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OPINION	:	No. 81-715
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of	:	<u>JANUARY 21, 1982</u>
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THE HONORABLE HERBERT W. NOBRIGA, DIRECTOR, OFFICE OF ADMINISTRATIVE HEARINGS, has requested our opinion on the following question:

May the Office of Administrative Hearings demand payment in advance from the governing board of a school district for services it provides in connection with teacher dismissal hearings?

CONCLUSION

The Department of General Services, but not the Office of Administrative Hearings, may require the governing board of a school district to pay half of the anticipated costs of a teacher dismissal hearing.

ANALYSIS

When the governing board of a school district would dismiss one of its permanent certificated employees it must give him or her notice of that intention and the reasons therefor. (Ed. Code, §§ 44934, 44936, 44938, 44941; cf. *id.*, §§ 44932, 44933.)¹ The employee may demand a hearing (§ 44943; cf. §§ 44941, 44937) which must be commenced within sixty days (§ 44944, subd. (a)) before a Commission on Professional Competence, consisting of three members - one selected by the employee, one selected by the governing board and one being a hearing officer of the state's Office of Administrative Hearings (hereinafter "OAH") (§ 44944, subd. (b); cf. Gov. Code, § 11502), an entity established within the Department of General Services to provide hearing services for various public agencies, including school districts. (Gov. Code, §§ 11501, 11502, 11370.3; cf. 64 Ops.Cal.Atty.Gen. 651, 651-652 (1981).) So constituted, the Committee on professional Competence is charged with determining whether the employee should be dismissed or not. (§ 44944, subd. (c).) Where the Committee determines the employee should be dismissed, "the expenses of the hearing" (including the cost of the hearing officer) are shared equally by the governing board and the employee, with the state paying the reasonable expenses of the members selected by the employee and the governing board, including their additional compensation if their services are utilized during summer recess or vacation periods. (§ 44944, subd. (e).) If the Committee determines that the employee should not be dismissed, all of the foregoing costs (including attorney's fees) are borne by the governing board. (*Ibid.*)

We are told that OAH has encountered some difficulty in securing payment for the services it renders in connection with teacher dismissal hearings (in the main, in securing payment afterwards from the dismissed employee), and we are asked whether OAH may demand payment for its services in advance. Such in effect would be the "expenses of the hearing" spoken of in section 44944, subdivision (e), and would primarily include charges for the services of the hearing officer and the shorthand reporter, which are currently assessed at the rates of \$69.80 and \$34.50 an hour, respectively. (See 64 Ops.Cal.Atty.Gen., *supra*, at pp. 652-654.) It would also include attendant costs such as those incurred in securing a hearing room if necessary. We conclude that OAH may not demand advance payment from a school district for the services it provides in connection with a dismissal hearing at all, but that the Department of General Services may require the district to make payment in advance for the half share of those (OAH) hearing expenses for which the district would be responsible regardless of the outcome of the hearing.²

¹ All unidentified section references herein are to the Education Code.

² We were asked two additional questions by the requester, which are made moot by our resolution of the question addressed. It was inquired whether OAH may refuse to provide hearing services when *its* demand for payment in advance from school boards for them is not complied

Section 11370.4 of the Government Code states that OAH is to be self-sufficient, paying its operating expenses from charges derived from the state or other public agencies for which it provides services. It reads as follows:

"The total cost to the state of maintaining and operating the Office of Administrative Hearings *shall be determined by, and collected by the Department of General Services in advance or upon such other basis as it may determine* from the state or other public agencies for which services are provided by the office." (Emphasis added.)

The section thus delegates to the Department of General Services the task of determining how the costs to the state of running OAH are to be assessed among the agencies using its services so that the total cost of its maintenance and operation might be recovered. As part of that assessment the section clearly provides that the Department *may* require the payment of determined costs in advance.

There is a substantial difference, however, between the assessment and collection in advance of sums for which a party will certainly be obligated and the assessment and collection in advance of sums for which the party will only become liable

with. In view of our conclusion that OAH does not have the authority to make such a demand in the first place, we do not resolve that question. We would note, however, that OAH is required by law, indeed its *raison d'être* is, to provide hearing services for state and other public entities such as school districts when requested (Gov. Code, §§ 11370.3, 11501, 11502) and a teacher's right to a hearing on an intended dismissal is not only compelled by statute (§§ 44943, 44944) but is one of constitutional dimension. (See, e.g., *Board of Regents v. Roth* (1972) 408 U.S. 564; *Arnett v. Kennedy* (1974) 416 U.S. 134; *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, *Morrison v. State Board of Education* (1969) 1 Cal.3d 214.) Moreover, the People have a right to have a hearing conducted to insure that only the fit teach their children. (§ 44932; cf. *Morrison v. State Board of Education*, *supra*, at pp. 229, 235; *Board of Trustees v. Stubblefield* (1971) 16 Cal.App.3d 820, 824.) Thus more is at stake in a hearing taking place than OAH's interest in recovering its costs and we do not believe those other factors can be compromised by that interest, especially where problems incident to collection of costs can be and are dealt with through less drastic avenues. (See, e.g., Gov. Code, § 12419.5 (ability of controller to offset any amount due a state agency from a person or entity against any amount owing them by any state agency).)

