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FOR DISCUSSION ONLY

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

Suggestions and Notes on March 10, 2009 version

For March 27 – 29, 2009 Drafting Committee Meeting

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the [state] Administrative Procedure Act.

SECTION 102. DEFINITIONS. In this [act]:

SECTION 102(1) "Adjudication" means the process of determining facts or applying law to facts in order ~~pursuant~~ to ~~which an agency~~ formulate~~s~~ and issue~~s~~ an order.

> **DRAFTING NOTES:** The suggested revisions define adjudication in terms of both determining facts and applying law to facts, which is at once a more complete and concise definition. The awkward phrase "pursuant to which" is replaced by the phrase "in order to" to keep the closing phrase in the active voice.

SECTION 102(2) "Agency" means a state ~~board,~~ authority, board, bureau, cabinet, commission, ~~institution,~~ department, division, institution, office, officer, or other state entity ~~that is~~ authorized or required by law to make rules or to adjudicate. The term does not include the Governor, the Legislature, ~~and~~ or the Judiciary.

> **DRAFTING NOTES:** The suggested revisions simply add additional names used for agencies to the list and put the list in alphabetical order. Under the law of Kentucky, a list like this must either be exhaustive or contain the required caveat, "including but not limited to" if it is to cover anything that is not listed. The use f "that" as a pronoun here is unnecessary and the meaningless phrase "that is" has been deleted. The disjunctive is substituted in the last sentence to follow the sense of the sentence.

SECTION 102(4) "Agency head" means the individual ~~in whom,~~ or one or more members of ~~the body~~ a group of individuals ~~in which, the ultimate legal authority of an agency is vested~~ authorized [by law] to issue a final rule or order.

> **DRAFTING NOTES:** The suggested revisions delete the awkward construction "in whom, or one" and replaces it with a straightforward compound subject, using "group" instead of "body" for reasons explained in the comments to Section

402(a). The vague phrase "the ultimate legal authority of an agency is vested" is deleted and the proposed revision of the last sentence uses the defined terms “issue” and “final order” to define "agency head" and to put the sentence in the active voice.

SECTION 102(6) “Contested case” means ~~an~~ the entire agency adjudication procedure, ~~adjudication in which~~ including an opportunity for an evidentiary hearing, ~~is~~ as required by the federal or state constitutions, ~~or a federal or state~~ statutes, regulations, or ~~a federal or state~~ judicial decisions.

DRAFTING NOTES: The suggested revisions are intended to give "contested case" a broad reach and scope to set it at the top of the references to adjudicative procedures. The first revision inserts a broad definitional scope for the "contested case." The word "including" is inserted in place of "adjudication in which" to set off the following descriptive phrase. The word "regulation" is inserted because in Kentucky some regulations create a right to hearing where such right is not stated in the enabling statute but is necessarily implied. Moreover, in Kentucky, even when the enabling statute does grant a right to hearing, often regulations set out the details of how and when such a hearing must be requested. The listing of the legal bases for hearings has been shortened by putting the adjectival phrase “federal or state” before the listing and eliminating its repetition thereafter.

POLICY NOTES: The Act should adopt a hierarchy of terms to clarify the distinctions between the various components of an overall "contested case." Thus, the Act should consistently use "contested case" as the broadest descriptor for an agency adjudication. Below this the Act should use "proceedings" to denote all the component "proceedings" that may make up a "contested case." The Act should use "hearing" or "adjudicative hearing" to describe one particular type of "proceeding" within a "contested case." Within this hierarchy a presiding officer would "preside" over a "contested case," and "conduct" the component "proceedings," including any "hearing" or "adjudicative hearing."

SECTION 102(10) “Evidentiary hearing” means an ~~hearing~~ adjudicative proceeding conducted for the purpose of admitting ~~receipt of~~ evidence in the hearing record regarding ~~on~~ issues ~~on which~~ that a ~~decision of the~~ presiding officer may ~~be made~~ decide in a contested case.

DRAFTING NOTES: The word "hearing" is deleted from the first phrase to avoid defining an "evidentiary hearing" as a "hearing." This is not useful. The phrase "hearing for the receipt of evidence" is replaced with "adjudicative proceeding conducted for the purpose of admitting evidence" to comport with the hierarch of terms discussed in the Policy Notes to §102(6). The phrase "in the hearing record" is inserted to make the purpose of the hearing clear. The awkward phrase "on issues on which a decision of the presiding hearing officer may be made" is replaced with the phrase "regarding issues a presiding officer may

decide" to simplify the language and put the phrase in the active voice.

SECTION 102(10A) "File" or "filing" means the oral or written designation of material for inclusion in the hearing record by the presiding officer or the marking of the [time and] date by which material is included in the hearing record by the keeper of the hearing record.

POLICY NOTES: For some reason, the Act does not define "file" or "filing" for the purpose of Article 4, although the verb "file" or "filed" is used in §403(c), 414(c), 414(d), 416(a), (b) and (c), and the gerund "filing" is used in §405(b), 416(a) and (b). The benefit of defining how to "file" something or what constitutes a "filing" is that it creates a uniform procedure that marks documents with a date certain. This allows all parties to reliably and easily calculate time limits from that date. At present, the Act calculates time periods from the "effective date" (§407(g) - emergency order), from "after the notice" (§408(f) - to respond to ex parte communication), "upon written notice" (§411(b) - discovery), from "after a recommended, initial or final order is rendered" (§412(b) - motion to vacate), "after issuance" (§413(a) - initial order to final order), "after the initial order is issued" (§414(c) - motion for review or agency notice of intent to review), "after notice of a final order is given" (§416(c) – motion for reconsideration), "after the filing denying" a petition for reconsideration (§416(c) – motion for reconsideration), and "after the parties are notified of the final order" (§417 - stay). The Act should uniformly use an easily identifiable date from which to calculate effect, time periods, and limitations: using the date a document is "filed" would do this. Thus, the various vague examples above could all be redrafted to use the filing date as defined in this proposed section.

SECTION 102(11) "Final order" means the order issued by ~~the~~ an agency head ~~sitting as the~~ presiding ~~officer~~ in a contested case, or by an agency head upon review of a recommended order, that resolves all or part of a contested case [or remands the case for further proceedings]. The phrase shall include an initial order that has become a final order by operation of law under Section 413.

DRAFTING NOTES: The definite article is replaced with the indefinite article to make clear the definition includes orders issued by any agency head. The phrase "sitting as the presiding officer in a contested case" is replaced with "presiding in a contested case" to shorten the sentence without changing the meaning and to eliminate "sitting" and retain "presiding" for reasons explained above in the Policy Notes to §102(6). The phrase following the disjunctive is meant to bring final orders that result after review of a recommended order into the definition. The final sentence is inserted to make sure that final orders that came from initial orders fall within the definition, as they must, even though they are not issued by an agency head presiding over the case.

POLICY NOTES: The definition of "final order" must be broad enough to

encompass the various ways states treat these orders. In complex cases, there can be a separate final order for some parties in a case but not others. These are styled "final orders" by agencies, because as to that party they are final. Also, although it may not be common, some agencies will allow an interlocutory-type review of certain rulings from a presiding officer to the agency head. Since these reviews are by their nature reviews of orders on parts or distinct issues of a case, the best policy is to include them in the definition of final order. See §414(d) (mentioning final order of remand). Ordinarily these are dispositive motions ruled on by the presiding officer and then reviewed by the agency head. They too are styled "final orders" sometimes, which can be useful for all parties if it allows appeal of a dispositive legal issue before having to go through an entire hearing.

SECTION 102(12A) "Hearing record" means the hearing record in an adjudication governed by Section 406, and the agency record in emergency adjudication governed by Section 407.

DRAFTING NOTES: The Act uses "agency record," "hearing record" and "record" as loose synonyms when they are not. The phrase "agency record" is defined in §201, and "hearing record" is defined in §406. All instances of "record" in Article 4 should be changed to "hearing record" so it is clear that the "record" in §406 and the record of emergency adjudications in §407 is what is meant. The phrase "hearing record" appears for the first time in these proposed revisions in §406(g).

POLICY NOTES: Reading the expansive definition of "agency record" in §102(5), it would appear the Committee intended the phrase "agency record" to serve for all references to what is commonly referred to as the "hearing record" in contested case under Article 4 as well as the record in other Articles of the Act. This is unwise given the very different scope and subject matter of the various Articles of the Act. The definition of "agency record" is too broad for use in Article 4 and would only create confusion. Moreover, it is not clear why the Committee would want to use "agency record" instead of "hearing record" when there is a whole section defining "hearing record."

SECTION 102(15A) "Issue" means the act of signing and dating an order by the agency head, presiding officer, or an individual authorized by law, or if the order is undated, then when the order is filed in the hearing record.

DRAFTING NOTES: Article 4 uses various terms such as "render," "issue," "dispose," "sign," and "file" to mean the act of ruling on a motion or issue, or making an order effective, or perhaps the process of making a ruling. The term "issue" is defined in §413(f) to mean the act of "an agency head, presiding officer, or an individual authorized by law" signing an "order." However, that definition applies to final, recommended or initial "order[s]" issued under §413, and not other sections of Article 4.

"issue"

Several sections other than §413 use a form of the verb "issue" with a form of the object "order" to convey the same meaning as in §413. *See* §404(7) (protective orders); 407(b), (c), (d), (f) and (g) (emergency order); §410(a) (subpoenas); §411(c), (d), and (e) (protective, compelling, authorizing discovery); §412(a) (default order and recommended, initial, or final order); §414(c) (initial order); §416(c) (order on motion to reconsider); §606(a) (recommended or initial orders). The widespread use of "issue" to mean the same as in §413 indicates that term should be in this definitional section for the entire Act or at least Article 4.

"render"
At other places Article 4 uses the verb "render" to mean the same thing as "issue": §413(a) and (b), §415(b), and §606 all use the verb "render" with the object "order" to mean the decision maker's act of making or conveying an order to affected persons. §415(c) uses the past tense "rendered" to mean the same thing. §412 uses the past participle "rendered" in a passive construction to refer to the same thing.

"dispose"
§414(b) and (d) use a form of the verb "dispose" regarding a petition (motion) for reconsideration to mean "rule" or "decide" while (c) requires the "order" on a motion for reconsideration to be "issued."

§415(c) uses the adverbial "disposing" referring to a final order. This use of "disposing" appears intended to mean "ruling on" or perhaps "resolving."

§416(b) uses "dispose" to mean "rule on" a "petition" (motion) for reconsideration and fixes the time for judicial review at "disposition" whenever that may be. As used here, "dispose" could mean "issue," or "file," or "make."

POLICY NOTES: Article 4 should use "issue" where possible to mean the act of ruling on a motion or issue, or making an order effective. "Issuance" should be used when referring to the process of "issuing" or the point in time an order is "issued."

SECTION 102(23) "Presiding officer" means an individual authorized to conduct and govern ~~who presides over~~ the ~~evidentiary hearing~~ all the proceedings in a contested case and issue a recommended, initial or final order.

DRAFTING NOTES: These revisions replace the phrase "who presides over the evidentiary hearing in a contested case" with the phrase "authorized to conduct and govern all the proceedings in a contested case." The purpose of these revisions is to convey the characteristic act and function of a "presiding officer." They are intended to make clear that a "presiding officer" is the person authorized to govern, conduct, put on, hold, or run all the "proceedings" within an entire "contested case." The phrase "and issue a recommended, initial, or final order" is intended to make clear that the presiding officer presides until the end of the proceedings.

POLICY NOTES: The Act does not always use terms that clearly differentiate between the kinds of actions performed by presiding officers. The Act uses the word "conduct" in §§102(24), 403(e) and (f), 404(7), 412(b) and 415(b) with the noun "hearing." §407(a) uses "conduct" with the noun "(emergency) adjudication." §412(a) uses "conduct" with the noun "proceedings." In all these

cases, the Act uses "conduct" to convey the idea of putting on, holding, or running a proceeding within a contested case. §409(e) uses "hold" to mean the same thing. §403 (l) uses "conducts" with the noun "contested case" to mean something like "governs." The Act should clarify its terms to reflect the hierarchy discussed in the Policy Notes to §102(6).

SECTION 102(30A) Unless otherwise provided by law, "serve" shall mean actual delivery of a document to the person intended or the act of depositing a document with the United States postal service for delivery to the person, properly addressed, postage prepaid. If a document is deposited with the United States postal service certified mail, return receipt requested, then service shall be complete upon the date the return receipt was signed or postmarked, or upon the date the United States postal service returns the unsigned return receipt to the sender.

POLICY NOTES: The word “serve” is used in the current draft of the Article in Sections §405(c)(7), 410(b), and 413(c) to mean the delivery of a notice, or order, similar to the definition offered above. This proposed definition comports with the policy discussion concerning the proposed definition of "file" or "filing" in proposed §201(10A) and is offered to allow the Act to place a date certain upon certain acts keyed to delivery of orders, notices, etc. where the filing date may not be appropriate. The conditional introductory phrase is used because agencies may wish to specify only certain methods of service for use in their adjudications or may wish to incorporate the service provisions of the rules of civil procedure.

[ARTICLE] 4
~~X.~~ I. ADJUDICATION IN A CONTESTED CASE

SECTION 401. WHEN ARTICLE APPLIES; CONTESTED CASES.

This [article] applies to ~~an~~ agency adjudications ~~made by an agency~~ in ~~a~~ all contested cases.

DRAFTING NOTES: This Section is clearly intended to apply to *all* agency adjudications, not just "a" contested case or "an" adjudication. This should be made clear in the text. Thus the singular indefinite articles have been deleted, the nouns made plural and the adjective "all" inserted before "contested cases." Similar changes are proposed below without specifically being discussed in subsequent drafting notes. The phrase “adjudications made by an agency” is wordy and can be replaced by the more succinct and syntactically equivalent “agency adjudications.”

SECTION 402. PRESIDING OFFICERS.

SECTION 402(a) A presiding officer ~~must~~ shall be the individual ~~who is the~~ agency head, a member of a ~~multi-member body~~ group of individuals that is the agency head, ~~or,~~ an individual designated by the agency head, unless prohibited by law, or an administrative law judge assigned ~~in accordance with~~ according to Section 602.

DRAFTING NOTES: For consistency's sake and to ensure the directives of the Act are understood to be an obligation and a requirement, all instances of "must" have been replaced with "shall" throughout Article 4. The unnecessary pronoun phrase "who is the agency head" has been shortened to "agency head" and "individual" is then positioned to modify "agency head." The very odd phrase "multi-member body" has been replaced with the more concise "group" for the reasons discussed in the Policy Notes. The second disjunctive is deleted as unnecessary for the list in which it appears. The phrase "in accordance with" has been replaced by "according to" because the sense being conveyed here is that the assignment is to be one as indicated by Section 602.

The auxiliary verb "must" is used in some places in the Act and "shall" is used in others. In American English "must" and "shall" are often used to mean the same thing, with "must" being used more often, at least in my part of the country. However, the idea of an obligation to act is not the foremost meaning of "must" and can sometimes be interpreted to mean a statement is directory, whereas "shall" is more uniformly used to indicate requirement or obligation and to convey the mandatory nature of these provisions. The Act does not merely list the required parts of actions, it gives certain directions to take certain acts and should be so written.

POLICY NOTES: The Act uses the phrase “multi-member body” in §402(a) and §408(g) instead of the more common legal term "collegial body." The phrase “multi-member body” conjures certain Frankenstein-ish images to the reader. The drafters should and have avoided legalese in most cases, but I question this translation of “collegial body.” Perhaps shortening this awkward phrase to just "body" or, as I have, to "group" would serve the same purpose, be briefer, and more concise. “Body” is the term already appearing in the Act and its use would constitute the smallest change in wording, and could be consistently used in the phrase “body of individuals” throughout the Act. The word “group” has been used in these proposed revisions only because it seems a better choice as a “group” by definition is a kind of "multi-member body" and therefore needs no modifier, whereas a "body" can be used to denote various entities in the law, and sometimes is even used when the "body" is just one person.

The phrase “according to" has been substituted for the prepositional phrase "in accordance with" wherever the latter phrase is found in the Act as a shorter equivalent alternative and to be more accurate. “Accordance” means agreement or conformity with and “according to” means done as indicated by.

SECTION 402(b) An individual who has served as investigator, prosecutor, or advocate at any stage in a contested case may not serve as the presiding officer or assist

or advise the presiding officer in ~~the~~ that contested case. An individual who is subject to the authority, direction, or discretion of an individual who has served as [investigator,] prosecutor [,] [or] advocate at any stage in a contested case, including investigation, may not serve as the presiding officer or assist or advise the presiding officer in the same ~~proceeding~~contested case.

