

January 1967

## Administrative Agencies

Garrett Elmore

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/callaw>

 Part of the [Administrative Law Commons](#)

---

### Recommended Citation

Garrett Elmore, *Administrative Agencies*, 1967 Cal Law (1967), <http://digitalcommons.law.ggu.edu/callaw/vol1967/iss1/14>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Cal Law Trends and Developments by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

## *Administrative Agencies*

by *Garrett Elmore\**

The past year has seen a cross section of administrative law at work. If there is any discernible trend, it is that both the California courts and the California legislature seem keenly aware of the problems of balance that are involved in agency procedures and in the judicial review of an agency's act or decision. It may be speculated that in such balancing, continued attention will be given to such matters as prehearing discovery and conferences, the adequacy of findings of fact in particular situations, and the relationship between administrative remedies and court determinations.

This article will consider the year's developments, primarily court decisions, in the following order: prehearing investiga-

\* A.B. 1923, Stanford University; LL.B. 1926, Harvard University. Associate Professor of Law, Hastings College of the Law. Special Counsel, The State Bar of California. Member, California State Bar.

The author extends his appreciation to Robert R. Hole for assistance in the preparation of this article.

The views herein expressed are the author's individual views, and do not reflect the opinions of The State Bar of California.

## Administrative Agencies

tions and procedures, formal charge, defenses, hearing procedures, administrative findings, and the relationship between agency decisions and the courts. By reason of the varied statutes and local laws governing particular administrative proceedings, it is not feasible to portray each case in its particular setting in detail. Rather, the purpose of this review is to present the year's decisions or other developments in a highlight fashion.

### Prehearing Investigations and Procedures

Of outstanding significance this past year was the unanimous decision of the California Supreme Court in *Shively v. Stewart*,<sup>1</sup> according, for the first time in California, a right of prehearing discovery to a respondent charged with a disciplinary offense in a proceeding under the California Administrative Procedure Act. Indeed, the implications of *Shively* extend beyond proceedings under the Act.<sup>2</sup> *Shively* applied common-law rules to permit and regulate the use of the agency's subpoena power to secure prehearing discovery by a respondent. Principally, it applied the analogy of criminal-law discovery, though also using certain civil discovery techniques in matters of detail.<sup>3</sup>

Under *Shively*, a respondent now has a means of compelling prehearing production of witness' statements and other writings held by the agency. It is clear that the items need not be admissible in evidence to compel their production, but discovery standards apply. Conversely, as in the case of discovery in criminal cases, there must be a showing of more than a mere wish for the benefit of all the information in the adversary's files. Principally, this question will arise

1. 65 Cal.2d 475, 55 Cal. Rptr. 217, 421 P.2d 65 (1966).

2. See, e.g., *Endler v. Schutzbank*, 68 Cal.2d 160, 65 Cal. Rptr. 297, 436 P.2d 297 (1968) (referring to *Shively* for the conduct of a nonstatutory hearing).

3. Civil discovery techniques include issuance of a subpoena duces tecum

upon affidavit (Cal. Code Civ. Proc. § 1985), use of depositions, though not for the broad purposes provided by the California Civil Discovery Act (Cal. Code Civ. Proc. §§ 2016-2036), and the application of "good cause" and attorney's work product standards (Cal. Code Civ. Proc. § 2016(b), § 2036(a)), in the case of broad demands for reports gathered for the agency.

upon a call, as in *Shively*, for all reports and documents gathered by investigators and employees of the agency. *Shively* held that this type of call was too broad, but that respondent might make an additional showing of need and specificity and obtain documents that are neither privileged nor protected as the attorney's work product. To obtain information necessary to make such a showing, the respondent was given the right to take depositions of the agency's attorney and executive secretary.

In brief, the legal procedure outlined in *Shively* contemplates that the respondent is entitled as a matter of course to the issuance of a subpoena duces tecum, by the agency or assigned hearing officer, upon filing the affidavit provided for by Code of Civil Procedure section 1985; the agency can move to quash, vacate, or modify the subpoena in the superior court; and the respondent may take depositions as mentioned above. In respect to the agency's cross right of prehearing discovery, it was noted that the agency had sufficient resources and legal means to enable it to secure complete information and prepare its case before filing the accusation.

At this time, as indicated by the legislature's pre-existing interest in the subject and the introduction of three types of bills in 1967,<sup>4</sup> there is some basis to believe that legislative action may be forthcoming in this area. But it is doubtful that the legislation will depart radically from the simple approach of *Shively*, which obviously is capable of application in other administrative proceedings.

