and not from some mythical date earlier conjured as in the decision of *Walters v. Contractors' License Board*.[20]

Procedure at Administrative Hearings

During the year, perhaps the most interesting case in the field of administrative hearing procedures was the case that extended the right to hearing to a person not normally thought of as being in a class of people entitled to a hearing or even over whom the agency had jurisdiction. In *Endler v. Schutzbank*,[1] the plaintiff, after a number of years in the finance

18. Wilson v. Hidden Valley Municipal Water Dist., 256 Cal. App.2d 271, 63 Cal. Rptr. 889 (1967).

19. 264 Cal. App.2d —, 70 Cal. Rptr. 224 (1968).

20. 229 Cal. App.2d 449, 40 Cal. Rptr. 390 (1964). See Reimel v. ABC Appeals Board, 254 Cal. App.2d 340, 62 Cal. Rptr. 54 (1967).

1. 68 Cal. 2d 162, 65 Cal. Rptr. 297, 436 P.2d 297 (1968).

business, found himself unable to obtain employment because the Commissioner of Corporations had allegedly labeled him *persona non grata,* and threatened to bring disciplinary proceedings against any financial associations hiring him. Plaintiff had worked for a financial institution, and according to the description presented in the opinion of the supreme court, the institution had been advised to let plaintiff go. The institution was loath to do so. Later, disciplinary proceedings were begun against the financial house and, finally, the plaintiff was dismissed. Two weeks later the proceedings against the financial institution were also dismissed. The commissioner had offered to conduct an informal hearing on the charges against the plaintiff with the understanding that any such informal hearing was not taken pursuant to any specified statute or statutory authority. The quest of the plaintiff was to find a way to protect his name and be able to meet the charges which the commissioner supposedly had against him. The court recognized that the right to employment was very valuable and suggested that although there was no precise administrative remedy provided, one could be improvised. The action of the court was based on the Fourteenth Amendment insofar as it protects the pursuit of one's profession from abridgement by arbitrary state action. The case also recognized that the state had some right to regulate various people in the exercise of professions and callings and that the contours of due process in this connection would not necessarily always be the same. The court had cited a number of cases where persons' employment rights were terminated without a hearing and then summed up the situation as follows:

> We thus reaffirm an elementary requirement of justice where we hold, as we do here, that the state may not make a man an outcast in his own profession without affording him a full opportunity to present his defense.[2]

There may be other agencies which are faced with this problem; for example, the Department of Alcoholic Beverage

2. 68 Cal.2d at 173, 65 Cal. Rptr. at 304, 436 P.2d at 304.

Control may revoke a license or discipline a licensee for employing a manager who does not have the same qualifications as the licensee.[3] Perhaps the department in a situation like this may proceed in either of two fashions. In any action brought against a licensee for hiring an unqualified manager, the department could name the manager as a party respondent and serve on him the necessary papers; he could participate or not participate in the hearing, as he wished, but at least he would have been afforded a hearing. On the other hand, when the question first arises whether a given person should be hired as a manager, the department could set up a hearing on a statement of issues[4] and if any question is raised as to the jurisdiction of the department to proceed to hear the case, it might assert that while there is no statutory jurisdiction to hear the case, there might be a constitutional mandate, citing *Endler v. Schutzbank*. Other agencies may be faced with the same problem in the process of experimentation. Perhaps the answer to the problem posed by lack of legislative jurisdiction over the particular individual may be solved pragmatically until such time as the legislature provides a hearing procedure or makes for inclusion into existing hearing procedures.

Throughout the year questions relating to the kind of evidence admissible and to its effect once admitted were the subject of judicial discussion. Specifically, the issue of collateral estoppel, which was raised by the decision of the supreme court in *Teitelbaum Furs Inc. v. Dominion Insurance Co., Ltd.*,[5] received much attention.

Prior to *Teitelbaum* it had been held in *Manning v. Watson*,[6] that proof of a specific act subjecting a licensee to disciplinary action could not be proved simply by showing conviction for such act. The court held that such acts were hearsay. It would appear that on the basis of *Teitelbaum* the hearsay question would be removed and indeed, the conclusion that

3. Cal. Business & Professions Code § 23788.5.

4. Cal. Government Code § 11504.

5. 58 Cal.2d 601, 25 Cal. Rptr. 559, 375 P.2d 439 (1962).

6. 108 Cal. App.2d 705, 711, 239 P.2d 688, 692 (1952).

the acts took place should be compelled. The courts, however, have not agreed upon that proposition. In the case of *Richards v. Gordon,*[7] the court was dealing with a statute which provided that a final judgment in a civil action against a real estate licensee upon grounds of fraud, misrepresentation or deceit with respect to transactions for which he is licensed gave the Real Estate Commissioner grounds for disciplining the licensee. In *Richards,* such a judgment was shown, yet the trial court attempted to annul the action of the Real Estate Commissioner. Apparently, at the administrative hearing there was an attempt to introduce evidence of an impeaching nature concerning the civil judgment, but the evidence was excluded. The court of appeal held that the document res judicata collaterally estopped the impeachment of the prior judgment, and citing such cases as *Contractors' State License Board v. Superior Court,*[8] and *Bernhard v. Bank of America,*[9] the court concluded:

> [T]he trial court erred in finding that respondent was not collaterally estopped from impeaching the prior findings and judgment that fraud and deceit had been perpetrated by him in the [last] transaction.[10]

In *Lundborg v. Director of the Department of Professional and Vocational Standards,*[11] the court was faced with a private investigator who had suffered a civil judgment against him, which essentially involved dishonesty or fraud. The judgment, properly certified, was introduced into evidence along with the findings. There was no objection to the admission of these documents at the administrative hearing and, in fact, the parties had a discussion with regard to the matter at the hearing. The hearing officer indicated that he felt that the doctrine of res judicata barred the licensee from contesting the allegations that he had committed an act of dishonesty

7. 254 Cal. App.2d 735, 62 Cal. Rptr. 466 (1967).

8. 187 Cal. App.2d 557, 10 Cal. Rptr. 95 (1960).

9. 19 Cal.2d 807, 122 P.2d 892 (1942).

10. 254 Cal. App.2d at 742, 62 Cal. Rptr. at 471.

