

MODEL STATE ADMINISTRATIVE PROCEDURE ACT ISSUES AND POLICY STATEMENT

HISTORY AND APPROACH TO THE CURRENT REVISION

The 1946 Model State Administrative Procedure Act

The 1946 Model State Administrative Procedure Act (MSAPA) drew heavily upon the Federal Administrative Procedure Act (FAPA) that was enacted in the same year. That MSAPA incorporated basic principles with only enough detail to support essential features of an administrative procedure act. The differences among the states in administrative procedure and the differences among agency tasks were so great that the drafters purposely adopted this “model act,” rather than a uniform act, approach.

The 1961 Model State Administrative Procedure Act

The MSAPA was revised in 1961 to take into account a “maturing” of thought on administrative procedure. The 1961 MSAPA articulated its objectives as fairness to parties and creation of procedure that was effective from the governmental standpoint. This revision also followed a model act approach that focused on major features, because, it explained, details must vary from state. A great deal of the 1961 MSAPA has been adopted by the states.

The 1981 Model State Administrative Procedure Act

The MSAPA was revised in 1981 because of the expansion in types of regulation carried out by the state agencies, such as, for example, workplace safety and environmental regulation. The 1981 MSAPA approach was “entirely new” with “more detail” than earlier acts. This approach offered guidance to the states so that they could select the parts of the MSAPA that were suitable for their particular situation, and took into account the greater experience with administrative procedure since 1961. There have been only a few adoptions of provisions from the 1981 MSAPA.

The Current Proposed Revision

It has been twenty-five years since the 1981 revision of the MSAPA. There have been many changes and significant events since that time. One is the emergence of the Internet in the mid 1980’s and its explosive growth since that time. States have discovered that the Internet furnishes an excellent, efficient and low-cost method for communication with the public. In the past two decades, state legislatures have expressed dissatisfaction with agency rulemaking, and have taken action to assure continuous oversight and creation of mechanisms and procedures overrule agency action. At the present time, the American Bar Association has undertaken a major study of the Federal Administrative Procedure Act and has recommended revisions that draw upon fifty years of experience with the FAPA, which is similar in many respects to the various revisions of the MSAPA. Finally, in the past twenty-five years, there have been a large number of state and federal judicial decisions that involve the administrative procedure acts of the various states and the Federal Administrative Procedure Act, a continuous stream of scholarly articles on federal administrative law, and the emergence of a body of

academic writing on *state* administrative procedure. These developments have been taken into account in this revision of the MSAPA.

KEY ISSUES AND SIGNIFICANT SECTIONS IN THE PROPOSED MSAPA REVISION

There are two lists below. They are: Key Issues, and Significant Sections of the Act.

KEY ISSUES

§ 102(5) Disputed Case and § 401. When Article Applies. Disputed Cases.

These two sections work together to define the right to a hearing. Section 102(5) defines a disputed case, and Section 401 makes the procedure of Article 4 adjudications applicable to disputed cases.

A disputed case is an adjudication in which the opportunity for an evidentiary hearing is required by law. Law is defined as federal or state constitution or statute, judicial decision, common law, rule of court, executive order, or rule or order of an agency.

This definition is less inclusive than the 1981 MSAPA, which presumptively created a right to a hearing whenever a person petitioned for it. This definition is broader than the 1961 MSAPA definition of “contested case,” which was a proceeding in which the legal rights, duties, or privileges of a party were required by law to be determined by an agency after an opportunity for hearing. In the 1961 MSAPA the term law was not defined, and the meaning of right, duty and privilege was the subject of extensive litigation. Courts in states that adopted the 1961 MSAPA created a large body of case law that identified those rights, duties or privileges that granted parties contested case status.

