D R A F T

FOR DISCUSSION ONLY

REVISED MODEL STATE

ADMINISTRATIVE PROCEDURES ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

April 2006 Meeting Draft

WITH GENERAL INTRODUCTION AND COMMENTS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporters. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

April 3, 2006

DRAFTING COMMITTEE TO REVISE MODEL STATE ADMINISTRATIVE PROCEDURES ACT

FRANCIS J. PAVETTI, 18 The Strand, Goshen Point, Waterford, CT 06385, *Chair*
DUCHESS BARTMESS, 3408 Windsor Ave., Oklahoma City, OK 73122
JERRY L. BASSETT, Legislative Reference Service, 613 Alabama State House, 11 S. Union St., Montgomery, AL 36130
STEPHEN C. CAWOOD, 108 ½ Kentucky Ave., P.O. Drawer 128, Pineville, KY 40977-0128
VICCI COLGAN, Wyoming Attorney General, 123 Capitol Bldg., Cheyenne, WY 82001
KENNETH D. DEAN, University of Missouri-Columbia School of Law, 116 Jesse Hall, Columbia, MO 65211
BRIAN K. FLOWERS, Office of the General Counsel, 1350 Pennsylvania Ave. NW, Suite 4, Washington, DC 20004
H. LANE KNEEDLER, 901 E. Byrd Street, Suite 1700, Richmond, VA 23219
RAYMOND P. PEPE, 17 N. Second St., Payne Shoemaker Building, 18th Floor, Harrisburg, PA 17101-1507
ROBERT J. TENNESSEN, 80 South 8th Street, 500 IDS Center, Minneapolis, MN 55402-3796
JOHN L. GEDID, Widener Law School, 3800 Vartan Way, P.O. Box 69382, Harrisburg, PA 17106-9382*, National Conference Reporter*

EX OFFICIO

HOWARD J. SWIBEL, 120 S. Riverside Plaza, Suite 1200, Chicago, IL 60606, *President*
MICHAEL B. GETTY, 1560 Sandburg Terr., Suite 1104, Chicago, IL 60610, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

JIM ROSSI, Florida State University College of Law, 425 W. Jefferson St., Tallahassee, FL 32301-1601, *American Bar Association Advisor*
ROSE MARY BAILLY, 80 New Scotland Rd., Albany, NY 12208-3434, *American Bar Association Section Advisor*
EDWIN L. FELTER, JR., 633 17th St., Suite 1300, Denver, CO 80202, *American Bar Association Section Advisor*
EDWARD J. SCHOENBAUM, 1108 S. Grand Ave. W, Springfield, IL 62704-3553, *American Bar Association Section Advisor*

EXECUTIVE DIRECTOR

WILLIAM H. HENNING, University of Alabama School of Law, Box 870382, Tuscaloosa, AL 35487-0382, *Executive Director*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195
www.nccusl.org

REVISED MODEL STATE ADMINISTRATIVE PROCEDURES ACT

TABLE OF CONTENTS

ARTICLE 4
ADJUDICATION

ARTICLE 5
JUDICIAL REVIEW

ARTICLE 6
OFFICE OF ADMINISTRATIVE HEARINGS

ARTICLE 7

REVISED MODEL STATE ADMINISTRATIVE PROCEDURES ACT

GENERAL INTRODUCTION

The 1946 Model State Administrative Procedure Act

The Model State Administrative Procedure Act (Act) of the National Conference of Commissioners on Uniform State Laws (Conference) has furnished guidance to the states since 1946, the date that the first version of the Act was promulgated and published. The Federal Administrative Procedure Act was drafted at about the same time as the 1946 Act, and there was substantial communication between the drafters of the two acts.

The 1946 Act incorporated basic principles with only enough elaboration of detail to support essential features[1] of an administrative procedure act. This is the major characteristic of a "model", as distinguished from a "uniform", act. The drafters of the 1946 Act explained that a model act approach was required because details of administrative procedure must vary from state to state as a result of different general histories, different histories of legislative enactment and different state constitutions. Furthermore, the drafters explained, the Act could only articulate general principles because 1) agencies--even within a single state--perform widely diverse tasks, so that no single detailed procedure is adequate for all their needs; and 2) the legislatures of different states have taken dissimilar approaches to virtually identical problems.[2] By about 1960, twelve states had adopted the 1946 Act.[3]

The 1961 Model State Administrative Procedure Act

As a result of several studies conducted in the nineteen fifties, the Conference decided to revise the 1946 Act. The basis given for that decision was that a maturing of thought on administrative procedure had occurred since 1946. The drafters of the 1961 Act explained that their goals were fairness to the parties involved and creation of procedure that is effective from the standpoint of government.[4] The resulting 1961 Act also followed the model, not uniform, act approach, because "details must vary from state to state." The 1961 APA purposely included only "basic principles" and "essential major features." Some of those major principles were: requiring agency rulemaking for procedural rules; rulemaking procedure that provided for notice, public input and publication; judicial review of rules; guarantees of fundamental fairness in adjudications; and provision for judicial review of agency adjudication. Over one half of the

---

[1] 1946 Model State Administrative Procedure Act preface at 200.

[2] Id. at 200

[3] Those states, as identified in the preface to the 1961 Model State Administrative Procedure Act were: North Dakota, Wisconsin, North Carolina, Ohio, Virginia, California, Illinois, Pennsylvania, Missouri, Indiana.

[4] Preface to 1961 Model State Administrative Procedure Act.

states adopted the 1961 Act or large parts of it.[5]

The 1981 Model State Administrative Procedure Act

In the nineteen seventies, the Conference began work on another revision of the Act which was completed in 1981. The Conference based the need for this revision upon greater experience with administrative procedure by state governments, and growth in state government in such areas as the environment, workplace safety and benefit programs. This growth, it was argued, was so great as to effect a change in the nature of state government. The 1981 Act sought to deal with those changes.

The preface to the 1981 Act explained that the approach to drafting had changed from the 1946 and 1961 Acts. According to the drafters, the 1981 Act was entirely new, with more detail than earlier versions of the Act. This expanded focus on detail was based upon changed circumstances in the states and greater state experience with administrative procedure since 1961.[6] The 1981 Act, when completed, consisted of ninety-four sections[7]. In the twenty-odd years since promulgation of the 1981 Act, Arizona, New Hampshire, and Washington have adopted many of its provisions. Several other states have drawn some of their administrative procedure provisions from the 1981 Act.[8]

The Present Revision

There are several reasons for revision of the 1981 Act. It has been more than twenty years since the Act was last revised. There now exists a substantial body of legislative action, judicial opinion and academic commentary that explain, interpret and critique the 1961 and 1981 Acts and the Federal Administrative Procedure Act. In the past two decades state legislatures,

---

[5] Uniform Laws Annotated at 357 (1980 Master Edition) catalogued numerous states that used the 1961 Model State Administrative Procedure Act. They are: Arizona, Arkansas, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

[6] Preface, 1981 Model State Administrative Procedure Act. The greater emphasis on detail in the 1981 Model State Administrative Procedure Act is apparent from the text of the preface:

> In addition, the drafters of this effort have produced an act that is more detailed than the earlier Model Act. There are several reasons for this. First, virtually all state administrative procedure acts are much more detailed than the 1961 Revised Model Act. Second, the states badly need and want guidance on this subject in more detail than the earlier act provided. Third, substantial experience under the acts of the several states suggests that much more detail than is provided in the earlier Model Act is in fact necessary and workable in light of current conditions of state government and society. Since this is a Model Act and not a Uniform Act, greater detail in this act should also be more acceptable because each state is only encouraged to adopt as much of the act as is helpful in its particular circumstances.

[7] For example, the 1961 Model State Administrative Procedure Act contained nineteen sections; the 1981 Model State Administrative Procedure Act contained more than eighty sections divided among five different articles.

[8] Some of those states are: Florida, Iowa, Kansas, California, Mississippi and Montana.

dissatisfied with agency rulemaking and adjudication, have enacted statutes that modify administrative adjudication and rulemaking procedure. There has been considerable scholarly examination of scope and standard of judicial review of agency action in the past twenty-five years, as well as extensive judicial examination at the state and federal level about the problems and difficulties of this area. At the present time the American Bar Association has undertaken a major study of the Federal Administrative Procedure Act and is recommending revision. Since some sections of the Act are similar to the Federal Administrative Procedure Act, the ABA study furnishes useful comparisons for the Act. The emergence of the Internet, which did not exist at the time of the last revision of the Act, is another event that the Model Administrative Procedure Act must address. Finally, since the 1981 Act, approximately thirty states have adopted central panel administrative law judge provisions. What has been learned from the experience in those states can be used to improve this Act.

REVISED MODEL STATE ADMINISTRATIVE PROCEDURES ACT

ARTICLE 1

GENERAL PROVISIONS

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

SECTION 102. DEFINITIONS. In this [act]:

(1) "Adjudication" means the process for determination of facts pursuant to which an agency formulates and issues an order.

(2) "Agency" means a statewide board, authority, commission, institution, department, division, or officer, or other statewide government entity, that is authorized or required by law to make rules or to adjudicate. The term includes the agency head and one or more members of the agency head, agency employees, or other persons directly or indirectly purporting to act on behalf of, or under the authority of, the agency head. The term does not include the Governor, the Legislature, or the Judiciary.

(3) "Agency action" means:

(A) the whole or part of any agency order or rule;

(B) the failure to issue an order or rule; or

(C) an agency's performance of, or failure to perform, any duty, function, or activity or to make any determination placed upon it by law.

(4) "Agency head" means the individual or body of individuals in which the ultimate

legal authority of an agency is vested.

(5) "Disputed case" means an adjudication in which an opportunity for an evidentiary hearing is required by federal or state law.

(6) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(7) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(8) "Emergency adjudication" means an agency adjudication taken in a disputed case in which there is an immediate danger to the public health, safety, or welfare that requires immediate action.

(9) "Evidentiary hearing" means a hearing for the receipt of evidence to resolve a disputed issue in which the decision of the hearing officer may be made only on material contained in the record created at the hearing.

(10) "Guidance document" means a record developed by an agency that provides information or guidance of general applicability to the staff or public for interpreting or implementing statutes or the agency's rules. The term does not include agency minutes or records that pertain only to the internal management of an agency.

(11) "Index" means an alphabetical list of items by subject and title in a record with a page number, hyperlink, or any other connector that links the alphabetical list with the record to which it refers.

(12) "Informal adjudication" means a disputed case in which the presiding officer is permitted to follow an informal procedure.

(13) "Initial order" means an order issued by a presiding officer who is not the agency head which is subject to review by the agency head.

(14) "Law" means federal or state constitution or statute, common law, rule of court, executive order, or rule or order of an agency.

(15) "License" means a permit, certificate, approval, registration, charter, or similar form of permission required by law which is issued by an agency.

(16) "Licensing" means the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(17) "Notify" means to take such steps as may be reasonably required to inform another person in the ordinary course, whether or not the other person actually comes to know of it.