11. 257 Cal. App.2d 141, 64 Cal. Rptr 650 (1967).

or fraud, and the licensee's attorney agreed that the hearing officer was bound by the judgment and announced his intention to limit his case to the facts in mitigation. As a result, the matter was tried and a decision of revocation was rendered by the agency. Represented later by another attorney, the licensee went to court and secured from the superior court a judgment ordering the issuance of a peremptory writ of mandate against the director of the department commanding him to annul the revocation order. The trial court held specifically that Lundborg had not committed any act of dishonesty or fraud in his relationship with the person involved in the civil judgment. The court of appeal, division two of the first district, held that the doctrine of collateral estoppel enunciated in *Bernhard v. Bank of America,* and *Teitelbaum Furs Inc. v. Dominion Insurance Co., Ltd.,* had no place in the case and could not be invoked in the determination of the efficacy of the charge at the hearing. The court also relied in part on the case of *Title v. Immigration & Naturalization Service,*[12] where the court indicated that a prior denaturalization proceeding was not res judicata on the fact of the person's Communist affiliations in a subsequent deportation proceeding, the court noting some congressional intention that an alien would have a right to present evidence at each hearing to stave off the charges against him.

The court, in *Lundborg,* merely bridged the gap between the federal case and the case at bar by stating that the hearing officer's application of the doctrine of collateral estoppel limited his consideration of the evidence to deprive the licensee of a full and complete hearing required by the statute. The court did note, however, cases in the real estate field dealing with the statute there involved and noted that there was no similar statute here making a prior civil judgment grounds for disciplinary proceedings. The court reasoned that if the prior judgment were to have this effect in the case before it, the legislature would have so indicated as it had done in the real estate field.

Of interest to the practitioner beyond the point of collateral

12. 322 F.2d 21 (9th Cir. [1963]).

estoppel is the court's reasoning that since the judge had erroneously exercised his discretion on the erroneous theory of collateral estoppel, he had not fully exhausted the use of his discretion and hence, the matter should be remanded to him for a proper hearing.

The decision of the court in *Lundborg* received mild criticism in *McNeil's Inc. v. Contractors State License Board.*[13] The court pointed out in a footnote:

> The opinion in *Lundborg v. Director of the Department of Professional etc. Standards, supra,* 257 Cal. App. 2d 620, did not consider the decision in *Contractors' State License Board v. Superior Court,* 187 Cal. App. 2d 557, 562 [10 Cal. Rptr. 95], approving the application of the doctrine of collateral estoppel by judgment in a contractor's license revocation proceeding.[14]

Nevertheless, the court in *McNeil's Inc.,* noted that the judgment introduced in evidence came in along with other evidence supporting the charges; the judgment did not stand alone as a basis for collateral estoppel. The decision in *Lundborg,* however, becomes a little bit more difficult to understand when one considers the case of *Pathe v. City of Bakersfield,*[15] which recognized that a decision of the Industrial Accident Commission may be binding on a pension board under the guise of res judicata. The court relied somewhat on the earlier case of *French v. Rishell,*[16] which held that the doctrine of res judicata is applicable where the identical issue was decided in the prior case by a final judgment on the merits and the party against whom the plea is asserted is a party or privy to the party to a prior adjudication. It might be noted that in *Gale v. State Board of Equalization,*[17] a determination of the Public Utilities Commission was held to col-

13. 262 Cal. App.2d 322, 68 Cal. Rptr. 640 (1968).

14. 262 Cal. App.2d at 328, 68 Cal. Rptr. at 644.

15. 255 Cal. App.2d 409, 63 Cal. Rptr. 220 (1967).

16. 40 Cal.2d 477, 254 P.2d 26 (1953).

17. 264 Cal. App.2d —, 70 Cal. Rptr. 469 (1968).

laterally estop a taxpayer in his suit for refund of taxes filed against the Board of Equalization.

Criminal Law and Related Problems and Their Effect on Administrative Procedure

The courts of this state had occasion to consider *Miranda v. Arizona,*[18] in an administrative law setting. No special effort is made here to explain the so-called *Miranda* decision other than to point out that in a criminal proceeding a person who has the focus of suspicion placed on him while in custody of a peace officer has the right to be told before being interrogated and before answering questions that he has the right to remain silent; that he has the right to counsel; and that if he cannot afford counsel, one will be provided for him. The question has raged a bit over the application of these rights to a person who is being charged administratively. In the case of *Mumford v. Department of Alcoholic Beverage Control,*[19] the licensee, relying on *People v. Dorado*[20] (California's anticipation of the *Miranda* case) contended that his admission was inadmissible because the record did not show that he was warned of his constitutional rights to silence and counsel as required by the First, Sixth, and Fourteenth Amendments to the Constitution of the United States. The court held that the introduction into evidence of *Mumford's* admission did not deprive him of property without due process of law because his license to sell intoxicating liquors was not a proprietary right within the meaning of due process. It will be noted that the court also disposed of his contention that the admission was inadmissible hearsay, the court reasoning that it was admissible as an admission by a party, an exception to the hearsay rule. Thus, the admission came in as direct evidence under Government Code section 11513, subdivision (c). It should be noted that the *Miranda* rule in the administrative law setting will be discussed later in the material relating to the subject of drivers' licenses and implied consent.[1]

18. 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974 (1966).

19. 258 Cal. App.2d 49, 65 Cal. Rptr. 495 (1968).

20. 62 Cal.2d 338, 42 Cal. Rptr. 169, 398 P.2d 361 (1965).

1. Cal. Vehicle Code § 13353.

Although it should come as no surprise, in *Arenstein v. California State Board of Pharmacy*,[2] the court held that a plea of guilty in a criminal prosecution was admissible in the administrative proceeding to prove charges contained in the accusation. The court noted that although one may contest the truth of the matters admitted in his plea of guilty and may present all the facts surrounding the same including the nature of the charges, the plea, and the reason for entering such plea, it is probable that all adjudicatory proceedings are viewed at sometime by the judge or trier of fact in light of matters outside the record. As pointed out earlier in the case of *Beverly Hills Federal Savings & Loan Assn. v. Superior Court,* the superior court dismissed the contention that the Savings & Loan Commissioner considered evidence outside the record. Based upon the court's consideration of what type of hearing the petitioner was entitled to the court determined that the petitioner was entitled to a hearing only to determine if there was substantial evidence in the record to support the decision of the agency. The court was not, however, inclined to concern itself with the contention that evidence outside the record had been considered.

