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OFFICE OF THE ATTORNEY GENERAL
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OPINION	:	No. 82-802
	:	
of	:	<u>DECEMBER 31, 1982</u>
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THE OFFICE OF ADMINISTRATIVE HEARINGS has requested an opinion on the following question:

In light of a final superior court judgment providing that the Office of Administrative Hearings "is precluded by Government Code sections 11370.3 and 11512(d) from using electronic recording devices to record any Administrative Procedure Act hearing," may the Office continue to use such devices in those hearings if the parties waive the requirement of a "phonographic reporter" contained in Government Code section 11512(d)?

CONCLUSION

In light of a final superior court judgment providing that the Office of Administrative Hearings "is precluded by Government Code sections 11370.3 and 11512(d) from using electronic recording devices to [report] any Administrative Procedure

Act hearing," that Office may not continue to use such devices in those hearings even if the parties waive the requirement of a "phonographic reporter" contained in Government Code section 11512(d).

ANALYSIS

This opinion answers whether, in light of a recent decision of the Superior Court of Sacramento County, the Office of Administrative Hearings may continue an experimental program of "reporting" hearings it conducts under the Administrative Procedure Act (i.e., pursuant to Gov. Code, tit. 2, div. 3, ch. 5, § 11500 et seq.) by means of electronic recording devices instead of using certified shorthand reporters. We conclude that it may not.

Hearings of state agencies which are required to be conducted under the Administrative Procedure Act (the "APA") must be conducted by hearing officers on the staff of the Office of Administrative Hearings ("OAH") (Gov. Code, § 11502,¹ cf. § 11501 (listing of specific agencies), § 11370.3), an entity established primarily for that purpose within the Department of General Services and placed under the direction and control of a director (§ 11370.2, subd. (a); cf. § 11370.3). (See also 64 Ops.Cal.Atty.Gen. 651, 652 (1981).) The director is charged with appointing and maintaining a staff of full time (and part time) hearing officers sufficient to fill the needs of the various state agencies (§ 11370.3), and also with "*appoint[ing] shorthand reporters and such other technical and clerical personnel as may be required to perform the duties of the office.*" (§ 11370.3; emphasis added.)

Section 11512, subdivision (d) provides for the reporting of an APA hearing as follows:

"The proceedings at the hearing shall be reported by a phonographic reporter."

The meaning of the subdivision was the focus of an informal opinion (No. CV 77/181 IL) we issued on July 12, 1978, answering a request as to whether OAH could then institute the experimental program in which its APA hearings would be reported by electronic recording devices rather than by shorthand reporters. We determined that the use of "phonographic reporter" in section 11512, subdivision (d) referred to a "stenographic reporter" (i.e., a Certified Shorthand Reporter certified under the Shorthand Reporters Act (Bus. & Prof. Code, div. 3, ch. 13, § 8000 et seq.)). Toward making that determination we noted that the term "phonographic" was defined as "[a] system of phonetic shorthand, as

¹ Unidentified section references will be to the Government Code.

that invented by . . . Pitman in 1837 (The Random House Dictionary of the English Language Unabridged, 1966 . . .)"² and that where the Legislature had wished to authorize the reporting of hearings conducted by state agencies other than by means of phonographic or shorthand reporters, it had specifically done so as in Vehicle Code section 14107 and Welfare and Institutions Code section 10956.³

Since the term "phonographic reporter" was thus considered synonymous with the term "shorthand reporter,"⁴ and since it had been treated so by the Legislature and the courts (e.g., *Poitevin v. Randall* (1936) 66 P.2d 1113, 1114 ("[t]he phonographic report of the testimony . . . means the stenographic report or shorthand notes of the stenographer. . ."); see also *Stevens v. Truman* (1899) 127 Cal. 155, 161 ("[t]he Legislature has simply authorized the judge of the court to employ a person to take down and transcribe shorthand notes of court proceedings, who shall be known as *phonographic reporter* of the court.")), we concluded that the legislative directive contained in section 11512, subdivision (d) meant that "hearings conducted by [OAH] must *normally* be reported by stenographic reporters" and by no other means. We noted, however, on the basis of Civil Code section 3513 ("anyone may waive the advantage of a law intended solely for his benefit"), that if both parties to an APA proceeding waived their right to a stenographic reporter, the hearing could be conducted without such a reporter, using a tape recording device instead.

After our opinion issued, OAH commenced its experimental program. At the commencement of hearings in which a recording device would be used, the parties to the hearing were advised of their right under section 11512, subdivision (d), to have the proceedings reported by a stenographic reporter, and were asked if they waived that

² See also Webster's *Third New International Dictionary*, "'phonography' = a system of shorthand writing based on sound;" cf. "'phonograph' = a character or symbol used to represent a word or syllable."