The other question that was asked is whether compelling advance payments from school boards would constitute the creation of newly mandated obligations which the states would be required to reimburse under article XIII B, section 6, of the California Constitution. (See also Rev. Tax. Code, § 2231; cf. *id.*, §§ 2207.5, 2209, subd. (c).) In light of our conclusion that prepayment even if required by the Department of General Services could only be for an amount which a district has always been obligated to pay (i.e., half of OAH's expenses), a newly mandated obligation is not involved.

on the happening of a contingency. While the former may be projected with justification under generally accepted accounting procedures, the latter cannot. Here section 44944, subdivision (e), comes into play, for under the mechanism of its carefully devised detail, the total obligation of a governing board (i.e., the school district) and any obligation of an employee can only be known and only attaches at the conclusion of a hearing when its outcome is rendered in decision. The subdivision reads in full as follows:

"(e) If the Commission on Professional Competence determines that the employee should be dismissed the governing board and the employee shall share equally the expenses of the hearing, including the cost of the hearing officer; and the state shall pay, any costs incurred under paragraph (2) of subdivision (d), the reasonable expenses, as determined by the hearing officer, of the member selected by the governing board and the member selected by the employee, including, but not limited to payments or obligations incurred for travel, meals, and lodging, and the cost of the substitute or substitutes, if any, for the member selected by the governing board and the member selected by the employee. The State Controller shall pay all claims submitted pursuant to this paragraph from the General Fund, and may prescribe reasonable rules, regulations, and forms for the submission of such claims. The employee and the governing board shall pay their own attorney fees.

"If the Commission on Professional Competence determines that the employee should not be dismissed, the governing board shall pay the expenses of the hearing, including the cost of the hearing officer, any costs incurred under paragraph (2) of subdivision (d), the reasonable expenses, as determined by the hearing officer, of the member selected by the governing board and the member selected by the employee, including, but not limited to payments or obligations incurred for travel, meals, and lodging, the cost of the substitute or substitutes, if any, for the member selected by the employee, and reasonable attorney fees incurred by the employee. "

As used in this section, 'reasonable expenses' shall not be deemed 'compensation' within the meaning of subdivision (d).

"If either the governing board or the employee petitions a court of competent Jurisdiction for review of the decision of the commission, the payment of expenses to members of the commission required by this subdivision shall not be stayed.

"In the event that the decision of the commission is finally reversed or vacated by a court of competent jurisdiction, then either the state, having paid the commission members' expenses, shall be entitled to reimbursement from the governing board for such expenses, or the governing board, having paid such expenses, shall be entitled to reimbursement from the state.

"Additionally, either the employee, having paid a portion of the expenses of the hearing, including the cost of the hearing officer, shall be entitled to reimbursement from the governing board for such expenses, or the governing board, having paid its portion and the employee's portion of the expenses of the hearing, including the cost of the hearing officer, shall be entitled to reimbursement from the employee for that portion of such expenses."

The subdivision thus speaks conditionally *in futuro* with respect to the requirements for costs to be paid. Both the requirement for equal sharing of the expenses of the hearing by the governing board and the employee and the requirement for the governing board to pay all costs associated with the hearing (including all of the OAH expenses) appear as the "conclusion" of the conditional sentences which commence "if the Commission . . . determines that the employee should be dismissed, [then] the governing board and the employee shall share equally the expenses of the hearing . . ." and "if the Commission . . . determines that the employee should not be dismissed, [then] the governing board shall pay" The operation of such, however, is only effective when the condition expressed in the preceding "if"-clause is true or occurs. (64 Ops.Cal.Atty.Gen. 455, 458 (1981).) Thus, whether a school district's obligation will only be for an equal sharing of the OAH *expenses* of the hearing with the employee (if he or she is dismissed) or will be for the total *costs* of the hearing (if the employee is not dismissed), including all those expenses and those other costs of hearing that the state would otherwise pay, *can only be known* at the time a decision is rendered, and a determination is had telling "either (1) [t]hat the employee should be dismissed [or] (2) [t]hat the employee should not be dismissed." (§ 44944, subd. (c).) But that can only occur *after a hearing is held*.