> **DRAFTING NOTES:** The phrase "in that contested case" is inserted here in place of the phrase "in the case" at the end of the first sentence to make clear that paragraph is talking about the same case. The phrase "contested case" is used to make clear the conflict of interest provision applies to the entire contested case, according to the hierarchy of terms discussed in the Policy Notes to §102(6). The phrase "contested case" is substituted for "proceeding" at the end of the last sentence for the same reason.
>
> **POLICY NOTES:** Throughout the Act, the word "case" is sometimes used in the phrase "contested case" and sometimes used alone, as here. When used alone, as in this subsection, there is no prior reference to a "contested case" as that term is defined in §102. Because the phrase "contested case" was defined in §102(6), and is used throughout the Act in other places, unless it is introduced in a subsection first and then followed by the word "case" as a referent, the whole phrase "contested case" should be used. This is especially true because the word "case" is also used in other Sections to mean other things. Instances of "case" used alone in Article 4 have been revised throughout to read "contested case."

SECTION 402(c) Subsection (b) also governs separation of functions as to the agency head or other person or body to which the power to hear or decide the ~~proceeding~~ contested case is delegated.

> **DRAFTING NOTES:** The phrase "contested case" is substituted for the word "proceeding" to follow the suggested hierarchy of terms and to make clear that the prohibition from serving as a presiding officer extends to the entire case, not just a component proceeding.
>
> **POLICY NOTES:** I am not even sure what this section addresses the way it is worded. If it means that categorical disqualification by function under subsection (b) apply to disqualify an agency head from acting as agency head to make a final order, it should be reworded. Or better yet, just add ", including an agency head, " after the word "individual" in the first sentence of subsection (a). The second sentence of subsection (a) would not appear to require any change since presumably the "agency head" is not "subject to the authority" of others for the enumerated functions.

SECTION 402(d) A ~~presiding officer is subject to disqualification~~ person may be disqualified from serving as a presiding officer for bias, prejudice, financial interest,

ex parte communications as provided in Section 408(h), or any other factor that provides reasonable doubt about the presiding officer's impartiality ~~of the presiding officer~~. A presiding officer, after making ~~a~~ reasonable inquiry, shall disclose to all parties any known facts related to grounds for disqualification that ~~would be~~ are material to the presiding officer's impartiality ~~of the presiding officer~~ in the contested case ~~proceeding~~.

DRAFTING NOTES: The use of the passive construction "is subject to" makes this subsection ambiguous in light of the rest of the subsection. "Subject to" seems to indicate that someone else will be doing the disqualifying, but the subsequent provisions of this subsection make it clear that only the presiding officer will decide whether to disqualify himself. The revision retains the passive construction because of the ambiguity of this subsection. In our state motions to disqualify are ruled on first by the presiding officer, and if denied, they are passed up the decision chain to the agency head to rule on. In practice this has worked well.

The main drafting problem with this subsection is the use of "disqualify" as the operative verb. "Disqualify" is a transitive verb and so needs an actor and an object. However, this subsection hides the actor by using "disqualify" in passive constructions. A better choice would be to use the non-transitive verb "withdraw," which is reflexive in nature and does not need an object such as "self" to show that it is the actor doing something to himself as does "disqualify." For example, the phrase could be expressed: "The presiding officer shall disqualify himself." versus "The presiding officer shall withdraw."

The possessive prepositional phrase "of the [object]" appears here for the first time in Article 4. It is unfortunately repeated throughout the Article in various other subsections. In these revisions, this phrase, where possible, has been revised to use the grammatically equivalent noun plus the possessive "s," e.g., "presiding officer's impartiality" in place of "impartiality of the presiding officer." Subsequent replacements of this kind are not noted or discussed in subsequent drafting notes after this one.

The indefinite article is deleted in front of "reasonable inquiry" to avoid the idea of "a single" or "one" complete inquiry. This subsection should make the obligation to conduct a "reasonable inquiry" ongoing.

What appears to be a use of the subjunctive "would" is replaced above with the present tense "are." There appears to be no reason to use the subjunctive tense in this case, particularly when the drafter is expressing a condition or characteristic, like materiality.

The word "proceeding" is deleted because it seems to limit the consideration of conflicts to discrete and component parts of an overall "contested case." The meaning of the remainder of this Section appears to apply to disqualification from an entire "contested case" and not just from a prehearing conference or hearing.

"proceedings" v. "contested cases" v. "contested case proceedings."

The phrase “contested case proceeding” has been revised above to delete “proceeding” from the phrase. This raises an overall diction problem in the Act. The Act sometimes uses “proceeding” to mean “contested case” or vice versa, and in yet other sections uses the concatenated “contested case proceeding” to mean “proceeding.” Thus, §402(b), (c) and (d) use “proceeding” or “contested case proceeding” but appear to mean an entire “contested case” as that phrase is defined in §101(6); §403(c) uses “contested case proceeding” apparently to refer to an entire “contested case”; §403(e) uses “proceeding” expressly to mean only an “evidentiary hearing or a prehearing conference”; §403(f) uses “proceeding” expressly to mean “the hearing”; §403(g) uses “proceeding” as equivalent to “hearing”; §404(a) uses “adjudicative proceeding” to mean “contested case”; §405(b)(1) and (c)(4) use “proceeding” to mean the “contested case” or perhaps the agency file or hearing file; §405(e) uses “proceedings” to mean “contested case”; §405(g) uses “proceeding” to mean a discrete portion of a “contested case” such as a hearing or prehearing conference; §406(b)(1) uses “proceeding” to refer only to “hearing” and no other portion of a case; §406(b)(2) uses “proceedings” in the plural apparently to refer to discrete parts of a “contested case” such as a prehearing conference or a hearing; §408(a) uses “proceeding” and may mean either “contested case” or a subset thereof; §408(b) and (g) address a pending “proceeding” but clearly mean a pending “contested case” since “pending” generally modifies a larger “case” and not individual “proceedings” within a case; §408(c) uses “proceeding” apparently to mean “contested case” because it is used in the phrase “at any stage of the proceeding” indicating it is not intended to mean a discrete “stage” but a larger “case”; §409(a)-(d) use “proceeding” or “proceedings” regarding intervention. In those subsections “proceeding” could mean either a “contested case” or a subset thereof. “Contested case” would appear to be the prime sense of the word simply because people generally intervene in an entire “case” and not in just one discrete “proceeding” in an administrative case; §411(b)(3) uses the phrase “parties to a contested case proceeding” referring to discovery responses. The sense of “proceeding” in this subsection is “contested case” because parties generally are not parties only to discovery, yet discovery is the only “proceeding” covered by this section; §415(c) uses “proceeding” in the phrase “disposing of the proceeding” modifying the noun “final order.” “Final orders” generally resolve administrative (“contested”) cases in whole or in part as the final “agency action.” Consequently, “proceeding” here apparently means “contested case.” §415(c) and (d) use the phrase “further proceedings” when addressing what a final decision maker may order on remand, clearly differentiating between a “contested case” and component “proceedings”; §416(c) uses “proceedings” in the phrase “setting the matter for further proceedings.” The best sense of “proceedings” here is a component part of “the matter” or the case.

§101(24) defines “proceeding” to mean

any type of formal or informal agency process or procedure commenced or conducted by an agency. The term includes adjudication, rulemaking, and investigation.

Contested case is defined in §101(6) to mean,

an adjudication in which an opportunity for an evidentiary hearing is required by the federal or state constitution, a federal or state statute, or a federal or state judicial decision.

These definitions indicate “contested case” means the overall adjudication and should connote the idea of an “administrative adjudicative action,” starting with

the initial filing and including everything until the time has run for appeal of a "final order." In contrast, "proceeding" appears to be used to mean the various meetings, procedures, filings, etc., including conferences, prehearing conferences, mediation, and oral argument, and specifically including as a distinct "proceeding" the formal "adjudicative hearing" that make . The use of the terms "proceeding" and "contested case" should be regularized to conform to their definitions and "contested case proceedings" should not be used at all. The only proceedings addressed Article 4 are proceedings in contested cases.

The revisions throughout have changed the various references to "proceedings" and "contested cases" to conform to their definitions.

POLICY NOTES: This section contains no provision for anyone other than the presiding officer to rule on a motion to withdraw. Because of the tripartite nature of administrative agencies, litigants often enter and leave the administrative adjudication process with the perception that the process is not and cannot be fair. In my experience this is so even when they win! Therefore, creating a process for the litigant to determine or be assured the hearing officer is impartial is a must in this kind of an act. This section addresses one of the ways in which basic fairness provisions both ensure and demonstrate to the public that the administrative adjudicative process is fair by weeding out clear bias and prejudice. Unfortunately, this section stops short of the mark. Lawyers may understand and believe that an adjudicative officer can rule "objectively" on a motion that directly questions his own "objectivity" and so come to a fair result. The public does not get this circular logic: the average litigant cannot understand how the person he claims is biased gets the final say on whether that person is biased. Consequently, some sort of quick, summary, interlocutory review for a supervisory presiding official (if for instance there is a Central Panel) or agency head (if there is not) should be included in this section, allowing the litigant to challenge a denial of a motion to withdraw.

SECTION 402(e) Any party may ~~petition for the disqualification of~~ move to disqualify a presiding officer promptly after notice that ~~the person~~ officer will preside or~~,~~ ~~if later,~~ promptly upon discovering facts establishing a ground for disqualification. The ~~petition~~motion ~~must~~ shall state with particularity the ground upon which ~~it is claimed that~~ the party claims the presiding officer cannot give the party a fair and impartial hearing ~~cannot be accorded, or the~~ or consideration and shall identify any applicable rule or canon of practice or ethics that requires disqualification. The ~~petition~~motion may be denied if the party fails to exercise due diligence in ~~requesting~~ moving for disqualification after discovering a ground for disqualification.

DRAFTING NOTES: The phrase "petition for the disqualification of" has been revised to the more succinct "move to disqualify" and the entire subsection has been revised to be in the active voice. The phrase "hearing or consideration" has

been inserted so as to ensure this subsection applies to those cases in which a presiding officer did not actually conduct the adjudicative hearing but was assigned the case after the hearing to write a recommended, initial, or final order.

"petition"

The verb "petition" is replaced with "move" to reflect a more common usage. The use of "petition" here also raises a larger diction question for Article 4.

Article 4 uses both "petition" and "motion" to mean a request for relief from a party or intervener. Where "petition" is used, the Article refers to the moving person as the "petitioner" or where it is a "petition" to intervene as the "intervener." Where "motion" is used, Article 4 refers to the moving person as the "party."

The word "petition" is used in its more general sense as a cognate for the word "motion" in §§402(e), 409(a), (b), (e), 411(c), (d), (e), 412(b), 413(b), (d), 414(b), (c), (d), 416(a), (b) and (c). In those sections "petition" is used to refer to a request for some specific relief during the course of an administrative case. The use of "petition" in this way is particularly confusing because, as you know, in the administrative arena the word "petition" is often used as a term of art for the documents initiating an administrative adjudication before the agency. It is common for enabling statutes and procedural regulations to use "petition" to denote those documents.

The Act does use the word "motion" in other sections in a similar way, to refer to a request for some specific relief: in §412(b) the word "motion" is used to refer to a request to vacate a default. In §§413(b) and 414(a) and (c) "motion" is used in the phrase "on its own motion," to refer to the agency head acting on its own initiative to review an initial order. The word also appears in §403(c), which requires the presiding officer to give parties an opportunity to "file … motions" and §406(b)(4) which requires the "hearing record" to include "any motions." Thus, use of the word "motion" in place of "petition" in §§402(e), 409(a), (b), (e), 411(c), (d), (e), 412(b), 413(b), (d), 414(b), (c), (d), 416(a), (b) and (c) would be consistent with other sections of the Act and regularize terms and usage across sections. "Motion" should therefore be substituted for "petition" in those sections.

The related term "petitioner" is used in §§409(a) and (b), 416(b), and 506(c) and (d). Use of "petitioner" in this way is also problematic. It is common in administrative cases for the person who files the "petition" at the beginning of the administrative case to be denominated and listed as "the petitioner" in the whole case. Parties responding to the "petition" are called often called "respondent." Yet, §409 calls a person who makes a motion to intervene (who by definition is not "the petitioner") a "petitioner" and §416 calls a party making a motion to reconsider (whether or not he is a "respondent") a "petitioner" as to that motion.

Where the word "petitioner" is used but really means the person making a motion to intervene under §409, "intervener" is more precise. Indeed the term is used in §409(c) and (d) to refer to the moving party, although perhaps it is intended in those subsections only to refer to the moving party after intervention has been granted. As to motions for reconsideration under §416, the term "party" is more accurate since §416(a) provides that only parties may make such a motion.

Not every use of "petition" or "petitioner" is a problem. The person who files an appeal of a final order with a court of law is often denominated by state law as "the petitioner" who files a "petition" for review. Consequently, where the word

"petition" appears to refer to an initiating document on appeal in §§503(d), 504, 506(a), (b) and perhaps 801, and the word "petitioner" refers to the party appealing an administrative order in §506, those terms are accurate and should remain as they are.

"or, if later,"

This phrase is very confusing. The phrase "if later" somehow seems to limit the following phrase, "promptly upon discovering facts." It is not clear why this second condition is dependent upon the first condition, although it is equally unclear how the second condition could come before the first. The use of "notice" in this sentence does not help the sense of the subsection. It would seem however, that the deleted phrase is unnecessary. The revision simply deletes the phrase and replaces it with the simple disjunctive to give the maximum flexibility to the parties.

"it is claimed that"

At times statutes must use the passive voice because of the subject matter or the nature of the directions given. However, it is better to avoid these constructions, particularly in procedural acts like this one the purpose of which is to convey to persons what each person can do in the process. This revision replaces the passive phrase "upon which it is claimed" with a phrase making it clear that a "party" is doing the "claiming." The revision conforms to the first sentence of this subsection which makes clear that "parties" are the only persons who can make such motions.

"requesting"

The revision replaces most instances of "request" in Article 4 with a form of "move" because that appears to be the sense being conveyed and is more accurate in an adjudicative setting. To is also necessary to be consistent with the change of "petition" to "motion" or "move."

SECTION 402(f) ~~A~~ The presiding officer whose disqualification is ~~requested~~ sought shall ~~determine whether to grant~~ consider the ~~petition~~motion to disqualify and ~~state~~ file in the hearing record a written order granting or denying the motion and stating the facts and reasons for the ~~determination in writing~~ruling. A presiding officer's decision to deny disqualification is not subject to interlocutory judicial review.

DRAFTING NOTES: The past participle "requested" is replaced with "sought" the revision above to differentiate it from the other, and proper, use of "request" in §§405, 406, 410, 411, and 416. The phrase "determine whether to grant" is deleted to remove the implication that a grant of the motion is the default action, and for similar reasons, the phrase "granting or denying" is inserted later in the subsection. This revision uses the verb "file" rather than "state" for reasons explained in subsequent drafting notes. The use of "written order" rather than the phrase "determination in writing," however, raises another overall diction problem in the Act.

"determine"

The use of "determine" in this subsection raises some questions about the word to use to convey the act of ruling on a motion or request. Some form of the verb "determine" appears in §402(f) ("determine whether to grant") where it connotes deciding or ruling on. In §§404(7) ("in determining the case"), 407(f) ("to determine the issues"), 412(a) ("shall determine all issues") all use "determine" to refer to making an overall decision on the contested case or considering or resolving the issues within the case. §§411(d) ("determines that action on") and 415(b) ("to determine credibility") both use "determine" to convey the idea of making a finding on. §418(c) ("determines it is possible") uses "determine" to convey the idea of reaching a conclusion.

"dispose"

§414(b) and (d) use a form of the verb "dispose" regarding a petition (motion) for reconsideration to mean "rule" or "decide" while (c) requires the "order" on a motion for reconsideration to be "issued."

§415(c) uses the adverbial "disposing" referring to a final order. This use of "disposing" appears intended to mean "ruling on" or perhaps "resolving."

§416(b) uses "dispose" to mean "rule on" a "petition" (motion) for reconsideration and fixes the time for judicial review at "disposition" whenever that may be. As used here, "dispose" could mean "issue," or "file," or "make."

Some form of "disposition" appears in §408(b)("the disposition of ex parte matters") and 414(d)("upon disposition of the motion"). In both cases, "disposition of" appears to convey the idea 'on the resolution of' or a similar idea.

"determination," "decision," "ruling," "order."

Although it defines "order" in §102(20), the Act is inconsistently refers to orders a presiding officer makes to resolve a request for relief, whether it involves making a finding, reaching a conclusion, resolving issues, or issuing a decision. In this subsection, the phrase "the determination in writing" refers to the substance of the ruling by the presiding officer ruling on a motion to disqualify. While "order" could be used here, it is the substance of the "order" or the "ruling" of the presiding officer that is being referred to here, and so "ruling" is inserted. "Determination" is also used in §508(a)(3)(D) in the phrase, "an agency determination of fact" but there it clearly refers to an individual finding rather than an entire "order" or "ruling" as referred to in this subsection.

Article 4 also uses the word "decision" to mean a judgment, order or ruling. §102(6), (16) uses use "decision" to mean a written court judgment or order. §§102(10), 402(f), 403(k), 404(4) all use "decision" to mean a ruling on an issue, which could be an "order." §§404(8), 406(b)(10), 407(d), 408(b), 412(b) and 418(b) all use "decision" to expressly refer to some kind of order provided for in Article 4.