(18) "Order" means an agency action of particular applicability that determines the legal rights, duties, privileges or immunities, or other legal interests of one or more specific persons.

(19) "Party" means the agency taking action, the person against whom the action is directed, and any other person named as a party or permitted to intervene.

(20) "Pending proceeding" means a proceeding that is not final.

(21) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, [public corporation, government, or governmental subdivision, agency or instrumentality,] or any other legal or commercial entity. [The term does not include a public corporation, government, or government subdivision, agency or instrumentality.] Note: delete one of the bracketed phrases to ensure inclusion or exclusion of government entities.

(22) "Presiding officer" means the person who presides over the evidentiary hearing in a

disputed case. [The term presiding officer includes administrative law judges, as defined in article 6].

(23) "Proceeding" means any type of formal or informal agency process or procedure commenced or conducted by an agency. The term includes adjudication, rulemaking, and investigation.

(24) "Publisher" means [secretary of state].

(25) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(26) "Rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy or the organization, procedure, or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule.

(27) "Rulemaking" means the process for adopting, amending, or repealing a rule.

(28) "Sign" means with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach or logically associate with the symbol an electronic symbol, sound or process.

(29) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(30) "Written" means inscribed on a tangible medium.

Comment

Adjudication. This definition gives the general meaning of adjudication that distinguishes it from rulemaking. This Act and the definitions in this Section also identify some categories of adjudication that require procedure specified in this Act to be used to reach a decision. For example, the term disputed case, defines a subset of adjudications that must be conducted as prescribed in Article IV of this Act.

Agency. This definition is drawn in large part from the 1981 MSAPA and the Federal APA. The object is to subject as many state actors as possible to this definition.

Agency Head. This definition differentiates between the agency as an organic whole and the particular persons (commissioners, board members or the like) in whom final authority is vested.

Agency Record. This set of definitions distinguishes between the record compiled by an agency in a proceeding governed by Article 4 of this Act [Subsection (A)]; adjudications for which another statute prescribes hearing procedure [Subsection (B)]; and adjudications not made on the record in an evidentiary hearing, and rulemaking. This definition of record is not binding on reviewing courts, and the provisions of this Act on scope of review recognize the power of reviewing courts to order augmentation of the record.

Disputed case. This term similar to the "contested case" definition of the 1961 MSAPA. Like the 1961 MSAPA, this Act looks to external sources such as statutes to describe situations in which a party is entitled to a hearing. This Act does not follow the 1981 MSAPA approach of creating a presumptive right to a hearing in all situations that might result in an order. This term differs slightly from the 1961 MSAPA's term "contested case" however, because it also includes hearings required by constitution, and makes provision in Article 4 for the type of hearing to be held in a case where a constitution creates the right to a hearing. Including constitutionally created rights to a hearing eliminates the problem of looking outside the Act for the type of hearing in cases of this type.

Record. Modern electronic-age statutes such as the Uniform Computer Information Transactions Act and the Uniform Electronic Transactions Act, adopt a broad definition of the term record that includes the term document. This act follows those definitions.

Electronic. The term "electronic" refers to the use of electrical, digital, magnetic, wireless, optical, electromagnetic and similar technologies. It is a descriptive term meant to include all technologies involving electronic processes. The listing of specific technologies is not intended to be a limiting one. The definition is intended to assure that this act will be applied broadly as new technologies develop. For example, biometric identification technologies would be included if they affect communication and storage of information by electronic means. As electronic technologies expand and include other competencies, those competencies should also be included under this definition. The definition of the term "electronic" in this act has the same meaning as it has in UETA SECTION 2(5) and in the Uniform Real Property Electronic

Recording Act.

NOTE ON THE USE OF ELECTRONIC TECHNOLOGY. Many agencies already make extensive use of electronic technology to communicate and store records. This act recognizes and encourages agency experimentation with, and use of, electronic technology. That technology has led to clearer, more effective, more interactive and less expensive communication between agencies and the public. However, there remain small agencies in some states that do not have sufficient resources to move to electronic technology immediately. This subsection makes clear that, although the use of electronic technology is encouraged and recognized in this [act], it is not mandatory.

Electronic Record. This definition is identical to § 2(7) of the Uniform Electronic Transactions Act. An "electronic record" is a document that is in an "electronic" form. Documents may be communicated in electronic form; they may be received in electronic form; they may be recorded and stored in electronic form; and they may be received in paper copies and converted into an electronic record. This Act does not limit the type of electronic documents received by the publisher. The purpose of defining and recognizing electronic documents is to facilitate and encourage agency use of electronic communication and maintenance of records.

Guidance document. This definition is taken from the Virginia APA. See Va. Code Ann. SECTION 2.2-4001. See also the Michigan APA, M.C.L.A. 24.203(6) ; Idaho I.C. SECTION 67-5250 and N.Y. McKinneys State Administrative Procedure Act, SECTION 102. This is a definition intended to recognize that there exist agency statements for the guidance of staff and the public that differ from, and that do not constitute, rules. Many states recognize such statements under the label "interpretive statement" or "policy statement." See Wash. Rev. Code, SECTION 34.05.010(8) & (15). Later sections of this Act will provide for the publication and availability of this type of record so that they are not "secret" records. See: Michael Asimow, Guidance Documents in the States, 54 Adm. L. Rev. 631 (2002); Michael Asimow, California Underground Regulations, 44 Adm. L. Rev. 43 (1992).

Index. The definition of index has been added as a guide to agencies, publishers and editors about their duties to make records available and easily accessible to the public in the form of an index, as that term is used throughout this act.

License. The definition of license is drawn largely from the 1961 MSAPA.

Order. This definition is drawn from the 1981 MSAPA. Unlike the federal APA which defines rule, but not order, this section provides a positive definition of order based on case law and agency experience. The key concept is that an order includes solely agency legal determinations that are addressed to particular, specific, identified individuals in particular circumstances. An order may be addressed to more than one person. Further, the definition is consistent with modern law in rejecting the right/privilege distinction in constitutional law. The addition of the language "or other interests" is intended to clarify this change and to include

entitlements. See also Cal.Gov.Code SECTION 11405.50.

Party. This definition includes the agency, any person against whom agency action is brought and any person who intervenes. Its terms also include any person who may participate in a rulemaking proceeding, such as someone who offers a comment. This section is not intended to deal with the issue of a person's entitlement to review. Standing and other issues relating to judicial review of agency action are addressed in Article 5 of this Act.

Presiding Officer. This definition includes an agency staff member, [an administrative law judge or one or more members of the agency head when designated to preside at a hearing.

Person. The definition of a "person" is the standard definition for that term used in acts adopted by the National Conference of Commissioners on Uniform State Laws. It includes individuals, associations of individuals, and corporate and governmental entities.

Rule. This is identical to the 1981 MSAPA definition, which was modeled on the 1961 MSAPA definition. The essential part of this definition is the requirement of general applicability of the statement. This criterion distinguishes a rule from an order, which focuses upon particular applicability to identified parties only. Applicability of a rule may be general, even though at the time of the adoption of the rule there is only one person or firm affected: persons or firms in the future who are in the same situation will also be bound by the standard established by such a rule. It is sometimes helpful to ask in borderline situations what the effect of the statement will be in the future. If unnamed parties in the same factual situation in the future will be bound by the statement, then it is a rule. The word "statement" has been used to make clear that, regardless of the term that an agency uses to describe a declaration or publication and whether it is internal or external to the agency, if the legal operation or effect of the agency action is the same as a substantive rule, then it meets this definition.

SECTION 103. APPLICABILITY. This [act] applies to all agencies unless the agency is expressly exempted.

Comment

This section is intended to define which agencies are subject to the provisions of this act. Many states have made use of an applicability provision to define the coverage of their Administrative Procedure Act. See: Iowa, I.C.A. SECTION 17A.23; Kansas, K.S.A. SECTION 77-503; Kentucky, KRS SECTION 13B.020; Maryland, MD Code, State Government, SECTION 10-203; Minnesota, M.S.A. SECTION 14.03; Mississippi, Miss. Code Ann. SECTION 25-43-1.103; Washington, West's RCWA 34.05.020.

SECTION 104. SUSPENSION OF PROVISIONS WHEN NECESSARY TO AVOID LOSS OF FEDERAL FUNDS.

(a) To the extent necessary to avoid a denial of funds or services from the federal government which otherwise would be available to the state, the [Governor, by executive order][Attorney General, by emergency rule], may suspend, in whole or in part, one or more provisions of this [act]. The [Governor, by executive order][Attorney General by emergency rule], shall declare the termination of a suspension as soon as it no longer is necessary to prevent the loss of funds or services from the United States.

(b) If any provision of this [act] is suspended pursuant to this section, the [Governor] [Attorney General] shall promptly report the suspension to the Legislature. The report shall include recommendations concerning desirable legislation to conform this [act] to federal law, including the exemption from this [act], if appropriate, of a particular program.

Comment

This approach to the federal funds and federal requirements problem divides the state response between the governor or attorney general and the legislature. This provision is drawn from the 1981 MSAPA, section 104. Subsection (b) provides for immediate notification of the legislature in case of suspension of any law under the provisions of this section.

ARTICLE 2

PUBLIC ACCESS TO AGENCY LAW AND POLICY

SECTION 201. PUBLICATION, COMPILATION, INDEXING, AND PUBLIC INSPECTION OF RULES.

(a) The publisher shall administer this section and other sections of this [act] that require publication.

(b) The publisher shall prescribe a uniform numbering system, form, and style for all proposed and adopted rules.

(c) The [administrative bulletin] shall be published as a record as prescribed by the publisher at least once per [_]. [The [administrative bulletin] must be made available in written form upon request, for which the publisher may charge a reasonable fee]. For purposes of calculating adherence to time requirements imposed by this [act], an issue of the [administrative bulletin] is deemed published on the later of the date indicated in the issue or the date of its dissemination via the format and medium as prescribed. The [administrative bulletin] must contain:

(1) notices of proposed rule adoption prepared so that the text of the proposed rule shows the text of any existing rule proposed to be changed and the change proposed;

(2) newly filed adopted rules prepared so that the text of the newly filed adopted rule shows the text of any existing rule changed and the change being made;

(3) any other notices and materials designated by [law] [the publisher] for publication in the administrative bulletin; and

(4) an index to its contents by subject and caption.

(d) The [administrative code] must be compiled, indexed by subject, and published in a format and medium as prescribed by the publisher. The rules of each agency must be published and indexed in the [administrative code].

(e) The [administrative bulletin and administrative code] must be furnished [online via the Internet or other appropriate technology in a format and medium as prescribed by the publisher without charge, or] in writing upon request and to all subscribers at a cost to be determined by the publisher. Each agency shall also make available for public inspection and copying those portions of the [administrative bulletin and administrative code] containing all rules adopted or used by the agency in the discharge of its functions and an index to those rules.

