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GEORGE DEUKMEJIAN
Attorney General

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| OPINION | : | No. 79–615 |
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| of | : | December 20, 1079 |
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| GEORGE DEUKMEJIAN | : | |
| Attorney General | : | |
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| Anthony S. DaVigo | : | |
| Deputy Attorney General | : | |
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SUBJECT: APPLICABILITY OF CALIFORNIA CONSTITUTION ARTICLE III, SECTION 3.5—The provisions of California Constitution, article III, section 3.5 apply to the Alcoholic Beverage Control Appeals Board in the exercise of its authority under California Constitution, article XX, section 22, and Business and Professions Code sections 23080–23087.

The Honorable Peter M. Finnegan, Chairman, Alcoholic Beverage Control Appeals Board, has requested an opinion on the following question:

Do the provisions of California Constitution, article III, section 3.5 apply to the Alcoholic Beverage Control Appeals Board in the exercise of its authority under California Constitution, article XX, section 22, and Business and Professions Code sections 23080 through 23087?

CONCLUSION

The provisions of California Constitution, article III, section 3.5 apply to the Alcoholic Beverage Control Appeals Board in the exercise of its authority under California

Constitution, article XX, section 22, and Business and Professions Code sections 23080 through 23087.

ANALYSIS

On June 6, 1978, section 3.5 of article III of the California Constitution (hereinafter, “section 3.5”), known as Proposition 5 at the 1978 primary election, was adopted by the people. This amendment, proposed by Senate Constitutional Amendment number 25 (Stats. 1977, Resolution Chapter 48), provides as follows:

“An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

“(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

“(b) To declare a statute unconstitutional;

“(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.”

The inquiry presented is whether section 3.5 applies to the Alcoholic Beverage Control Appeals Board in the exercise of its authority under article XX, section 22 of the California Constitution and sections 23080 through 23087 of the Business and Professions Code.¹ The principal issue is whether the Alcoholic Beverage Control Appeals Board is an “administrative agency” within the meaning of section 3.5.² We first examine the nature and scope of authority of the Appeals Board.³

¹ Hereinafter, all section references are to the Business and Professions Code unless otherwise indicated.

² For purposes of the limited scope of this analysis, it is not necessary to inquire, nor do we express any opinion with regard to the constitutional sufficiency of section 3.5.

³ In *Rice v. Alcoholic Bev. etc. Appeals Ed.* (1978) 21 Cal. 3d 431, the Supreme Court affirmed the decision of the Appeals Board issued prior to the adoption of section 3.5 which declared invalid on constitutional grounds the state resale price maintenance laws relating to distilled spirits. Thereafter, the Court of Appeal reversed a decision of the Appeals Board issued after the adoption of section 3.5 enforcing similar fair trade laws regarding the sale of wine. (*Capiscean Corporation*

The 1954 amendment of article XX, section 22 of the California Constitution established two new constitutional agencies, the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board. (See *Marlin v. Alcoholic Bev. etc. Appeals Bd.* (1959) 52 Cal. 2d 238, 241.) The amended provision prescribed the respective powers of these agencies in pertinent part as follows:

“The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. It shall be unlawful for any person other than a licensee of said department to manufacture, import or sell alcoholic beverages in this State.

“The Alcoholic Beverage Control Appeals Board shall consist of three members appointed by the Governor, subject to confirmation by a majority vote of all of the members elected to the Senate. Each member, at the time of his initial appointment, shall be a resident of a different county from the one in which either of the other members resides. The members of the board may be removed from office by the Governor, and the legislature shall have the power, by a majority vote of all members elected to each house, to remove any member from office for dereliction of duty or corruption or incompetency.

“When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the decision subject to such limitations as may be imposed by the Legislature. In such cases, the board shall not receive evidence in addition to that considered by the department. Review by the board of a decision of the department shall be limited to the

v. Alcoholic Bev. etc. Appeals Bd. (1979) 87 Cal. App. 3d 996.) The Court noted that “[t]he Board believed itself prohibited from declaring the wine price maintenance provisions invalid by reason of article III, section 3.5 of the California Constitution.” (*Id.*, at p. 998.) The court did not expound upon the merits of that issue.

questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department it may enter an order remanding the matter to the department for reconsideration in the light of such evidence. In all other appeals the board shall enter an order either affirming or reversing the decision of the department. When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department. Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order.”⁴

Section 3.5 does not define the term “administrative agency.” In common parlance, the term “administrative” pertains to the executive branch of government. (*Cf.* Webster’s New Internat. Dict. (3d ed. 1961) p. 28.) Thus, it has been stated that acts which are in furtherance of the execution of declared legislative policies and purposes or which are devolved upon a public agency by the organic law of its existence are deemed as acts of administration and classed among those governmental powers properly assigned to the executive department. (*Hubbs v. People ex rel. Department of Public Works* (1974) 36 Cal. App. 3d 1005, 1008–1009; *Hughes v. City of Lincoln* (1965) 232 Cal. App. 2d 741, 744–745; and *cf.* 61 Ops. Cal. Atty. Gen. 159, 180 (1978).)

