

2010 MODEL STATE ADMINISTRATIVE PROCEDURE ACT ISSUES STATEMENT FOR ARTICLES 4, 5, AND 6

For background on the MSAPA, See the prefatory note to the draft act.

1. SECTION 401 and SECTION 102(7) Contested Cases : The contested case provisions of Article 4 are applicable when an opportunity for an evidentiary hearing is required by the federal constitution or a federal statute or the constitution or a statute of this state. These provisions return to the external hearing rights approach of the 1961 MSAPA with the addition of constitutional hearing rights. Article 4 does not apply to adjudications that are not a contested case.

Section 102 (7) “Contested case” means an adjudication in which an opportunity for an evidentiary hearing is required by the federal constitution or a federal statute or the constitution or a statute of this state.

Section 401 Contested Case. This [article] applies to an adjudication made by an agency in a contested case.

Comments: Article 4 of this Act does not apply to all adjudications but only to those adjudications, defined in Section 102(7) as a “contested case.” An adjudication that is not made in a contested case is not subject to this article but is subject to Sections 311(d) and (f), and Article 5. For a statute to create a right to an evidentiary hearing, express use of the term “evidentiary hearing” is not necessary in the statute. Statutes often use terms like “appeal” or “proceeding” or “hearing”, but in context it is clear that they mean an evidentiary hearing. An evidentiary hearing is one in which the resolution of the dispute involves particular facts and the presiding officer’s decision is based on the hearing record. Hearing rights are created by statutes that establish an agency and delegate powers to the agency (agency enabling acts). Article Four does not apply to adjudications that are not a contested case. See *Goss v. Lopez* 419 U.S. 565 (1975) for an example of informal adjudication procedures required when a public school district suspends students for ten days or less. In those circumstances the constitution does not require an opportunity for an evidentiary hearing.

2. SECTION 403(e) Electronic Hearings; Section 403(e) provides for electronic hearings including telephone hearings and video conference hearings. Modern technology makes video conference hearings easy to administer, and some states, including Florida use this technology regularly for contested case hearings. The parties must consent to the use of electronic technology in which the witnesses may not be seen. The bracketed language offers an alternative way to use electronic hearings when the presiding officer finds that this method will not impair reliable determination of the credibility of testimony. Each party must be given an opportunity to attend, hear, speak and be heard at the proceeding as it occurs.

Comment: Subsection (e) is based on 1981 MSAPA Section 4-211(4). Under subsection (e)

hearings in contested cases can be conducted using the telephone, television, video conferences, or other electronic means. Due process of law may require live in person hearings when there are disputed issues of material fact that require the fact finder to make credibility determinations. See *Whiteside v. State*, (2001) 20 P. 3d 1130 (Supreme Court of Alaska) (due process of law violated with telephone hearing in driver's license revocation hearing when driver's credibility was material to the hearing, and the driver was not offered an in person hearing); But see *Babcock v. Employment Division* (1985) 72 Or. App. 486, 696 P. 2d 19, 21 (telephone hearings do not violate due process of law in hearings in which the credibility of a party is at issue because audible indicia of a witness's demeanor are sufficient for credibility). Telephone hearings are widely used in high volume short hearing dockets such as unemployment compensation hearings.

3. SECTION 404 Evidence in Contested Case: Section 404 provides for evidence rules in contested cases. Subsection (1) includes a burden of proof provision that is based upon Section 556(d) of the Federal Administrative Procedures Act. The other subsections are based upon provisions of the 1961 and 1981 MSAPA that are carried forward in this Act. Subsection (2) codifies the evidentiary rules that govern contested cases. The second sentence of subsection (2) codifies the admissibility standards for evidence in contested case proceedings, including the admissibility of hearsay evidence. See alternatives in Section 413(f) for the *legal residuum* and the *reliability* alternatives for the persuasive value of hearsay evidence. Subsection (7) codifies the official notice of facts doctrine that is widely accepted in federal and state administrative law.

4. SECTION 408(e) Ex Parte Communications: Section 408 governs ex parte communications. Subsection (e) codifies the drafting committee's compromise language governing the agency head exception to ex parte communications bans. Section 408(e) includes an agency head exception that is narrower than the provisions of the 1981 Act (Section 4-213(b)). Section 408(e) permits the agency head to have communications with staff that does not augment, diminish or modify the evidence in the agency hearing record (Section 408(e)(2)), and that satisfies one of three other alternatives: including an explanation of the technical or scientific basis or terms in the evidence in the agency hearing record (Section 408(e)(2)(A)), an explanation of the precedent, policies, or procedures of the agency (Section 408(e)(2)(B)), or any other communication that does not address the quality, sufficiency of, or the weight that should be given to evidence in the agency hearing record, or the credibility of witnesses (Section 408(e)(2)(C)). These three alternatives are new and are a departure from the 1981 Act which included only the "does not augment, diminish or modify the evidence in the agency hearing record" language. An ex parte communication will fall within the Section 408(e) exception if both the stated language of subsection (e)(2), and one of the alternatives listed in subsection (e)(2)(A),(B), or (C), are satisfied. Section 408(e) (2) is a compromise reached by the drafting committee in response to polar positions that advocated for no agency head exception (thus deleting subsection (e) entirely), and those that supported the approach of the 1981 Act (with only the language of subsection (e)(2) and not the added language in subsection (e)(2)(A),(B), or (C)). The compromise recognizes the need for agency heads, who are often political appointees with little knowledge of the legal issues that come before the agency, to obtain staff advice when acting as a presiding officer or a final decision maker, but also carefully circumscribes the types of communication that can occur.