In *Shakin v. Board of Medical Examiners,* the matter had been heard by the Board of Medical Examiners at a hearing. Evidence was taken, but subsequently a new hearing was held before a different hearing officer and at the second hearing the doctor appeared before the Medical Board with an attorney for the first time. As a result of this hearing the doctor's license was revoked. It was his contention that his license had been revoked because of evidence that was introduced at the first hearing where he was not represented by counsel and that this evidence had had an adverse effect on the board at the second hearing. Among other things the court pointed out:

> Appellant contends that the Board rendered its decision on *ex parte* evidence since it retained the memory of the officer's testimony introduced at the earlier hearing. The

2. 265 Cal. App.2d —, 71 Cal. Rptr. 357 (1968).

> Board, however, adopted the hearing officer's proposed decision in its entirety; that decision rested completely upon the evidence adduced at the June 28 *de novo* hearing [the second hearing]. The hearing officer was not present at the earlier hearing and no resort to *ex parte* evidence of any sort occurred, as the trial court properly found.[3]

Administrative heads, as well as judges, are sometimes subjected to the charge that they lean in a certain direction as far as law or the policy of the law is concerned. In *Western Airlines v. Schutzbank,* the contention was made that the commissioner was biased and prejudiced because he had a policy in favor of cumulative voting with respect to the election of voter-directors of corporations. The court pointed out that the fact that a hearing officer or judge believes or does not believe in the law which must be applied to evidence before him does not disqualify him or make him biased or prejudiced.

The courts over the past year have also given some thought to the matter of evidence and, again, in *Shakin,* the court held that since this was not a criminal proceeding, the corpus delicti did not have to be established and that the admissions of any party could be relied upon in the absence of independent evidence to support the agency's findings and decisions with respect to the charges of unprofessional conduct. In *Goss v. Department of Motor Vehicles,*[4] the court held that the charges of the agency might be proved simply by the licensee's testimony.

In *Arenstein* the court held that the agency might take official notice that drugs referred to by their brand names were dangerous drugs within the meaning of Business and Professions Code section 4211.[5] Usually the agency has the burden of making sure that an intelligible record of formal proceedings at an adjudicatory hearing has been prepared. In the case of *County of Madera v. Holcomb,* supra, this same question

3. 254 Cal. App.2d at 110, 62 Cal. Rptr. at 281, app. dismd. 390 U.S. 410, 19 L.Ed.2d 1272, 88 S.Ct. 1112.

4. 264 Cal. App.2d —, 70 Cal. Rptr. 447 (1968).

5. See Cal. Government Code § 11515.

was raised with regard to the sufficiency of the administrative record which had been prepared from a phonographic taping rather than by stenographic reporter. The court, however, while noting that portions of the record were labeled "inaudible", noted that the balance of the record, in accordance with the statute, was sufficient for the purpose of the trial court and was not so unintelligible as to require reversal.

The Decision-making Process

There have been a few cases dealing with the process by which decisions are reached. The court in *Wilhelm v. Workmen's Compensation Appeals Board,*[6] emphasized that while an agency may not believe all the evidence presented, it still has the duty to reach substantial understanding of the record; accordingly, it cannot disregard testimony and hold in effect that there is no such evidence. This is a problem encountered by an agency deciding a case on reconsideration or, acting under Government Code section 11517, subdivision (c), deciding the case itself after rejecting the hearing officer's proposed decision. The problem in *Wilhelm* stems from the semantic trap of saying "there is no evidence" when one really means "the evidence lacks sufficient convincing power". *Wilhelm,* however, has one additional point not often raised. Due process does not require the agency to hear a petition for reconsideration in the presence of counsel.

In *Cooper v. State Board of Medical Examiners,*[7] the supreme court held that where the members of the Board of Medical Examiners sat and heard a case and some of the members' terms expired and they were replaced by new members, the latter, after reading the administrative record, could, with the remaining members who heard the case, decide it. A local body, however, may find itself unable to operate in this manner if local law specifically provides that only those present at the hearing may vote.[8]

6. 255 Cal. App.2d 30, 62 Cal. Rptr. 829 (1967).

7. 35 Cal.2d 242, 217 P.2d 630, 18 A.L.R.2d 593 (1950).

8. Rigley v. Board of Retirement, 260 Cal. App.2d 445, 67 Cal. Rptr. 185 (1968).

Questions have often been raised as to the propriety of making changes in administrative decisions. A real estate broker had a license allowing him to operate under two business names at two locations. By mistake the order of revocation specified only one of the business names. In *Russ v. Smith*,[9] the court approved of the commissioner's entering a *nunc pro tunc* order a month later making the decision applicable to both names. A revocation affecting only one location or name was no revocation at all, reasoned the court. The court noted that the disciplinary proceeding was *in personam* against the licensee, not *in rem* against the license.

Where on one set of facts pleaded, proven and found, the Registrar of Contractors asserted grounds for disciplinary action under three code sections, the court in *McNeil's Inc. v. Contractors State License Board,* supra, held that if the findings supported a charge of misconduct under any one of the code sections, the fact that the other two sections were included was of no consequence. Although Government Code section 11518 separates an administrative decision into three parts—findings of fact, determination of issues, and recommendations—the court in *McNeil's Inc.*, held that the segregation was of no moment in determining what facts were actually found. The court reaffirmed the traditional view that findings are to be liberally construed; administrative findings need not be stated with the formality required of judicial findings; the doctrine of implied findings is applicable to administrative agencies; and findings need not include every evidentiary fact in dispute.

Although agencies created by the constitution may issue decisions to which the doctrine of res judicata may apply,[10] decisions of non-constitutional state-wide administrative agencies do not have this effect.[11]

9. 264 Cal. App.2d —, 70 Cal. Rptr. 813 (1968).

10. Hollywood Circle, Inc. v. Department of ABC, 55 Cal.2d 728, 732, 13 Cal. Rptr. 104, 106–107, 361 P.2d 712, 714–715 (1961).

11. Pratt v. Local 683, 260 Cal. App. 2d 545, 67 Cal. Rptr. 483 (1968).

Driver's License—Implied Consent Law

The period under review saw the settling of some basic issues relating to the implied consent law, the popular name given to California Vehicle Code section 13353.