The revisions proposed here use the verb "rule" to mean resolving an intermediate request for relief without resolving an entire case, the gerund "ruling" to mean the substance of such a resolution, and the noun "order" to mean the order embodying the resolution.

"hearing record"

The phrase "hearing record" is used in this subsection's revisions for the first time. The Act uses "agency record," "hearing record" and "record" as loose synonyms when they are not. "agency record" is defined in §201, and "hearing record" is defined in §406. All instances of "record" in Article 4 should be changed to "hearing record" so it is clear that the "record" in §406 and the record of emergency adjudications in §407 is what is meant. A proposed definition of "hearing record" appears above in proposed §201(15A).

POLICY NOTES: Although it is not good policy to allow a motion to disqualify to become a second litigation and lead to a delaying judicial review, to preserve the actuality and perception of fairness, interlocutory review by the agency head of a refusal to withdraw should be allowed.

SECTION 402(g) If a substitute presiding officer is required, the substitute ~~must~~ shall be appointed [as required by law, or if no law governs,] by:

(1) the Governor, if the original presiding officer is an elected official; or

(2) the appointing authority, if the original presiding officer is an appointed official; or

(3) by the final decision maker; or

(4) the chief hearing officer under §6___.

DRAFTING NOTES: Because state presiding officers often are merit employees and generally are neither "elected" nor "appointed" as those terms are defined in state laws, this provision does not appear to allow them to be appointed as "substitute presiding officers." Moreover, the word "official" is often used as a term of art in other state statutes, such as ethics laws, to mean only certain high ranking government officials, which presiding officers may or may not be. The revision above simply puts in a default method of appointing a substitute presiding officer in all other cases.

POLICY NOTES: The policy reasons for the hole in this provision is not clear. As presently drafted, the provision would only allow substitute presiding officers to be appointed for "elected" or "appointed" "officials" and not merit employee presiding officers. Yet, it would seem that if a substitute hearing officer is required that a protected merit employee or other similar type of presiding officer would be exactly the kind of person you would want to be the substitute presiding officer, not a political appointee as permitted in paragraphs (a) and (b), when there is a Central Panel structure in place specifically made to handle this type of problem.

SECTION 402(h) If ~~participation of~~ the agency head is the only person authorized by law ~~necessary~~ to enable the agency to take action in a contested case, then the agency head may ~~continue to participate~~ preside in the case, notwithstanding a ground

for disqualification ~~or exclusion~~.

DRAFTING NOTES: The phrase "participation of" has been deleted here as being too vague and because it does not seem to follow the Rule of Necessity as I understand it. The Rule of Necessity provides that a decision maker otherwise disqualified may decide a case and must do so if the case cannot be heard otherwise. See, e.g., U.S. v. Will, 449 U.S. 200, 212-213 (1980). Thus the Rule does not apply merely when the law requires the agency head to "participate" in a proceeding, but when the law requires the agency head to be the (one and only) person to resolve a proceeding. References to "participate" are therefore deleted from this subsection. The word "continue" has been deleted as a consequence.

The phrase "in a contested case" is inserted in this provision as a precedent to the phrase "preside in the case" because it is "presiding" in a "contested case" that the agency head is disqualified from.

"If …, then"

Throughout the Act the sentence construct, "if … ," is used to express conditionals and consequences rather than the more explicit "if …, *then*" construct. While it may not be as colloquial as it once was, "if … then" is a more precise construction. The Act should avoid implication of terms, even "then," particularly if they convey precondition, position, meaning, or sequence, such as here. These revisions therefore replace all "if … ," constructs throughout Article 4 with "if …, then."

SECTION 403. CONTESTED CASE PROCEDURE.

POLICY NOTES: One area not covered anywhere in this Act is the division of authority between a presiding officer conducting a hearing heard an agency head, whether the agency head is an individual, a collegial body or a hearing panel of a collegial body. Hearings before a hearing panel are not unusual in Kentucky and the division between the authority of the presiding officer and the panel is not always clear. Generally, the presiding officer should have the authority to rule on matters of law outside the presence of the hearing panel, to conduct all proceedings prior to the evidentiary hearing alone and make prehearing rulings on order of proof, evidence, and procedure. The presiding officer should also be able to conduct settlement conferences, or refer the matter to mediation. Likewise, he should be authorized with the discretion to dispose of a matter on a settlement by the parties. Prehearing dispositive motions could be handled in three ways: 1) allow the presiding officer to rule on such motions, or 2) let the presiding officer make a recommended or initial order to the panel (sometimes difficult to do because of the way and when a panel may be created), or 3) only allow the panel to make these decisions. Procedural authority of the presiding officer during the hearing would have to address such things as the authority to make evidentiary rulings and exclude evidence, to limit panel members participation or questions, to allow voir dire of the panel for bias or prejudice, to rule on directed recommendations, to give the panel legal advice by way of "instructions" on the record or otherwise, to attend deliberations of the panel, and to draft recommended or final orders for the panel.

SECTION 403(b) An agency shall make available to the person subject to ~~which an~~ agency action ~~is directed~~ a copy of the agency procedures governing the proceedings in a contested case.

DRAFTING NOTES: The Act uses the very awkward phrase "the person to which the agency action is directed" in §403(b), (l) and §407(c), (e), (f). In each instance, the phrase appears to mean the person subject to, or who is directly or indirectly affected by an agency order or action. The phrase currently used is very wordy and has been replaced throughout these revisions to Article 4 with the shorter but equivalent phrase "subject to the order/action" or some similar phrase.

This phrase "proceedings in a contested case" is inserted partly because "case" is used alone here without "contested case" or any other proceeding referent. Moreover, the provision appears to mean the procedural rules for the various stages of contested cases. The proposed revision was the least intrusive change to make this point. The entire last phrase "a copy of the agency procedures governing the case" could be made even more concise using a phrase such as, "a copy of all applicable agency procedural rules" or something similar.

SECTION 403(c) In a contested case, the presiding officer shall give all parties ~~a~~ timely opportunity to file pleadings, motions, and objections. The presiding officer may give all parties the opportunity to file briefs, proposed findings of fact and conclusions of

law, and recommended, interim, or final orders. The presiding officer, with the consent of all parties, may refer the parties in a contested case ~~proceeding~~ to mediation or to other dispute resolution procedures.

DRAFTING NOTES: The word "proceeding" was deleted because as currently drafted, this subsection implies the referral to mediation will only cover the discrete "proceeding" rather than the entire contested case or any part thereof.

POLICY NOTES: It is not clear what "timely" means in this subsection. It might be deleted altogether without doing any damage to the meaning or effect of this subsection since without any definition or reference to determine timeliness, the adjective has little meaning. As an alternative, the listed actions (file pleadings, motions, and objections) all appear to be actions that are generally taken before an evidentiary hearing, whereas the later list of actions (file briefs, proposed findings and conclusions and draft order) appear to be actions generally taken after an evidentiary hearing. Timeliness could be defined in terms of before and after an evidentiary hearing.

SECTION 403(d) In a contested case, to the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall ~~afford to~~ give all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence.

DRAFTING NOTES: The single word "give" was substituted here for the phrase "afford to" to shorten and simplify without changing the meaning. It is also used to keep the wording of this subsection consistent with the wording of §403(c), which uses "give."

SECTION 403(e) Except as otherwise provided by law ~~other than this [act]~~, the presiding officer may conduct all or part of ~~an evidentiary hearing or a prehearing conference~~ proceedings in a contested case by telephone, television, video conference, or other electronic means. The presiding officer shall give each ~~Each~~ party to the proceeding ~~must be given~~ an opportunity to hear, speak, and be heard at the proceeding as it occurs.

DRAFTING NOTES: There is obviously a policy reason for repeating the phrase "other than this [act]" in Article 4. The same sentiment seems to be conveyed by the phrase "otherwise provided by law" immediately before this phrase. However, if it must be made clear that the law referred to in this phrase is not the current Act, the word "other" could be inserted before "law." The phrase "other law" is sometimes substituted below in other revisions for similar phrases. This change is proposed in part because the deleted phrase implies that something in this Act provides otherwise than the provisions in the subsection, but that does

not appear to be the case.

The specific named proceedings have been deleted and replaced with a more generic reference using the word "proceeding" as it is expansively defined in §102 so as to cover "proceedings" other than just hearing or prehearing conferences, such as oral arguments, settlement conferences, other proceedings that an agency does not call a prehearing conference or a hearing, but which are in fact proceedings in a "contested case."

The final sentence is rewritten in the active voice and in so doing makes clear that this is the presiding officer's responsibility and authority, something that should always be explicit when it can be.

SECTION 403(f) Except as otherwise provided in subsection (g), an evidentiary hearing in a contested case ~~must~~ shall be open to the public. An evidentiary hearing conducted by telephone, television, video conference, or other electronic means is open to the public if members of the public have an opportunity, at reasonable times, to hear or inspect the hearing record, and to inspect any transcript obtained by the agency.

DRAFTING NOTES: The word "evidentiary" is inserted in this subsection to make use of the definition in §102, and because it is clear that this provision is intended to be limited to the actual evidentiary hearing itself and not other proceedings in a contested case.

SECTION 403(g) A presiding officer may close ~~a hearing~~ contested case proceedings to the public on a ground on which a court of this state may close a judicial proceeding or pursuant to other ~~a statute other than this [act]~~law.

DRAFTING NOTES: Here the word "hearing" has been revised to "proceeding" because there are other "proceedings" that may not be "hearings" that a presiding officer may want to or have to close to the public. The phrase "to the public" is used to make this provision consistent with the phrasing elsewhere in this Section.

The insertion of "a court of" limits the authority of the presiding officer to close a proceeding to the same authority exercised by *a court* of the state. The use of just "state" here is ambiguous and broad and implies that the presiding officer can close a hearing on any legal theory by any part of government. This would seem no limitation at all; executive agencies often have very broad legal theories by which they justify keeping all manner of things secret.

SECTION 403(h) ~~Unless prohibited by law other than this [act], a~~A party, at the party's expense, may be represented in a contested case by legal counsel or, if permitted by other law, may be advised, accompanied, or ~~represented~~ assisted by another

individual.

> **DRAFTING NOTES:** It is not clear why the meaning of this subsection is not stated as "a right to counsel," as is generally done. The modifying phrase "unless permitted by law" has been changed appropriately and moved to modify the last phrase regarding "another individual" because presumably there is no law that *prohibits* representation by counsel and "other law" would presumably only apply to representation by "another individual." The changed beginning of this subsection parallels the construction of subsection (i) below. The inserted phrase "in a contested case" is intended to make clear that this right may be exercised at any stage in the entire contested case. The word "legal" counsel parallels the changes in subsection (i) below.
>
> Without the revisions proposed here, or something similar, the phrase "represented by another individual" would cross the line between executive and judicial functions, at least in our state, by allowing "another individual"—presumably meaning not an attorney—represent a party. Agencies and the public will read "any other individual" to permit non-attorney representation in agency adjudications. In Kentucky the practice before administrative agencies is the practice of law, supervised exclusively by our judiciary. Legislation allowing non-attorney practice in Kentucky would be unconstitutional. The proposed replacement of the last instance of "represented" with "assisted" gets around this problem as explained below in the Policy Notes.
>
> **POLICY NOTES:** If the final disjunctive were changed from "represented" to "assisted" this subsection would not run afoul of unauthorized practice provisions or constitutional questions. Even with this change it would be advisable to put some caveat in the subsection indicating that the presiding officer has discretion to limit any "assistance" so as not let it become "representation."

SECTION 403(i) A party may ~~exercise the right to self representation~~ participate in a contested case without legal counsel, and in such circumstances the presiding officer may explain contested case procedures to that ~~the self represented~~ party.

> **DRAFTING NOTES:** The phrase "exercise the right to self representation" is replaced with the word "participate" as a shorter statement of the meaning of this phrase, and to make the construction more closely track the construction of subsection (h) above. This subsection and subsection (h) are oddly worded for Kentucky. The "right" in Kentucky law is generally "to counsel" not "to self-represent." Logically, it would seem the default participation in an adjudication would be "without counsel." The final adjectival phrase "the self represented party" has been changed to "that party" to shorten it, because there is only one party discussed in this section, and because the party is already described above as "without legal counsel" so the phrase is unnecessary.

SECTION 403(j) A presiding officer ~~must~~ shall record ~~the hearing to~~ contested case proceedings by stenographic reporter, video recording, audio recording, or other electronic means and may provide a written transcript of ~~the hearing~~those recordings. ~~The~~

~~transcript of the hearing may be recorded by stenographic reporter, video recording, audio recording, or other means.~~

DRAFTING NOTES: This whole subsection is revised to put it in the active voice. It also replaces "the hearing" with "contested case proceedings" to make clear that a presiding officer must record all proceedings that should be "on the record," such as prehearing conferences, not just "hearings." The word "written" is inserted before "transcripts" because the word "transcripts" generally refers to a writing, although that is not clear from the present draft. The second sentence has been reduced to a phrase describing the methods by which a recording may be made, keeping the listing as it appears in the draft second sentence. It could easily be shortened to "stenographic or other electronic means" to build upon the definition of "electronic" in §102(7).

POLICY NOTES: The movement to all electronic files is unstoppable. The gains in storage, handling, administration, mailing, and archiving make this a foregone conclusion. There is no need to include a provision on archiving because these records are generally already covered by a state's records retention policy.

SECTION 403(k) The ~~decision~~ recommended, initial, and final order in a contested case ~~must~~ shall be written, based exclusively on the hearing record, and shall include a statement of the factual and legal bases of the ~~decision~~order.

DRAFTING NOTES: The word "order" is substituted for "decision" here for reasons detailed in other drafting notes. Presumably the phrase "in a contested case" means 'resolving a contested case' or something similar. Thus, because an order resolving a contested case may be recommended, initial, or final, those types of orders are all listed before the first instance of "order." The word "exclusively" has been inserted to mirror the parallel provision of §413(e). One of these provisions is unnecessary.

POLICY NOTES: It is not clear why subsection (k) is in this Section. The content of recommended, initial, and final orders is covered in §413. Subsections (d) and (e) of §413 already cover this subject. The only difference between the two is that this subsection requires the orders to be "written." This requirement could easily be included in §413(d), making this subsection redundant.

SECTION 403(l) Subject to Section 204, the agency rules ~~by which an agency conducts~~ for a contested case may include provisions more protective of the rights of the person subject to ~~which the~~ agency action ~~is directed~~ than the ~~requirements~~ provisions of this section.

DRAFTING NOTES: The phrase "agency rules for" is substituted here for the equivalent very wordy phrase "rules by which an agency conducts." The word "provisions" is substituted for the word "requirements" to make the sentence

construction parallel with the prior reference to “provisions.”

SECTION 404. EVIDENCE IN CONTESTED CASE. The following rules apply in contested cases:

> **DRAFTING NOTES:** This section uses numbers to set its subsections apart. Other sections use letters, there appears to be no reason why this to this section should be numbered rather than lettered. All sections and subsections should be denoted in the same way unless there is some overriding reason not to do this. Consistency in numbering will help those administering the Act and those having to litigate cases under the Act.

SECTION 404(~~1~~a) Except as otherwise provided by law, ~~when~~ the party seeking a benefit not previously given or to uphold agency action ~~agency initiates the adjudicative proceeding, the agency~~ has the burden of proof. ~~When a~~ A party ~~other than the agency initiates the adjudicative proceeding, that party~~ seeking to impose a penalty or remove a benefit previously given has the burden of proof. ~~.~~

> **DRAFTING NOTES:** The deletions and additions are to set forth the burden of proof as explained in the Policy Notes.
>
> **POLICY NOTES:** It is not clear why this subsection is written as two separate sentences that address the same issue. The meaning seems to be that whoever starts the case bears the burden of proof. This is not the law in Kentucky. Under our law, a person asking for a benefit not previously or seeking agency action given bears the burden to show entitlement to the benefit. The agency imposing a penalty or removing a benefit previously given has the burden to show the propriety of the agency action. I believe this is the state of the law in many states and so this section should be redrafted to reflect this. Moreover, this appears to be the division of the burden contemplated in the default provision, §412. In addition, the phrase "burden of proof" should either be defined or explained here.
>
> It would be better to also expressly provide that parties interposing an affirmative defense have the burden of establishing that defense. It might be wise to address what the standard of proof for administrative hearings is, that is, does the party have to establish his case by a preponderance of the evidence? Agencies, litigants, and lawyers often get bollixed up on the standard of proof during the hearing and the standard of proof on review (substantial evidence).

SECTION 404(~~2~~b) ~~Upon proper objection, t~~The presiding officer shall exclude from the hearing record evidence that is irrelevant, immaterial, unduly repetitious, excludable on constitutional or statutory grounds, or excludable on the basis of an evidentiary privilege recognized in the courts of this state. Any other relevant evidence may be ~~received~~ admitted if it is of a type commonly relied upon by reasonably prudent

individuals in the conduct of their affairs. The presiding officer may exclude evidence that is objectionable under the ~~applicable~~ rules of evidence applicable in a civil action in this state, but evidence may not be excluded solely because it is hearsay.