³ Vehicle Code section 14107 provides:

"The entire proceeding at any formal hearing may be recorded by a phonographic recorder *or otherwise perpetuated* by mechanical, electronic or other means capable of reproduction or transcription."

Welfare and Institutions Code section 10956 is the same except that the word "shall" is substituted for "may."

⁴ It is worth observing that the synonymity between "phonographic reporter" and "shorthand reporter" is consistent with the definition of the latter given in Business and Professions Code section 8017 ("the practice of shorthand reporting is defined as the making by means of written symbols or abbreviations in shorthand or machine shorthand writing of a verbatim record of any oral . . . proceeding . . .") and is confirmed by the etymology the former ("phonography," from the Greek *phono* (sound) + *graphein* (to write); cf. fn. 2, *ante*).

requirement. If a waiver was obtained, the proceeding would be "reported" by an electronic recording device; if not, a shorthand reporter would be secured to report the proceeding. Parties to administrative hearings however were not waiving their "right" and on August 13, 1979, OAH filed a complaint for declaratory relief against this office in Superior Court of Sacramento County (No. 283502) praying for the court's declarations: (a) that the phrase "phonographic reporter" as used in section 11512, subdivision (d), means any means of reproducing speech which completely, accurately and comprehensibly reproduces that speech and (b) that OAH was not legally obligated to supply shorthand reporters to record and transcribe its APA hearings but instead could use electronic tape recorders operated by "monitors" trained in their use for that purpose.⁵

OAH did not prevail in its cause; in a comprehensive 23-page notice of intended decision which painstakingly reviewed the case and statutory law, the court decided: (1) that under Government Code section 11512(d) OAH is obligated to assign only certified shorthand reporters or state employed and salaried hearing reporters to report all proceedings in APA hearings; (2) that the term "phonographic reporters" used in Government Code section 11512(d) refers only to certified shorthand reporters or state employed hearing reporters as described in Government Code section 11370.3, and (3) that OAH is precluded by the APA, Government Code sections 11370.3 and 11512(d), from using electronic recording devices to electronically record any APA hearing proceedings. (*Notice of Intended Decision*, endorsed Nov. 25, 1981.) Judgment entered on March 26, 1982, provides as follows:

"1. The phrase 'phonographic reporter' as used in Government Code section 11512(d) means a certified shorthand reporter or a state employed and salaried hearing reporter as described in Government Code section 11370.3; and

"2. Plaintiff is precluded by Government Code sections 11370.3 and 11512(d) from using electronic recording devices to record *any* Administrative Procedure Act hearing."

In light of this judgment which is now final, we are asked whether OAH may continue using electronic recording devices to "report" APA hearings when the parties thereto waive

⁵ Paragraph 7 of OAH's complaint filed in superior court avers:

"On numerous occasions since that Attorney General's opinion was issued, parties to administrative hearings before various state agencies governed by the Administrative Procedure Act have, in reliance upon defendant's opinion letter, refused to participate in hearings unless the proceedings are reported by a shorthand reporter as opposed to being reported by electronic means."

their right to a "phonographic" reporter. At issue therefore is *not* whether OAH can use those devices to report APA hearings when the parties do *not* agree to that procedure, but whether they even may be used as before when the parties do agree. We conclude that in light of the judgment of the superior court, OAH may not use electronic recording devices to report its hearings conducted under the Administrative Procedure Act even when the parties thereto are amenable to waiving the requirement of section 11512(d) for a "phonographic reporter" to report the hearing.

The purposes of a declaratory relief action have been succinctly summarized as follows:

"The purpose of a declaratory judgment is to serve some practical end quieting or stabilizing a disputed or uncertain jural relation. Declaratory relief liquidates uncertainties and controversies which might result in future litigation. It is provided so that parties may know their rights and obligations when a controversy arises, before a breach of violation occurs. [¶] Declaratory procedure operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights, or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them. Thus, the purpose of a judicial declaration of rights in advance of an actual tortious incident is to enable the parties to shape their conduct so as to avoid a breach. [¶] Where an individual is uncertain of his right[s] . . . , a declaratory judgment may be the only remedy whereby the risk of a 'leap into the dark' is obviated." (26 Cal.Jur.3d, Declaratory Relief, § 2, pp. 7-9; fns. omitted.)