By way of background to a discussion of the California implied consent law, it should be noted that yearly some 53,000 people die on the nation's highways and that approximately one-half of all auto fatalities involve the drunken driver.[12] The California Highway Patrol reports that the drinking driver was observed in one-third of all fatal traffic accidents in 1966, which involved some 1,534 victims in 1,311 accidents.[13] In *People v. Sudduth,*[14] the Supreme Court of this state seemed to encourage the use of scientific aids such as breathalyzers to determine the question of intoxication, a question otherwise dependent upon fallible human observation. Perhaps the purpose of the implied consent law is to create a system by which one either takes the test or faces the consequences of suspension of this driving license. This system, of course, removes any necessity to use physical force on the suspect and prevents the struggle likely to arise when an intoxicated driver refuses to do what the peace officer effecting the arrest insists he is bound to do.[15] Cases such as *Sudduth* also recognize that there is a certain fairness about employing scientific aids to intoxication detection because these aids not only have the ability to prove guilt but also innocence. California has recognized the taking of blood samples even though the person has not consented as far back as *People v. Duroncelay;*[16] and *Schmerber v. California,* advanced that recognition even more.[17] On the other hand, there were theoretical limits beyond which the peace officers

12. Kelner, *Highway Murder,* New Republic, p. 13, Sept. 2, 1967.

13. Report of California Highway Patrol Department on Fatal and Injury Motor Vehicle Traffic Accidents, 1966, pp. 6, 10–11 (1967).

14. 65 Cal.2d 543, 55 Cal. Rptr. 393, 421 P.2d 401 (1966), cert. den. 389 U.S. 850, 19 L.Ed.2d 119, 88 S.Ct. 43.

15. Weinstein, *Chemical Tests for Intoxication,* 45 Journal Criminal Law & Criminology, 541, 543 (1954–55).

16. 48 Cal.2d 766, 312 P.2d 690 (1957).

17. 384 U.S. 757, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966).

could not use the offer of force to extract blood samples.[18] Accordingly, a statute was needed to provide a systematic and orderly method for approaching the subject in an attempt to arrive at a method of getting a blood sample without trial by battle.[19]

Thus the implied consent law took effect in 1966. By 1967 a multitude of cases were filed in the superior courts under section 1094.5 of the Code of Civil Procedure to review the action of the Department of Motor Vehicles suspending drivers' licenses for six months, pursuant to provisions of the new law. Superior court rulings with respect to the law varied not only from superior court to superior court, but the clash in ideas among the judges within a given superior court was notable. Hence, the decisions which were handed down by the appellate courts, particularly in the summer of 1968, have proved quite helpful in resolving the issues involved.

What the New Law Entails. Pursuant to Vehicle Code Section 13353, the Department of Motor Vehicles may suspend the driving privileges of a person if (1) the person was arrested for any offense committed while driving on a public highway under the influence of intoxicating liquors; (2) a peace officer had reasonable cause to believe the person had been driving on a public highway while under the influence of intoxicating liquor; and (3) the person has been advised that the failure to submit to a chemical test to determine the alcoholic content of his blood would result in the suspension of his driving privileges for a period of six months. Under the statute the person who has been arrested and requested to submit to the chemical test has a choice of tests—blood, breath or urine. If the person refuses to submit to the test, the peace officer, having reasonable cause to believe that the person was driving a motor vehicle on the highway while under the influence of intoxicating liquor, submits a sworn statement to the Department of Motor Vehicles show-

18. People v. Barton, 261 Cal. App. 2d 561, 564, 68 Cal. Rptr. 157, 159–160 (1968).

19. Rausenbush, *Constitutionality in Wisconsin of Compulsory Scientific Tests for Intoxication,* Wisconsin Law Review, pp. 251, 259 (1953). See *Virginia's Implied Consent Statute, a Survey and Appraisal,* Virginia Law Review, pp. 386, 397 (1963).

ing his reasonable cause and the refusal of the person to submit to the test. The department thereupon issues its order suspending the driving privileges of the individual for six months. The statute affords the driver an opportunity for a hearing upon a timely request. A timely request for a hearing stays the order of suspension and the matter is set for hearing on four issues: (1) whether there was an arrest; (2) whether there was reasonable cause to believe the person was driving on a highway while under the influence of intoxicating liquor; (3) whether there was a refusal to submit to the test; and (4) whether the driver was told that his driving privileges would be suspended if he refused to take the test. The Department of Motor Vehicles, at the conclusion of the hearing, makes its order and findings and either revokes or affirms the action to suspend.

Implied Consent v. Constitutional Protections. Although the constitutional question with regard to the right to counsel with respect to the taking of these tests would appear to have been answered clearly in cases such as *United States v. Billy Joe Wade,*[20] *Schmerber,* and *People v. Sudduth,* supra, attorneys continued to press the issue sometimes gaining surprising success in the superior courts. Accordingly, the cases involving the implied consent law were also cases that had more definitive statements to make with regard to the right to counsel as well as with regard to the allied right against self-incrimination when one was confronted with the request to submit to a chemical test. In *Finley v. Orr,*[1] the court took up the questions of the right to counsel and the right against self-incrimination. Principally on the authority of *Schmerber,* the court held that there was no infringement of the right against self-incrimination in requiring submission to a chemical test under the implied consent law, there being no testimonial compulsion. Likewise in *Fallis v. Department of Motor Vehicles,*[2] the court held that there was no right either under the First or Fifth Amendments of the United

20. 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1967).

1. 262 Cal. App.2d 656, 69 Cal. Rptr. 137 (1968).

2. 264 Cal. App.2d —, 70 Cal. Rptr. 595 (1968). For further discussion of this case, see Leahy, CONSTITUTIONAL LAW, in this volume.

States Constitution to remain silent in the face of a request to submit to a chemical test. *Finley* also held that there was no right to counsel at the time the police demanded that the driver submit to a chemical test. Although the court in *Finley* did not rely on the decision in *United States v. Billy Joe Wade,* the court might have referred to that authority for the proposition that at the stage that a chemical test is requested a critical stage in the criminal proceeding has not been reached so as to require the protection of the rights secured by the *Miranda* case. The court also took pains to mention the case of *People v. Ellis,*[3] wherein the defendant claimed that he was confused by the giving of the *Miranda* warning, which in effect told him that he could be quiet, and the request by the police officer that he speak. In that case his speech was required for voice identification. In *Finley,* the court noted that in *Ellis* there may have been a certain similarity between speech in terms of speech for conversation and speech for voice identification, but in the case where the fellow is asked to take the test, as in *Finley,* and the man refuses, his refusal is not really remaining silent and hence, the strong indication is that there is no confusion between the *Miranda* warnings and his duties under the implied consent law. *Finley* also stands for the proposition that since the proceedings concerning driver's license suspensions are civil in nature, no person then has the right to counsel upon request to submit to the test.