4. See Assembly Bill 24 (1965); Assembly Bills 572, 925 and 926 (1967); Senate Bills 942 and 1359 (1967); Senate Resolution 388 (1967). In 1965 Assembly Bill 25, a broad bill adapted from the California Civil Discovery Act, passed one house. In 1967 (after *Shively*) narrower bills were introduced. One form, drafted by a State Bar committee, was based upon modified civil discovery before a hearing officer but with superior court review (Assembly Bill 572 and Senate Bill 942). A

second form provided for bilateral inspection of writings and written claims of privilege, with court review only upon review of final decision in the case (Senate Bill 1359). The third form (as amended) provided for bilateral inspection of writings and the right to take depositions, under limitations, and subject to hearing-officer rulings (Assembly Bills 925, 926). It received the most favorable consideration, but went to interim study.

Also of substantial importance in the area of prehearing discovery is an amendment to the Federal Administrative Procedure Act, effective July 4, 1967. As a public records measure, it permits "any person" to inspect all agency records except those in nine listed categories, two of which are similar to that matter which under California law is protected by privilege and work product exceptions.<sup>5</sup>

In the area of the agency's own investigative powers, two cases may be noted. *People v. King*<sup>6</sup> illustrates the problems that may be encountered when the statutory authority for an administrative subpoena also provides for immunity from criminal prosecution by reason of compelled testimony or compelled production of records. *King* holds that the giving of compelled testimony under such a statute confers the immunity. There is no need to claim privilege against self-incrimination if the statute does not so require. *King* implies, without directly holding, that under such a statute the witness can be compelled to produce *corporate* records pursuant to the administrative subpoena, without giving rise to immunity, so long as he is not compelled to testify.

The second case, *Miley v. Harper*,<sup>7</sup> involves the legal position of the private citizen who fails in an action in which he has instituted a complaint against a licensee. The question is important, since it is only through the cooperation of private citizens that many regulatory laws can be effectively administered. As to administrative proceedings generally, the substantive law of this state was declared in the 1957 case of *Hardy v. Vial*.<sup>8</sup> *Hardy* imposes liability on the private citizen for malicious prosecution in accord with the rule of section 680 of Restatement (First) of Torts. In *Miley*, the agency accusation had previously been decided in favor of the respondent-licensee, and the complainant was made the de-

5. 5 U.S.C. § 552. See H.R. Rep. No. 1497, 89th Cong. 2d sess. (1966); U.S. Code Cong. & Ad. News 2418.

6. 66 Cal.2d 633, 58 Cal. Rptr. 571, 427 P.2d 171 (1967).

7. 248 Cal. App.2d 463, 56 Cal. Rptr. 536 (1967).

8. 48 Cal.2d 577, 311 P.2d 494, 66 A.L.R.2d 739 (1957); see also *Werner v. Hearst Publications, Inc.*, 65 Cal. App. 2d 667, 151 P.2d 308 (1944); Restatement (First) of Torts, Comment g, § 653.

pendant in the civil action for malicious prosecution. A motion for summary judgment for the defendant was granted by the trial court, largely on the basis of a supporting declaration of the agency's attorney, which indicated that the agency itself had made the decision to file the accusation, based on its own investigation. On appeal, the ruling was reversed for failure to show facts sufficient to establish a finding of "independent investigation" and independent causation. The decision indicates that had the agency's full investigative report been part of the record, it could have supported the motion as admissible hearsay and sufficient facts might then have been presented for summary judgment. It would seem, therefore, that considerable importance attaches to the agency investigation of complaints and to the adequacy of the agency's records thereof.

Finally, in the area of prehearing procedures, a 1967 legislative measure, if passed, would have provided for a pre-accusation conference between representatives of the potential respondent and the agency.<sup>9</sup> Its purpose was to facilitate possible agreed dispositions, including a disposition by payment of a stipulated fine, within defined statutory limits, and thereby avoid formal charges and later proceedings. Although the measure was vetoed, a version of the same bill may be expected to be introduced at a future session of the legislature.

### Formal Charge

In *Wisuri v. Newark School District*,<sup>10</sup> the familiar rule was restated that notice of charges need not meet the formal requirements of a complaint in a civil action. But frequently this rule leads to difficulties, of which *Sarac v. State Board of Education*<sup>11</sup> is an illustrative case, in that problems may be encountered in the use of conclusionary and evidentiary allegations in the accusation, including alleged admissions of the respondent. Little or no decisional law exists on this

9. Senate Bill 366 (1967).

11. 249 Cal. App.2d 58, 57 Cal.

10. 247 Cal. App.2d 239, 55 Cal. Rptr. 490 (1966).

Rptr. 69 (1967).

form of notice, which is sometimes used by draftsmen. For example, the accusation may allege specific misconduct or acts and also allege surrounding circumstances, such as the respondent's arrest, the criminal charges or the outcome thereof, and alleged admissions of other acts of misconduct made to the arresting officer. In form, this type of accusation goes beyond the California Administrative Procedure Act, which provides that the accusation shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged.<sup>12</sup> Such additional and evidentiary allegations place the respondent on notice of what the accuser claims. But they may also have the undesirable effect of framing irrelevant issues and of alleging admissions which perhaps cannot be legally established.