The Office of Administrative Hearings brought the superior court action for those very purposes—i.e., to secure a declaration from the court defining its legal obligation with respect to supplying shorthand reporters to conduct APA hearings. (Complaint, prayer, ¶ 2.)⁶ It thus raised the general issue of its legal obligation to supply shorthand reporters to report APA hearings and it specifically brought before the court the matter of whether parties could refuse to participate in them without that type of reporting of the testimony (see fn. 5, *ante*). The court was thus vested with jurisdiction to decide the issue of OAH's legal obligation to supply shorthand reporters in its APA hearings and the

⁶ OAH's prayer reads in part:

"WHEREFORE plaintiff prays: . . . (2) For this Court's declaration to the effect that plaintiff is not legally obligated to supply shorthand reporters to record and transcribe hearings conducted under the Administrative Procedure Act, but may instead supply four track electronic tape recorders and monitors trained to operate that equipment."

effect the parties' desires in their regard would have thereon. Inasmuch as the matter of the parties waiving the code requirement was brought before the court, OAH opened the door to the possibility of its obtaining not only an unfavorable judgment on the issue, but also one which would place it in a *more* unfavorable position with respect to it than had the action not been brought. (*MacIsaac v. Pozzo* (1945) 26 Cal.2d 809, 814, 815.) The function, indeed the duty, of the court in the declaratory relief action was: (1) to make a *full*, complete, and authoritative determination of the controversy, disposing of *all* questions of rights encountered in it (*American Enterprises, Inc. v. Van Winkle* (1952) 39 Cal.2d 210, 219; *Osborne v. Security Inc. Co.* (1957) 155 Cal.App.2d 201, 204; *Caffroy v. Fremlin* (1961) 198 Cal.App.2d 176, 184; *Abbott v. San Diego* (1958) 165 Cal.App.2d 511, 525) and (2) to issue a judgment to "decree . . . what the parties may or may not do" (*Monahan v. Department of Water & Power* (1941) 48 Cal.App.2d 746, 751). The court did exactly that and the "public officials [who brought the action] must respect [its] declaration and follow its interpretation of the law." (*Louis Eckert B. Co. v. Unemploy. R. Com.* (1941) 47 Cal.App.2d 844, 846.)

The court's judgment states that "[OAH] is precluded by Government Code sections 11370.3 and 11512(d) from using electronic recording devices to record [*sic*, report] *any* Administrative Procedure Act Hearing."⁷

The indefinite adjective "any" derives from "a one" (*Bates v. McHenry* (1932) 123 Cal.App. 81, 86) and carries a broad scope of application equivalent to "every" (*Davidson v. Dallas* (1857) 8 Cal. 227, 229) or "all" (*Emmolo v. Southern Pacific Co.* (1949) 91 Cal.App.2d 87, 92; *Coelho v. Truckell* (1935) 9 Cal.App.2d 47, 59; *Powell v. Allen* (1925) 70 Cal.App. 663, 668), especially when it is used as it is here to describe a type of prohibited activity. (64 Ops.Cal.Atty.Gen. 192, 202 (1981).) As the court said in construing the phrases "any time" and "any interest" in *Estate of Howe* (1947) 81 Cal.App.2d 95:

"The agreement declares that neither party should at '*any time*' claim '*any interest*' in the separate property of the other. It would be difficult, if indeed possible, to select simpler and more comprehensive words. They require no amplification; any time includes all time and any interest includes every interest. There is no need to be specific for the law never has demanded emphasis." (81 Cal.App.2d at 99.)

⁷ Section 1060 of the Code of Civil Procedure states that the declaration of a court in an action for declaratory relief "may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment."

The use of the term "*any . . . hearing*" in the court's judgment would thus apply its prohibition to *each and every* hearing OAH conducts under the Administrative Procedure Act. As its effect is to preclude OAH from using electronic recording devices in *any one* of them, it prevents OAH from using those devices even in APA hearings where the parties are willing to "dispense" with the requirement contained in section 11512(d) for a shorthand reporter to report the testimony. That possibility being raised in the case and now being removed by the court's judgment, we conclude that OAH cannot continue its experimental program of using electronic recording devices to report its hearings conducted under the Administrative Procedure Act.⁸

⁸ In light of our conclusion that OAH may not continue with its experimental program because the terms of the judgment of the superior court preclude the use of any means other than shorthand reporters to report APA hearings, we do not need to examine whether our earlier perception of the requirement set forth in section 11512(d) for APA hearings to be reported by a certified shorthand reporter (*qua* "phonographic reporter") is truly a "right of the parties" which may be waived by them, or is instead a "law established for a public reason [which] cannot be contravened by a private agreement." (Civ. Code, § 3513.) Nor need we decide the niceties of the question of whether even if the parties should still have *their* "right" to waive the requirements of section 11512(d), the transcript made from other means than "phonographic reporting" would be cognizable (acceptable) for the purpose of judicial review of the administrative proceeding under Code of Civil Procedure section 1094.5. (See 64 Ops.Cal.Atty.Gen. 651, 653, fn. 3 (consequences of a mandate petitioner proceeding without a transcript).)