Comment

This section seeks to assure adequate notice to the public of proposed agency action. It also seeks to assure adequate record keeping and availability of records for the public. Article 2 is intended to provide easy public access to agency law and policy that are relevant to agency process. Article 2 also adds provisions for electronic publication of the administrative bulletin and code. Generally, this section is modeled after the 1981 Model State Administrative Procedure Act. Most states now have an administrative rules editor or her equivalent and an administrative bulletin published on a regular basis. This Act substitutes the word "publisher" for editor and limits the authority of the publisher to make changes to material submitted to her, except for creating a uniform numbering system, form and style. Subsection (f) is important to provide for public access to all rules and notice of applicable rules, even though those rules are exempted from normal rulemaking procedures under Sections 3-108 and 3-109 *infra*.

SECTION 202. REQUIRED AGENCY RULEMAKING AND RECORDKEEPING. In addition to any other rulemaking requirements imposed by law, each agency shall:

(1) adopt as a rule a description of its organization, stating the general course and method

of its operations and the methods whereby the public may obtain information or make submissions or requests;

(2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency;

(3) adopt as a rule a description in plain English of the process for application for license, benefits available, or other matters for which an application is appropriate, unless the process is prescribed by law other than this [act]; and

(4) file with the publisher all rules, including any emergency rule adopted under Section 309(a)

Comment

Like the 1981 MSAPA, one object of this section is to make available to the public all procedures followed by the agency, including especially how to file for a license or benefit. It is modeled on the 1961 Model State Administrative Procedure Act, Sections 2(a) (4) & 2(b), the 1981 MSAPA, Sections 2-102 & 103, and the Kentucky Administrative Procedure Act, KRS Section 13A.100. Persons seeking licenses or benefits should have a readily available and understandable reference sources from the agency. A second reason is to eliminate "secret law" by making all guidance documents used by the agency available from the agency and the administrative publisher.

SECTION 203. DECLARATIONS BY AGENCY.

(a) Any interested person may petition an agency for a declaration of the applicability of any rule or order issued by the agency.

(b) Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. The provisions of this [act] for formal, informal, or other applicable hearing procedure do not apply to an agency proceeding for

a declaration, except to the extent provided in this article or to the extent the agency so provides by rule or order.

(c) Within 60 days after receipt of a petition pursuant to this section, an agency shall either decline in writing to issue a declaration or schedule the matter for hearing.

(d) If the agency declines to consider the petition, it shall promptly notify the person who filed the petition of its decision and include a brief statement of the reasons for declining. An agency decision to decline to issue a declaration is not subject to judicial review.

(e) If the agency issues a declaration, the agency declaration must contain the names of all parties to the proceeding, the particular facts on which it is based, and the reasons for the agency's conclusion. A declaratory order has the same status and binding effect as an order issued in an adjudication.

Comment

This section embodies a policy of creating a convenient procedural device that will enable parties to obtain reliable advice from an agency. Such guidance is valuable to enable citizens to conform with agency standards as well as to reduce litigation. It is based on the 1981 MSAPA, Section 2-103 and Hawaii Revised Statutes, Section 91-8.

Subsection (5) is based on the 1981 MSAPA, Section 2-103, the California APA, West's Ann.Cal.Gov.Code Section 11465.60; and the Washington APA, West's RCWA 34.05.240. A declaratory decision issued by an agency is judicially reviewable; is binding on the applicant, other parties to that declaratory proceeding, and the agency, unless reversed or modified on judicial review; and has the same precedential effect as other agency adjudications. A declaratory decision, like other decisions, only determines the legal rights of the particular parties to the proceeding in which it was issued. The requirement in subdivision (a) that each declaratory decision issued contain the facts on which it is based and the reasons for its conclusion will facilitate any subsequent judicial review of the decision's legality. It also ensures a clear record of what occurred for the parties and for persons interested in the decision because of its possible precedential effect.

[SECTION 204. DEFAULT PROCEDURAL RULES.

(a) The [Attorney General] [Legislature] shall adopt default procedural rules for use by agencies. The default rules must provide for the procedural functions and duties of as many agencies as is practicable.

(b) Except as otherwise provided in subsection (c), an agency must use the default procedural rules published under subsection (a).

(c) An agency may adopt a rule of procedure that differs from the default procedural rules adopted under subsection (a) by adopting a rule that states with particularity the need and reasons for the variation from the default procedural rules].

Comment

One purpose of this provision is to provide agencies with a set of procedural rules. This is especially important for smaller agencies. Another purpose of this section is to create as uniform a set of procedures for all agencies as is realistic, but to preserve the power of agencies to deviate from the common model where necessary because the use of the model rules is demonstrated to be impractical for that particular agency. Like Section 2-105 of the 1981 MSAPA, this section requires all agencies to use the model rules as the basis for the rules that they are required to adopt under Section 202. An agency may deviate from the model rules only for impracticability.

ARTICLE 3

RULEMAKING; ADOPTION AND EFFECTIVENESS OF RULES

SECTION 301. CURRENT RULEMAKING DOCKET.

(a) Except for sections 311, 312, 313, 314 and 315, as used in this article, "rule" does not include an emergency rule adopted under Section 309(a) or a fast-track rule adopted under Section 309(b).

(b) Each agency shall maintain a current rulemaking docket.

(c) A current rulemaking docket must list each pending rulemaking proceeding. The docket must indicate or contain:

(1) the subject matter of the proposed rule;

(2) notices related to the proposed rule;

(3) where written or electronic comments may be inspected;

(4) the time within which written or electronic comments may be made;

(5) electronic and written requests for public hearing;

(6) appropriate information about the public hearing, if any, including the names of the persons making the request;

(7) how comments may be made in writing and electronically; and

(8) the timetable for action.

(d) Regardless of whether an agency maintains a docket electronically, it must maintain a written docket.

Comment

This section is modeled on Minn. M.S.A. Section 14.366. This section and the following section, Section C3-102 state the minimum docketing and rulemaking record keeping requirements for all agencies. This section also recognizes that many agencies use electronic recording and maintenance of dockets and records. However, for smaller agencies, the use of electronic recording and maintenance may not be feasible. This section therefore permits the use of exclusively written, hard copy dockets. The current rulemaking docket is a summary list of pending rulemaking proceedings or an agenda referring to pending rulemaking.

SECTION 302. AGENCY RECORD IN RULEMAKING PROCEEDING.

(a) An agency shall maintain an official rulemaking record for each rule it proposes to adopt. The record and materials incorporated by reference must be available for public inspection or be available online via the Internet.

(b) The agency rulemaking record must contain:

(1) copies of all publications in the [administrative bulletin] with respect to the rule or the proceeding upon which the rule is based;

(2) copies of any portions of the agency's public rulemaking docket containing entries relating to the rule or the proceeding upon which the rule is based;

(3) all written or electronic petitions, requests, submissions, and comments received by the agency and all other written or electronic materials or records considered by the agency in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based;

(4) any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, any tape recording or stenographic record of those presentations, and any memorandum prepared by the agency official who presided over the hearing, summarizing the contents of those presentations;

(5) a copy of the rule and explanatory statement filed in the office of the [Secretary of State]; and

(6) all petitions for exceptions to, or amendment, repeal or suspension of, the rule.

Comment

This section is taken from the 1981 MSAPA, section 3-112. The following states have similar or identical agency rule-making record provisions: Az., A.R.S. Section 41-1029; Colo., C.R.S.A. Section 24-4-103; Minn., M.S.A. Section 14.365; Miss., Miss. Code Ann. Section 25-43-3.110; Mont., MCA 2-4-402; Okl., 75 Okl.St.Ann. Section 302; and Wash., RCWA 34.05.370.

The comment to the 1981 MSAPA section from which this section is taken makes the case for adoption of this section, and especially for subsection (c) for judicial review.

In requiring an official agency rulemaking record, subsection (a) should facilitate a more structured and rational agency and public consideration of proposed rules, and the process of judicial review of the validity of rules. The requirement of an official agency rulemaking record has recently been suggested for the Federal Act in S. 1291, the "Administrative Practice and Regulatory Control Act of 1979," title I, Section 102(d), [5 U.S.C. 553(d)], 96 Cong.Rec. S7126 at S7129 (daily ed. Jun. 6, 1979) (Sen. Kennedy).

Subsection (b) requires *all written* submissions made to an agency and *all written* materials considered by an agency in connection with a rulemaking proceeding to be included in the record. It also requires a copy of any existing record of oral presentations made in the proceeding to be included in the rulemaking record. In certain instances Section 3-104(b)(3) assures a record of oral presentations in a rulemaking proceeding. But subsection (b) does *not require other oral communications* relating to a rulemaking proceeding, whether or not *ex parte*, to be electronically recorded or reduced to writing and to be included in the official agency rulemaking record. It would be undesirable to require all oral communications pertinent to every rulemaking proceeding to be electronically recorded or reduced to writing and to be included in the rulemaking record. See Scalia, "Two Wrongs Make a Right," *Regulation* 38 (July-August 1977); Administrative Conference of the U.S., Recommendation no. 77-3, 42 Federal Register 54253 (1977). Cf. Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C.Cir.1977) certiorari denied, 434 U.S. 829 (1977). See also generally, "Ex Parte Communication During Informal Rulemaking," 14 Colum. Journ. of Law and Social Prob. 269 (1979). Of course, if an agency wants to impose on itself by rule such a prohibition on *ex parte* oral communications in rulemaking, or a requirement that all such oral communications be reduced to writing and included in the agency rulemaking record, it may do so. Paragraph (9) of subsection (b) is

bracketed because this paragraph is wholly dependent on subsequently bracketed Section 3-204(d).

[SECTION 303. ADVICE ON POSSIBLE RULE BEFORE NOTICE OF PROPOSED ADOPTION OF RULE.

(a) In addition to seeking information by other methods, an agency, before notice of the proposed adoption of a rule, may solicit comments and recommendations from the public on a subject matter of possible rulemaking under active consideration within the agency by causing notice of possible rulemaking on the subject matter to be published in the [administrative bulletin] and indicating where, when, and how persons may comment.

(b) Before publication of a notice of the proposed adoption of a rule, each agency may appoint a committee to comment or to make recommendations on the subject matter of a possible rulemaking under active consideration within the agency. In making the appointments, the agency shall seek to establish a balance in representation among all interested stakeholders and must include at least one public member who is not part of the regulated industry or profession as a member of each committee. The agency shall publish a list of all committees with their membership at least [annually] in the [administrative bulletin].]

Comment

This section is modeled on the 1981 Model State Administrative Procedure Act, section 3-101. As noted there, seeking advice before proposing a rule may alert the agency very early to potential serious problems that may cause the agency to be forced to rewrite the rule entirely later. Several states have enacted provisions of this type in their APAs. Some of them merely authorize agencies to seek informal input before proposing a rule, and several of them indicate that the purpose of the provision is to promote negotiated rulemaking. Those states are Idaho, I.C. § 67-5220; Minnesota, M.S.A. § 14.101; Montana, MCA 2-4-304; and Wisconsin, W.S.A. 227.13. Subsection (b) is intended to include negotiated rulemaking.