DRAFTING NOTES: The phrase "upon proper objection" has been deleted for the reasons set forth in the Policy Notes. The phrase "from the hearing record" has been inserted to make clear what the presiding officer is excluding evidence from. The word "received" has been replaced by "admitted" to parallel "exclude" earlier in the sentence, and to avoid the vague reference to "receiving evidence." The phrase "applicable rules of evidence" has been changed to "rules of evidence applicable in a civil action in this state" for the reasons stated in the Policy Notes.

POLICY NOTES: This revision is proposed to make clear what "exclude" means; that is, what the evidence is being excluded from. It is not clear why this authority must be triggered by "proper objection." There will often be times when an unrepresented party does not know enough to object to evidence, but it clearly is objectionable. This provision appears to prevent the presiding officer from excluding such evidence from the record, except that in the next subsection that authority is granted the presiding officer. Thus, this phrase has been deleted. The final change is intended to clarify the phrase "the applicable rules of evidence" since generally no rules of evidence are to contested administrative hearings.

SECTION 404(~~3~~c)

ALTERNATIVE A

Hearsay evidence may be used to supplement or explain other evidence, but on timely objection, is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action.

ALTERNATIVE B

Hearsay evidence is sufficient to support fact findings if it constitutes reliable, probative, and substantial evidence.

END OF ALTERNATIVES

SECTION 404(~~4~~d) Parties shall make any ~~An~~ objection ~~must be made at the time the~~ to evidence when it is offered for the hearing record. In the absence of an objection, the presiding officer may exclude evidence at the time it is offered. A party

may make ~~an~~ a proffer of proof when evidence is objected to or before or after the presiding officer's ~~decision~~ ruling to exclude evidence.

> **DRAFTING NOTES:** The proposed revisions to the first phrase convert it to the active voice from the passive voice, thereby making clear who is required to do what. The phrase "for the hearing record" is inserted to make clear what the evidence is being offered for. The noun "proffer" is used here to make it consistent with §406(b)(7), which requires "proffers of proof" to be to made part of the hearing record. In Kentucky, the phrases "offer of proof" and "proffer of proof" are used interchangeably. The point is to make the Article consistent and use the same term for the same idea every time. Thus this change. The phrase "or after" is inserted in recognition of the fact that often a brief "proffer" is made to the presiding officer by the party seeking to introduce the evidence in order to argue the motion, and only after the presiding officer excludes the evidence does the party move to put a "proffer" of evidence in the record.

SECTION 404(~~5~~e) The presiding officer may admit evidence in the hearing record ~~Evidence may be received~~ in written form if doing so will expedite the ~~hearing~~ proceedings without substantial prejudice to a party. ~~. Documentary~~ The presiding officer and may allow evidence ~~may be received~~ in the record in the form of copies or excerpts or by incorporation by reference.

> **DRAFTING NOTES:** This revision converts the entire subsection into one sentence in the active voice. Converting this subsection to active voice is particularly important because ruling on evidence and compiling a record is part of the core authority of the presiding officer and that authority should be made explicit. "Proceedings" is substituted for "hearing" because a presiding officer may take evidence at other proceedings that are not or may not be called "hearings." The verb "receive" has been deleted to avoid its use, and "allow" has been substituted. The phrase "in the record" has been inserted to make clear what the presiding officer is to do with the evidence allowed. The word "admit" could also be used here.

SECTION 404(~~6~~f) Testimony ~~must~~ shall be made under oath or affirmation.

SECTION 404(~~7~~g) ~~Evidence must~~ The presiding officer shall make all evidence admitted, received, or considered ~~be made~~ part of the hearing record ~~of the case~~. Information or evidence may not be considered in ~~determining the~~ resolving a contested case unless it is part of the hearing record. If a party claims the hearing record contains confidential information ~~that is confidential~~, the presiding officer may conduct a

proceeding closed to the public ~~hearing~~ to discuss the information, may issue necessary protective orders, and may seal all or part of the hearing record.

DRAFTING NOTES: The proposed changes to the first sentence convert it from the passive voice to the active voice. The phrase "admitted, received, or considered" is inserted to cover evidence admitted in the record during a proceeding, received during a proceeding but not admitted in the record, and "officially noticed" evidence or evidence "incorporated by reference" that may not actually be in the record, but the presiding officer may consider. The phrase "determining the case" has been replaced with "resolving a contested case" to keep the hierarchy of terms consistent. The phrase "of the case" is deleted because it is redundant after the words "hearing record." The first proposed change to the third sentence converts it to a phrase in the active voice making clear who may make a claim of confidentiality. The phrase "confidential information" is substituted for the longer "information that is confidential."

The word "proceeding" is substituted for "hearing" because the actual process used to determine confidentiality may not be a hearing but a conference or an oral argument at which evidence may or may not be offered for the record. There is no reason to require or limit this provision to only apply at a "hearing."

The phrase "closed to the public" is inserted to make this parallel the provision in §403 which requires hearings to be "open to the public."

POLICY NOTES: The subsection as currently drafted is non-sequitur. If the hearing record actually contains confidential information no proceeding is necessary and the information must be protected. It is a *claim* of confidentiality that triggers the authority of the presiding officer to conduct a proceeding to determine if the material is really confidential.

SECTION 404(~~8~~h) The presiding officer may take official notice of ~~all~~ any facts ~~of which~~ a court may take judicial notice ~~may be taken and~~ of as well as other scientific and technical facts within the specialized knowledge of the agency. The presiding officer shall notify the parties ~~Parties must be notified~~ at the earliest practicable time of ~~the~~ facts proposed to be noticed and their source, including any staff memoranda or data, and shall give the~~. The~~ parties ~~must be afforded~~ an opportunity to contest any officially noticed facts before the ~~decision is announced~~ presiding officer issues an order based upon those facts.

DRAFTING NOTES: Overall the revisions to this subsection convert it from the passive to the active voice, to make clear what authority the presiding officer has. In the first sentence, the phrase "any facts a court may take judicial notice of" is inserted to make clear that the presiding officer may take notice of facts generally authorized by the rules of civil procedure in court. The phrase "as well as" is

added to make clear that the presiding officer may also take notice of "specialized" facts, something a court cannot do.

The changes to the second sentence convert it from passive to active voice.

The changes in the third sentence revise the phrase "must be afforded" to "shall be given." The word "afforded" as used here means to provide. A simpler term than "afforded" with the same meaning is "give." The sentence is left in the passive voice simply for variation of sentence structure in this subsection. The phrase "decision is announced" because "decision" is used here to mean an "order" (or perhaps a "final order') based upon noticed facts. Thus "order" is used instead. The word "announced" is deleted and "issue" is used instead, according to the proposed definition in §102 and currently appearing elsewhere in the Article.

SECTION 404(~~9~~i) The presiding officer may use his experience, technical competence, and specialized ~~knowledge~~ understanding ~~of the presiding officer may be used in the evaluation~~ of the evidence in evaluating the hearing record.

DRAFTING NOTES: This provision may have been at the center of a dispute on the Committee and shows the signs of some compromise. Most of the changes proposed here are intended to convert this subsection from the passive to the active voice. The changes suggested therefore do not attempt to alter the meaning of the provision except for one word.

POLIKCY NOTES: That one substantive change proposed is the deletion of the word "knowledge" and substitution of "understanding." The problem with using "knowledge" here is that it implies that the presiding officer is free to use facts that only he knows and that are outside the hearing record to decide the case. That does not appear to be the intent of this provision, however. With the addition of the phrase "understanding of the evidence" it is made clear that the presiding officer may apply his own abilities but only to the evidence that is "in the hearing record."

SECTION 405. NOTICE IN CONTESTED CASE.

POLICY NOTES: There is no good reason for there to be a separate section for notice in cases that are filed by an agency as opposed to cases filed by an individual. §405(b) and (c) should be combined.

SECTION 405(a) Except as otherwise provided for an emergency adjudication under Section 408, an agency shall give notice as provided in this section.

SECTION 405(b) In an action initiated by a person other than an agency, within a reasonable time after filing, the agency shall give notice to all parties that an action has been commenced. The notice ~~must~~ shall include:

(1) the official file or other reference number, the name of the proceeding, and a general description of the subject matter;

(2) contact information for ~~communicating with~~ the agency, including the agency mailing address and telephone number;

DRAFTING NOTES: The phrase "communicating with" is deleted here because it is not necessary. "Contact information" is by definition information that you use to contact (communicate) with the agency. Presumably a party would not use "contact information" for other purposes.

(4) the name, official title, mailing address, and telephone number of any attorney or employee ~~who has been~~ designated to represent the agency; and

DRAFTING NOTES: The pronoun phrase "who has been" is unnecessary here and has been deleted.

(5) the presiding officer's name, official title, mailing address, [e-mail address,] [facsimile number,] ~~and telephone number of the presiding officer or,~~ if no officer has been appointed at the time the notice is given, the name, official title, mailing address, [e-mail address,] [facsimile address,] and telephone number of the agency's representative;

DRAFTING NOTES: The phrase "presiding officer" has been moved to the front of this phrase to avoid the "of the" possessive construction. Reference to the presiding officer's telephone number has been deleted.

POLICY NOTES: It is not a good idea to require the presiding officer's telephone number be included in the notice. It only invites ex parte communication by individual litigants.

(6) a statement that a party ~~that~~ who fails to attend or participate in any subsequent proceeding in a contested case may be held in default;

(7) a statement that the party served may request a hearing ~~and~~ , giving instructions in plain language about how to request a hearing; and

(8) the names and last known addresses of all parties and other persons to which notice is being given by the agency.

SECTION 405(c) In an action initiated by the agency, the agency ~~must~~ shall give an initial notice to the party against ~~which~~ whom the action is brought. The notice shall include:

DRAFTING NOTES: The object pronoun "whom" is substituted here for "which." "Which" is improper here because "party" is presumably an individual of unknown gender. Thus, "whom" is the correct word. "Which" implies that the "party" is an artificial person like a corporation. This is an oddity throughout Article 4, which uses both "which" and "that" as pronouns for "party." Using these (neuter) pronouns implies that "party" is not an individual person but an artificial person like a corporation.

(1) ~~notification~~ a warning that an action has been commenced against the party that ~~may~~ could result in an order ~~has been commenced against the party~~contrary to the party's interest;

DRAFTING NOTES: This proposed revision is more accurate and is inserted to avoid using the confusing and redundant construction of a "notice" that must have a "notification." The phrase "has been commenced against the party" has been moved to be closer to its verb. The word "could" is inserted here for "may" to indicate the possible. The closing phrase has been added to make it clear what kind of an order could be issued. Otherwise the notice is just that "an order" may be issued.

(2) a short and plain statement of the matters asserted, including the issues involved;

(3) a statement of the legal authority under which the hearing is held,

citing the statutes involved;

(4) the official file or other reference number and the name of the proceeding;

(5) the presiding officer's name, official title, mailing address, [e-mail address,] [facsimile number,] ~~and telephone number of the presiding officer~~ or, if no officer has been appointed at the time the notice is given, the name, official title, mailing address, [e-mail address,] [facsimile address,] and telephone number of the agency's representative;

(6) a statement that a party ~~that~~ who fails to attend or participate in any subsequent proceeding in a contested case may be held in default;

DRAFTING NOTES: See the notes regarding the use of pronouns in subsection (c) above.

(7) a statement that the party served may request a hearing ~~and~~ together with instructions in plain language about how to request a hearing; and

(8) the names and last known addresses of all parties and other persons ~~to which notice is being given by~~ the agency is notifying.

DRAFTING NOTES: The awkward phrase "to which notice is being given by the agency" has been replaced with "the agency is notifying." Although it is still in passive voice, this is a shorter construction and therefore more readable and understandable.

SECTION 405(d) ~~When~~ If a prehearing conference is scheduled in the notice, then the agency shall give parties notice that contains the information required by subsection (b) or (c) at least 14 days before the ~~hearing~~conference.

DRAFTING NOTES: The use of "when" here implies that a prehearing conference will always be scheduled at some point in time, when that is often not the case with agency adjudications. The word "when" is used here to indicate the conditional and therefore the "if … then" is used instead. Finally, the word "hearing" has been replaced by "conference" for reasons discussed in the Policy Notes below.

POLICY NOTES: It is not clear whether the word “hearing” at the end of this sentence is a mistake. The sentence discusses a prehearing conference, not a hearing. The word “conference” has been substituted here for “hearing” as making more sense. This would require the agency to give the party notice of what the hearing is about at least 14 days before the prehearing conference. The phrase “in the notice” is inserted to clarify this subsection and tie it back to the subject of the section.

SECTION 405(e) Notice may include other matters that ~~the presiding officer considers desirable to~~ may expedite the proceedings.

DRAFTING NOTES: The phrase “the presiding officer considers desirable to” has been replaced with “may,” indicating it is within the presiding officer’s discretion, which is what “the presiding officer considers desirable” means.

SECTION 406. HEARING RECORD IN CONTESTED CASE.

SECTION 406(b) The hearing record ~~must~~ shall contain:

(1) a recording of the proceeding;

(2) notices of all proceedings;

(3) any pre-hearing or post-hearing order;

DRAFTING NOTES: The phrase "or post-hearing" has been inserted to refer to orders ruling on motions to reconsider, for review of an initial order, for stay, or to remand the case. This addition would get all post-hearing orders, regardless of kind.

(4) any motions, responses, replies, ~~pleadings,~~ initiating documents and responses, briefs, petitions, requests, and intermediate rulings;

DRAFTING NOTES: The additions to paragraph (4) are intended to make clear that associated documents are also part of the hearing record. Under Rule 7 of the civil rules the "pleadings" are the complaint, answer, a reply to a counter-claim, an answer to a cross-claim, a third party complaint, or a third party answer. Each of these types of pleadings have a corresponding set of rules applicable to them. Here, the word "pleading" has been deleted because few agencies have designated documents filed in the hearing record as "pleadings" like Rule 7 does, and fewer still have any kind of regulations governing what constitutes those "pleadings."

POLICY NOTES: It is not clear why separate kinds of documents are listed in this section rather than a catch-all phrase such as "all documents filed in the hearing record." Using the proposed definition of "file" and "filing" this would comport with the reality that the hearing record consists of everything that is marked as filed in the case file.

(5) evidence admitted, received, or considered;

(6) a statement of matters officially noticed;

(7) proffers of proof and objections and rulings thereon;

(8) proposed findings ~~,~~ and requested orders~~, and exceptions~~;

DRAFTING NOTES: The phrase "and exceptions" has been deleted because the Act does not provide for "exceptions" per se. Presumably the motion for reconsideration under §416 or the motion for review of an initial order under §414 have taken the place of what are commonly known as "exceptions". Since these are both post-hearing orders, they fall under the revisions in paragraph (3).

(9) any transcript of all or part of the hearing;

(10) any final, recommended, or initial order~~, recommended decision, or order on reconsideration~~;

DRAFTING NOTES: The phrase "recommended decision" is deleted here and "recommended" added to the list of modifiers for "order." It is not clear why "recommended decision" is used here instead of "recommended order." Presumably this is not meant to insert something new in the Article and so "decision" has been deleted. Clearly, all of these types of orders must be included in the hearing record for a proper review by a final decision maker or the courts. See the discussion of using "order" rather than "decision" in other drafting notes. The phrase "or order on reconsideration" has been deleted because it is a post-hearing order covered in paragraph (3).

(11) all memoranda, data, or testimony prepared under Section 407; and

(12) matters placed ~~on~~ in the hearing record after an ex parte communication.

DRAFTING NOTES: The phrase "placed on the record" is not always the easiest provision to administer. It is often interpreted to refer to an audio, video, shorthand, or stenographic recording of statements at a proceeding that is intended to be the hearing record, such as referred to in (b)(1). The proposed changes in §408 provide for the filing of matters *in* the hearing record after an ex parte communication. Thus, "in" is substituted for "on" here.

SECTION 407. EMERGENCY ADJUDICATION PROCEDURE.

SECTION 407(a) Unless prohibited by law ~~other than this [act]~~, an agency shall conduct an emergency adjudication in a contested case under this section.

SECTION 407(b) An agency may issue an emergency order under this section ~~only~~ to deal with an imminent danger to the public health, safety, or welfare. The agency may only take ~~only~~ action in the emergency order ~~that is~~ necessary to deal with the imminent danger to the public health, safety, or welfare. [The ~~action must~~ emergency order shall be temporary.]

DRAFTING NOTES: Every other "order" in Article 4 is specially denominated and distinguished except for the order covered by this section. There is no reason for this. The use of "emergency order" here instead of just "order" is intended to tie the Section to its heading and distinguish such orders as different from the other types of orders addressed elsewhere in the Act. Thus, every instance of "order" by itself has been revised to "emergency order" in this section without specifically being discussed in drafting notes. The word "only" in the first sentence of this subsection has been deleted as unnecessary in light of the meaning of the second sentence and its use of "only." The second "only" has been moved to between "take" and its helping verb. While this may not be strictly the most grammatical under older styles, it makes more sense to the modern reader than "may take only action."