That the Legislature intended for the time of the decision to be the time at which costs are to be fixed and at the *latest* to be paid is made clear from other provisions of subdivision (e). Paragraphs (5) and (6) of the subdivision provide that in the event a decision of Commission is revised by a court of competent jurisdiction,³ then the state, the

³ Section 44945 provides that a decision of the Commission may be reviewed by a court of competent Jurisdiction on petition by the school district or the employee, in the same manner as a decision made by a hearing officer under the Administrative Procedures Act. (Gov. Code, § 11500 et seq.) (See also Code Civ. Proc., §§ 1094, 1095.5; cf. *id.*, § 1085.)

governing board or the employee, "*having paid*" certain costs under the just discussed mechanisms of paragraphs (2) and (3) of subdivision (e), *is to be reimbursed* for that payment from the appropriate party, i.e., the party who would now be liable for them because of the changed decision. In other words where a decision sustaining the dismissal of an employee is reversed, the employee having paid his or her half share of the OAH expenses of the hearing must be reimbursed for that amount by the governing board which is now responsible for all those expenses. (*Id.*, (6).) Similarly, where a Commission's decision favorable to the employee is reversed on petition by the governing board, "the governing board, having paid its portion and [what is now] the employee's portion of the expenses of the hearing, including the cost of the hearing officer, [is] entitled to reimbursement from the employee for that portion of such expenses." (*Ibid.*) Paragraph (4) of subdivision (e)—which provides that the payment of expenses to members of the Commission "shall not be stayed" by the filing of a petition for court review—also makes it clear that the Legislature has fixed the time of decision as the time that costs must be paid.

It has been posited, in view of this, that Government Code section 11370.4 (providing for agencies' payment in advance of expenses of OAH) and Education Code section 44944, subdivision (e) (providing for payment of such expenses in school district dismissal hearings upon decision, i.e., after a hearing) are in irreconcilable conflict and that the latter being more specific and later enacted must prevail. (See also *Board of Education v. Commission on Professional Competence* (1980) 102 Cal.App.3d (provision for award of reasonable attorneys fees incurred by employee in § 44944, subd. (e) prevails over \$1,500 limit contained in Gov. Code, § 800).) Thus, the argument goes, payment of OAH expenses pursuant to the latter in the specific situation of school district dismissal hearings may not be required in advance, but only at the conclusion of a hearing when a decision is rendered (and proper allocation of costs known), Government Code section 11370.4 notwithstanding.

We do not completely agree. We do not believe the sections are in irreconcilable conflict *insofar as the payment by a school district of its half of the expenses of the hearing that it would have to pay regardless of the outcome is concerned*. While it is true that whether the district (governing board) will be responsible for all or only half of the OAH expenses of the hearing will not be known until a decision is rendered to trigger the cost allocation formulae of subdivision (e), still it is certain that the district's governing board will be responsible for at least half of those expenses in any event. As that much is certain we see no appreciable difference between that amount being paid to the Department of General Services in advance, if the Department so requires pursuant to Government Code section 11370.4, and the payment of other amounts the Department might project and collect in advance from agencies pursuant to that section. While the ultimate amount of payment may not be known exactly, that can be true in any case when payment is required

in advance under section 11370.4, and accounting practice can make subsequent adjustment accordingly.

Taking this a step further, it has been suggested on the other side that Just as adjustment may be made for subsequent developments after an advance payment is made, section 11370.4 should permit the Department to demand a school district to pay *all* of the OAH expenses of a hearing in advance, with adjustment being made if necessary after the outcome is known. With this suggestion we cannot agree at all. There is nothing in section 44944, subdivision (e), to countenance that procedure which would in effect have a school district serve as a guarantor or surety for its employees' possible half share of OAH's costs and there is nothing to suggest that the Legislature intended that it do so. (Cf. Code of Civ. Proc., § 1058.) To the contrary, the section, as we have seen, envisions both a district's governing board and an employee paying *their own* appropriate share of the expenses of the hearing *when the decision is rendered*, with reimbursement coming, if at all, only *after* those payments have been made, and the decision is changed on Judicial review requiring a different assessment to be made. Indeed, without a positive duty or obligation for a school district to provisionally advance an employee's share of costs before that time (and it not even being sure until then that the employee has an obligation), the district would not have a right to seek subsequent reimbursement from the employee at all. (14 Cal.Jur.3d, *Contribution & Indemnification*, § 5, p. 647., cf. *Hodges v. Kauffman* (1928) 95 Cal.App. 598, 601; *Barry v. Goad* (1891) 89 Cal. 215, 218.) We therefore conclude that in no event may a school district be asked to pay that portion of the expenses of a hearing in advance which the employee upon decision may become obligated to pay.

With the half share of expenses of the hearing for which the school district would be obligated in any event the situation is otherwise, and we conclude that under Government Code section 11370.4 that payment may properly be demanded in advance. Pursuant to that section, however, it is the Department of General Services and not OAH which is to make the determination that such advance payment is to be tendered and it is the Department and not OAH which is to collect it. The Office of Administrative Hearings itself is without authority to require that advance payments for its services in connection with school district dismissal hearings be made.