*Sarac* involved an accusation in which additional circumstances were alleged. Unfortunately, the allegations were at least technically incorrect in alleging that respondent had pleaded guilty in a criminal case. Instead, he had pleaded *nolo contendere* under Penal Code section 1016(3), which expressly states that such plea shall not be used as an admission against the defendant in a civil suit. The alleged plea of guilty was carried into the findings. On appeal, the licensee contended that such plea had prejudiced the trier of fact in a case where the principal evidence was in sharp conflict. He also objected to use of his alleged admissions of prior misconduct at the time of arrest. The appellate court decided neither the propriety of the accusation form nor the effect of the respondent's alleged admissions, but affirmed the court below on the limited ground that proof of the act of misconduct specifically alleged was sufficient.

The interesting point, not decided in *Sarac*, is whether a *nolo contendere* plea or the conviction based thereon may be equated with a guilty plea and treated as an admission for purposes of an administrative proceeding. Arguments may be made, pro and con.<sup>13</sup> When the plea is made under Penal Code section 1016(3), an administrative proceeding appears

12. Cal. Government Code § 11503. —*Its Use and Effect*, 52 CAL. L. REV.

13. See comment, *Nolo Contendere* 408 (1964).

to be within the spirit, though not the literal terms, of the restraint applicable to its use as an admission in a civil suit. But even if the plea cannot be used as an admission, it and the criminal judgment, when arising out of the act or misconduct charged, would appear to have some relevancy to the overall issues and, therefore, be admissible (when properly proved) under Evidence Code sections 210 and 351. But when received merely as "relevant evidence" the plea obviously would have much less weight than when received as an admission.

### Defenses

Whether a county permit to operate a private patrol service can be summarily "revoked" by action of a county official, without prior notice of charges and opportunity to present defenses, was decided in *Stewart v. County of San Mateo*.<sup>14</sup> In a decision exploring the limits of the procedural due process rule that permits summary action where the public interest is compelling, the court determined that a private patrol service has a sensitive relationship to the public safety. It upheld the "revocation," but as a temporary permit "suspension." A later full-scale hearing on specific charges by a review body, in this instance the board of supervisors, sufficiently satisfied procedural due process.

A similar question arose in *Sokol v. Public Utilities Commission*,<sup>15</sup> a case of first impression in California. Acting pursuant to a regulation of the state public utilities commission,<sup>16</sup> a telephone company discontinued service to a subscriber. It based its decision on a letter from a chief of police, who claimed that he had reasonable cause to believe the telephones were being used in an illegal activity. The regulation made such a letter sufficient, and no provision was made for advance notice to the subscriber. The exclusive remedy of the subscriber was to file a complaint with the commission under general law. The service was in fact re-

14. 246 Cal. App.2d 273, 54 Cal. Rptr. 599 (1966). For further discussion of this case, see Leahy, *Constitutional Law*, in this volume.

15. 65 Cal.2d 247, 53 Cal. Rptr. 673, 418 P.2d 265 (1966).

16. 47 Cal. P.U.C. at 859-60.

stored upon complaint of the subscriber and pursuant to a commission proceeding, wherein it was found there was insufficient evidence of use for illegal purposes. The Supreme Court, considering cases dealing with postponement of the right to hearing until after action had been taken, found there is no rule of general application in this situation. Recognizing the value of telephone communication to legitimate business and First Amendment rights, the court held the summary termination of telephone service deprived the subscriber of property without due process of law. Looking to other jurisdictions for some guidelines, and finding varying views, the court drew a comparison between a discontinuance of service and a search. Consequently, a minimum requirement for a regulation of this type is that the police satisfy an impartial tribunal that they have "probable cause" to act, with the same showing as is required before a magistrate to obtain a search warrant. Additionally, the subscriber is to be promptly afforded an opportunity to challenge the allegations of the police and to secure restoration of service.<sup>17</sup>

The defense of entrapment was raised unsuccessfully in three appellate court decisions during this past year. In *O'Mara v. State Board of Pharmacy*,<sup>18</sup> state investigators had arranged with doctors for prescriptions for dangerous drugs in the names of fictitious patients. Apparently on the investigator's request, the respondent pharmacist refilled the prescriptions without the necessary doctor's authorization for a refill. The licensee's contention that discipline was based on a "trumped-up" charge was unsuccessful.