In the case of *Ent v. Department of Motor Vehicles,*[4] the court noted that there was no right to counsel and, relying on *Fallis,* held that one was not entitled to counsel *before deciding which test to take.* The court made it clear that it was rejecting the licensee's contention that she needed and was entitled to the advice of counsel in choosing which of the three tests to take. The court also decided in *Ent* that the police had no duty to warn the driver that she had no right to counsel at such time. The driver in *Ent* relied almost entirely on *People v. Ellis* in making this contention. The

3. 65 Cal.2d 529, 55 Cal. Rptr. 385, 421 P.2d 393 (1966).

4. 265 Cal. App.2d —, 71 Cal. Rptr. 726 (1968).

court rejected the contention on two grounds: (1) there was nothing in the record to indicate that the police ever attempted to carry out a process of interrogation lending itself to eliciting incriminating statements or that the *Miranda* or any similar warning was ever given or required; and (2) that on the basis of footnote 14 in *People v. Ellis*[5] even if the warning were given it could not mislead the driver into believing she had the right to counsel because what was sought was evidence of other physical characteristics, not voice or voice characteristics or voice identification.

Thus, the courts have spoken rather clearly and forcefully on the issue of the right to counsel. So definite have the courts been that in *Fallis* the court held that where the individual said that he would not take the test without his attorney or doctor being present, there was a refusal. The statement was made that *any* equivocal refusal may be interpreted as a refusal. The court in *Finley* took up the question of conditional consent, i.e., consent to take the test if an attorney or doctor is present; the court concluded that a driver, when requested to take the required test, cannot impose a condition that a doctor of his own choice be present during the taking of the test and, impliedly, no condition as to the presence of his attorney can be imposed either.

What Constitutes "Refusal". In *Ent v. Department of Motor Vehicles,* the trial court had indicated that the petitioner had not refused to take the test but in essence only asked that the taking of the test be delayed until her attorney could be present. In its conclusion of law the trial court stated that the reply to the officer's request only amounted to delay and did not amount to a refusal under California law. The appellate court, however, found that a refusal had taken place. One of the considerations which is present throughout all of these cases, including *People v. Sudduth,* is the idea that the law should not encourage any refusal that might operate to suppress evidence of intoxication which disappears rapidly with the passage of time.

5. 65 Cal.2d at 539, 55 Cal. Rptr. at 390, 421 P.2d at 398.

In considering the question of a consent conditioned upon the test being administered by the licensee's physician, the courts, as we have noted, have treated this as a refusal. The statutory scheme provides for what might be referred to as the "police test" under section 13353 of the California Vehicle Code.[6] However, the law also provides for what may be referred to as the "additional test" under Vehicle Code section 13354, which recognizes the right of a driver to procure his own, and additional, test. Thus, the court in *Fallis* was able to perceive that the test administered by the driver's own physician was the additional test guaranteed by section 13354 and that this was not the test which the police were entitled to under section 13353. In so recognizing, the court had before it good authority from both New York and South Dakota.[7] It will be noted also that the court in *Fallis* struck down the assertion by the licensee that he was suffering from some malady which prevented him from submitting to a chemical test of his blood. While the court did not explain it further, it appeared that if the individual were suffering from some malady which made it impossible for him to submit to a blood test, he still had the choice of the other two tests. While it might be within the realm of possibility that some condition might prevent him from submitting to the urine test, it is hard to imagine a viable driver who could not breathe.

Perhaps, one of the more unique defenses raised was the defense of being too drunk to refuse. In *Bush v. Bright,*[8] the superior court held the driver in question was so far gone that he was rendered incapable of refusal. Part of the problem was raised by that portion of section 13353 which states that:

> Any person who is dead, unconscious, or otherwise in a condition rendering him incapable of refusal shall be deemed not to have withdrawn his consent.

It might be noted that his consent is the implied consent one gives to such a test by driving on the highway. It has been

6. People v. Dawson, 184 Cal. App. 2d Supp. 881, 7 Cal. Rptr. 384 (1960).

7. Sowa v. Hults, 22 App. Div. 2d 730, 253 N.Y.S.2d 294, 295–296 (1964); Beare v. Smith (S.D.) 140 N.W.2d 603, 607 (1966).

8. 264 Cal. App.2d —, 71 Cal. Rptr. 123 (1968).

contended that this provision was intended to provide that the person arrested would have certain inalienable rights and that the legislature being aware of these rights wanted to give the driver an opportunity to make a reasonable choice or waiver. However, the court indicated that the driver and the superior court must construe the nature and purpose of the statute. The court was concerned that one might use physical force to avoid taking the test, and thus become dangerous to himself and those charged with administering it. This being so, he is excused from taking the test from his indication of unwillingness, but once he does that he then suffers the risk of losing his license. The court held then, that if the requirements of section 13353 are otherwise met, regardless of the degree of the voluntary intoxication or lack of understanding resulting therefrom, when the driver of an automobile refuses to submit or otherwise manifests an unwillingness to take the test, he is subject to the license suspension provisions of the section. As an aside, perhaps in practice, one who is incapable of refusal will never be involved in any of these cases because the very condition which makes it impossible for him to refuse will make it impossible for him to drive the automobile. These are points of intoxication never quite reached by any of the drivers in these cases.

In the case of *August v. Department of Motor Vehicles,*[9] the court had before it a similar issue. In the various subdivisions of the opinion, the court carried this heading for one of its discussions: "The claim that intoxication rendered licensee incapable of intelligently refusing to submit to the test does not avert the consequences of the refusal."[10] The court under this discussion noted that the lack of recollection was not inconsistent with the driver's being aware at the time of what the officer said to him and what he said to the officer and apparently, this was the bulk of the proof advanced in the case.

In the case of *Zidell v. Bright,*[11] the court had before it a

9. 264 Cal. App.2d 52, 70 Cal. Rptr. 172 (1968).

10. 264 Cal. App.2d at 67, 70 Cal. Rptr. at 182.