SECTION 407(c) Before issuing an emergency order under this section, an agency, if practicable, shall give the persons subject to agency action notice and an opportunity to be heard ~~to the person to which the agency action is directed~~. The notice ~~and hearing~~ may be oral or written and may be communicated by telephone, facsimile, or other electronic means. The emergency hearing under this section may be conducted by any means allowed under Section 403(e).

DRAFTING NOTES: The direct object phrase "to the person …" has been converted to the shorter "person subject to agency action" and put next to its verb and before the indirect object. The word "person" is changed to the plural here to make clear that all persons, whether one or more, shall be given. The word "all" is not used here as it is elsewhere in these revisions in place of the definite article because there is an identifiable, though perhaps not completely known, group of persons the emergency order affects. The phrase "and hearing" has been deleted for the reasons discussed below in the Policy Notes.

POLICY NOTES: It is not clear how a hearing could be "communicated" by "facsimile." I am not aware of any facsimile hearings. The phrase "and hearings" in the second sentence of this section is clearly either a hold over or an afterthought that does not fit. The last sentence has been added to include the idea that I believe was trying to be expressed.

SECTION 407(d) An emergency order issued under this section ~~must~~ shall briefly explain the factual and legal reasons for making the ~~decision~~ order using emergency adjudication procedures.

DRAFTING NOTES: The word "order" is substituted here for "decision" because that is the meaning conveyed and "order" is more accurate. The use of "order" as opposed to "decision" and other similar terms is discussed in other drafting notes.

SECTION 407(e) To the extent practicable, an agency shall give the persons subject to the emergency order notice of ~~an~~ the order ~~to the person to which the agency action is directed~~. The emergency order ~~is effective~~ shall take effect when ~~signed by an agency official~~it is issued.

DRAFTING NOTES: The direct object phrase "to the person …" has been converted to the shorter "person subject to the emergency order" and put next to its verb and before the indirect object to parallel §407(c). The word "person" is again changed to the plural to make clear that all persons, one or more, affected by an emergency order will be given notice. The revisions proposed for the first sentence of this subsection convert it to the active voice and implement other changes as discussed above. The current draft uses the phrase "is effective" in the second sentence without explaining what that means. The Act uses the word "effective" elsewhere: in §407(e) which makes an order "issued" under (b) "effective when signed," presumably meaning 'takes effect.' The word "effective" is used in §407(e) ("effective when served"), to mean the same thing. Similarly, in §§407(g)("effective date"), and 417 ("effective date"), the word "effective" is used to modify the noun "date" to convey the date an order 'takes effect'. In §407(g) ("effective for 180 days"), the term "effective" is used to mean 'in effect.' Because of its use elsewhere, "effect" is retained in the proposed revision to the second sentence, which is converted to the mandatory. The use of "effective" here raises diction problems, some of which are discussed in other drafting notes, related to the use of "issue." The phrase "signed by an agency official" has been replaced by "it is issued" because the original phrase is the definition of "issued." See proposed §102(15A), above.

POLICY NOTES: As presently drafted, this section would allow "an" agency official to issue an emergency order. It is dangerous to draft a provision authorizing any "agency official" to sign an emergency order. These kinds of orders are often used by agencies to put litigants out of business before they can even get a full hearing, or to at least soften them up before the hearing. Admittedly, this section requires the ability of the agency to act expediently, but allowing "an agency official" to sign an emergency order is going too far. The

authority should at least be restricted to an "authorized agency official." It would be better policy to restrict this authority to the agency head. In the revisions the use of "issued" builds on the definition of that term in proposed §102(15A), above, which incorporates the idea of proper authorization.

SECTION 407(f) After issuing an emergency order ~~pursuant to this section~~, an agency shall proceed as soon as practicable to ~~provide notice and an opportunity for a hearing following the procedure under Section 403~~ start [commence or initiate] a contested case to determine the issues underlying the ~~temporary~~ emergency order.

DRAFTING NOTES: With the addition of "emergency" before the word "order," this phrase is redundant. Therefore, the phrase "pursuant to this section" is deleted as unnecessary because there is no other kind of order issued "pursuant to this section" than an emergency order.

The inserted phrase "persons subject …" uses the noun "persons" because with emergency orders the agency may not know exactly who to name and may be required to give broad orders that affect many people. Those persons may or may not technically be a "party" to the later formal adjudicative hearing. Thus "party" is not used here.

The phrase "start [commence or initiate] a contested case" is substituted for the word phrase "provide notice and an opportunity for a hearing following the procedure under Section 403." Providing notice and an opportunity to be heard following the procedure in Section 403 means starting a contested case.

The phrase "temporary order" is revised here to "emergency order." The revision keeps references to the order called for in this section consistent throughout this sections. Moreover, even if an emergency order is temporary in duration, it is not advisable to use the word "temporary" as part of the order's name. State administrative regulations often contain provisions for orders of "temporary relief." Use of the word "temporary" here for an "emergency order" will confuse this kind of order with a "temporary relief order" and will add nothing to this Section.

SECTION 407(g) ~~The~~ An emergency order ~~is effective~~ shall be in effect for 180 days, or until the ~~effective date~~ issuance of an order ~~issued~~ under the contested case procedures of Section 403, whichever is shorter.

DRAFTING NOTES: The noun "issuance" is used here to be consistent with the original wording of this subsection. Other words such as "filing," "signing," or "service" could be used here. "Issue" and "issuance" are the subject of other drafting notes. Similarly, the substitution of "shall be in effect" for "is effective" is discussed in drafting notes above.

SECTION 408. EX PARTE COMMUNICATIONS.

SECTION 408(a) For purposes of this section, the final decision maker means the agency head or another person or body ~~to which the power~~ authorized by law to resolve a contested case~~decide the proceeding is delegated~~.

> **DRAFTING NOTES:** The phrase "to which the power" is replaced by "authorized by law" to make clear that it is the legal authority that distinguishes the final decision maker, not his power. Agencies and agency heads have all kinds of power to act but can and do act beyond the legal authority to exercise that power. The meaning of the phrase "is delegated" is subsumed within "authorized by law" and so has been deleted. However, the phrase "resolve a contested case" has been inserted at the end of the sentence to comport with the proposed hierarchy of terms.
>
> POLICY NOTES: It is not clear why this provision is here. How is this different from the common understanding of the term? This is definitional. Should it be in the definitions?

SECTION 408(b) Except as otherwise provided in subsections (c) and (d), or unless required for the disposition of ex parte matters authorized by statute, while a contested case is pending, the presiding officer and the final decision maker may not make ~~to~~ or receive ~~from any person~~ any communication regarding any issue in the ~~proceeding~~ contested case without notice and opportunity for all parties to participate in the communication. For the purpose of this section, a ~~proceeding~~ contested case is pending from the date ~~issuance of~~ the ~~agency's pleading~~initiating document is filed in the hearing record~~, or from an application for an agency decision, whichever is earlier~~.

> **DRAFTING NOTES:** The phrase "from any person" because a communication by definition is conveying information from one person to another. The phrase is therefore redundant. The word "proceeding" is replaced with the phrase "contested case" to make clear that the ex parte provisions apply to entire contested cases, and not just subparts of cases. The phrase "from the issuance of the agency's pleading, or from an application for an agency decision, whichever is earlier" is replaced with "from the date the initiating document is filed in the hearing record" because "issuance," "agency's pleading," and "application" are all undefined or ill defined terms. Although the phrase "initiating document" is not defined either, it is at least descriptive of the kind of document referred to.
>
> "issuance"

This subsection uses "issuance" to refer to a point in time when "the agency's pleading" is filed in the record or made known to the charged party. The sense of "issuance" in subsection (b) therefore could be "served," "communicated," "mailed," or perhaps even "made." The sense of "issuance" in is not helped by the definition of "issue" in §413(f) because that subsection expressly only covers "order[s]" not "pleadings" as mentioned here. Further discussion of the use of "issue" appears below.

"the agency's pleading"

§408(b) refers to the "issuance of the agency's pleading" in defining when a proceeding first becomes "pending." §403(c) refers to an opportunity to file "pleadings." §406(b)(4) requires the "hearing record" to include "pleadings."

In the rules of civil procedure the "pleadings" are generally defined as the complaint, the answer, a counterclaim and any answer required to be filed to a counterclaim or cross-claim. See e.g., FRCP 7(a). In an administrative hearing the pleadings would by analogy be the petition or request for hearing, the notice, any answer and other paper required to be filed by the hearing officer or the governing law to respond to a claim or answer. Unfortunately, the term "pleading" is not defined in the Act.

Its use in these various sections, particularly §408(b), is therefore highly problematic. The use of the multiple undefined terms in §408(b), "issuance," "pleading," makes fixing when a proceeding becomes a "pending proceeding" for ex parte purposes particularly difficult. The alternative in that subsection—"from an application for an agency decision"—is equally unhelpful for the same reason.

To be more accurate the term "pleading" either should not be used at all in §§403, 406, or 408, or should be defined to mean those documents required to be filed with the agency by rule. In the revisions for this subsection, it has been edited out.

"an application for agency action"

The term "application" appears in §408(b) and (g) (Ex Parte Communications). In those subsections, it appears to refer to the act of filing a petition or initiating document seeking relief, or perhaps to the document itself, or perhaps to a "contested case" as that phrase is defined in §102(6). The term "application" also appears in §410(b) (Subpoenas) in which it appears to refer to a motion in court for enforcement of a subpoena. It also appears in §402A (Licensing) in which it refers to a request for a license.

The term "application" here has been replaced with a descriptive phrase, "initiating document." Alternately "application" could be replaced with a term that is added to the definitions in the Act, e.g., "petition" or "complaint" or "initiating document." The use of "application" in §410(b) regarding enforcement of subpoenas should be changed to "motion" to reflect the manner in which it is being used. The use of "application" in §402A is accurate and should remain.

SECTION 408(c) A presiding officer or ~~and the~~ final decision maker may communicate with an individual authorized by law to provide legal advice to the presiding officer or ~~to~~ the final decision maker and may communicate on ministerial

matters with an individual who serves on the presiding officer's or the final decision maker's [administrative] [personal] staff ~~of the presiding officer or the staff of the final decision maker~~ if:

(1) the communication ~~if the individual~~ does not furnish, augment, diminish, or modify the evidence in the hearing record.

(2) the ~~person providing legal advice or ministerial information~~ legal advisor or staff member has ~~not~~ served as investigator, prosecutor, or advocate at any stage of the ~~proceeding~~contested case, and

DRAFTING NOTES: The phrase "presiding officer's or final decision maker's" is substituted here for the deleted phrase to avoid the possessive construction "of the" discussed in other drafting notes. The phrase "contested case" is substituted for "proceeding" to make clear that the ex parte provisions in this subsection apply to entire cases, not just to discrete proceedings within contested cases. This subsection has been split into paragraphs to mirror the structure of Section 408(d). The "of the" possessive construction has been revised out of the first sentence of this subsection. The second sentence has substituted "legal advisor" for "person providing legal advice" and staff member for "person providing … ministerial information" to shorten the sentence without changing the meaning. The last phrase after the conjunctive has been added to clarify the prohibition. Subsequent changes are grammatical.

POLICY NOTES: This subsection as drafted would be very difficult to police. The parties cannot police it, at least the non-agency parties. How would parties ever know that the presiding officer has engaged in communication with a person in violation of this subsection? Whose obligation is it to ensure the requirements of this subsection are not violated? The presiding officer? The staff member? It would be better to make it the express obligation of the presiding officer to make sure the requirements of this subsection are met rather than state the requirements in the abstract. The structure of this subsection has been intentionally altered to mirror the structure of Section 408(d) because the two subsections deal with permitted ex parte communication. If §408(d) stays in the Act, the Committee should consider revising the two subsections down to one, rather than repeating similar provisions.

SECTION 408(d) The agency head serving as presiding officer may communicate with an ~~An~~ employee or representative of the agency ~~may make communications to or receive communications~~ concerning a pending contested case ~~from an agency head sitting as presiding officer or decision maker~~ if:

(1) the communication does not furnish, augment, diminish, or modify the

evidence in the hearing record;

(2) the employee or representative has not served as investigator, prosecutor, or advocate at any stage of the proceeding; and

(3) the employee or representative does not receive communications that the agency head is prohibited from receiving.

DRAFTING NOTES: The changes to this subsection convert it from passive to active voice, and makes the subject the "agency head." The phrase "of the agency" has been inserted to make clear who the individual is employed by or represents.

POLICY NOTES: The limitation here applies primarily to the "agency head" and not the "employee or representative" and it is the agency head, and not the employee or representative who will be expected to know and obey that limitation. Therefore, directing the restrictions of this subsection to "an employee or representative" who would have no way of knowing these restrictions rather than the agency head will only water down the effect of provision and make it impossible to administer.

I do not doubt that ex parte communications occur between agency heads and various other employees of an agency in important cases. However, I do not believe such ex parte is rampant, even in the worst agencies for most cases. Thus, I question the policy of codifying a way for agency heads to do this in every case. Codification of ex parte contact will make it easier and more acceptable in cases that are not so "important" and thereby expand, rather than control the practice. In short, I believe this subsection will only invite mischief from agency heads and staff, who will take advantage of this to try even the less "important" cases outside the hearing of the parties.

I believe the policy behind this subsection is misguided. If this subsection this is intended to address cases in which an agency head needs "help" understanding or handling a case, then he should remand it to the presiding officer with instructions to get that help in the record, however, it should be done. It is the Hearing Officer's job to put the evidence together in a digestible and understandable way. If he cannot do this, it should be remanded so he can do it. If the agency head is going to go behind everyone's back for hard cases it will only encourage presiding officers to spend less time on writing decisions in hard cases. What, after all, would be the point. Thus perhaps a better place to address this problem would be in the section on final orders and remands of matters to hearing officers. Second, if the case is not understandable because the record is not complete, then the matter should be remanded or the burden of proof rules applied to resolve the case. It is the burden of the party to make its case and put in the record everything necessary to support their case, which includes everything that is necessary for the final decision-maker to understand the issues. A provision like this will only encourage agency counsel to be lazy in their presentation because they can get another (secret) bite at the apple.

If the purpose of this subsection is to let the agency head have someone explain something technical to him, or to get more "independent" technical or expert advice, this is not the right way to go about it. My suggestion would be to let the

agency head, by order filed in the record, appoint his own expert or Special Master (or whatever you want to call it) to report orally to the Agency head in front of the parties or (more probably) to file a written report on specifically identified technical, financial, scientific, etc. issues. This would be somewhat similar to court appointed experts or Special Masters. The benefits of this procedure is all the parties know what is being done, what is being reported, who is doing the reporting, and the entire communication is not ex parte. Requirements could be set for who could be appointed, whether the parties could/must agree, whether they want the matter remanded, and how they would be compensated if outside the agency. The timing of such an appointment could be restricted to a period before exceptions must be filed to any recommended order, so that any objections to the Report could be included in the exceptions. If the appointment is allowed to fall after exceptions are filed, there would be no chance for the parties to object prior to appealing the matter to court, although this may not be objectionable as a policy matter. In any case, such a procedure would probably require an extension of the time the agency head has to resolve the case, to allow the appointed expert review the file and submit a report.

SECTION 408(e) If a presiding officer or ~~the~~ final decision maker ~~makes or receives a communication~~ communicates in violation of this section, the presiding officer or the final decision maker~~, if the communication is~~shall:

DRAFTING NOTES: The phrase "makes or receives a communication" is replaced with "communicates with others" because unless the communication is made or received by someone it is not a communication. The phrase "makes or receives" is redundant. The final conditional phrase is unnecessary in light of the revisions proposed for paragraphs (1) to (4) and is replaced with "shall."

(1) ~~written, shall make the communication a part of the hearing record and~~ prepare and ~~make part of the record~~ file a memorandum and notice that ~~contains~~ contains the substance of any oral communication, attaches a copy of any written communication, sets forth the response of the presiding officer ~~and~~ or the final decision maker to the communication, and ~~the identity of~~ identifies the party or person that communicated~~; or~~ and;

DRAFTING NOTES: Paragraph (1) has been revised to combine the provisions of paragraphs (1) and (2) into one paragraph that covers both written and oral ex parte communications. The first phrase is deleted to make the paragraph match the grammar of the body of subsection (e). The word "file" has been inserted for the phrase "make part of the record" because that is what "file" means. The phrase "and notice" is inserted after "memorandum" to match this up with the "notice" mentioned at the end of the new paragraph (2). The phrase "contains the substance …" is inserted from the old paragraph (2). The phrase "attaches a copy of any written communication" conveys the substance of the initial deleted phrase. The verbs "sets forth " and "identifies" are inserted to keep the structure

of various phrases of the sentence parallel.

~~(2) oral, shall prepare a memorandum that contains the substance of the verbal communication, the response of the presiding officer and the final decision maker, and the identity of the party or person that communicated.~~

DRAFTING NOTES: This paragraph is deleted in its entirety and is revised into paragraph (1) above.