In *Harris v. Alcoholic Beverage Appeals Board*,<sup>19</sup> the filed charges were based on three instances which took place in 1962, when a female employee of an on-sale licensee had allegedly accepted a drink, paid for by an undercover agent, in violation of a regulation under the Alcoholic Beverage Control Act.<sup>20</sup> In each instance the investigator was found

17. The federal anti-gambling statute, 18 U.S.C. § 1084(d), follows a different pattern. It requires prior notice to the subscriber before discontinuance of service.

18. 246 Cal. App.2d 8, 54 Cal. Rptr. 862 (1966).

19. 245 Cal. App.2d 919, 54 Cal. Rptr. 346 (1966).

20. Cal. Adm. Code § 143.

to have initiated the incident. The appeals board held that public policy had been violated by the investigators' actions, and reversed the department's thirty-day suspension order. The trial court reversed the appeals board, and its decision was affirmed by the appellate court. The decision notes that enforcement policy is a matter for the agency. The entrapment contention, it was found, was insufficient as a matter of law, for there was no tempting of innocent persons into a violation, and there was no showing of inducing an originally well-intentioned person into crime by persuasion and artifice.<sup>1</sup> On a contention by the licensee that the investigators should not have been permitted to testify as to an admission by the employee that she had committed similar violations in the past, the court, while recognizing that the criminal-law rule on entrapment in this state would exclude the admission of such evidence, held such evidence proper in this type of proceeding to show the employee's readiness to violate the law.

In *Whitlow v. Board of Medical Examiners*,<sup>2</sup> three state agents and two aides from the District Attorney's office posed as patients and obtained prescriptions for dangerous drugs. On several occasions, conversations in the doctor's office were relayed by concealed transmitters to another agent outside the building, stationed there for the purpose of recording the conversations. The agent operating the recording equipment was allowed to testify, over the objection of the licensee, from a transcript based on the recordings but containing certain obvious inaccuracies. The facts show that 60 percent of the transcript was based upon clear transmission and the balance upon the agent's memory, because the recording was partially unintelligible. The appellate court found no error, noting that the objection had been made to the agent's testimony as a whole, rather than to those portions based on memory alone, and that nonlegal evidence can be received in an administrative proceeding, the objection going only as to the weight of the evidence.

1. See *People v. Benford*, 53 Cal. 2d 1, 345 P.2d 928 (1959) for definition of entrapment. 2. 248 Cal. App.2d 478, 56 Cal. Rptr. 525 (1967).

The trial court sustained the agency's decision against the licensee and impliedly found against entrapment. The appellate court affirmed, finding the record insufficient to establish entrapment as a matter of law. Further, the court noted, an effective deception was practiced upon the licensee by reason of the fact that the so-called "patients" were enforcement agents carrying recording equipment to obtain evidence to be used against him. But, it concluded, this deception was allowable; it could not be said as a matter of law that the licensee had been entrapped in the legal sense of the term by these facts.

Were another *Whitlow* to arise, it is possible that recent decisions on search and seizure and right to privacy might preclude admission of the evidence obtained by the undercover agents. But this result seems doubtful, because business premises were involved. Both decoy and electronic methods of law enforcement have been upheld generally.<sup>3</sup> Unless a distinction can be made on the grounds that the office of a doctor, like that of a lawyer, is semiprivate and that the nature of the calling requires that such privacy be ensured, it seems likely that the combined methods used in *Whitlow* will continue to be held legal.

### **Hearing Procedures**

The issue was again raised this past year whether, in a proceeding under the California Administrative Procedure Act,<sup>4</sup> a respondent is entitled at the close of the agency's case-in-chief to move for a dismissal on the ground that the facts proved do not establish a violation. In giving a negative answer, *O'Mara v. State Board of Pharmacy*<sup>5</sup> followed earlier

3. Analysis of criminal-law cases is beyond the scope of this article. But see generally the majority, concurring and dissenting opinions in *Katz v United States*, — U.S. —, 19 L. Ed.2d 576, 88 S.Ct. 507 (1967); *Hoffa v. United States*, 385 U.S. 293, 17 L. Ed.2d 374, 87 S.Ct. 408 (1966); *Lopez v. United States*, 373 U.S. 427, 10 L. Ed.2d 462, 83 S. Ct. 1381 (1963); *People v. Benford*, 53 Cal.2d 1, 345 P.2d 928 (1959);

*People v. Braddock*, 41 Cal.2d 794, 264 P.2d 521 (1953); *People v. Miller*, 248 Cal. App.2d 731, 56 Cal. Rptr. 865 (1967); *People v. Ross*, 236 Cal. App.2d 364, 46 Cal. Rptr. 41 (1965); and Cal. Penal Code §§ 630-637.2.

4. Cal. Government Code §§ 11500-11528.

5. 246 Cal. App.2d 8, 54 Cal. Rptr. 862 (1966).

decisions holding that, under the act, the hearing officer must proceed until all the evidence to be offered by all the parties has been received.