SECTION 304. NOTICE OF PROPOSED RULE ADOPTION.

(a) At least [30] days before the adoption of a rule, an agency shall cause notice of its contemplated action to be published in the [administrative bulletin]. The notice of the proposed adoption of a rule must include:

(1) a short explanation of the purpose of the rule proposed;

(2) the specific legal authority authorizing the rule proposed;

(3) the text of the rule proposed;

(4) where, when, and how persons may present their views on the rule proposed;

(5) where persons may obtain copies of the full text of the regulatory analysis of the rule proposed; and

(6) where, when, and how persons may present their views on the rule proposed and demand an oral proceeding thereon if one is not already provided.

(b) a concise summary of the regulatory analysis required under Section 305 must be published in the [administrative bulletin] at least [10] days before the earliest of:

(1) the end of the period during which persons may make written submissions on the rule proposed;

(2) the end of the period during which an oral proceeding may be requested; or

(3) the date of any required oral proceeding on the rule proposed.

(c) Within three days after publication of the notice of the proposed adoption of a rule in the [administrative bulletin], the agency shall cause a copy of the notice to be mailed or sent electronically to each person that has made a timely request to the agency for a mailed or electronic copy of the notice. An agency may charge a person for the actual cost of providing

written mailed copies if the person has made a request for a written copy.

Comment

This section draws upon the 1981 MSAPA, Section 3-103. Many states have similar provisions.

SECTION 305. REGULATORY ANALYSIS.

(a) An agency shall prepare a regulatory analysis for a rule proposed by the agency having an estimated economic impact of more than [$].

(b) An agency is not required to prepare a regulatory analysis for a rule proposed by the agency having an economic impact of less than [$]; however, for a rule that has an estimated economic impact of less than [$], if, within [20] days after the notice of the proposed adoption of the rule is published, a written request for the analysis is filed in the office of the publisher by [the Governor], [a political subdivision], [an agency], [or] [a member of the Legislature], the publisher shall immediately forward a certified copy of the request for regulatory analysis to the agency proposing the rule. The agency shall then prepare a regulatory analysis of the proposed rule.

(c) A regulatory analysis must contain:

(1) a description of any persons or classes of persons that would be affected by the rule and the costs and benefits to that class of persons;

(2) an estimate of the probable impact, economic or otherwise, of the rule upon affected classes;

(3) a comparison of the probable costs and benefits of the rule to the probable costs and benefits of inaction; and

(4) a determination of whether there are less costly or less intrusive methods for achieving the purpose of the rule.

(d) The agency preparing a regulatory analysis under this section shall file the analysis with the publisher in the manner provided in Section 315 [and submit it to the [regulatory review agency] [department of finance and revenue] [other]].

Comment

Regulatory analyses are widely used as part of the rulemaking process in the states. The subsection also provides for submission to the rules review entity in the state, if the state has one.

SECTION 306. PUBLIC PARTICIPATION .

(a) For at least [30] days after publication of the notice of the proposed adoption of a rule, an agency shall allow persons to submit information and comment on a rule proposed by the agency. The information or comments may be submitted electronically or in writing.

(b) The agency shall consider fully all information and comments submitted respecting a rule proposed to be adopted by the agency.

(c) Unless a public hearing is required by law other than this [act], an agency is not required to hold a public hearing on a rule proposed to be adopted. If an agency does hold a public hearing, the agency may allow persons to present orally information and comments with respect to the rule.

(d) A public hearing on a rule proposed to be adopted may not be held earlier than [20] days after notice of its location and time is published in the [administrative bulletin].

(e) An agency official shall preside at a public hearing on a rule proposed to be adopted. If the presiding agency official is not the agency head, the official shall prepare a memorandum

for consideration by the agency head summarizing the contents of the presentations made at the oral proceeding. Oral proceedings must be open to the public and recorded by stenographic or other means.

(f) If the default procedural rules promulgated under Section 204 do not include provisions for the conduct of public hearings, each agency shall issue rules for the conduct of public hearings.

Comment

This section gives discretion to the agency about whether to hold an oral hearing on proposed rules in the absence of a statutory or constitutional requirement that an oral hearing be held.

SECTION 307. TIME OF ADOPTION.

(a) An agency may not adopt a rule until the period for submitting information or comments has expired.

(b) Except as otherwise provided in subsection (c), within [ ] days after the expiration of the time for submission of information or comments on a rule proposed to be adopted or the end of a public hearing thereon, whichever is later, an agency shall adopt the rule pursuant to the rulemaking proceeding or terminate the proceeding by publication of a notice to that effect in the [administrative bulletin]

(c) With the approval of the Governor, an agency may obtain one extension of the period specified in subsection (b). The Governor, by executive order, may impose an extension of the period of [ ] days if there is a change in the rule from the rule initially proposed.

(d) A rule not adopted and filed within the time limits set by this section is invalid.

Comment

This section is substantially similar to Section 3-106 of the 1981 MSAPA. However, in subsection (b) the agency has been given a substantially longer period of time to act.

SECTION 308. VARIANCE BETWEEN NOTICE OF RULE AND RULE ADOPTED.

(a) An agency may not adopt a rule that substantially differs from the rule proposed in the notice of proposed adoption of a rule on which the rule is based unless the rule being adopted is the logical outgrowth of the rule proposed in the notice, as determined from consideration of the following factors:

(1) the extent to which all persons affected by the adopted rule should have understood that the published proposed rule would affect their interests;

(2) the extent to which the subject matter of the adopted rule or the issues determined by that rule are different from the subject matter or issues involved in the published rule proposed; and

(3) the extent to which the effects of the adopted rule differ from the effects of the published rule proposed had it been adopted instead.

Comment

This section draws upon the 1981 MSAPA, section 3-107 and similar provisions from a number of states. See Mississippi Administrative Procedure Act, Miss. Code Ann. Section 25-43-3.107 and the Minn. Administrative Procedure Act, M.S.A. Section 14.05. The 1981 MSAPA drew heavily on the federal "logical outgrowth" test. The logical outgrowth test attempts to strike a balance between the need for notice to the public in rulemaking, the need of the agency to make modifications in proposed rules as a result of comments received, and encouragement to agencies to consider the information received in comments from the public in formulating final rules. The following cases discuss and analyze the logical outgrowth test, and this section seeks to incorporate the factors identified in those cases, as did the 1981 MSAPA. These judicial

opinions also convey the wide acceptance and use of the logical outgrowth test in the states. *First Am. Discount Corp. v. Commodity Futures Trading Comm'n,* 222 F.3d 1008, 1015 (D.C.Cir.2000); *Arizona Publisher. Serv. Co. v. EPA*, 211 F.3d 1280, 1300 (D.C.Cir.2000); *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C.Cir.1994); *Trustees for Alaska v. Dept. Nat. Resources*, ___AK____, 795 P.2d 805 (1990); *Sullivan v. Evergreen Health Care*, 678 N.E.2d 129 (Ind. App. 1997); *Iowa Citizen Energy Coalition v. Iowa St. Commerce Comm.* ___IA___, 335 N.W.2d 178 (1983); *Motor Veh. Mfrs. Ass'n v. Jorling,* 152 Misc.2d 405, 577 N.Y.S.2d 346 (N.Y.Sup.,1991); *Tennessee Envir. Coun. v. Solid Waste Control Bd.*, 852 S.W.2d 893 (Tenn. App. 1992); *Workers' Comp. Comm. v. Patients Advocate,* 47 Tex. 607, 136 S.W.3d 643 (2004); *Dept. Of Publisher. Svc. re Small Power Projects*, 161 Vt. 97, 632 A.2d 13 73 (1993); *Amer. Bankers Life Ins. Co. v. Div. of Consumer Counsel*, 220 Va. 773, 263 S.E.2d 867 (1980).

SECTION 309. EMERGENCY RULES; FAST-TRACK RULES.

(a) If an agency finds that an imminent peril to the public health, safety, or welfare requires immediate adoption of a rule and states in writing its reasons for that finding, the agency, without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, may adopt an emergency rule. An emergency rule may be effective for no longer than [ ] days [renewable once for not exceeding [ ] days]. The adoption of an identical rule under Sections 304 through 308 is not precluded. The agency shall take appropriate measures to make an emergency rule known to the persons who may be affected by it.

(b) A rule that is expected to be noncontroversial may be promulgated in accordance with this subsection. [With the concurrence of the Governor, and after written notice to the applicable standing committees of both houses of the Legislature, [and the Commission] an agency may submit a fast-track rule. A fast-track rule is subject to Sections 202 and 304, and must be published in the [administrative bulletin] along with a statement by the agency setting out the reasons for using fast-track rulemaking. If an objection to the use of the fast-track process is received within the public comment period from [50] or more persons [or any member of the

applicable standing committee of either house of the [Legislature] or the [commission], the agency shall file notice of the objection with the publisher for publication in the [administrative bulletin] and proceed with the normal rulemaking process set out in this article, with the initial publication of the fast-track rule serving as the notice of the proposed adoption of a rule.

(c) Each agency shall maintain a separate, official, current, and dated index of all rules adopted under this section. Each agency shall also maintain a compilation of all rules adopted under this section. Each addition to, change in, or deletion from, the official compilation must also be dated and indexed and a record thereof kept. The index and compilation must be made available at agency offices for public inspection and copying [and online via the Internet]. The index and compilation must be kept current by the agency at least every [30] days. The full compilation must also be furnished to the publisher and the [Secretary of State] [the Attorney General].

(d) Unless a fast-track rule is objected to pursuant to subsection (b), the rule becomes effective 15 days after the close of the comment period, unless the rule is withdrawn or a later effective date is specified by the agency.

Comment

This section is taken from the 1961 MSAPA, Section 3(2)(b), and the Virginia Administrative Procedure Act, Va. Code Ann. Section 2.2-4012.1. Some state courts have indicated that *any* exemption from rulemaking requirements must be strictly construed to be limited to an emergency or virtual emergency situation.

However, recognizing that there may be a few other justifications for exemption, this section adopts a broader rule for matters that will be noncontroversial. Thus, a situation where the agency is merely making a stylistic correction or correcting an error that the agency believes is noncontroversial may be adopted without formal rulemaking procedures. See the VA Fast-Track Rule provision at Va. Code Ann. Section 2.2-4012.1.

In order to prevent misuse of this procedural device, noncontroversial rule promulgation requires the consent of elected officials, and may be prevented by the requisite number of persons filing objections.

SECTION 310. GUIDANCE DOCUMENTS.

(a) An agency may issue guidance documents.

(b) An agency need not follow the procedures of Sections 304 through 308 to issue guidance documents.

(c) Each agency is encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of guidance documents. Guidance documents are advisory only.

(d) A reviewing court may determine de novo the validity of a guidance document.