11. 264 Cal. App.2d —, 71 Cal. Rptr. 111 (1968).

case where the driver manifested his refusal and some 30 to 45 minutes later changed his mind. Although the arresting officer had left in the interim a telephone call was made to him. The officer refused to return, and no test was ever given. The court held that there had been a refusal in this situation. The court relied on the language in the statute[12] to this effect:

> The test shall be incidental to a lawful arrest and administered at the direction of a peace officer having reasonable cause to believe such person was driving . . . while under the influence of intoxicating liquor.[13]

The court said that this language implied that the decision of the arresting officer whether to request the test and the subject's response thereto should not be delayed. It was further contended by the appellant that he had a right to have the officer give him a chemical test under subdivision (f) of section 13353. The court held that this contention could not be sustained. That subdivision was to permit the suspected drunk driver to obtain a chemical test only if the arresting officer failed to take the initiative. The court concluded that the legislature did not add subdivision (f) to give an accused drunk driver the right to refuse the officer's request to submit to the test and thereafter the right to demand that the test be given. The court held further that it would be inconsistent with the purpose of the statute to hold that the arresting officer or the officers placed in charge of the driver at the police station where he was being held, should turn aside from their other duties and responsibilities and arrange for the administration of the belated test when once there had been a refusal after fair warning. A similar situation was presented in *Ent* where the driver's request that her attorney be present resulted in a delay of one hour between the time of the request and the time the attorney arrived. The court noted, however, that even though the delay caused by the respondent's demand for the presence of her attorney was a period of only one hour, the department would still have the right to suspend her license under section 13353. The court relied on *Zidell* in great part

12. 264 Cal. App.2d at —, 71 Cal. Rptr. at 112–113.

13. Cal. Vehicle Code § 13353 subdivision (a).

as well as the language appearing in *Sudduth* that the evidence of intoxication disappears rapidly with the passage of time and therefore, a refusal that might operate to suppress such evidence should not be encouraged as a device to escape prosecution.

These implied consent cases also dispose of some other procedural matters which are of interest to the lawyer practicing in the administrative law field. In *Finley*, the court once again sought to inter the perennial contention that a judicial function was delegated to an administrative department, thus depriving the licensee of due process. The licensee was particularly concerned with the question of determining whether the peace officer had a reasonable cause. This determination was delegated to the department. Citing the case of *Escobedo v. State of California*,[14] the court held that this was not an invalid delegation of judicial power to the administrative agency. It was next urged by the licensee in *Finley* that he was denied an impartial hearing. He argued that the department acted as both the accuser and judge. The court, on the strength of *Hohreiter v. Garrison*,[15] held that the contention was not only improper but that there was nothing in the record to indicate that the driver was not afforded a fair hearing.

In *Serenko v. Bright*,[16] the driver contended that section 13353 was not applicable to her because she had been issued her driving license prior to the enactment of the section. She contended that the application of the section, insofar as it attempted to proceed on the concept of implied consent, was a retroactive application which she believed to be unconstitutional. The court pointed out that it was not the act of obtaining the driver's license which brought the statute into play, but that it was the act of driving from which the driver's implied consent to the chemical test flowed. The statute, the court said, was broad enough to encompass all

14. 35 Cal.2d 870, 877, 222 P.2d 1, 6 (1950).

15. 81 Cal. App.2d 384, 392–393, 184 P.2d 323, 328–329 (1947).

16. 263 Cal. App.2d 682, 70 Cal. Rptr. 1 (1968).

drivers on California highways whether licensed by California, other jurisdictions, or even if unlicensed. The licensee noted that she had pleaded guilty to the criminal charge of violating Vehicle Code section 23102, subdivision (a) ("drunk driving") and that the traffic court, pursuant to Vehicle Code section 13352, had recommended that there be no suspension. Based upon this, the licensee argued that her license should not be suspended. The court noted that section 13353 was not a section which was based on section 13352 at all, the latter section providing for the suspension of the driving privileges on certain convictions of driving while intoxicated. Section 13353 is not predicated upon driving while intoxicated or even on conviction therefor, but is predicated on refusal to submit to the chemical test. Moreover, the duty of the department to suspend the license for six months is clear; the statute's use of the word "shall" makes it a mandatory duty rather than a discretionary act on the part of the department. Thus, the fact that the person in *Serenko* subsequently pleaded guilty or that the court recommended no suspension had no effect on the proceedings under section 13353. Thus, the court indicated that the arrestee, by subsequent guilty plea, had no power to avoid retroactively the consequences of his or her earlier refusal to cooperate. It was also contended that the licensee in *Serenko*, was prejudiced because her case did not come up for hearing within the 15 day period provided for in section 13353; but the court noted that the section also provided that if the case was not heard within the 15-day period, the suspension should not take place until the department had ultimately decided the case; thus, there was no prejudice by delay.

Hearing Procedures Under the New Law. The application of the implied consent law not only brought about the interesting divergent comments of the superior courts with regard to the substantive problems involved but also brought into sharp focus for examination the hearing procedures of the Department of Motor Vehicles. Basically, the hearing procedures of the department involved either a formal hearing procedure conducted substantially pursuant to the provisions

of the Administrative Procedure Act,[17] or an informal hearing procedure conducted pursuant to the Vehicle Code section 14104, which contemplates that the hearing be conducted in a completely informal manner. The constitutionality of these hearing procedures has been commented upon briefly in the case of *Hough v. McCarthy*,[18] and *Beamon v. Department of Motor Vehicles*.[19]

It is in this area that the chief importance of the *Serenko* case lies, for that case decided that the person conducting the hearings for the Department of Motor Vehicles pursuant to Vehicle Code section 14107 need not be a hearing officer possessing the same qualifications as a hearing officer contemplated by the Administrative Procedure Act.[20] In formal hearings held by the Department of Motor Vehicles, the referee hearing the matter for the department need not be a lawyer. The court, among other things, noted a very salient distinction between proceedings arising under the provisions of the Vehicle Code,[1] and cases governed entirely by the Administrative Procedure Act. Among other things, section 14107 of the Vehicle Code provides that formal hearings may be conducted by the director of that department, by a referee or by a hearing board appointed by him consisting of officers or employees of the department. Although the Vehicle Code section 14112 provides that the Administrative Procedure Act is applicable to those matters not covered by the Vehicle Code, the court held that which of these three was to hear these cases was determined by the Vehicle Code and hence, that portion of the Administrative Procedure Act which defined the qualifications of the hearing officer would not be applicable to these proceedings. The court pointed out something else which is often times overlooked not only by practitioners but by the courts. The inclusion of an agency in the list of agencies under the Code[2] does not necessarily make the pro-

17. Cal. Vehicle Code § 14112.

18. 54 Cal.2d 273, 5 Cal. Rptr. 668, 353 P.2d 276 (1960).

19. 180 Cal. App.2d 200, 4 Cal. Rptr. 396 (1960).

20. Cal. Government Code §§ 11500 et seq.

1. Cal. Vehicle Code §§ 14100–14112.

2. Cal. Government Code § 11501 (b).

visions of the Code applicable to those agencies therein listed. Section 11501 of the Government Code expressly provides that the procedure of any agency shall be conducted under the provisions of the chapter (Administrative Procedure Act) "only as to those functions relating to the particular agency." In this connection, the cases of *Bertch v. Social Welfare Department*,[3] and *Taliaferro v. Insurance Commission*,[4] cited by the court might well be read by those persons who are not aware of the purpose of the listing of agencies under Code section 11501(b).