The leading case of *Ashbacker Radio Corporation v. Federal Communications Commission*<sup>6</sup> holds that where several applicants for a license have competing claims, they must receive equal treatment as to opportunity to be heard. Commonly, this requirement results in consolidation of proceedings. *Bostick v. Martin*<sup>7</sup> applied the *Ashbacker* rule where a new savings and loan association and an existing institution each applied for a permit to open an office in a geographical area where the commissioner would issue but one permit.

In *Goldberg v. Regents of the University of California*,<sup>8</sup> procedural requirements were examined under the due process standard. The proceeding concerned the discipline of certain students under ground rules set forth by the hearing committee. Included was a detailed notice of charges sent to each student in advance of hearing. The notice suggested that the student might like to retain counsel, and suggested methods for presenting evidence at the hearings. *Goldberg* rejected the earlier concept that a university occupies a position of parent to child, while upholding the procedure followed by the committee as providing the due process safeguards declared necessary in *Dixon v. Alabama State Board of Education*.<sup>9</sup>

### Administrative Findings

Few areas in California civil procedure have generated as much controversy as the requirement for findings of fact in civil cases. In California, findings are not required in small claims suits. They are not required in justice courts or in municipal courts where the amount in controversy is \$300 or

6. 326 U.S. 327, 90 L. Ed. 108, 66 S. Ct. 148 (1945).

7. 247 Cal. App.2d 179, 55 Cal. Rptr. 322 (1966).

8. 248 Cal. App.2d 867, 57 Cal. Rptr.

463 (1967). For further discussion, see Leahy, *Constitutional Law*, in this volume.

9. 294 F.2d 150 (5th Cir. [1961]), cert. denied 368 U.S. 930, 7 L. Ed.2d 193, 82 S. Ct. 368 (1962).

less.<sup>10</sup> Proposals have been made to lessen the obligation of a trial judge to make findings in civil cases in superior and municipal courts. Conversely, efforts have been made to encourage more meaningful findings.<sup>11</sup> No trend for lessening the findings requirement is discernible in administrative law. Rather, recent California legislation and decisions place emphasis on the findings requirements imposed upon an agency in a particular decision making process.

In *Broadway, Laguna, Vallejo Association v. Board of Permit Appeals*,<sup>12</sup> the question concerned a local zoning code which authorized the zoning administrator to grant a variance if he found that certain stated standards had been met and if he made findings of fact establishing compliance with the standards. If the administrator denied the variance application, a review board was authorized to change the administrator's ruling but was required to specify errors and to make findings of the facts relied on. In this case the administrator denied the variance application, and the review board overruled him. In mandamus, the trial court and the court of appeal denied a writ. The supreme court reversed. The majority noted the requirement of the code for "specific findings" by the review board. The decision reviewed the findings made by the review board and found them inadequate to sustain its action. It also reviewed the record, and by viewing it in the light most favorable to the review board, found the findings of fact which would support it were likewise inadequate. The requirement of the code for specific findings by the review board was a distinguishing feature. The case states that the rule providing that presumptions that an agency's ruling rest upon necessary findings, and that such findings are supported by substantial evidence, does not apply to agencies which must state their findings and set forth the relevant supportive facts.

<sup>10</sup> Cal. Code Civ. Proc. §§ 117h, 117j, 632.

Cal. Code Civ. Proc. §§ 632, 634 (Cal. 11 Stats 1959, c. 637).

<sup>11</sup> See Twentieth Biennial Report, Cal. Judicial Council 18 (1965); Senate Bill 483 (1965); 1959 amendments to

<sup>12</sup> 66 Cal.2d 767, 59 Cal. Rptr. 146, 427 P.2d 810 (1967).

Similarly, in *Greyhound Lines v. Public Utilities Commission*,<sup>13</sup> the Supreme Court annulled an agency order for insufficient findings. In 1961, section 1705 of the Public Utilities Code was amended. The amendment requires the Public Utilities Commission to set forth in its decisions, separately stated, findings of fact and conclusions of law on material issues.<sup>14</sup> In September 1964, the commission on its own motion instituted an investigation into Greyhounds' commuter service in the San Francisco area. Following hearings, the commission issued an order directing the carrier to establish peak-hour commuter service on two routes. The only separately stated finding appearing in the decision was that "public interest requires the establishment" of the service but that "[the] [s]afety of operations will not permit the inauguration [of portions thereof] until adequate turnouts for bus stops are constructed by the responsible public authorities."<sup>15</sup> This finding was held inadequate to meet the requirement of section 1705, for it did not contain findings of the basic facts upon which the ultimate finding of "public interest" or "public convenience and necessity" was based. Repeating reasoning stated in an earlier decision,<sup>16</sup> the court observed that findings of basic facts afford a rational basis for judicial review, assist the reviewing court to ascertain the principles relied upon by the agency and to determine whether it acted arbitrarily, and also assist parties to know why the case was lost and to prepare for rehearing or review and assist others who may be planning activities involving similar questions.