(e) It shall be the duty of every agency annually to publish in the [administrative bulletin] an index of all guidance documents upon which the agency currently relies. The filing shall be made on or before January 1 of each year in a format to be developed by the publisher.

(f) Each agency shall maintain an index of all of its currently operative guidance documents, make the index available for public inspection, and make available for public inspection the full texts of all guidance documents to the extent inspection is permitted by law; and, upon request, make copies of such indexes or guidance documents available without charge, at cost, or on payment of a reasonable fee.

Comment

This section draws upon the provisions of the Va. and WA APAs. See: Va. Code Ann. Section 2.2–4008; WA RCWA Section 34.05.230.

This section recognizes the need for guidance documents that an agency will prepare 1) as

a guide to its employees and 2) as a guide to the public. Agency law often needs interpretation, and agency discretion needs some channeling. The public needs to know the agency opinion about the meaning of the law and rules that it administers. Increasing public knowledge and understanding reduces unintentional violations and lowers transaction costs. See Michael Asimow, *California Underground Regulations*, 44 Admin. L. Rev. 43 (1992); Peter Strauss, *The Rulemaking Continuum,* 44 Duke L. J. 1463 (1992). Excusing the agency from full procedural rulemaking for guidance documents furnishes a powerful economic incentive for agencies to use these devices to inform their employees and the public.

Many states have recognized the need for this type of exemption in their statutes. They are also referred to as interpretive statements or policy statements. These states have defined interpretive and policy statements differently from rules, and also excused agencies creating them from some or all of the procedural requirements for rulemaking. See Ala. Ala. Code Section 41-22-3(9)(c) (2000) ("memoranda, directives, manuals, or other communications which do not substantially affect the legal rights of, or procedures available to, the public."); Colo. Colo. Rev. Stat. Section 24-4-102(15), 24-4- 103(1) (exception for interpretive rules or policy statements "which are not meant to be binding as rules"); *AMAX, Inc. v. Grand County Bd. of Equalization*, 892 P.2d 409, 417 (Colo. Ct. App. 1994) (assessors' manual is interpretive rule) (2001); Ga. Ga. Code Ann., Section 50-13-4 ("Prior to the adoption, amendment, or repeal of any rule, other than interpretive rules or general statements of policy, the agency shall") (emphasis added); Mich, M.C.L.A. 24.207(h) (excepts "A form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory.). Wyoming, WY ST Section 16-3-103 ("Prior to an agency's adoption, amendment or repeal of all rules *other than interpretative rules or statements of general policy*, the agency shall") (emphasis added) and see *In re GP*, 679 P.2d 976, 996-97 (Wyo. 1984). See also, Michael Asimow, *Guidance Documents in the States: Toward a Safe Harbor*, 54 Admin. L. Rev. 631(2002). (Professor Asimow estimates that more than thirty states have adopted some provision for agency guidance documents such as interpretive and policy statements).

The federal Administrative Procedure Act also makes a similar distinction. See 5 U.S.C. Section 553(b)(A) (1988) (Under this section "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" are excused from normal section 553 notice and comment procedural requirements).

SECTION 311. CONTENTS OF RULE. Each rule adopted by an agency must contain the text of the rule and be accompanied by a record containing:

(1) the date the agency adopted the rule;

(2) a concise statement of the purpose of the rule;

(3) a reference to all rules repealed, amended, or suspended by the rule;

(4) a reference to the specific statutory or other authority authorizing the rule;

(5) any findings required by any provision of law as a prerequisite to adoption or effectiveness of the rule; and

(6) the effective date of the rule.

SECTION 312. CONCISE EXPLANATORY STATEMENT.

(a) At the time it adopts a rule, an agency shall issue a concise explanatory statement containing:

(1) the agency's reasons for adopting the rule, which must include an explanation of the principal reasons for and against the adoption of the rule, the agency's reasons for overruling substantial arguments and considerations made in testimony and comments, and its reasons for failing to consider any issues fairly raised in testimony and comments; and

(2) the reasons for any change between the text of the proposed rule contained in the published notice of the proposed adoption of the rule and the text of the rule as finally adopted.

(b) Only the reasons contained in the concise explanatory statement required by subsection (a) may be used by any party as justifications for the adoption of the rule in any proceeding in which its validity is at issue.

Comment

This provision is similar to the 1981 MSAPA, Section 3-110 requirement for a concise explanatory statement of a rule when it is adopted. Arkansas (A.C.A. Section 25-15-204) and Colorado (C.R.S.A. Section 24-4-103) have similar provisions. The federal Administrative Procedure Act uses the identical terms in section 553 (c) (5 U.S.C.A. Section 553). However, this provision also requires the agency to explain why it rejected substantial arguments made in

comments.

[**SECTION 313. INCORPORATION BY REFERENCE.**

(a) An agency may adopt a rule that incorporates by reference all or any part of a code, standard, or rule that has been adopted by an agency of the United States, this state, another state, or by a nationally recognized organization or association, if:

(1) incorporation of the text of the code, standard, or rule in the rule would be unduly cumbersome, expensive, or otherwise inexpedient; and

(2) the reference in the agency rules fully identifies the incorporated code, standard, or rule by location, date, and otherwise, [and must state that the rule does not include any later amendments or editions of the incorporated code, standard, or rule]; and

(3) the code, standard, or rule is readily available to the public;

(4) the rule states where copies of the code, standard, or rule are available at cost from the agency issuing the rule and where copies are available from the agency of the United States, this state, another state, or the organization or association originally issuing the code, standard, or rule; and

(5) the rule is of limited public interest, as determined by the [Governor][Attorney General].]

Comment

This section is drawn in part from the 1981 MSAPA, section 3-111(c) . Several states have provisions that require the agencies to retain the voluminous technical codes. See, Alabama, Ala.Code 1975 section 41-22-9; Michigan, M.C.L.A. 24.232; and North Carolina, N.C.G.S.A. § 150B-21.6. Wisconsin permits only incorporating by reference codes that are readily available from the outside promulgator, and that are of limited public interest as determined by a source outside the agency. Wisconsin, W.S.A. 227.21. These provisions will

guarantee that important material drawn from other sources is available to the public, but that less important material that is freely available elsewhere does not have to be retained.

SECTION 314. COMPLIANCE AND TIME LIMITATION. No rule adopted under this [act] is valid unless adopted in substantial compliance with the procedural requirements of this [act]. A proceeding to contest any rule on the ground of noncompliance with the procedural requirements of this [act] must be commenced within two years from the effective date of the rule.

Comment

This section is a slightly modified form of the 1961 Model State Administrative Procedure Act, section (3)(c). As noted in the comment to the 1981 MSAPA, section 3-113, there have been no complaints from the states about the two year time limitation on procedural challenges to rules. This section also deals with the new concept, not part of the 1961 or 1981 MSAPA, of fast-track rules.

SECTION 315. FILING OF RULES. An agency shall file in the office of the publisher each rule it adopts, and all rules existing on [the effective date of this [act]] that have not previously been filed. The agency may file a rule under this section as an electronic record. The filing must be done as soon after adoption of the rule as is practicable. At the time of filing, each rule adopted after [the effective date of this [act]] must have attached to it the explanatory statement required by Section 312. The publisher shall affix to each rule and statement a certification of the time and date of filing and keep a permanent register open to public inspection of all filed rules and attached explanatory statements. In filing a rule, each agency shall use a standard form prescribed by the publisher.

Comment

This section is based on the 1961 Model State Administrative Procedure Act, Section 4(a) and its expansion in the 1981 MSAPA, Section 3-114.

SECTION 316. EFFECTIVE DATE OF RULES.

(a) Except as otherwise provided in subsection (b), (c), or (d), each rule adopted after [the effective date of this [act]] becomes effective [60] days after publication of the rule in the [administrative bulletin].

(b) A rule may become effective on a later date than that established by subsection (a) if the later date is required by another statute or specified in the rule.

(c) A rule may become effective immediately upon its filing or on any subsequent date earlier than that established by subsection (a) if the agency establishes the date and finds that:

(1) it is required to be implemented by a certain date by the federal or [state] constitution, a statute, or court order;

(2) the rule is an emergency rule under Section 309(a).

(d) A fast-track rule adopted pursuant to Section 309(b) to which no objection is made becomes effective 15 days after the close of the comment period, unless the rule is withdrawn or a later effective date is specified by the agency.

(e) A guidance document becomes effective immediately upon its filing or at a later date established by the agency.

Comment

This is a substantially revised version of the 1961 Model State Administrative Procedure Act, section 4 (b)&(c) and 1981 Model State Administrative Procedure Act, section 3-115. Most of the states have adopted provisions similar to both the 1961 Model State Administrative Procedure Act and the 1981 Model State Administrative Procedure Act, although they may differ on specific time periods. Subsection (c)(3) has been adopted from TX, V.T.C.A., Government

Code Section 2001.036.

SECTION 317. PETITION FOR ADOPTION OF RULE. Any person may petition an agency to request the adoption of a rule. Each agency shall prescribe by rule the form of the petition and the procedure for its submission, consideration, and disposition. Within [60] days after submission of a petition, the agency shall:

(1) deny the petition in a record and state its reasons for the denial;

(2) initiate rulemaking proceedings in accordance with this [act]; or

(3) if otherwise lawful, adopt the rule.

Comment

This section is substantially similar to the 1961 MSAPA as modified slightly by the 1981 MSAPA.

ARTICLE 4

ADJUDICATION

SECTION 401. WHEN ARTICLE 4 APPLIES. DISPUTED CASES. This Article applies to an adjudication made by an agency if, under the federal or state constitution or federal or state law, an opportunity for an evidentiary hearing is required for the formulation and issuance of an order. If the requirements for informal adjudication under sections 405 and 406 or an emergency adjudication under section 407 are met, a disputed case hearing may be conducted following the procedures in those sections.

Comment

Article 4 of this Act does not apply to all adjudications but only to those adjudications, defined in Article 1-102(6) as a "disputed case." This section connects the definitions of Adjudication in Article 1, section 102(1), "disputed case" in Article 1, section 102(6), and order, [section 102(18)]. The definition of adjudication in section 102(1) is general and intended to distinguish adjudication from rulemaking. On the other hand, disputed case is the definition of the subset of adjudications that fall within this section because a federal or state statute or constitution requires an evidentiary hearing to resolve particular facts. This section is subject to the exceptions in sections 405 and 406 for informal hearing and section 407 for emergency hearing if the requirements for those exceptions under this Article apply. All disputed cases are also subject to the adjudication bill of rights of section 402 of this article.