In its stricter connotation, an “administrative agency” is a governmental body, other than a court⁵ or legislature, invested with power to prescribe rules or regulations or to adjudicate private rights and obligations. (2 Cal. Jur. 3d Admin. Law, § 2, pp. 2 19–220;

⁴ A determination of the Appeals Board is subject to judicial review by “the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose.” (§ 23090.)

⁵ Administrative agencies, in the exercise of their adjudicatory powers, proceed as quasi-judicial bodies as distinguished from a court. (*Stevens v. Board of Education* (1970) 9 Cal. App. 3d 1017, 1021; *Chinn v. Superior Court* (1909) 156 Cal. 478, 482.) Although such an agency may be constitutionally authorized to exercise judicial power (*cf. Dare v. Bd. of Medical Examiners* (1943) 21 Cal. 2d 790, 794; and *cf.* 61 Ops. Cal. Atty. Gen. 46, 49 (1978)) it does not follow that it is a judicial tribunal in the strict sense. (*People v. Western Air Lines, Inc.* (1954) 42 Cal. 2d 621, 631.632.)

3 Davis, Administrative Law Treatise (1958) § 1.01, p. 1.) While the Appeals Board exercises “judicial” power (*cf. Francisco Enterprises, Inc. v. Kirby* (1973) 482 F.2d 481, 485), it is clearly an agency within the executive branch of government and falls within both of the foregoing definitions.

Moreover, section 3.5 was clearly intended to apply to such agencies as the Appeals Board. Section 3.5 was a response to the California Supreme Court’s decision in *Southern Pacific Transportation Co. v. Public Utilities Commission* (1976) 18 Cal. 3d 308.⁶ The Public Utilities Commission is a constitutionally established agency exercising judicial power. In holding that the Public Utilities Commission was authorized to determine the validity of statutes, the Supreme Court said in part (*id.*, at pp. 311–312 fn. 2):

“.....

“In any event, the Constitution and statutes of this state grant the commission wide administrative, legislative and judicial powers. (Cal. Const., art. XII, §§ 1–9; Pub. Util. Code, § 701; *People v. Western Air Lines, Inc.* (1954) 42 Cal. 2d 621, 630–633 [268 P.2d 723]; *Southern Calif. Edison Co. v. Railroad Com.* (1936) 6 Cal. 2d 737, 748–749 [59 P.2d 808].) The Legislature has limited the judiciary from interfering with the commission by restricting review to the Supreme Court and by additionally restricting review to determining ‘whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.’ [Italics added; Pub. Util. Code, §§ 1756–1760; *Waters v. Pacific Telephone Co.* (1974) 12 Cal. 3d 1, 4, 6 *et seq.* [114 Cal. Rptr. 753, 523 P.2d 1161]; *Pacific Tel. & Tel. Co. v. Superior Court* (1963) 60 Cal. 2d 426, 429–430 [34 Cal. Rptr. 673, 386 P.2d 233]; *Hickey v. Roby* (1969) 273 Cal. App. 2d 752, 763–768 [77 Cal. Rptr. 486].) Public Utilities Code section 1732 provides corporations and individuals may not raise matters in any court not presented to the commission on petition for reheating, reflecting, when read with the judicial review sections, legislative determination that all issues must be presented to the commission. Under the broad powers granted it, the commission may determine the validity of statutes.”

⁶ Southern Pacific was expressly referred to in the ballot arguments. For purposes of interpretation, such ballot arguments are the functional equivalent of the legislative history of a statute passed by the Legislature. (*Schmitz v. Younger* (1978) 21 Cal. 3d 90, 97, *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equal.* (1978) 22 Cal. 3d 208, 245–246.)

Finally, any apparent ambiguities of an enactment, including an enactment approved by the voters, frequently may be resolved by the contemporaneous construction of an administrative agency charged with its implementation. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equal.*, *supra*, 22 Cal. 3d at p. 245.) In this regard, it is noted that the Appeals Board has construed section 3.5 as being applicable to its proceedings. (*Cf. Capiscean Corporation v. Alcoholic Bev. etc. Appeals Bd.*, *supra*, 87 Cal. App. 3d at p. 998.) It is concluded that section 3.5 applies to the Appeals Board in the exercise of its authority under article XX, section 22 of the California Constitution and sections 23080 through 23087.