(2) ~~408(f)~~ ~~If a communication prohibited by this section is made, the presiding officer shall notify~~ serve the memorandum required by paragraph (1) upon all parties ~~of the prohibited communication~~ and ~~permit~~ give the parties the opportunity to respond in writing within 15 days after service~~the notice~~.

DRAFTING NOTES: Subsection (f) has been moved to paragraph (2) of subsection (e) because it covers the same condition covered in subsection (e), and concerns the memorandum required in subsection (e) paragraph (1). Because it covers the same condition, the conditional phrase "If a communication prohibited by this section is made" has been deleted. The following phrase has been deleted to make the paragraph agree grammatically with the body of subsection (e). The word "notify" has been replaced with the phrase "serve upon" so that a date can be fixed to determine the running of the 15 day response period set in this paragraph. See the drafting notes to proposed §102(30A). The definition of "notify" in §102(19) does not allow a date to be fixed to figure this time period. The phrase "copies of the memorandum required by this subsection" has been substituted for "of the prohibited communication" because paragraph (2) defines the memorandum as containing the prohibited communication. The single word "service" has been substituted for "the notice" to parallel the use of "serve" earlier in the sentence.

SECTION 408(~~4~~f) Upon good cause shown, the presiding officer may ~~permit~~ conduct additional proceedings ~~testimony~~ in response to ~~the~~ a prohibited communication.

DRAFTING NOTES: The word "permit" has been replaced by "conduct" to match with "proceedings." The word "testimony" has been replaced with "proceedings" because testimony may not be the form of the evidence required to address the effect of the ex parte communication, and something more than just taking additional testimony may be required.

SECTION 408(g) If a presiding officer is a member of a ~~multi-member body of individuals~~ group that is the agency head with final decision-making authority, the presiding officer may communicate with the other members of ~~the multi-member body~~that group. Otherwise, while a ~~proceeding~~ contested case is pending, the presiding

officer may not communicate~~there may be no communication~~, directly or indirectly, regarding any issue in the ~~proceeding~~ contested case with ~~between the presiding officer and~~ the group agency head or other person or body ~~to which~~ delegated the power to hear or decide the ~~proceeding~~contested case ~~is delegated~~.

DRAFTING NOTES: The word "group" replaces the phrase "multi-member body of individuals" and "multi-member body" in these proposed revisions for the reasons set forth in other drafting notes. The word "proceeding" is replaced with "contested case" to make clear that the ex parte provisions of this section apply to an entire case, and not just select proceedings within the case. Moreover, the phrase in this subsection, "while a proceeding is pending," appears to have the same meaning as the phrase "a pending contested case" that appears in §408(b) and (d). Thus, "contested case" should be used here as well. The remaining changes to this subsection are required to put it in the active voice.

POLICY NOTES: The one substantive change made here is the insertion of the phrase "with final decision-making authority" in the first sentence. This is intended to make it clear that the section applies in cases in which the presiding officer is a member of the group that will decide the case.

SECTION 408(h) If necessary to ~~eliminate~~ address the effect of an ex parte communication ~~received in violation of~~ violating this section, a presiding officer ~~and~~ or final decision maker may ~~be disqualified~~ disqualify himself under ~~the provisions of~~ this Section~~s 402 (d) and(e)~~ and withdraw from the case, or may seal the parts of the hearing record pertaining to the ex parte communication ~~may be sealed~~ by protective order, or may grant other appropriate relief ~~may be granted~~, including an adverse ruling on the merits ~~of the case~~ or dismissal of all or part of the contested case~~application~~.

DRAFTING NOTES: The word "address" is substituted for "eliminate" because that is too high a requirement for this kind of problem. The best a presiding officer can do is address ex parte on the record and make it known. The complete effect of the ex parte may never be completely "eliminated." The word "violating" is substituted for the wordier phrase "received in violation of." The disjunctive is substituted for the conjunctive to make clear this provision applies to both a presiding officer and a final decision maker. The phrase "disqualify himself" is inserted to put the sentence in the active voice and the subsequent addition "and withdraw from the case" is inserted to make clear the consequences of being disqualified, i.e., that the presiding officer must withdraw. The phrases "or may seal" and "may grant" put the phrases in which they appear in the active voice. The phrase "of the case" is not necessary and a little vaugarity here is appropriate because "the merits" may be of the case or of a pending motion or claim, but not the whole case. This idea is reflected in the

insertions following the disjunctive. The word “application” is deleted and replaced with “contested case” for reasons explained in other drafting notes.

SECTION 409. INTERVENTION.

POLICY NOTES: It is not clear why §409(a) and (b) are separate subsections. They should be combined into one section with a paragraph addressing intervention as of right, and a paragraph addressing permissive intervention. The vague reference to a "timely" motion must be quantified to be meaningful. The deadline to make a motion to intervene timely could be pegged to various points in a contested case, however, my experience is that intervention causes the most trouble when it comes very close to the evidentiary hearing. Thus, the five day deadline suggested here is pegged to an evidentiary hearing.

SECTION 409(a) A motion to intervene in a contested case must be filed at least five (5) days before an evidentiary hearing on the merits of the case is scheduled to commence. ~~A presiding officer shall grant a timely petition for intervention in a contested case if:~~

DRAFTING NOTES: This sentence is inserted here to give meaning to the word "timely" used in this section, and to remove the direction from the presiding officer, who only administers the deadline but does not file motions. The language used parallels that used in §409(f). The deleted portion of this subsection has been moved to 409(b).

~~(1) the petitioner has a statutory right to initiate or to intervene in the proceeding in which intervention is sought; or~~

~~(2) the petitioner has an interest that may be adversely affected by the outcome of the proceeding and that interest is not adequately represented by existing parties.~~

SECTION 409(b) A presiding officer considering a timely filed motion to intervene,

(1) shall grant the motion if the moving person has a statutory right to initiate or to intervene in the contested case or has an interest that may be adversely affected by the outcome of the contested case and that interest is not adequately represented by existing parties; or

(2) may grant ~~a timely petition for intervention~~ the motion to intervene

if the ~~petitioner~~ moving person has a conditional statutory right to intervene or ~~if~~ the ~~petitioner's~~ moving person's claim or defense is based on the same transaction or occurrence as the contested case.

DRAFTING NOTES: This subsection is comprised of the end of the current subsection (a) and current subsection (b) to group all the standards for intervention together. The phrase "petition for intervention" is replaced in this subsection and throughout this section with the "motion to intervene" for reasons explained in other drafting notes discussing the use of "motion" instead of "petition." The word "petitioner" is replaced with "moving person" in this subsection and throughout this section to parallel the use of "motion" in subsection (a) above. The word "petitioner" has been replaced throughout this section with "moving person" or "intervener." The last prepositional phrase "in the proceeding in which intervention is sought" is deleted and replaced with "contested case." This section does not discuss any other "proceeding" and it is difficult to believe a moving party would seriously move to intervene in one proceeding when ordinarily the right is to intervene in a "case."

SECTION 409(c) A presiding officer may impose conditions at any time upon ~~the~~ an intervener's participation in the ~~proceedings~~contested case.

DRAFTING NOTES: The phrase "contested case" replaces "proceedings" here because the authority of the presiding officer should extend throughout the entire "contested case" and not be limited just to "the proceedings" which implies a limitation to a subset of a "contested case."

SECTION 409(d) A presiding officer may ~~permit~~ grant a provisional intervention ~~provisionally~~ and, at any time later ~~in the proceedings~~ or at the end of the proceedings, may revoke the provisional intervention.

DRAFTING NOTES: The word "permit" is replaced with "grant" to parallel the language in subsection (a) above and (f) below. The adverb "provisionally" which is separated from the verb it modifies is changed to the adjective "provisional" which is inserted before and modifies "intervention." This construction parallels the language and syntax at the end of the sentence.

POLICY NOTES: It is not clear why this subsection does not simply provide that a presiding officer shall have the discretion to grant, limit, or revoke provisional intervention. In any case, the phrase "later in the proceedings" in context is redundant. We are only talking about "in the proceedings" so any reference to a point in time is in the context of the ongoing proceedings. It is not entirely clear why the parenthetical phrase has been used here. Its entire meaning is subsumed within "may" and is unnecessary. If it is within the presiding officer's discretion, then he can do it "at any time later in the proceedings or at the end of the proceedings." It is not clear why it is necessary to add the phrase "or at the end of the proceedings." There seems little point in revoking intervention at the *end* of the proceedings. By definition, the intervention would seem to be over already.

SECTION 409(e) Upon ~~request~~ motion by the interveners or ~~existing~~ other parties, the presiding officer may ~~hold~~ conduct a separate proceeding ~~hearing~~ on the ~~intervention petition~~motion to intervene.

DRAFTING NOTES: The word "request" is replaced with "motion" here for the reasons discussed in other drafting notes above. The word "existing" is replaced with "other" because all parties "exist;" what is meant is other parties. The word "hold" is changed to "conduct" to match "proceeding." "Proceeding" is modified by "separate" to make clear that the proceeding on the motion to intervene is something in addition to the ordinary procedure.

SECTION 409(f) A presiding officer shall promptly give the interveners and other parties notice of an order granting, denying, or revoking intervention ~~to the petitioner for intervention and to all parties~~. The notice ~~must~~ shall be given at least 24 hours before an evidentiary hearing on the merits of the contested case.

DRAFTING NOTES: The phrase "the interveners and other parties" replaces the prepositional phrase "to the petitioner for intervention and to all parties" to place a compound direct object next to the verb. Its form is intended to parallel the language in subsection (g). The adjective “evidentiary” is inserted to make clear what kind of hearing it must be and “contested” is inserted in front of case to make clear it is the merits of the entire “case.”

SECTION 410. SUBPOENAS.

SECTION 410(a) Upon ~~a~~ request ~~in a record by~~ of a party ~~in a contested case~~ and a showing of general relevance and reasonable scope of the discovery sought, the presiding officer or any other ~~officer~~ person to whom the ~~power~~ authority is delegated shall issue a subpoena for the attendance of a witness and the production of books, records, ~~and~~ or other evidence ~~upon a showing of general relevance and reasonable scope of the evidence sought for use at the hearing~~.

DRAFTING NOTES: The word "request" is left in this subsection because it appears to be appropriate. The common practice is for subpoenas to be issued upon informal request by the parties or counsel, not by a formal motion filed in the record. The word “power” is replaced with “authority” to make it clear the section addresses when the law allows delegation of this power (but see the Policy Notes below.) The final conditional phrase "upon a showing … " has been moved to the beginning of the sentence to make a compound conditional phrase. This makes it clear that both conditions must be met before the authorized person will issue a subpoena. The phrase "any other officer" has been revised to "any other person" to avoid confusion with the preceding "presiding officer" and because no other kind of "officer" is mentioned in Article 4.

POLICY NOTES: It is not clear who the phrase “or any other officer to whom the power is delegated” refers to. Ordinarily, judicial or quasi-judicial officers cannot delegate the exercise of this authority. It does not appear that this subsection is granting the authority to delegate this power. On the other hand, it is common for smaller agencies, particularly those headed by collegial bodies to have been given the authority to issue subpoenas as part of their enabling act. Sometimes this is for investigative purposes, sometimes for hearing purposes, sometimes for both. Given that this authority is granted by other statute and not as a consequence of this Act, it would seem unnecessary to mention it here. More beneficial would be a provision governing what happens when the presiding officer has this independent authority to issue subpoenas and the agency issues its own or acts to quash the presiding officer’s subpoena. In such cases, the agency generally triumphs as the final decision-maker, however, it would be better policy for the agency to be prohibited from quashing a presiding officer’s subpoena during the course of the hearing, or at least until the agency head took the matter away from the presiding officer in some regular manner.

SECTION 410(b) ~~Unless~~ Except as otherwise provided by law or agency rule, a subpoena~~s~~ issued under subsection (a) shall be served and~~, upon application to the court by a party or the agency,~~ may be enforced by a court in the manner provided by law for the service and enforcement of subpoenas in a civil action.

DRAFTING NOTES: The phrase “Except as otherwise provided by law” used in this subsection is used as an introductory phrase in §403(e) and (f), §404(1), 413(b), 417, and as a concluding phrase in §414(b). The shorter phrase “Except as provided by law” appears in §508(a)(1). A similar phrase, “Unless otherwise provided by law or agency rule” is used as an introductory phrase in §410(b), and the shorter “Unless otherwise provided by law” is used as an introductory phrase in §§410(a), 412(a), and 502(a). There appears to be no difference between the meanings intended for the synonyms “except” and “unless” in any of the sections in which they appear. Consequently, they should be regularized and either “except” or “unless” should be used in a standard phrase such as “Except as otherwise provided by law.” The phrase “Except as otherwise provided by law” is therefore substituted here and throughout Article 4 for the phrase “Unless otherwise provided by law.”

The phrase "upon application to the court by a party or the agency" is wordy and redundant. A court will not sua sponte enforce a subpoena and so parties per force must "apply" or “move” for enforcement. The last part of the deleted phrase is not necessary because only parties, including agencies, may get a subpoena under subsection (a).

SECTION 411. DISCOVERY.

POLICY NOTES: Mandating Rule 26-type discovery, even at the behest of the parties, is not the most useful discovery provision for administrative actions. For certainly, providing a structure on which a party can issue discovery demands as of right is not a good idea in many administrative proceedings. Such a provision will only encourage difficult parties to issue canned discovery requests right away in cases, and then quibble about the responses. Agencies will wield this as a hammer. Attorneys will grind this provision to make their bread. Unrepresented parties will be lost in what exactly is required. Hearing Officers will have more delightful discovery conferences that slow the case down. Generally, discovery provisions are better left up to the individual agency and hearing officer to tailor to the type of case, the individual case, and the parties and counsel involved. Much more useful would be provisions giving some uniform guidance on how discovery that may be ordered should be structured on a presiding officer’s order, even if the provision just directs the presiding officer to use the civil rules by analogy on ordering discovery.

SECTION 411(a) In this section, “statement” includes a record of a ~~person’s~~ signed written statement ~~signed by a person~~ and a record that summarizes an oral statement ~~made by a person~~.

DRAFTING NOTES: It is not clear why the phrase "record of a person's written statement" is used rather than simply "a person's written statement." A written statement is a "record." The phrase implies there is some other indicia of the written record that could be admitted in the administrative record. The word "person's" is deleted here as not necessary. Non-persons generally do not make "statements" at all, nor statements that will be used in administrative proceedings. The phrase "signed by a person" is replaced with the word "signed" used as an adjective for statement. The phrase "made by a person" is also deleted as not necessary. Non-persons generally do not make "oral statements," nor oral statements that will be proof in a case.

POLICY NOTES: Rather than change "person" to "individual," it is better to eliminate the adjective altogether so as to give this subsection the greatest reach. Thus references to "person" should be deleted.

SECTION 411(b) Except in an emergency hearing under Section 408, a party, upon written notice to another party at least [ ] days before an evidentiary hearing, may:

(1) obtain the names and addresses of witnesses ~~the disclosing~~ other party ~~will~~ may present at the hearing, to the extent known ~~to the other party~~; and

DRAFTING NOTES: The phrase "disclosing party" is replaced with "other party" to parallel the phrase "another party" in the body of subsection (b) and "other party" used in subsequent paragraphs. This change is implemented throughout this section.

(2) inspect and copy any of the following material in the possession, custody, or control of the other party:

(A) statements of parties and witnesses ~~then proposed to be called~~ the other party may call to testify;

DRAFTING NOTES: The phrase "the other party may call to testify" is used here in place of "then proposed to be called" as a better statement in the active voice of what should be revealed. The phrase "proposed to be called" is too close to "will call" and will only invite the parties to hide witnesses because a party has not "proposed" to call that witness. The use of "may" expands this provision appropriately to stop such nonsense. Similar changes are made below where "propose" or similar terms are used, without being specifically discussed in drafting notes.

(B) all records, including reports of mental, physical, and blood examinations, and other evidence the other party ~~proposes to~~ may offer as evidence;

(C) investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the ~~adjudication~~contested case;

DRAFTING NOTES: The phrase "contested case" is substituted for "adjudication" here because "adjudication" is defined in terms of a process, and "contested case" is defined to include "adjudication" and because such reports often may "pertain" to various stages in a "contested case," such as discovery, but may or may not "pertain" to the "adjudication."

(D) statements of expert witnesses ~~proposed to be called~~the party

may call to testify;

(E) any exculpatory material in the agency's or the other party's possession ~~of the agency~~; or

DRAFTING NOTES: This is an important provision and may (still) constitute a change in the law of many states. The possessive phrase "of the agency" is revised here to the "agency's possession" and "or the other party's" is added because there are many administrative hearings where no "agency" participates as a party but only resolves a dispute between two other parties. There is some danger in using "exculpatory" because that term is often used in criminal proceedings and importing the criminal law into administrative proceedings, even if by analogy, is fraught with problems.

(F) other materials for good cause shown.

(3) Parties to a contested case ~~proceeding~~ have a duty to supplement responses provided under subsection (b) to include information ~~thereafter~~ acquired later to the extent they will rely on that information ~~will be relied upon~~ in the ~~hearing~~contested case.