In some cases, statutes or the constitution call for administrative proceedings that do not reach the level of an evidentiary hearing. For example, the constitution or a statute might merely require a consultation or a decision that is not based on an exclusive record or a purely written procedure or an opportunity for the general public to make statements. In some cases, the agency has discretion to create a procedure for adjudication. In other cases, the hearing called for by the statute is informal and investigative in nature, and any decision that results is not final but subject to a full administrative hearing at a higher agency level. This section does not apply in such cases. Examples of cases in which the required procedure does not meet the standard of an evidentiary hearing for determination of facts are: Goss v. Lopez, 419 U.S. 565 (1975) and Hewitt v. Helms, 459 U.S. 460 (1983). Agency action pursuant to statutes that do not require evidentiary hearings are not subject to this section. This section does not apply where agency rules or practice, rather than a statute or constitution, call for a hearing.

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 is limited to material in the record in making his decision.

Hearings that are required by procedural due process guarantees include life, liberty and property *interests*, where a statute creates a justified expectation or legitimate entitlement. This section includes more than what were described as "rights" under older common law. In cases where the right to an evidentiary hearing is created by due process, attention is directed to section 405(2)F *infra*, which may permit an informal hearing.

This section does not apply to an investigatory hearing, or a hearing that merely seeks public input or comment. Also, this section is not applicable to the situation where a party is entitled to a de novo administrative or judicial hearing. An agency may by rule make all or part of this article applicable to adjudication that does not fall within requirements of this section.

This section draws upon the California, (see Cal. Cal.Gov.Code Section 11410.10); Minnesota, (see Minnesota Statutes Annotated, Section 14.02, subd. 3; Washington (see Revised Code of Washington, 34.05.413(2) and Kansas (see Kansas Stat. Ann., KS ST Section 77-502(d) & Kansas Stat. Ann., KS ST Section 77-503). The definition of disputed case used in this Act is similar to, but broader than, the definition of contested case in the 1961 MSAPA, Section 1(2).

SECTION 402. PRESIDING OFFICERS.

(a) In a disputed case, a presiding officer shall preside over the conduct of the hearing and shall regulate the course of the proceedings in a manner that will promote their orderly and prompt resolution.

(b) The agency head, one or more members of the agency head, one or more administrative law judges assigned by the Office in accordance with section 602 [or, unless prohibited by law, one or more persons designated by the agency head], in the discretion of the agency head, may serve as the presiding officer.

(c) An individual who has served as [investigator], prosecutor [,] or advocate at any stage in a disputed case, including investigation, may not serve as a presiding officer or assist or advise

any presiding officer in the same proceeding;

(d) 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 disputed case, including investigation, may not serve as presiding officer or assist or advise a presiding officer in the same proceeding.

(e) A presiding officer is subject to disqualification for bias, prejudice, financial interest, or any other cause for which a judge is or may be disqualified.

(f) A party may request the disqualification of a presiding officer by filing an affidavit, before the taking of evidence at an evidentiary hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded, or the applicable rule or canon of practice or ethics that requires disqualification. If grounds for disqualification are discovered at a time later than the beginning of the taking of evidence, a party must request disqualification promptly after discovery.

(g) A presiding officer whose disqualification is requested shall determine whether to grant the position, and state facts and reasons for the determination in writing.

(h) If a substitute presiding officer is required, the substitute must be appointed 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.

Comment

Subsection (b) governs who may be appointed to serve as a presiding officer in a disputed case. If the case is heard by more than one presiding officer, as when the agency head hears a disputed case en banc, one member of the agency head may serve as chair, but all of the persons

sitting as judge in the case are collectively the presiding officer.

Subsection (b) confers a limited amount of discretion upon the agency head to determine who will preside. The presiding officer may be either the agency head, or one or more members of the agency head, or one or more administrative law judges assigned by the Office of Administrative Hearings in accordance with section 603. Without the bracketed language, subsection (b) resembles the law in a group of states that have created a central panel of administrative law judges, and have made the use of administrative law judges from the central panel mandatory unless the agency head or one or more members of the agency head presides. In some states, however, the use of central panel administrative law judges is mandatory only in certain enumerated agencies or types of proceedings. If the bracketed language is adopted, the agency head, in addition to the preceding options for appointment and unless prohibited by law, may designate any one or more "other persons" to serve as presiding officer. This discretion is subject to subsections (c) & (d) on separation of functions. This discretion is also limited by the phrase "unless prohibited by law," included in the bracketed language, which prevents the use of "other persons" as presiding officers to the extent that the other state law prohibits their use. Thus, if this language is adopted by a state that has an existing central panel of administrative law judges whose use is mandatory in enumerated types of proceedings, the agencies must continue to use the central panel for those proceedings, but may exercise their option to use "other persons" for other types of proceedings.

SECTION 403. DISPUTED CASE PROCEDURE.

(a) Except for emergency adjudications and except as otherwise provided in section 406, this section applies to disputed cases.

(b) Except as provided in section 407(c) for emergency adjudications, the agency shall give to the person to which the agency action is directed notice that is consistent with Section 404.

(c) The agency shall make available to the person to which the agency action is directed a copy of the governing procedure.

(d) The following rules apply in a disputed case:

(1) Relevant evidence must be admitted if it is the type of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Evidence may not

be excluded solely because it is hearsay.

(A) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence except that on timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

(2) Upon proper objection the presiding officer shall exclude evidence that is immaterial, irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. In the absence of proper objection, the presiding officer may exclude evidence that is objectionable.

(A) Evidence is unduly repetitious under this subsection if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

(B) A presiding officer's determination that evidence is unduly repetitious may be overturned only for abuse of discretion.

(2) An objection is timely if made before submission of the case or on reconsideration.

(3) In a disputed case, any part of the evidence may be received in written form, if doing so will expedite the hearing without substantial prejudice to the interests of a party. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

(4) All evidence must be made part of the hearing record of the case, including, if the agency desires to avail itself of information or it is offered into evidence by a party, records in the possession of the agency which contain information classified by law as not public. No

factual information or evidence may be considered in the determination of the case unless it is part of the agency record. If the agency record contains information that is not public, the presiding officer may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record.

(5) In a disputed case the presiding officer may take official notice of all facts of which judicial notice may be taken and of other scientific and technical facts within the specialized knowledge of the agency.

(A) Parties must be notified at the earliest practicable time, either before or during the hearing, or by reference in preliminary reports, preliminary decisions or otherwise, of the facts proposed to be noticed and their source, including any staff memoranda or data.

(B) The parties must be afforded an opportunity to contest any judicially noticed facts before the decision is announced, unless the agency determines as part of the record or decision that fairness to the parties does not require an opportunity to contest such facts.

(6) The experience, technical competence, and specialized knowledge of the presiding officer may be used in the evaluation of the evidence.

(e) Except for informal hearings under sections 405 and 406 and emergency hearings under section 407, in a disputed case, the presiding officer, at appropriate stages of the proceedings, shall give all parties the opportunity to file pleadings, motions, objections, and offers of settlement in a timely manner. The presiding officer, at appropriate stages of the proceeding, may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed, recommended or final orders. If available, the original of all records must be filed with the agency, and copies of all filings shall be sent to all parties.

(f) Except for informal hearings under sections 405 and 406 and emergency hearings under section 407, in a disputed case, to the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence.

(g) Unless prohibited by law, if each party to a hearing has an opportunity to hear, speak and be heard in the proceeding as it occurs, the presiding officer may conduct all, or part of, an evidentiary hearing, or a prehearing conference, by telephone, television, or other electronic means;

(h) All testimony of parties and witnesses must be given under oath or affirmation and the presiding officer may administer an oath or affirmation for that purpose.

(i) The hearing in a disputed case is open to public observation, except for a hearing or part of a hearing that the presiding officer states to be closed on the same basis and for the same reasons that a court of [state] is empowered to close a hearing or states to be closed pursuant to a statutory provision other than this [act] that authorizes closure. To the extent that a hearing is conducted by telephone, television, or other electronic means, and is not closed, the availability of public observation is satisfied by giving members of the public an opportunity, at reasonable times, to hear or inspect the agency's record, and to inspect any transcript obtained by the agency.

(j) Unless prohibited by law other than this [act], at the party’s expense, any party may be represented by counsel or may be advised, accompanied or represented by another individual.

(k) The decision in a disputed case must be in writing, based on the record, and include a statement of the factual and legal bases of the decision.

(l) This section applies to agency procedure in disputed cases without further action by

the agency, and prevails over a conflicting or inconsistent provision of the agency's rules.

(m) The rules by which an agency conducts a disputed case may include provisions equivalent to, or more protective of, the rights of the person to which the agency action is directed than the requirements of this section.

Comment

This section specifies the minimum hearing requirements that must be met in disputed cases under this act. This section applies to all agencies whether or not an agency rule provides for a different procedure; this procedure is excused only if a statute expressly provides otherwise. This section does not prevent an agency from adopting more stringent procedures than those in this section. This section does not supersede conflicting state or federal statutes.

There are several interrelated purposes for this procedural provision: 1) to create a minimum fair hearing procedure; and 2) to attempt to make that procedure applicable to all agencies. In many states, individual agencies have lobbied the legislature to remove various requirements of the state Administrative Procedure Act from them. The result in a considerable number of states is a multitude of divergent agency procedures. This lack of procedural uniformity creates problems for litigants, the bar and the reviewing courts. This section attempts to provide a minimum, universally applicable procedure in all disputed cases. The important goal of this section is to protect citizens by a guarantee of minimum fair procedural protections. The procedures required here are only for actions that fit the definition of a disputed case and fall within the provisions of Section 401. Thus, they do not spread quasi judicial procedures widely, and do not create any significant agency loss of efficiency or increased cost.

This section is modeled on the Arizona Regulatory Bill of Rights, see A.R.S. Section 41-1001.01 and the California Administrative Adjudication Bill of Rights, see West Ann.Cal.Gov.Code Section 11425.10.

The right to be represented by counsel has been adapted from the 1981 Model State Administrative Procedure Act section 4-203.

Subsection (4) is taken from the 1981 MSAPA.

The disqualification for bias in subsection (8) is intended to include the current case law that recognizes disqualification for prejudgement, or financial or personal bias.

Subsection (c) has been included in order to help to insure that full consideration is given to the consequences of reducing the minimum provisions of this section.

Subsection (a)(6) was modeled on the Virginia provision on judicial bias and prejudice. See Va. Code Ann. Section 2.2-4024.

This section is largely drawn from the 1961 MSAPA, Sections 9&10 and the 1981 MSAPA section 4-211.

Many states permit the issuance of subpoenas. But the problem of the danger of party abuse has been noted by the Conference. Therefore, in this section a party's right to a subpoena is conditioned on its relevance and reasonableness.

Some states permit discovery, but many severely limit discovery in the interest of efficiency and simplicity, and to prevent abuse. Subsection (h) permits discovery, but limits the subjects of discovery primarily to statements, reports, and exculpatory matter.

SECTION 404. NOTICE.

(a) Except for emergency adjudication under section 407, an agency shall give reasonable notice of the right to a hearing in a disputed case.

(b) In case of applications or petitions submitted by persons other than the agency, within a reasonable time after filing the agency shall give an initial notice to all parties that an action has been commenced which must include:

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

(2) the name, official title, mailing address [e-mail address] [fax address] and telephone number of the presiding officer;

(3) a statement of the time, place and nature of the prehearing conference or hearing, if any;

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

(5) any other matter that the presiding officer considers desirable to expedite the proceedings.