The facts in the case disclose that there were several material issues on which evidence was introduced. The carrier questioned the jurisdiction of the commission based upon the contention that the new routes were beyond its dedication

13. 65 Cal.2d 811, 56 Cal. Rptr. 484, 423 P.2d 556 (1967).

14. Cal. Pub. Util. Code § 1705 in pertinent parts provides: "[T]he commission shall make and file its order, containing its decision. The decision shall contain, separately stated, findings of fact and conclusions of law by

the commission on all issues material to the order or decision."

15. 65 Cal.2d at 813, 56 Cal. Rptr. at 485, 423 P.2d at 557.

16. *California Motor Transport Co. v. Public Utilities Comm'n*, 59 Cal.2d 270, 28 Cal. Rptr. 868, 379 P.2d 324 (1963).

of property to public use, and raised the question whether the new routes would support themselves.

Other statutes similar to section 1705 of the Public Utilities Code have also been interpreted to require findings of the basic facts upon which the ultimate decision is made. The federal case of *Braniff Airways, Inc. v. Civil Aeronautics Board*<sup>17</sup> concerned a review of a Civil Aeronautics Board decision based on Federal Aviation Act section 1005(f),<sup>18</sup> which is similar to California Public Utilities Code section 1705. The board had held extensive hearings to determine which carrier should operate new or improved routes in the southern parts of the United States. The board's findings recognized one carrier's need for route support but found in terms of quality of service offered by either carrier that neither could offer significant advantage in providing the new service. The court held that the findings fell short of the requirement that the board's decision must be supported in a manner to enable the court to review the correctness of the conclusion reached on the basis of the findings.

In *Saginaw Broadcasting Co. v. Federal Communications Commission*,<sup>19</sup> the court stated the purposes of detailed findings of fact in reasoning similar to that of the California Supreme Court in the *California Motor Transport Co.*<sup>20</sup> case.

The question comes to mind, what are "material issues" in an agency proceeding where the pertinent law provides only broad standards? In the *California Motor Transport Co.* case the court declared that it was within the discretion of the agency to determine the factors material to the ultimate decision.<sup>1</sup> But obviously no rule can be stated that will apply in every case, for much will depend upon the relevant contentions of the parties and the nature of the ultimate issue.

17. 306 F.2d 739, 113 App. D.C. 132 (D.C. Cir. [1962]).

18. 49 U.S.C. § 1485(f).

19. 96 F.2d 554, 68 App. D.C. 282 (D.C. Cir. [1938]).

20. *California Motor Transport Co. v. Public Utilities Comm'n*, 59 Cal.2d 270, 28 Cal. Rptr. 868, 379 P.2d 324 (1963).

1. 59 Cal.2d at 275, 28 Cal. Rptr. at 870, 379 P.2d at 326.

Further reflecting the need for findings even where the agency's action is quasi-legislative, *Bostick v. Martin*<sup>2</sup> held erroneous a decision of a department head denying an application for a permit for a new savings and loan association because the denial did not contain sufficient findings of fact. Even though no detailed requirement for findings was made by the pertinent statute, which merely used the word "finds" in stating the official's authority, a detailed finding was required.

Despite the emphasis that the cases under review place on basic findings, it is to be noted that many agency matters involve *adjudicative* proceedings where the fact issues are narrow or fairly routine. Undoubtedly, a case can be made for more informative or specific findings in such adjudicative matters. But they are of substantial volume; for the present at least, the California Administrative Procedure Act permits findings to be made in the language of the pleadings or by reference thereto.<sup>3</sup> Likewise, the rule has been frequently stated in California cases that detailed and specific findings are not required in a proceeding before an administrative body unless the statute authorizing the proceeding requires them.<sup>4</sup> In quasi-legislative proceedings of a local commission composed of laymen, findings may be informal and the standards of judicial findings need not be met.<sup>5</sup>

### Agency Decisions and the Courts

General principles of judicial review following final agency action, at state or local level, are now well established in California. During the past year, one substantial statutory

2. 247 Cal. App.2d 179, 55 Cal. Rptr. 322 (1966).

3. Cal. Government Code § 11518.

4. See *Martin v. Alcoholic Beverage Control Appeals Board*, 52 Cal.2d 259, 341 P.2d 291 (1959); *California Shipbuilding Corp. v. Industrial Accident Comm'n*, 31 Cal.2d 270, 188 P.2d 27 (1947); *Webster v. Board of Dental Examiners*, 17 Cal.2d 534, 110 P.2d 992 (1941); *Embey Foods, Inc. v. Paul*, 230

Cal. App.2d 687, 41 Cal. Rptr. 365 (1964); *Palm Springs Turf Club v. Cal. Horse Racing Board*, 155 Cal. App.2d 242, 317 P.2d 713 (1957). But see *County of Amador v. State Board of Equalization*, 240 Cal. App.2d 205, 49 Cal. Rptr. 448 (1966).