The present definition seeks to clarify those situations in which there is a right to a hearing under the MSAPA. Instead of a judicial search for a right, duty or privilege, the opportunity for a hearing must be created by law (broadly defined) or constitution. Unlike the 1981 MSAPA, this definition looks to a source outside the MSAPA to define when a hearing is required. This definition is consistent with the line of cases that identify constitutionally protected *interests* that occurred as part of the expansion of procedural due process beginning in the 1970’s.

§ 403(d) (1). Disputed Case Procedure.

The first sentence provides a standard for admissibility of evidence without the need for following the rules of evidence. This serves as a protection for unrepresented parties. The standard is further amplified in the comment, which provides a definition of the phrase “unduly repetitious.”

§ 403(d) (2) Disputed Case Procedure

Objection to the admissibility of evidence may be made up to conclusion of hearing. Should the objection be required when the evidence is offered?

§ 403(g). Disputed Case Procedure

All or part of a hearing may be conducted electronically, including by telephone. Is this too broad?

§ 409. Ex Parte Communications.

The presiding officer may not receive communications from any person on an issue in the case unless all parties participate. However, if the presiding officer is the agency head, he or she may communicate with agency staff for an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence, if the term is not a central, contested issue in the case and if the agency staff member meets the criteria in 409(1) (A) and (B). Also, the staff advice must be made part of the record, and parties given an opportunity to respond.

Various remedies are given if a violation of Section 409 occurs.

§ 506. Standing.

This section adopts a general description of standing. The “person aggrieved or otherwise affected” language has become a term of art around which courts have built a considerable body of case law. The approach of this section leaves the courts free to continue development of this concept. Is the term “otherwise affected” too broad? Should the standard be limited to “aggrievement?”

§ 507. Exhaustion of Administrative Remedies.

The new material in this section is in Subsections (c) and (d) and pertain to rulemaking only. Subsections (c) and (d) are entirely new. They permit a person who did not participate in a rulemaking proceeding to appeal the rule without exhausting administrative remedies. However, before doing so, the party that is challenging the rule must petition the agency to initiate rulemaking in order to resolve or cure the issues that the petitioner is challenging, and disclose that petition and the agency action on it to the court.

§ 509. Scope of Review.

The drafting committee is divided on the approach to take to scope of review, and has put two alternative versions of scope before the annual meeting for guidance. Alternative 1 is general and would leave considerable discretion to the courts. Alternative 2 is a detailed approach that some commentators and a few states have adopted. The second and third paragraphs of the note following the text of the section give some of the major arguments for each alternative. Alternative 2 is the longest version of scope that research has disclosed. There are versions available that are longer than alternative 1, but considerably shorter than alternative 2.

SIGNIFICANT SECTIONS

ARTICLE 1. GENERAL PROVISIONS.

Definitions.

§ 102(1) Adjudication.
§ 102(9) Evidentiary Hearing.
§ 102(10) Guidance Document.
§ 102(14) Law.

ARTICLE 2. PUBLIC ACCESS.

§ 201[(c) and (c). Publication. Internet website and written publication.
§ 204. Default Procedural Rules.

ARTICLE 3. RULEMAKING.

§ 303. Advice on Possible Rule.
§ 305. Regulatory Analysis.
§ 308. Variance between Notice and Rule Adopted.
§ 309(c). Fast-Track Rules.
§ 310. Guidance Documents.
§ 312. Concise Explanatory Statement.

ARTICLE 4. ADJUDICATION.

§ 405. Informal Procedure in Disputed Cases.
§ 406. Informal Adjudication Procedure.
§ 420. Availability of Orders. Index.

ARTICLE 5. JUDICIAL REVIEW.

§ 501. Right to Judicial Review; Final Agency Action.
§ 502. Review of Agency Action Other Than Order.
§ 503. Relation to Other Judicial Review Law and Rules.
§ 507. Exhaustion of Administrative Remedies.

ARTICLE 6. OFFICE OF ADMINISTRATIVE HEARINGS.

ARTICLE 7. RULE REVIEW.

ARTICLE 8. ELECTRONIC PUBLICATION AND NOTICE.