(c) In case of actions initiated by the agency that may or will result in an order, the agency shall give an initial notice to the party or parties against which the action is brought by personal service in a manner appropriate under [the rules of civil procedure for the service of process in a civil action in this state] which includes:

(1) notification that an action that may result in an order has been commenced against them; and

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

(3) a statement of the legal authority and jurisdiction under which the hearing is held that includes identification of the statutory sections involved; and

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

(5) the name, official title, mailing address [e-mail address] [fax address] and telephone number of the presiding officer, or, if no officer has been appointed at the time the first notice is given, the name, official title, mailing address [e-mail address] [fax address] and telephone number of any attorney or employee designated to represent the agency; and

(6) a statement that a party who fails to attend any subsequent proceeding in a disputed case may be held in default.

(7) a statement that the party served may request a hearing and 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.

(d) When a prehearing, hearing or other hearing, meeting or conference is scheduled, the agency shall give notice that shall contain the prehearing information described in this subsection at least 14 days before the hearing.

(e) Any notice may include other matters that the presiding officer considers desirable to expedite the proceedings.

Comment

This section is taken from: the 1961 Model State Administrative Procedure Act, section 9 and the 1981 Model State Administrative Procedure Act, section 4-206. See also; Oregon, O.R.S. Section 183.415; Kansas, K.S.A. Section 77-518; Iowa, I.C.A. Section 17A.12; Montana, MCA 2-4-601; and Michigan, M.C.L.A. 24.271.

SECTION 405. INFORMAL ADJUDICATION IN DISPUTED CASES. Unless prohibited by law other than this [act], an agency may use informal hearing procedure as provided in Section 406 in a disputed case if:

(1) there is no disputed issue of material fact; or

(2) the matter at issue is limited to any of the following:

(A) a monetary amount of not more than [one thousand dollars ($1,000)] whether liquidated in a sum certain or as periodic payments over no more than [12] months;

(B) a disciplinary sanction against a student that does not involve expulsion from an academic institution or suspension for more than 10 days or an employee that does not involve discharge from employment, demotion, or suspension for more than five days;

(C) a disciplinary sanction against a licensee that does not involve an actual

revocation of a license or an actual suspension of a license for more than five days;

(D) a proceeding in which an opportunity for an evidentiary hearing is not required by state or federal constitution or statute, common law, court rule, or executive order, and the agency by rule authorizes use of an informal hearing procedure under this section;

(E) a proceeding where the federal or state constitution requires an evidentiary hearing, but the hearing is not required to follow the adjudication procedures of Section 404; or

(F) the parties by written agreement consent to an informal hearing under this section.

Comment

The informal hearing procedure is intended to satisfy due process and public policy requirements in a manner that is simpler and more expeditious than formal adjudication. The informal hearing procedure provides a forum in the nature of a conference in which a party has an opportunity to be heard by the presiding officer. The informal hearing procedure provides a forum that may accommodate a hearing where by rule or statute a member of the public may participate without appearing or intervening as a party.

This section builds on the 1981 Model State Administrative Procedure Act, Articles 4-401 *et seq.* and 4-501 *et seq*., which provided for two different types of informal hearing. This section adopts a single category of informal procedure that an agency may use to perform the same functions, and the following section leaves to the discretion of the presiding officer the exact hearing procedure to be followed. This section also draws upon the California provision for an informal procedure, see Ann.Cal.Gov.Code SECTION 11445.20.

SECTION 406. INFORMAL ADJUDICATION PROCEDURE.

(a) Except as otherwise provided in subsection (b), the adjudication procedures required under Section 403 in a disputed case apply to an informal adjudication.

(b) In an informal adjudication, the presiding officer shall regulate the course of the proceeding. The presiding officer shall permit the parties and their representatives, and may

permit others, to offer written or oral comments on the issues. The presiding officer may limit the use of witnesses, testimony, evidence, and argument and may limit or eliminate the use of pleadings, intervention, discovery, prehearing conferences, and rebuttal. Where appropriate in the discretion of the presiding officer, an informal adjudication may be in the nature of a conference.

(c) In regulating the course of the informal adjudication proceedings, the presiding officer shall recognize the rights of the parties:

(1) to notice that includes the decision to proceed by informal adjudication;

(2) to protest the choice of informal procedure, and that protest must be promptly decided by the presiding officer;

(3) to participate in person or by a representative;

(4) to have notice of any contrary factual material in the possession of the agency that can be relied on as the basis for adverse decision; and

(5) to be informed briefly. in writing, of the basis for adverse decision in the case.

(d) The agency record for review of informal adjudication consists of the official transcript of oral testimony and any records that were considered, prepared by, or submitted to, the presiding officer for use in the informal adjudication or by or to the agency on review. The agency shall maintain these records as its record of the informal adjudication.

Comment

This section draws on the 1981 Model State Administrative Procedure Act, section 4-402, the California Administrative Procedure Act, West's Ann.Cal.Gov.Code SECTION 11445.40, the Va. Administrative Procedure Act, Section 2.2-4019, Va. Code Ann. § 2.2-4019, and the Washington Administrative Procedure Act, Section 34.05.485, West's RCWA § 34.05.485. Under this section, the informal adjudication procedure is a simplified form of an adjudication under the control of the presiding officer. The informal hearing may be in the nature of a conference at the discretion of the presiding officer. Although the hearing is streamlined and

informal, the hearing officer must observe basic protections of fairness spelled out in subsection (c).

SECTION 407. EMERGENCY ADJUDICATION.

(a) Unless prohibited by law other than this [act], an agency may conduct an emergency adjudication in a disputed case under the procedure provided in this section.

(b) An agency may issue an order under this section only to deal with an immediate danger to the public health, safety, or welfare. The agency may take only action that is necessary to deal with the immediate danger to the public health, safety or welfare. The emergency action must be limited to temporary, interim relief.

(c) Before issuing an order under this section, the agency, if practicable, shall give 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 hearing may be conducted in the same manner as an informal hearing under this [article].

(d) Any order issued under this section must contain an explanation that briefly explains the factual and legal basis for the emergency decision.

(e) An agency shall give notice of an order to the extent practicable to the person to which the agency action is directed. The order is effective when issued.

(f) After issuing an order pursuant to this section, an agency shall proceed as soon as feasible to conduct an adjudication following disputed case procedure under section 403, or, if appropriate under this article, informal adjudication under Sections 405 and 406, in order to resolve the issues underlying the temporary, interim relief.

(g) The agency record in an emergency adjudication consists of any testimony or records concerning the matter that were considered or prepared by the agency. The agency shall maintain those records as its official record.

(h) On issuance of an order under this section, the person against which the agency action is directed may obtain judicial review without exhausting administrative remedies.

Comment

The procedure of this section is intended permit immediate agency emergency adjudication, but also to provide minimal protections to parties against whom such action is taken. Emergencies regularly occur that immediately threaten public health, safety or welfare: licensed health professionals may endanger the public; developers may act rapidly in violation of law; or restaurants may create a public health hazard. In such cases the agencies must possess the power to act rapidly to curb the threat to the public. On the other hand, when the agency acts in such a situation, there should be some modicum of fairness, and the standards for invoking such remedy must be clear, so that the emergency label may be used only in situations where it fairly can be asserted that rapid action is necessary to protect the public.

Federal and state case law have held that in an emergency situation an agency may act rapidly and postpone any formal hearing without violation, respectively, of federal or state constitutional law. FDIC v. Mallen, 486 U.S. 230 (1988); Dep't of Agric. v. Yanes, 755 P.2d 611 (OK. 1987).

The generic provision in this section has several advantages over the present divergent approaches to emergency agency action. First, all agencies have the needed power to act without delay, but there is provision for some type of brief hearing, if feasible. Second, this article limits the agency to action of this type only in a genuine, defined emergency. Third, there are pre and post deprivation protections. This section seeks to strike an appropriate balance between public need and private fairness.

This section does not apply to an emergency adjudication, cease and desist order, or other action in the nature of emergency relief issued pursuant to other express statutory authority.

SECTION 408. EX PARTE COMMUNICATIONS.

(a) Except as otherwise provided in subsection (b), while a disputed case is pending, the presiding officer shall not receive any communication, direct or indirect, from any person

regarding any issue in the proceeding, without notice and opportunity for all parties to participate in the communication.

(b) Communication to an agency head sitting as presiding officer from an employee or representative of the agency that is a party to the proceeding, that is otherwise prohibited under subsection (a), is permissible in the following circumstances:

(1) The communication consists of an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence in the record, if:

(A) the employee or representative giving the technical explanation has not served as investigator, prosecutor, or advocate at any stage of the proceeding;

(B) the employee or representative giving the technical explanation does not receive communications that the agency head is prohibited from receiving; and

(C) the technical or scientific term on which explanation is sought is not a contested issue or an issue whose application is central to the decision in the case.

(c) If the presiding officer receives advice under subsection (b), the advice, if written, must be made part of the hearing record. If the advice is verbal, a memorandum containing the substance of the advice must be made part of the record and the parties must be notified of the communication. The parties may respond to the advice of an employee or representative of the agency in a record that is made part of the hearing record.

(d) If a presiding officer receives a communication in violation of this section:

(1) if it is a written communication, the presiding officer shall make the communication a part of the hearing record and prepare and make part of the record a memorandum that contains the response of the presiding officer to the communication and the

identity of the parties who communicated; or

(2) if it is a verbal communication, the presiding officer must prepare a memorandum that contains the substance of the verbal communication, the response of the presiding officer, and the identity of the parties who communicated.

(e) If a communication prohibited by this section is made, the presiding officer shall notify all parties of the prohibited communication and permit parties to respond in writing within 15 days. Upon good cause shown, the presiding officer may permit additional testimony in response to the prohibited communication.

(f) While a proceeding is pending, there shall be no communication, direct or indirect, regarding the merits of any issue in the proceeding between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated. However, where the presiding officer is a member of the agency head that is a body of persons, the presiding officer may communicate with the other members of the agency head without violation of this subsection.

(g) If necessary to eliminate the effect of a communication received in violation of this section, a presiding officer may be disqualified and the portions of the record pertaining to the communication may be sealed by protective order, or other relief may be granted as appropriate.

Comment

This section is modeled in part on the 1981 MSAPA section 4-213. Like that section, this section is not intended to be applied to communications made by or to a presiding officer or staff assistant regarding noncontroversial practice and procedure matters such as number of pleadings, number of copies or type of service. This section goes further in permitting advice to the presiding officer from staff members on complex technical and scientific matters, but permits parties to reply to those staff communications.

This section provides another remedy besides disclosure and party reply taken from the 1981 MSAPA section 4-213(f). In a case where disclosure and rely are inadequate to cure or eliminate the effect of the ex parte contact. The intent of authorizing the protective order is to keep the ex parte material from the successor presiding officer.