5. SECTION 413 Orders: Final, Recommended, Initial: This section provides for three types of orders, final recommended and initial Subsection (a) is based on 1981 MSAPA Section 4-215 (a), and provides that if the presiding officer is the agency head, the presiding office shall render a final order. Subsection (b) is new and varies from the provisions of 1981 MSAPA Section 4-215(b). Subsection (b) provides for both recommended orders, and initial orders. Initial orders are issued by presiding officers who are not the agency head but who have been delegated final decisional authority. Recommended orders are issued by presiding officers who are not the agency head but who have not been delegated final decisional authority. The three types of orders are recognized in this section, but which type of order, initial, final, or recommended, will apply to which type of decision is based on law other than this act, usually the organic statute that the agency is responsible for administering or enforcing. Subsection (f) provides for two alternatives. Subsection (f), Alternative A, adopts the legal residuum rule, and provides that hearsay evidence may be used to supplement or explain other evidence but would not be sufficient to support a fact finding unless admissible over objection in a civil action. The legal residuum rule is followed in many states. Subsection (f), Alternative B is based on the second sentence of 1981 MSAPA Section 4-215(d). Alternative B provides that hearsay evidence can be sufficient to support fact findings if the hearsay evidence is sufficiently reliable. This provision is also codified in the federal A.P.A. provision, 5 U.S.C. Section 556 (d), and the 1981 MSAPA Section 4-215(d). (reasonably prudent person standard for reliability). Both alternatives are provided because there is a split in the states over use of the legal residuum versus the reliability standard.

6. SECTION 505. Standing. Most states have established case law detailing the standing requirements for that particular jurisdiction. Section 505 is drafted broadly but generically so that existing state case law on standing in administrative law cases will be compatible with this section. Subsection (1) is a revised version of 1981 MSAPA Section 5-106(a)(5), and is also based on the first sentence of Section 702 of the federal Administrative Procedure Act, 5 U.S.C. Section 702.

Subsection (2) is a revised version of 1981 MSAPA Section 5-106(a)(4). This subsection confers standing that arises under any other provision of law in the state. However, the MSAPA test for standing is different from federal APA, i.e., it omits the requirement that the litigant be aggrieved ‘within the meaning of a relevant statute.’

7. SECTION 507. Agency Record on Judicial Review; Exception Subsection (a) is a revised version of 1961 MSAPA section 15(f). The first sentence of Section 507(a) provides for judicial review in a contested case based on a closed record. The second sentence of subsection (a) provides that the court may receive additional evidence when the party seeking judicial review makes allegations of procedural error arising from matters outside the hearing record or except when necessary to avoid manifest injustice. This subsection codified established law in many states that provides for closed record review in contested cases with the stated exceptions. Subsection (b) is new and defines the record for review in any case that is not a contested case.

8. SECTION 508. Scope of Review; This section governs scope of judicial review. Subsection (a) (1) is based upon 1981 MSAPA Section 5-116(a)(1). Subsection (a)(2) is based upon 1981 MSAPA Section 5-116(b). They are substantially similar to the general scope of review provisions of the Federal APA, 5 U.S.C. Section 706. Judicial review is essential and exists in all

states. Section 508 follows the approach that scope of review is notoriously difficult to capture in verbal formulas, and its application varies depending on context. For that reason, Section 508(3) follows the shorter, skeletal formulations of the scope of review, similar to the 1961 MSAPA Section 15(g), and the Federal APA, 5 U.S.C. Section 706(2). Most states have established bodies of law governing judicial review of agency rules and orders. Section 508(a)(3) has been drafted generally to make it easier for states to adopt Article Five because state specific understandings of the scope of review of agency action can be more easily accommodated with a general statement of standards of review.

The first clause of subsection (a)(3) is based on 1981 MSAPA Section 5-116(c). Subsection (a)(3) (A) includes, but is not limited to, violations of constitutional or statutory provisions and actions that are in excess of statutory authority from Section 15(g)(1), and (2) of the 1961 MSAPA, and includes 1981 MSAPA Section 5-116 subsections (c) (1), (2) and (4). The subsection includes challenges to the facial or applied constitutionality of a statute, challenges to the jurisdiction of the agency, erroneous interpretation of the law, and may include erroneous application of the law. This section is not intended to preclude courts from according deference to agency interpretations of law, where such deference is appropriate. Subsection (a)(3)(B) includes violations of procedures required by law from 1961 MSAPA Section 15(g)(3) and includes 1981 MSAPA Section 5-116 subsections (c)(5) and (6). Subsection (a)(3)(C) includes discretionary decisions of agencies that are judicially reviewable from 1961 MSAPA Section 15(g)(6) and 1981 MSAPA Section 5-116(8), and federal A.P.A. Section 706 (2)(A). Section (a)(3)(D) includes the fact determinations in contested cases from 1981 MSAPA Section 5-116(c)(7) and the federal APA Section 706(2)(E). Section (a)(3)(E) includes fact determinations that are not made in contested cases and is based upon the Federal APA Section 706(2)(F). Subsection (b) is based upon the federal APA section 706, last sentence.

9. SECTION 606. ADMINISTRATIVE LAW JUDGES; POWERS; DUTIES; DECISION MAKING AUTHORITY. This section governs the powers of administrative law judges who are employees of the central panel agency and who have been assigned to be presiding officers in contested cases. This section implements the assignment of presiding officers under Section 402(a) for contested cases in states with central panel agencies. Subsection (d) lists agencies that are exempt from article 6. Section 606 would not apply to those agencies.

Comment: Section 606(b) is based on Section 1-10(c) of the Model Act Creating a State Central Hearing Agency (Office of Administrative Hearings) adopted by the house of delegates of the American Bar Association (February 2, 1997).