5. E.g., *County of Santa Barbara v. Purcell, Inc.* 251 Cal. App.2d 169, 59 Cal. Rptr. 345 (1967).

change was made. Judicial review functions in alcoholic beverage control cases were transferred to the supreme court and courts of appeal, divesting jurisdiction from the superior courts.<sup>6</sup>

In the broad spectrum of the relationship between agencies and the courts, one of the most important questions confronting the courts and practitioners is the "exhaustion of remedy" rule. In particular applications, cases decided during the past year were divided in result; some applied the rule and others did not. Although the issues were not framed in terms of exhaustion, *California Water and Telephone Co. v. County of Los Angeles*<sup>7</sup> involved the same general criteria. Several utilities and a nonprofit association to which members of the industry belonged brought a representative suit for declaratory relief and sought to enjoin enforcement of a county ordinance. The court set aside the ordinance on the ground that it was unconstitutional and noted the interest of the public and the importance of the question. The ordinance in question, requiring administrative action, was alleged to conflict with state law, and the court so held after first considering whether the suit should be entertained. However, in *Robins v. County of Los Angeles*,<sup>8</sup> a suit was brought to enjoin enforcement of a county ordinance requiring the licensing of a place of business employing "topless" waitresses. The court held the suit to be premature, noting that the plaintiff had not made application for a license and therefore had not made available to himself the remedies against denial of a license that are provided by the ordinance.

In *Rosenfield v. Malcolm*,<sup>9</sup> the Supreme Court rejected a contention that a dismissed employee seeking reinstatement had overlooked his administrative remedy. The alleged remedy was provided by two county charter sections, both of which were stated in general terms and contained no specifics

6. Cal. Bus. & Prof. Code §§ 23090–23090.7.

7. 253 Cal. App.2d 11, 61 Cal. Rptr. 618 (1967).

8. 248 Cal. App.2d 1, 56 Cal. Rptr. 853 (1966). For further discussion of

this case see McKinstry, *State and Local Government*, in this volume.

9. 65 Cal.2d 559, 55 Cal. Rptr. 505, 421 P.2d 647 (1967). For further discussion see Leahy, *Constitutional Law*, in this volume.

for an administrative remedy. The rule was stated in the following terms:

[M]ere possession by some official body of a continuing supervisory or investigatory power does not itself suffice to afford an 'administrative remedy' unless the statute or regulation under which the power is exercised establishes clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties.<sup>10</sup>

The exhaustion rule was also held inapplicable in *Gaumer v. County of Tehama*,<sup>11</sup> where a suit was brought for a refund of real property taxes alleged to have been illegally assessed. The administrative remedy available to the taxpayer was an appeal to the board of supervisors, but by the time the taxpayer had received his tax bill, the prescribed period in which the board sat had expired. The contention that the taxpayer should have requested the board to sit in special session was rejected. This case seems to stand on its own facts. Other tax situations, where there is readily available a source of administrative relief, will require the taxpayer to seek first a decision from that body.

The decision in *City of Los Angeles v. Superior Court*<sup>12</sup> applied the exhaustion rule to bar a civil suit by an ex-policeman for reinstatement and back pay, holding that certain city charter provisions, not entirely explicit in the facts, provided an administrative remedy. Procedurally, the case is of interest. The trial court had taken the view that the exhaustion rule did not apply and had denied defendant's motion for summary judgment. In granting a *writ of prohibition* against further proceedings below, the court of appeal held that the exhaustion rule affected the jurisdiction of the courts. The incorrect trial court determination therefore could be corrected by writ.

California permits a declaratory judgment suit to test the

<sup>10</sup>. 65 Cal.2d at 566, 55 Cal. Rptr. at 511, 421 P.2d at 703.

<sup>12</sup>. 246 Cal. App.2d 73, 54 Cal. Rptr. 442 (1966).

<sup>11</sup>. 247 Cal. App.2d 548, 55 Cal. Rptr. 777 (1967).

validity of a state administrative regulation, when the suit is filed before a criminal or disciplinary proceeding has commenced. By use of this procedure, a licensee often may obtain a court ruling on a questioned administrative ruling, without undergoing the expense and risk of agency enforcement action. During the past year an interesting variation of this technique appeared in two cases testing the validity of recent licensing statutes relating to the ownership of pharmacies by licensed physicians. The two cases, *Magan Medical Clinic v. State Board of Medical Examiners*<sup>13</sup> and *Warrack Medical Center Hospital v. State Board of Pharmacy*,<sup>14</sup> arose on substantially undisputed facts. These involved differing fact situations, so the court would be in a position to interpret the statute definitively. In form, *Magan* was a declaratory relief suit; *Warrack* was a mandamus action to compel issuance of a pharmacy license after denial by the agency in reliance on the questioned statute.