It should be noted that most of the procedure at a formal hearing is provided by the Administrative Procedure Act while the informal hearing is governed by Vehicle Code section 14104. Whether the proceedings before the department will be formal or informal is determined by the driver himself. For when the driver makes the request for a hearing under Vehicle Code section 13353, subdivision (c), he then indicates what kind of hearing he desires. Normally, the information supplied to him by the department indicates that if he does not select a particular type of hearing, an informal hearing will be given to him. The court, in the *August* case indicated that the sworn statement of the peace officer may be used as evidence in these informal hearings. The court in that case concluded that the taking of oral testimony has not been made a prerequisite to the validity of an informal hearing before the department in the absence of timely objection to the admission of hearsay. The court pointed out the sworn statement could have the dignity of *prima facie* evidence in an informal hearing when received without objection and without a request to cross-examine the peace officer making the statement. The court adhered to the rule established in *Griswold v. Department of Alcoholic Beverage Control*,[5] that the failure to make an objection is deemed to be a waiver of objection,

3. 45 Cal.2d 524, 527, 289 P.2d 485, 487 (1955).

4. 142 Cal. App.2d 487, 489, 298 P.2d 914, 916 (1956), cert. den. 352 U.S. 972, 1 L.Ed.2d 325, 77 S.Ct. 362.

5. 141 Cal. App.2d 807, 810–811, 297 P.2d 762, 763–764 (1956).

and the court treated this as being a waiver of the objection to the hearsay nature of the evidence.

It will be noted that *Griswold* involved a hearing under the Administrative Procedure Act with all the trappings, and then some, of a formal hearing. Thus, the question of the failure to object would seem to be immaterial as to the type of proceeding. The court seemed to reason in the *August* case that the testimony of the licensee and that of his witness could fill in the gaps to bring about the requisite evidentiary support for the department's decision. The difficulty with *August* is that while it attempts to explore various rights, procedural and otherwise, with respect to the holdings of these hearings and attempts to define rules governing the nature of the evidence to be required, it seems to come up with no clear application of such rules and with no full analysis of Vehicle Code section 14104. On the facts of the case the court seems to have arrived at the proper result. In passing it will also be noted that this case, too, stands for the proposition that what happens in the criminal action is unrelated to this type of proceeding, a plea of guilty in the criminal matter not vitiating the refusal in the implied consent case.

In *Fallis*, the court had before it an informal hearing. The court concluded that the informal hearing process permitted the department to treat the sworn statement as *prima facie* evidence as to any matter in which there was no conflicting evidence. The court, however, indicated that an arrest report and a supplemental report might not serve as evidence in these cases. This holding is interesting because even in formal hearings conducted under the Administrative Procedure Act, hearsay is admissible.[6] Further, in light of the fact that under section 14104, specific rules of evidence are laid down anyway; so long as the matter is conducted in the purely informal manner contemplated, there should have been no reason why hearsay of a reliable type should not have been introduced, used, and relied upon in such hearings.

In the *Goss* case, the court had before it the problem of a formal hearing where the matter of hearsay was regulated

6. Cal. Government Code § 11513(c).

by Government Code section 11513. The court noted that while the sworn statement and two police arrest reports were all hearsay, they were admissible to supplement and explain other admissible testimony. The court noted that the licensee was called and his own testimony gave him away; hence, the hearsay documents which the court mentioned were all competent to supplement and explain the driver's testimony pursuant to section 11513(c).

During the period of time with which we deal there have been other cases which the appellate courts have cited in this implied consent field, but the the decisions in such cases have been certified for non-publication. While some of these cases represented well-established points, some have also presented interesting extensions of many of the points established by the cases commented upon here. It is a pity that the device of certification for non-publication essentially deprives the practitioners of the benefit of those decisions. Especially is this critical to the administrative agency that would like to rely on those cases but cannot cite them in court.

Exhaustion of Administrative Remedies

In commenting on *Eye Dog Foundation v. State Board of Guide Dogs for the Blind*, supra, we have already had occasion to note the general subject of exhaustion of administrative remedies as commented on by the courts throughout the year. The courts still state the general proposition that where an administrative remedy is provided by this statute, relief must be sought from the administrative body and this remedy exhausted before the court will act. Compliance with this rule is a jurisdictional prerequisite to resort to the courts.[7] The case of *Hollon v. Pierce*,[8] presented an interesting application of the doctrine. In that case the petitioner sought to compel reinstatement by his employer, the Shasta Union High School District. He alleged that the district had discharged him

7. McLeod v. City of Los Angeles, 256 Cal. App.2d 693, 64 Cal. Rptr. 394 (1967).

8. 257 Cal. App.2d 468, 64 Cal. Rptr. 808 (1967). For further discussion of this case, see Leahy, CONSTITUTIONAL LAW, in this volume.

because of his religious beliefs. The school district, after some allegedly unstable behavior by the petitioner, held an executive session and adopted a resolution withholding renewal of the petitioner's contract for the forthcoming school year. They did, however, offer to review any psychiatric examination he might obtain. The petitioner then filed a complaint with the State Fair Employment Practices Commission[9] which conducted an examination. The Commission received two psychiatric reports, neither of them indicating petitioner to be maladjusted, disoriented, psychotic, or dangerous. The evidence before the appellate court indicated that as time went on the State Fair Employment Practices Commission seemed to have dropped the matter.

The court indicated that a statute investing a public agency with supervisory or investigatory power affords an administrative remedy when it establishes clearly defined machinery for the submission, evaluation, and resolution of complaints by aggrieved parties. In this connection, the remedy before the State Fair Employment Practices Commission was deemed to be an administrative remedy within the rule and one which petitioner had to exhaust before seeking judicial review. Thus, the case stands for the proposition that the administrative remedy may very well be one which is afforded by some administrative agency wholly outside of the contemplated machinery involving the agency whose acts are in question. The court in *Hollon*, however, avoided any real problem in the case by holding that there had been an exhaustion of the remedy before the Fair Employment Practices Commission because, although the proceedings before the commission did not reach the point of completion by rejection of the complaint, or rendition of a final order, it did come to a complete halt. The administrative machinery had stopped, and the court reasoned that theoretically the complaining employee might have brought a mandate action with the objective of compelling the commission to act further. Such a lawsuit would have been expensive and would have entailed delay; thus, the court reasoned that the rule of resort to the adminis-

9. Cal. Labor Code § 1414.

trative agency only demanded exhaustion of the remedies not the attrition of the litigant.