DRAFTING NOTES: The word "proceeding" is deleted here to keep the reference to "contested case" consistent with other references throughout Article 4, and to make clear that the duty to supplement extends to an entire "contested case." The legalese "thereafter acquired" is revised to "acquired later." The last changes the phrase "will be relied upon" is replaced with "they will rely on" to put the phrase in the active voice, and "hearing" is replaced with "contested case" to parallel the reference to "contested case" in the first phrase of the sentence.

SECTION 411(c) ~~Upon petition, a~~A presiding officer may issue a protective order ~~for~~ covering any ~~material for which~~ information sought in discovery ~~is sought~~ under this section that is exempt, privileged, or otherwise ~~made~~ confidential, or is protected from disclosure by law, including material subject to the attorney-client privilege, attorney work product, and [executive] [deliberative process] privilege, and material the disclosure of which would result in undue annoyance, embarrassment, oppression, or ~~undue~~ burden or expense to any person or party.

DRAFTING NOTES: The initial phrase "Upon petition" has been deleted as discussed in the Policy Notes. The phrase "for any material for" is revised to "covering any information" to revise out the embedded prepositional phrases in

the original draft. The word "material" is changed to "information" as it is generally the information that is confidential or privileged and not the "material"—often meaning documents but apparently undefined here. The word “undue” has been moved from just before “burden” to just before annoyance to make it a modifier of all the following nouns. The reasons for this are set forth in the Policy Notes.

POLICY NOTES: The initial “upon motion” has been eliminated from this subsection so as not to limit the presiding officer’s authority to craft protective orders. In some cases there is no agency attorney present and no attorney for the individual litigant and so the only person likely to know that the law makes something confidential is the presiding officer, who often is a lawyer. Thus, to comply with the law, compose a proper hearing record, and avoid problems on appeal for everyone, the presiding officer should have the authority to make a protective order on his own.

“Undue” should modify all of the nouns in the final prepositional phrase of this subsection. As presently written, undue only applies to “burden or expense.” As the open records laws make clear, however, it generally is not the policy of government to seal records because they are annoying, embarrassing, or oppressive, but only if they are unduly so.

SECTION 411(d) Upon ~~petition~~motion, the presiding officer may issue an order compelling discovery for refusal to comply with a discovery request unless good cause ~~exists~~ is shown for refusal. The presiding officer may take any action authorized by the discovery rules of civil procedure if a person fails ~~Failure~~ to comply with ~~the~~ an order compelling discovery ~~order may be enforced according to the rules of civil procedure~~.

DRAFTING NOTES: The word "exists" is changed to "is shown" because the existence of "good cause" must first be established. The second sentence does not make sense and is in the passive voice to boot. It appears to say that a presiding officer may enforce a failure to comply. However, the rules of civil procedure do not enforce failures to comply but rather set forth what action a judge may take action on a party's failure to comply with a discovery request. The sentence has been rewritten in the active voice according to what must be its intended meaning.

POLICY NOTES: One particular problem that many presiding officers have in administrative hearings is that they are perceived as having no teeth in structuring and controlling the proceedings. Ordinarily they have no contempt power, rarely can they impose costs on a party, and it is not even clear they can exclude difficult counsel from practicing before the presiding officer in that hearing or the agency in general, One of the most common problems a presiding officer faces is what can he do when one party simply refuses to abide by discovery. It would be extremely useful to set out, even if in general, what a presiding officer has the authority to do in such a situation. The sentence regarding possible action according to the rules of civil procedure is not the best drafting, but does a minimal job.

SECTION 411(e) Upon ~~petition~~motion and for good cause shown, the presiding

officer may issue an order authorizing discovery by any other methods ~~provided~~ allowed by law ~~other than this [act]~~.

DRAFTING NOTES: The word "any" is added here in an attempt to make clear that the presiding officer may order methods other than as provided in this section, i.e., those provided for in subsection (d) above. The word "provided" is replaced with "allowed" because this is a permissive provision and "allowed" parallels the permissive meaning of the sentence.

POLICY NOTES: It would be of great benefit to set out somewhere what kinds of discovery a presiding officer has the discretion to order, even if that consists of a general reference to the types of discover allowed under the rules of civil procedure, or simple listing of the types of discovery. If such a provision is considered, there should be a caveat that the presiding officer cannot order discovery that is not permitted by agency regulation or statute. Thus, something like "the presiding officer may issue an order authorizing any discovery method permitted by agency law, or if there is no agency law governing discovery, then by any method allowed by law."

SECTION 412. DEFAULT.

SECTION 412(a) ~~Unless~~ Except as otherwise provided by law ~~other than this [act]~~, if a party without good cause fails to attend or participate in ~~a prehearing conference or hearing in a~~ any contested case proceeding, the presiding officer may ~~issue a~~ rule the party is in default ~~order~~. ~~If a default order is issued,~~ In case of default, the presiding officer may conduct any further proceedings necessary to determine all the issues in ~~complete~~ the ~~adjudication~~ contested case without the defaulting party ~~and shall determine all issues in the adjudication~~, including those affecting the defaulting party. ~~A~~ The presiding officer may base a recommended, initial, or final default order issued against a ~~defaulting~~ party ~~may be based~~ on the defaulting party's admissions or other evidence in the hearing record, ~~that may be used~~ without notice to the defaulting party. If ~~the burden of proof is on~~ the defaulting party has the burden to establish ~~that the party is entitled~~ entitlement to the agency action sought, then the presiding officer may issue a recommended, initial, or final order without ~~taking evidence~~conducting further proceedings.

DRAFTING NOTES: The two changes to the beginning dependent clause of the first sentence of this subsection are made for the reasons stated above in other drafting notes. The phrase "in a prehearing conference or hearing in a contested case" has been changed to "in a contested case proceeding" to make clear that this provision applies to other and all proceedings within a contested case, whatever they may be called, not just those two listed in the original version.

The first and second sentences are combined in this subsection to avoid the timing problem created by the current wording. The reality is that defaults are generally determined at the time of the proceeding and declared orally by the presiding officer, who may then conduct the proceeding without the defaulting party *and then* issue a default order. The default order does not generally issue first, then the presiding officer schedules and has a separate hearing.

The phrase "to complete the adjudication" is changed to "in the contested case" because "completing" the case may not necessarily be the next logical, legal, or procedural step in the process, and to allow the presiding officer the maximum flexibility to deal with the situation. The subsequent substitution of "case" for "adjudication" later in the same sentence conforms to the use of "contested case" before.

The changes to the first phrase of the third sentence put the sentence in the active voice. It is not clear anyone other than a "presiding officer" could issue a recommended, initial, or final order under this subsection and so "presiding officer" is the subject of the revised sentence. The addition of the phrase "in the hearing record" is inserted to ensure that the basis of the presiding officer's order is included in the record and available for review. Sometimes in these situations the individual does not comply with orders, but could have, and only later when he realizes the consequences of his failure or refusal and coughs up whatever "cause" he may have for not participating, an agency head will relent and remand the matter for a hearing. In any case, this revision dispels the implication in this sentence that "other evidence" that is *not* in the record could be the basis for a default decision. The proposed revision brings this subsection in line with the exclusivity restrictions of §406(c)/§413(e),

The syntax of the third sentence is revised to follow the "if …then" construct as discussed in other notes. The phrase "the burden of proof is on the defaulting party" is changed to "the defaulting party has the burden of proof" to make the sentence shorter and more direct without losing any meaning. The phrase "that the party is entitled to" is replaced with "entitlement to" for the same reason.

The final change to this sentence replaces the phrase "without taking evidence" with the phrase "without conducting further proceedings." The deletion of "taking evidence" is to remove a conflict with the various uses of "receiving evidence" found elsewhere in the Act to apparently mean the same thing. The use of "without further proceedings" parallels the construction of the first sentence of this subsection so as to make clear this is another in a list of conditional provisions. The use of "proceedings" as the object of the final revised prepositional phrase parallels the use of "proceedings" in the first sentence and leaves the presiding officer the ability to conduct whatever proceeding may be appropriate, which may or may not under state law including a proceeding at which parties offer proof for admission in the record. See the policy notes below.

POLICY NOTES: It is not clear why no provision is made here for the presiding officer to issue what is commonly referred to as a "show cause" order at this stage in the proceedings. Instead, the idea of the defaulting party asking for another shot was placed in subsection (b) below. The problem is that it is a descriptive provision of a permissive motion. Unfortunately, as a practical matter many, if not most, litigants who default do so because service on them was constructive not actual. In other words, they do not know they are defaulting. Thus, giving them a set time period to file a motion to vacate an order they never knew about often has little meaning in the day to day conduct of administrative cases. The presiding officer is in a much better position to determine whether the defaulting party has gotten actual notice, is avoiding notice, or can even be given notice. Indeed, the presiding officer is in the best position to decide whether additional measures could be or should be taken to get the word to the defaulting party or the constructive service provisions should be allowed to run. Although I certainly do not advocate the presiding officer engaging in research to save one party or the other from default, often service information is readily available to the presiding officer from the agency file, or from knowledge of parallel proceedings and case files, or past actions, or even from service information available to the presiding officer through the agency's systems, and takes negligible effort to obtain.

SECTION 412(b) Not later than [ ] days after the presiding officer serves a

recommended, initial, or final default order ~~is~~ , ~~rendered against~~ a party subject to ~~a~~ that default order~~, that party~~ may ~~petition~~move the presiding officer to vacate the ~~recommended, initial, or final~~ order. If the defaulting party shows good cause ~~is shown~~ for the party's failure to ~~appear~~attend or participate, then the presiding officer shall vacate the ~~decision~~ order and, after proper service of notice, conduct ~~another evidentiary hearing~~further proceedings in the case. If the defaulting party does not show good cause ~~is not shown~~ for the party's failure to appear, then the presiding officer shall deny the motion to vacate.

DRAFTING NOTES: The phrase "is rendered against a party" is replaced with "the presiding officer serves" to put the sentence in the active voice and to parallel the subject and grammar of the first sentence of subsection (a) above. The second reference in the first sentence to "recommended, initial, or final order" has been changed to simply "order." Repetition of the adjectives before the noun "order" is not necessary following the definite article. These are the only kinds of orders addressed in this subsection. The phrase "that party" is deleted as redundant. The verb "petition" is replaced with "move" for the reasons stated in the drafting notes to §402(e).

The proposed changes to the second sentence covert it to the active voice, and insert "then" to complete the "if … then" grammatical construct. Similar changes are made to the last sentence of this subsection. The word "appear" in the second sentence has been changed to "attend or participate" in order to parallel the bases for default set out in subsection (a). The phrase "another evidentiary hearing" has been changed to "further proceedings in the case" because a default may occur before a hearing is convened.

The noun "decision" is replaced with "order" in the second sentence of this subsection for the reasons set forth in the drafting notes to §402(f).

POLICY NOTES: The phrase "not later than [ ] days" is used throughout the Act to set time limits for various actions. The phrase could be replaced with the more concise "within [ ] days." This shorter formulation could be used, particularly in later sections, in a uniform manner that will shorten the text of the sections without changing the meaning, and simultaneously make them more readable. For the sake of consistency, however, the longer phrase has been left in place, and other equivalent phrases have been changed to match.

SECTION 413. ORDERS: FINAL, RECOMMENDED, INITIAL.

SECTION 413(a) ~~If the~~ A presiding officer who is the agency head~~, the presiding officer~~ shall ~~render~~ issue a final order to resolve a contested case. Except as otherwise provided by law ~~other than this [act]~~, ~~if the~~ a presiding officer who is not the agency head and who has not been delegated final decisional authority~~, the presiding officer~~ shall ~~render~~ issue a recommended order. ~~If the~~ A presiding officer who is not the agency head ~~and~~ but who has been delegated final decisional authority~~, the presiding officer shall render~~ shall issue an initial order ~~that becomes a final order [30] days after issuance, unless reviewed by the agency head on its own motion or on petition of a party~~.

DRAFTING NOTES: The three sentences comprising this subsection have been rewritten from conditional statements to simple declarative statements. Most of the changes to the three sentences are grammatical changes to alter the form of the statement. The pronouns "who" is used repeatedly in each sentence to have parallel structure within each sentence and between sentences. The word "issues" has been used in place of "render" for reasons discussed elsewhere. The disjunctive is used in the third sentence to distinguish it from the second sentence and draw attention to that distinction. The phrase "to resolve a contested case" or similar has been used in each sentence to make clear that the presiding officers referred to have the authority to issue these orders in order to conclude an entire case and resolve a controversy. The phrase "shall take effect as" is inserted in place of "become" for the reasons stated in the policy notes to §416. The last phrase "on its own motion or on petition of a party" is deleted and "pursuant to §414" is inserted because the phrase is merely a description of the procedure in §414 and therefore is unnecessary.

POLICY NOTES: It is not clear why the subject of the dependent clause in the first sentence is "presiding officer" and not "agency head." It would appear the emphasis here is that the agency head as such shall make the decision, not the agency acting merely as "presiding officer." It is not clear why the first condition set forth in subsection (a) is in a separate subsection with the next two conditions are together in one subsection. It is not clear whether the caveat, "except as otherwise provided by law" in the first condition of subsection (b) is intended to apply to the second sentence of subsection (b). If it is intended to apply to both sentences and there are two sentences in subsection only (b) because of the sub-condition "delegated final decisional authority" then the two sentences could easily be combined and the sub-conditions written as paragraphs or dependent phrases or even independent phrases separated by a semi-colon rather than different sentences. If the caveat in the first sentence of subsection (b) does not apply to both the sub-conditions, which grammatically it could not, then it is not clear why the second sentence of subsection (b) is not itself a subsection as shown in this revision.

SECTION 413(b) ~~Except as otherwise provided by law, a presiding officer who~~

~~is not the agency head and who has not been delegated final decisional authority shall issue a recommended order to resolve a contested case. A presiding officer who is not the agency head but who has been delegated final decisional authority shall issue an~~ An initial order ~~that~~ shall take effect as a final order resolving a contested case [30] days after issuance, unless the agency head reviews the ~~initial~~ order pursuant to §414.

DRAFTING NOTES: The first part of this subsection has been added to subsection (a), leaving only the provision relating to initial orders.

POLICY NOTES: All the provisions relating to the various orders and who issues them should be grouped together. Thus, the provisions in this subsection relating to recommended and initial orders has been moved to subsection (a).

SECTION 413(c) A recommended, initial, or final order ~~must~~ shall be filed and served ~~in a record~~ upon each party and the agency head within 90 days after the evidentiary hearing ends, the hearing record closes, or all memos, briefs, or proposed findings are ~~submitted~~filed, whichever is later. The time for closing the hearing record or making post-hearing filings may be extended by stipulation, waiver, or upon a showing of good cause.

DRAFTING NOTES: The phrase "served in a record" makes no sense and has been revised to "filed and served," which was presumably what was meant. The word "evidentiary" is inserted before "hearing" to build upon the definition in §102(10) and to make clear it is at the end of that particular "proceeding" that the time limit set in this subsection begins to run. The adjective "all" is inserted before the listing of post-hearing filings because there sometimes are several sets of such filings before all post-hearing briefing is complete. The word "submitted" is revised to "filed" to build upon the proposed definition of "file" or "filing" set out in proposed §201(10A). The passive voice is appropriate here because the emphasis is on the filing of the documents, not who in particular files those documents.

SECTION 413(d) A recommended, initial, or final order ~~must include separately stated findings of fact and conclusions of law on~~ shall address all material issues of fact, law, or discretion, the remedy prescribed, and, if applicable, the action taken on a ~~petition~~motion for stay, and ~~. A party may submit proposed findings of fact~~

~~and conclusions of law. The order must~~ shall ~~also~~ include separately stated findings of fact based exclusively on the evidence in the hearing record; conclusions of law; a statement of the ~~available~~ procedures and time limits for seeking reconsideration or other administrative relief~~, and~~ a statement of the time limits for seeking judicial review of ~~the agency~~ a final order; and a statement of any circumstances under which the order, ~~without further notice,~~ if it is an initial or recommended order, may become a final order without further notice.

DRAFTING NOTES: The word "available" is deleted here because presumably "the procedures" for seeking reconsideration will be the ones "available" and not the procedures not available. The entire second sentence has been deleted because it is already covered by §403 which leaves it up the presiding officer whether the parties may submit proposed findings and conclusions. The phrase "the agency order" in the third sentence is revised to "a final order" because "judicial review" may only be had of a "final order" under §501. The demonstrative "that" is inserted in place of the definite article because it refers to a compound subject.

SECTION 413~~(e) Findings of fact must be based exclusively on the evidence in the hearing record in the contested case and on matters officially noticed.~~

DRAFTING NOTES: The substance of this subsection has been moved to subsection (d). The phrase “in the contested case” has been deleted here because a “hearing record” is defined in a proposed addition to §102 above, to mean the record in a contested case. Consequently it is redundant. The concluding phrase “and on matters officially noticed” has been deleted because §408 makes matters officially noticed part of the hearing record.