In the day-to-day operation of most arms of government, there persists the continuing problem of delegation of power. Of importance this past year in this regard is the supreme court decision in *Wilke and Holzheiser, Inc. v. Department of Alcoholic Beverage Control*,<sup>15</sup> in which a divided court again upheld California's fair trade laws in the marketing of alcoholic beverages. The majority opinion concluded that there was no delegation to private persons of the power to fix prices, to regulate the business of competitors, or to exclude a potential competitor. The court also found that there was no unlawful delegation in the prescribed administrative and criminal sanctions for violation, because the legislature had prescribed sufficient guidelines. The issues as decided in *Wilke* reflect the traditional test for an improper delegation of power, and it seems clear at this time that any legislative delegation will be difficult to contest so long as there appears

13. 249 Cal. App.2d 124, 57 Cal. Rptr. 85 (1967). For further discussion see Brandel, *Business Associations*, in this volume.

14. 249 Cal. App.2d 118, 57 Cal. Rptr. 23, 420 P.2d 735 (1966).

on the face of the statute a substantial attempt to provide statutory guidelines.

The regard of the courts for state regulatory policy and for agency functions is shown by the recent decision of the supreme court in *Keller v. Thornton Canning Company*.<sup>16</sup> *Keller* involved the application of Public Utilities Code section 3571 in its relation to the Highway Carriers Act.<sup>17</sup> The court held that failure of a carrier to obtain the required permit from the Public Utilities Commission was not a bar to a civil suit to recover alleged undercharges to shippers, filed at the direction of the commission. The carrier had been instructed by a commission staff directive to review its records and collect undercharges from its shippers. Pursuant to the directive, the carrier brought a civil action. The shippers interposed the defense that plaintiff was barred from recovering the minimum rate because the carrier had not had the appropriate permit from the Commission at the time the service was rendered. The trial court held for defendants. The supreme court reversed, applying the principles stated by Chief Justice Traynor in an earlier case.<sup>18</sup> The Highway Carriers Act contains no express provision barring a non-licensed person from civil recovery. The court noted that the paramount purpose of the statute violated is to protect the public against ruinous carrier competition and possible attendant evils. It concluded that the more important objective of protecting the minimum rate structure, as enforced by the commission, should prevail over that of penalizing the unlicensed carrier by foreclosure of access to the courts. An earlier decision of a court of appeal denying recovery was distinguished on the ground that an unexecuted contract call-

16. 66 Cal. 2d 963, 59 Cal. Rptr. 836, 429 P.2d 156 (1967).

17. Cal. Pub. Util. Code § 3571 provides: "No highway contract carrier or radial highway common carrier shall engage in the business of transportation of property for compensation by motor vehicle on any public highway in this State without first having obtained from

the commission a permit authorizing such operation."

18. *Lewis & Queen v. N. M. Ball Sons*, 48 Cal.2d 141, 308 P.2d 713 (1957), involving statutory provisions, Cal. Bus. & Prof. Code § 7031, which declare expressly, in the case of a contractor, that no action may be brought or maintained in a court of this state by the unlicensed contractor.

ing for illegal rates had been involved.<sup>19</sup> The court of another state in *Johnston v. L. B. Hartz Stores, Inc.*<sup>20</sup> already clearly had established support for the commission's enforcement directive and its underlying policy considerations, stating:

[P]ressure of the shippers upon the carriers for reduced rates in violation of the statute will almost entirely be relieved if the shippers know that notwithstanding any illegal bargain that is made, recovery may still be had on the basis of the minimum rate fixed by the commission.<sup>1</sup>

Another civil suit brought by a carrier against a shipper to recover undercharges was considered by an appellate court last year. In *Pellandini v. Pacific Limestone Products, Inc.*,<sup>2</sup> the court of appeal, reversing the trial court, held in effect that the administrative determination that the rates in question were less than minimum was *res judicata*. The court noted that while the shipper was not a party to the administrative proceeding, he had standing to intervene or to move to rescind, modify, or annul the commission's decision.<sup>3</sup>

19. *Orlinoff v. Campbell*, 91 Cal. App.2d 382, 205 P.2d 67 (1949).

20. 202 Minn. 132, 277 N.W. 414 (1938).

1. 202 Minn. at 135, 277 N.W. at 416.

2. 245 Cal. App.2d 774, 54 Cal. Rptr. 290 (1966).

3. 245 Cal. App. at 777-78, 54 Cal. Rptr. at 291-292 (1967).