The courts also continued to hold that the court will not consider for the first time on judicial review points not presented to the agency. Thus where a petition for reconsideration is available in a Workmen's Compensation Appeals Board proceeding, the court will not consider for the first time points not presented in the applicant's petition for reconsideration.[10] The rule would be somewhat modified with regard to cases involving agencies governed by the Administrative Procedure Act because Government Code section 11523 expressly provides that a petition for reconsideration is not a condition precedent to seeking judicial review. However, even as to those agencies which operate under the Administrative Procedure Act, the courts have still indicated their disenchantment with litigants who do not present those points for consideration to the agency where there is that kind of availability.[11]

In *Reimel v. House*,[12] the court expressed its displeasure with a decision of the Alcoholic Beverage Control Appeals Board, a board to which appeals from decisions of the Department of Alcoholic Beverage Control are taken. In that case, the appeals board decided an issue neither presented at the hearing before the department nor even presented in the appeal before the appeals board. The court held that since the issue was not properly raised at the hearing before the department, it was not before the board. This is another application of the doctrine of exhaustion of administrative remedies used in a setting where an administrative tribunal is used as an appellate body over another administrative tribunal.

Public Employees and Administrative Law

During the year a number of cases involving public employees at all levels—city, county, and state—have been de-

10. Heath v. Workmen's Comp. App. Bd., 254 Cal. App.2d 235, 62 Cal. Rptr. 139 (1967).

11. Reimel v. ABC Appeals Board, 256 Cal. App.2d 158, 175, 64 Cal. Rptr. 26, 35–36 (1967), app. dismd. 393 U.S. 7, 21 L.Ed.2d 9, 89 S.Ct. 44.

12. 259 Cal. App.2d 511, 66 Cal. Rptr. 434 (1968), app. dismd. 393 U.S. 17, 21 L.Ed.2d 17, 89 S.Ct. 48.

cided. The court in *Hofberg v. County of Los Angeles Civil Service*,[13] restated the rule concerning public employment that although it is not a constitutional right, one cannot be properly barred from public employment for arbitrary, unreasonable, and capricious reasons. The court in *Hofberg* showed its unwillingness to impose conditions of employment which improperly impair the exercise of basic constitutional rights. In proceeding along these lines, the court was dealing with a petitioner who had sometime previously been discharged from county employment because he asserted the Fifth Amendment privilege in an appearance before the House of Representatives' Committee on Un-American Activities. Subsequently, and at a date closer to the institution of the proceedings, the employee sought employment by the agency, disclosed the particulars of his prior employment and reasons for discharge, and passed a written examination. His name was withheld from the eligible lists, however, under a rule which stated that an applicant's name might be withheld from the employment list if that person had been dismissed for cause.

In appealing this decision, the petitioner indicated his willingness to answer any questions asked by the County of Los Angeles or the Civil Service Commission which he had previously refused to answer before the House Un-American Activities Committee. He further indicated that in response to a request that if called upon he would appear before the HUAC but that on advice of counsel, predicated on Fifth Amendment grounds, he would refuse to answer any questions except those set out in Government Code section 1028.1 (relating to subversive activities). He added, however, that he would appear before any State Assembly Committee or Senate Committee and answer *any* questions. The court noted the expansion of constitutional rights of public employees over the years and the corresponding restrictions on the conditions which could be imposed on employment and concluded there was no substantial element of utility to support the Civil Service Commission's decision in denying reemployment. The

13. 258 Cal. App.2d 433, 65 Cal. Rptr. 759 (1968). For further discussion of this case, see Leahy, CONSTITUTIONAL LAW, in this volume.

court stressed petitioner's willingness to answer any questions by any local or state body and his willingness, except with the limitation here noted, to questions posed by the HUAC. The only refusal present was related to a possible future refusal to answer some unknown questions at a hypothetical hearing.

In *Board of Trustees of the Placerville Union School District v. Porini*,[14] the court held that in an action to dismiss a school teacher as being mentally incompetent, the judgment supporting a requirement that the teacher take a two-year leave of absence was unsupported where all the evidence of incompetence related to a time period sixteen months prior to the date of trial, and no evidence showed that she suffered any incapacity at the time of trial and where there was some evidence produced by the teacher to the contrary.

In *Orlandi v. State Personnel Board,*[15] a traffic officer was dismissed under Government Code section 19572, subdivision (t) (failure of good behavior of such nature that it causes discredit to the employee's agency or his employment). The dismissal, which arose out of the officer's fixing of a traffic ticket, was upheld although there was no actual proof presented that the crime actually resulted in damage to the reputation of the California Highway Patrol, and although there was no showing that the conduct was publicized. The statutory provision dealt with conduct of state employees and not with the extent of publicity that the conduct may attract. The officer's conduct was clearly the sort of behavior which would discredit the highway patrol and bring discredit to its officers.

Licensing—Nature of Licenses and Effect of Nonlicensing

In *Johnson v. Maddox*,[16] the court held that where a license is required by statute before a certain activity, such as con-

14. 263 Cal. App.2d 784, 70 Cal. Rptr. 73 (1968). For a further discussion of this case, see McKinstry, STATE AND LOCAL GOVERNMENT, in this volume.

15. 263 Cal. App.2d 32, 69 Cal. Rptr. 177 (1968).

16. Johnson v. Maddox, 257 Cal. App.2d 714, 65 Cal. Rptr. 185 (1968).

tracting, may be engaged in, an unlicensed person who contracts to do that for which a license is required may not recover on his contract. This case presented nothing particularly new, but the federal courts in *Power City Communications Inc. v. Calaveras Telephone Co.*,[17] provided an interesting twist on the application of the rule. In that case the district court held that in view of the rule in *Erie Railroad Co. v. Tompkins*,[18] the California statute prohibiting a contractor from bringing and maintaining an action to collect compensation for any act or contract for which a license is required without alleging and proving that it was a duly licensed contractor was determinative as to whether or not a Washington corporation was empowered to sue in a diversity action for installation and construction of telephone facilities in California. This California rule was the one to be followed rather than the usual federal rule providing that the capacity of a corporation to sue or be sued is to be determined by the law under which it was organized.

17. 280 F.Supp. 808 (D.C. [1968]).

18. 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, 114 A.L.R. 1487 (1938).