POLICY NOTES: This entire section appears to be largely duplicative of §406(c) except that it specifically addresses findings of fact. Including similar but not identical provisions addressing the same issue is probably not good policy. The Drafters should consider combining §406(c) with subsection (a) and deleting this subsection.

SECTION 413~~(f) An order is issued under this Section when it is signed by the agency head, presiding officer, or an individual authorized by law other than this [act] to sign the order.~~

POLICY NOTES: This subsection defines “issue” to mean when an order is “signed.” This, definition would be difficult to apply in the real world. The point in time when a document is “signed” is not always clear if the document is not also dated, and even if the document is dated, the date is put on by the signer and still

subject to question if the signer had a motive to backdate or fore date a document. The preferable solution to this problem is to make an order (except perhaps emergency orders) take effect when the order is "filed" or "served" or some other term which has a more accepted meaning and that can be defined in the act as coinciding with certain acts and times, e.g., stamping with date/time. Since "filing" is often a ministerial act performed not by the signer but by a clerk or an autonomous or independent entity, this point in time is less likely to be questioned by litigants and much easier to determine. See the proposed definition of "file" or "filing" in §102(10A).

Because "issue" and "issuance" are used throughout Article 4, this subsection should be converted to a definition to be added to §102 so that "issue" may have a consistent meaning throughout the Article. A proposed definition is found in the in proposed §102(15A).

SECTION 414. AGENCY REVIEW OF INITIAL ORDER.

SECTION 414(a) An agency head may review an initial order on its own ~~motion~~initiative in the same manner as a recommended order, except as otherwise provided by law.

DRAFTING NOTES: The inserted second sentence is a re-worded version of the last sentence of the original §414(c). It was moved to subsection (a) because it applies to instances in which an agency head reviews an initial order on its own motion. The like provisions have been grouped to make them more understandable and easier to apply.

POLICY NOTES: No standard is given for the agency head review of an initial like there is for review of a recommended order. Consequently, the phrase "in the same manner as a recommended order" has been inserted to provide some guidance to the agency in reviewing an initial order. More particular reference could be made to the review set forth in §415.

SECTION 414(b) Not later than [10] days after an initial order is filed, or the parties are served with a copy of the order, whichever is later,

(1) the agency head shall serve notice on the parties that it intends to review the initial order; or

(2) a ~~A~~ party ~~may petition~~ shall file a motion ~~an agency head to~~ for review of an initial order with the agency head or with any person designated for this purpose by agency rule. ~~Upon petition by a party, the agency head may review an initial order, except as otherwise provided by law other than this [act].~~

DRAFTING NOTES: The first sentence has been re-worded to use the "Not later than … " sentence structure used elsewhere in these proposed revisions, and to parallel the same construction in §414(b). The word "serve" is used instead of "give" so as to build upon the definition in proposed §102(30A), and the noun "notice" is used instead of the verb "notify" to put the sentence in the active voice and avoid using the vague reference to when "the parties are notified."
The substance of the first numbered paragraph has been moved from paragraph (c) for the reasons explained below. The word "serve" is used instead of "give" so as to build upon the definition in proposed §102(30A), and the noun "notice" is used instead of the verb "notify" to put the sentence in the active voice and avoid using the vague reference to when "the parties are notified." The last sentence in the new paragraph (2) has been deleted as its substance has been split between subsection (a) and subsection (b).

POLICY NOTES: The Act should be regularized to make clear when time

periods run and some decision should be made as to why a some events are pegged to "giving" as opposed to "service" or "signing" or "notice" or "filing" or "submission." The better practice is to require all documents to be dated in some certain method and according to a regular and independent procedure, such as by "service" or "filing" requirements. Vague references to actions that cannot be dated for certain will only encourage meaningless argument about the timing or effect of documents or actions.

~~**SECTION 414(c)** A petition for review of an initial order must be filed with the agency head, or with any person designated for this purpose by agency rule, not later than [10] days after the initial order is issued, or the parties are notified of the order, whichever is later. If the agency head decides to review an initial order on its own motion, the agency head shall give notice in a record of its intention to review the order within [10] days after it is issued, or the parties are notified of the order, whichever is later.~~

DRAFTING NOTES: Everything but part of the first sentence of §414(c) has been deleted here to group like provisions together. The last sentence applies to instances in which the agency head reviews an initial order on its own motion and so was moved to paragraph (a) which deals with the same thing. To parallel the new construction of paragraph (a), most of the first sentence of the original (c) has been moved to the end of §414(b) because both provisions deal with instances in which a party moves the agency head to review an initial order. Since these moves gutted §414(c), it was deleted.

SECTION 414(~~d~~c) The [10]-day period in subsection (~~c~~b) ~~for a party to file a petition or for the agency head to notify the parties of its intention to review an initial order,~~ is tolled by the submission of a timely ~~petition~~motion under Section 416 for reconsideration of the ~~-~~order. A new [10]-day period begins upon ~~disposition~~ the filing of an order ruling on the ~~petition~~motion for reconsideration. If an order is subject both to a timely ~~petition~~motion for reconsideration and to a ~~petition~~motion for review by the agency head, then the agency head shall rule on the ~~petition~~motion for reconsideration ~~must be disposed of~~ first, unless the agency head determines that action on the ~~petition~~motion for reconsideration has been unreasonably delayed.

DRAFTING NOTES: The use of "disposition" in this subsection could mean something like "issuance" or perhaps "final issuance" but could also mean "signing" or "the ruling upon." The term refers to a point in time that is almost impossible to fix, the moment when the decision maker "disposed" of a "petition for reconsideration." From this point in time, whenever that is, the 10 day period for review of an initial order starts. Accordingly, the word "disposition" is replaced here with "the filing" so that a date certain can be fixed by the process of "filing" the order called for in this subsection. See the definition for "file" or "filing" proposed in §102(10A).

SECTION 415. AGENCY REVIEW OF RECOMMENDED ORDER.

SECTION 415(a) An agency head shall review ~~a~~ recommended order<u>s</u> pursuant to this section.

DRAFTING NOTES: The changes to this subsection are intended to make clear that this section applies to the review of "all" recommended orders, not just "a" recommended order. Similar changes are made in subsequent subsections.

SECTION 415(b) When reviewing ~~a~~ recommended order<u>s</u>, the agency head shall exercise all the decision-making power that the agency head would have had if the agency head had conducted the hearing that produced the <u>recommended</u> order, except to the extent that the issues subject to review are limited by a provision of law ~~other than this [act]~~ or by order of the agency head upon notice to all the parties. In reviewing findings of fact in a recommended order ~~by the presiding officer~~, the agency head shall consider the presiding officer's opportunity to observe the witnesses and to determine ~~the~~ credibility ~~of witnesses~~. The agency head shall consider the <u>whole</u> hearing record or <u>those</u> parts ~~that are~~ designated by the parties.

DRAFTING NOTES: The phrase "by the presiding officer" has been deleted as unnecessary and redundant. An agency head or final decision maker will not make a recommended order; only a presiding officer may make a recommended order. The word "whole" is inserted before the phrase "hearing record" to reflect the state of the law which requires the final decision maker to consider the whole record in making findings. The word "those" is inserted with the deletions to put the final sentence in the active voice.

SECTION 415(c) An agency head may ~~render~~ <u>issue</u> a final order ~~disposing of the proceeding~~ <u>resolving a contested case</u> or may remand the ~~matter~~ <u>case</u> for further proceedings with instructions to the presiding officer ~~who rendered the recommended order~~. Upon remanding a matter, the agency head may order such temporary relief as is authorized and appropriate.

DRAFTING NOTES: The phrase "disposition of the proceeding" is replaced with "resolving a contested case" because under the proposed changes to the definition of "final order" a final order is an order resolving all or part of a

contested case.

SECTION 415(d) A final order or an order remanding ~~the~~ a matter for further proceedings ~~must~~ shall identify any difference between the final order and the recommended order and identify the ~~facts of~~ evidence in the hearing record that supports any difference in findings of fact, the source of law that supports any difference in legal conclusions, and the policy reasons that support any difference in the exercise of discretion. A final order under this section ~~must~~ shall include, or incorporate by express reference to the recommended order, all the matters required by Section 413(d). The agency head shall ~~deliver~~ file the final order in the hearing record and serve the order ~~to~~ on the presiding officer and ~~-~~all parties.

DRAFTING NOTES: The definite article is replaced with the indefinite article here because "matter" has not previously been introduced in the sentence. The modifier "final" is inserted before "order" to parallel the language at the beginning of the sentence. The word "facts" is replaced with "evidence" because "evidence" is in the word "state" is replaced with "identify" as a better choice. The word "state" is often used to mean "speak" in the context of an adjudicatory proceeding. The word "deliver" is deleted and replaced with the explicit requirement that the agency head both "file" and "serve" the final order.

SECTION 416. RECONSIDERATION.

POLICY NOTES: The use of the word "given" in subsection (a) brings the scope of this entire section into question. If this section applies when "notice of a final order is given" as stated in subsection (a), then presumably it does not cover cases under §413(a) in which an initial order "becomes" a final order. The use of the passive voice throughout this section masks who is making the final order in question and who is ruling on the motion to reconsider, thereby compounding the problem. Subsection (b) refers to "the agency" as "disposing" of a motion to reconsider and subsection (c) refers to a "presiding officer" "issuing" a written order. Use of "the agency" in subsection (b) could be read to mean "agency head," implying this section is limited only to those final orders issued by agency heads acting as presiding officers. The use of "presiding officer" in subsection (c) could mean that initial orders that "become" final orders *do* fall within the scope of this section. The scope of this section should be made explicit.

For the purposes of the proposed changes in this section, I have assumed that this section is *not* intended to be limited to those final orders issued by agency heads acting as presiding officers, because as a general matter agency heads do not personally serve as presiding officers. They have subordinate presiding officers do this work. Rather than limit this section to a tiny minority of cases, I have offered revisions give this section its proper scope. I have used the passive voice throughout because the actor may be either the agency head who has issued a final order or a non-agency head presiding officer who has issued an initial order that has turned into a final order.

SECTION 416. RECONSIDERATION.

SECTION 416(a) ~~Any party, n~~Not later than [ ] days after ~~notice of~~ a final order ~~is given~~ is served or takes effect, any party may file a ~~petition~~motion for reconsideration that states the specific grounds upon which relief is requested. The agency procedural rules, as stated in the final order, shall specify where a motion under this Section must be filed ~~place of filing and other procedures, if any, must be specified by agency rule and must be stated in the final order~~.

DRAFTING NOTES: The phrase “not later than … “ has been made the introductory phrase of this subsection so as to parallel the sentence construction in §412(b) and to be similar to the sentence construction in §417. This construction is paralleled in the revisions to §414(c) and §416(c). The phrase "notice of" has been deleted because there is no separate "notice" of a final order in Article 4. The passive construction "notice … is given" has been deleted and the subject has been converted to "a final order" rather than "notice of a final order." It is not clear what "given" is meant to indicate here, and for the reasons set forth in the policy notes to this section, it has been changed to "served or takes effect" to bring initial orders that turn into final orders within the scope of this section. The subject “any party” has been moved next to the predicate. The second sentence has been completely rewritten to put it in the active voice, to remove the use of “must,” and to refer to only “the agency procedural rules”

rather than list certain procedural rules as examples. The passive voice is used in the last sentence to emphasize the filing and the place of filing.

POLICY NOTES: Letting the agency specify by rule who must resolve a motion for reconsideration makes this entire Section vague. It would be better to specify this in the Act. If it is an initial order that has become a final order, the motion would more properly be directed to the presiding officer because the agency head has not participated in the decision. If it is a final order from the beginning, the motion should be directed to the agency head.

SECTION 416(b) If a ~~petition~~motion for reconsideration is timely filed~~,~~ and ~~if~~ the ~~petitioner~~ moving party has complied with any agency~~'s~~ procedural rules for reconsideration, ~~if any,~~ then the time for filing a petition for judicial review does not begin until ~~the agency disposes of~~ an order resolving the ~~petition~~motion for reconsideration is filed ~~as provided in Section 503(d)~~.

DRAFTING NOTES: The word "petition" is replaced throughout this section for reasons discussed in the drafting notes to other sections. The second "if" in the first phrase has been deleted here as the conjunctive makes clear that the conditional phrase is compound. The parenthetical phrase "if any" has been deleted and replaced with the prior phrase "any agency procedural rules." The general reference to "the agency" has been replaced with "presiding officer" for the reasons stated in the policy notes to this section. The verb "dispose," used here to mean "rule on," is deleted and replaced with "issues" for reasons explained in other drafting notes and to parallel the use of "issue" in subsections (a) and (c).

SECTION 416(c) Not later than [20] days after a motion for reconsideration ~~If a petition~~ is filed under subsection (a), ~~the presiding officer shall issue~~ a written order ~~not later than [20] days after the filing~~ denying the ~~petition~~motion, granting the ~~petition~~motion and dissolving or modifying the final order, or granting the ~~petition~~motion and setting the matter for further proceedings shall be issued. The order ~~petition may be granted only if the presiding officer states~~ shall include findings of fact~~s~~, conclusions of law, and the reasons for granting or denying the ~~petition~~motion.

DRAFTING NOTES: The phrase beginning "not later than …" has been inserted as the introductory phrase to keep the sentence structure in this subsection consistent with other the sentence structure of subsection (a). The sentence is converted from active to passive voice to hide the multiple possible actors, as discussed above in the policy notes to this section and the drafting notes to other subsections. The last sentence is also converted to the passive voice, and the

focus of both of the last two sentences is changed to the contents of the order.

SECTION 417. STAY. Except as otherwise provided by law ~~other than this [act], a party~~, not later than [~~seven~~7] days after ~~the parties are notified of the~~ a final order is filed, a party may ~~request~~ move the agency head to stay a final order pending judicial review. At any time before a petition for judicial review is filed or the time for filing in Section 503 expires, ~~The~~ the agency head may grant the ~~request~~ motion for a stay ~~pending judicial review~~ if ~~an~~ the agency head finds that justice so requires. ~~The agency may grant or deny the request for stay of the order before, on, or after the effective date of the order.~~

DRAFTING NOTES: The first sentence is revised above to convert it to the active voice so as to make clear who may do what. The word "filed" is used to key the start of the limitations period to a specific procedural act that sets a date. The indefinite article is substituted before the first instance of "final order" and the definite article is substituted before the second instance of "final order" to comport with proper usage. The word “request” is replaced with “move” for reasons set forth in other drafting notes. The phrase containing “after the effective date” is deleted entirely and not replaced with another similar phrase because as currently drafted, the agency could issue an order staying a final order even after a court takes jurisdiction on appeal. That occurs at the time a petition for review is filed under §503.

POLICY NOTES: The use of the word "agency" alone in this section is vague. It is not clear why the particular person holding this authority is not explicitly identified here, and not specifically identifying that person will only encourage agency officials to assume this authority when it suits them, whether or not they are the appropriate person to exercise the authority. A stay of effect is a particularly sensitive matter, largely grounded in policy, and should be left to the agency head alone, who may have very good policy reasons not to stop an order from immediately going into effect. If the agency head arbitrarily refuses to stay a matter, courts are given parallel authority to stay a final order.

SECTION 418. AVAILABILITY OF ORDERS; INDEX.

SECTION 418(b) Final orders or decisions that are exempt, privileged, or otherwise made confidential or protected from disclosure by [the public records law of this state] ~~are not public records and~~ may not be indexed.

> **DRAFTING NOTES:** The phrase "are not public records and" has been deleted here because every Open Records act I am aware of contains specific definitional exclusions or particular exclusions making confidential records not subject to the Act.

SECTION 418(c) The presiding officer or agency head may exclude a ~~A~~ final order ~~may be excluded~~ from an index and disclosure ~~only~~ by written order ~~of the presiding officer with a written statement of reasons attached to the order~~stating the reasons for exclusion. If the presiding officer or agency head finds ~~determines~~ it is possible to redact a final order that is exempt, privileged, or otherwise made confidential or protected from disclosure by [the public records law of this state] so that it complies with the requirements of that law, he may order the redacted order ~~may be~~ placed in the index and published.

> **POLICY NOTES:** Agencies are often touchy about what final orders are revealed to the public. While it is an excellent idea to require compiling and indexing decisions, I believe agency heads would only adopt such a practice if they, not just the "presiding officer", are given a final say over what gets compiled and indexed (or excluded). This could be accomplished, as in the proposed revisions here, by giving the presiding officer and the agency head concurrent authority to exclude items.
>
> **DRAFTING NOTES:** The first sentence has been revised to put it in the active voice, and to name the agency head. The second sentence has been revised to name the agency head and to replace the word "determines" with the more accurate word "find" since this would appear to be an adjudicative finding. The final phrase is revised from passive to active voice.

SECTION 418(d) An agency may not rely on a final order adverse to a party other than the agency as precedent in future adjudications unless the agency head designates the order as a precedent, and the order has been published, placed in an index, and made available for public inspection.

POLICY NOTES: The single word "agency" is replaced with "agency head" to parallel the sentiments in the policy notes to subsection (c). The agency head should be the one person to decide what will be "precedent" because this is a policy determination.