This section also draws in part from the systematic California provisions on ex parte contacts. See West's Ann.Cal.Gov.Code Section 11430.10 to 11430.80. The California sections address many of the problems that arise in this area, and attempt to distinguish technical, advisory contacts from agency staff to presiding officers or agency heads from other kinds of party contacts.

SECTION 409. INTERVENTION.

(a) A presiding officer shall grant a petition for intervention in a disputed case if the petitioner has a statutory right to initiate the proceeding in which intervention is sought.

(b) A presiding officer may grant a petition for intervention if the petitioner has an interest that will or may be adversely affected by the outcome of the proceeding and that interest is not adequately represented.

(c) When intervention is granted or at any subsequent time, the presiding officer may impose conditions upon the intervener's participation in the proceedings.

(d) A presiding officer may permit intervention conditionally, and, at any time later in the proceedings or at the end of the proceedings, may revoke the conditional intervention.

(e) The presiding officer, at least [24 hours] before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer shall promptly give notice to the petitioner for intervention and to all parties of an order granting, denying, or modifying intervention.

Comment

Subsection (b) recognizes the normal judicial practice of limiting the participation of

intervenors, especially on cross examination, to their particular interest and maintaining an orderly and expeditious hearing. Subsection (b) intervention may also be granted when the presiding officer determines that a petitioning intervenor has a substantial interest created by a statute or determines that as a practical matter the effect on the petitioner justifies petitioner's presence as a party. Subsection (d) recognizes the power of the presiding officer to dismiss a party who has intervened at any time after intervention has occurred when it appears that the conditions of this section or the requirements for the intervening party's standing have not been satisfied. Subsection (e) provides for notice suitable under the circumstances to enable parties to anticipate and prepare for changes that may be caused by the intervention.

SECTION 410. SUBPOENAS. In a disputed case, the presiding officer may issue subpoenas for the attendance of witnesses and the production of books, records and other evidence.

(1) After the commencement of a disputed case, when a written request for a subpoena to compel attendance by a witness or to produce books, papers, records, or records that are relevant and reasonable is made by a party, the presiding officer shall issue subpoenas.

(2) Subpoenas and orders issued under this subsection may be enforced pursuant to the rules of civil procedure.

[**SECTION 411. DISCOVERY.** For purposes of this section, "statement" includes records signed by a person of his oral statements, and records that summarize these oral utterances. Except in an emergency hearing under section 407, a party, upon written notice to another party at least [ ] days before an evidentiary hearing, is entitled to:

(1) obtain the names and addresses of witnesses to the extent known to the other party; and

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

(A) a statement of a person named in the initial pleading or any subsequent pleading if it is claimed that respondent's act or omission as to that person is the basis for the adjudication;

(B) a statement relating to the subject matter of the adjudication made by any party to another party or person;

(C) statements of witnesses then proposed to be called and of other persons having knowledge of facts that are the basis for the proceeding;

(D) all writings, including reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence; and

(E) investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the adjudication, to the extent that these reports contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions, or events that are the basis for the adjudication or reflect matters perceived by the investigator in the course of the investigation, or contain or include by attachment any statement or writing described in this section.

SECTION 412. CONVERSION.

(a) The adjudication in a disputed case of one type may be converted to an adjudication of another type under this article provided that:

(1) the adjudication at the time of conversion no longer meets the requirements under this article for adjudication of the type for which it was originally commenced; and

(2) at the time it is converted it meets the requirements under this article for the type of adjudication to which it is being converted.

(b) To the extent practicable and consistent with the rights of the parties and the requirements of this article relative to the new proceeding, the record of the original proceeding must be used in the new proceeding.

(c) The agency may adopt rules to govern the conversion of one type of proceeding under this article to another. The rules may include an enumeration of the factors to be considered in determining whether and under which circumstances one type of proceeding will be converted to another.

Comment

Under this section the presiding officer is empowered to convert from one type of disputed case adjudication to another in appropriate circumstances. Conversion may only occur if two requirements are satisfied: the situation that met the requirements under this article for the original proceeding must no longer exist, and the requirements for the new type of proceeding under this article must now be satisfied. Meeting both requirements is mandatory in order to prevent a presiding officer from converting an adjudication under section 402 to an informal adjudication in a situation where the procedural protections of section 402 are still justified under this article.

SECTION 413. DEFAULT. Unless displaced or modified by law other than this [act], if a party fails to attend or participate in a pre-hearing conference, hearing, or other stage of a disputed case, the presiding officer at his discretion may issue a default order.

Comment

Under this section the presiding officer has discretion to impose a default judgement. However, the presiding officer's discretion is displaced or modified by other law. Among the other laws that modify the presiding officer's discretion are the {state] rules of civil procedure. The section thus authorizes a presiding officer to issue a default judgement for the same reasons as contained in the state rules of civil procedure.

SECTION 414. LICENSES.

(a) This article applies when an opportunity for an evidentiary hearing is required by law

to formulate an order granting, denying, renewing, revoking, suspending, annulling, withdrawing, limiting, transferring, or amending a license.

(b) If an opportunity for an evidentiary hearing is not required by law for agency action on an application for a license, the agency shall give prompt notice of its action in response to the application. If the agency denies the application under this section, the agency shall include an explanation of the reasons for denial.

(c) When a licensee has made timely and sufficient application for the renewal of a license, the existing license does not expire until the application has been finally acted upon by the agency and, if the application is denied or the terms of the new license are limited, the last day for seeking review of the agency decision or a later date fixed by order of the reviewing court.

Comment

Subsection (1) is modeled on the following Administrative Procedure Acts: 1961 Model State Administrative Procedure Act, section 14(c), 1981 MSAPA, section 4-501; Arizona, A.R.S. Section 41-1065; Iowa, I.C.A. Section 17A.18; Wisconsin, W.S.A. 227.51.

Subsection (a)(1) is modeled on the Oregon Administrative Procedure Act, O.R.S. Section 183.435. Commercial and occupational licenses frequently represent such a substantial investment by the claimant, that, where the result is not based on test and inspection, an evidentiary hearing should be held to assure a high degree of accuracy.

Subsection (a)(2) is loosely based on the 1981 Model State Administrative Procedure Act, section 4-104 and the Florida Administrative Procedure Act, West's F.S.A. Section 120.60. This section does not include as much detail.

Subsection (b) was taken from the 1961 Model State Administrative Procedure Act, section 14(b), which has been adopted by many states. See, for example: Alabama, Ala.Code 1975 Section 41-22-19; Tennessee, T. C. A. Section 4-5-320; Michigan, M.C.L.A. 24.291; and Wisconsin, W.S.A. 227.51.

SECTION 415. ORDERS: INITIAL AND FINAL.

(a) If the presiding officer is the agency head, the presiding officer shall render a final order.

(b) If the presiding officer is not the agency head, the presiding officer shall render an initial order, which becomes a final order in [30]days, unless reviewed by the agency head on its own motion or on petition of a party.

(c) Unless the time is extended by stipulation, waiver, or upon a showing of good cause, an initial or final order must be served in writing within 90 days after conclusion of the hearing or after submission of memos, briefs, or proposed findings, whichever is later.

(d) An initial or final order must include, separately stated, findings of fact and conclusions of law on all material issues of fact, law, or discretion; on the remedy prescribed, and, if applicable, the action taken on a petition for stay of effectiveness. If a party has submitted proposed findings of fact, the order must include a ruling on the proposed findings. The order must also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An initial order must include a statement of any circumstances under which the initial order, without further notice, may become a final order.

(e) Findings of fact must be based exclusively upon the evidence of record in the disputed case and on matters judicially noticed.

(f) A presiding officer shall cause copies of the initial or final order to be delivered to each party and to the agency head within the time limits set in subsection (c).

Comment

See section 102(23) of this act for the definition of "initial order". This section draws

upon the 1981 Model State Administrative Procedure Act, Section 4-215. This section also draws upon useful provisions from several states. E.g. see: Alabama, Ala.Code 1975 Section 41-22-16; Iowa, I.C.A. Section 17A.15; Kansas, K.S.A. SECTION 77-526; Michigan, M.C.L.A. 24.281; Montana, MCA 2-4-623; Washington, RCWA 34.05.461.

SECTION 416. AGENCY REVIEW OF INITIAL ORDERS.

(a) An agency head, upon its own motion, may review an initial order. A party may appeal an initial order. Upon appeal by any party, the agency head shall review an agency order, except to the extent that:

(1) a provision of law precludes or limits agency review of the initial order; or

(2) the agency head, in the exercise of discretion conferred by a provision of law, declines to review the initial order.

(b) An appeal from an initial order must be filed with the agency head, or with any person designated for this purpose by rule of the agency, within [10] days after the initial order is rendered. If the agency head on its own motion decides to review an initial order, the agency head shall give written notice of its intention to review the initial order within [10] days after it is rendered. The [10]-day period for a party to file an appeal or for the agency head to give notice of its intention to review an initial order is tolled by the submission of a timely petition for reconsideration of the initial order pursuant to Section 415. A new [10]-day period starts to run upon disposition of the petition for reconsideration. If an initial order is subject both to a timely petition for reconsideration and to a petition for appeal or to review by the agency head on its own motion, the petition for reconsideration must be disposed of first, unless the agency head determines that action on the petition for reconsideration has been unreasonably delayed.

(c) An agency head that reviews an initial order 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 initial order, except to the extent that the issues subject to review are limited by a provision of law or by the agency head upon notice to all the parties. In reviewing findings of fact in initial orders by presiding officers, the agency head shall give due regard to the presiding officer's opportunity to observe the witnesses. The agency head shall personally consider the whole record or such portions of it as may be cited by the parties.

(d) An agency head may render a final order disposing of the proceeding or may remand the matter for further proceedings with instructions to the presiding officer who rendered the initial order. Upon remanding a matter, the agency head may order such temporary relief as is authorized and appropriate.

(e) A final order or an order remanding the matter for further proceedings under this section must identify any difference between this order and the initial order and shall state the facts of record which support any difference in findings of fact, state the source of law which supports any difference in legal conclusions, and state the policy reasons which support any difference in the exercise of discretion. A final order under this section must include, or incorporate by express reference to the initial order, all the matters required by Section 415(d). The agency head shall cause an order issued under this subsection to be delivered to the presiding officer and to all parties.

Comment

This section draws upon 1981 MSAPA, which reflects current practice in regard to initial orders, final orders and review of final orders more accurately than the 1961 MSAPA. Subsections (b) and (e) draw upon the Washington APA, West's RCWA 34.05.464, and the Kansas APA, K.S.A. § 77-527.

SECTION 417. RECONSIDERATION.

(a) Any party, within [15] days after notice of an initial or final order is rendered, may file a petition for reconsideration that states the specific grounds upon which relief is requested. The place of filing and other procedures, if any, shall be specified by agency rule.

(b) Filing a petition for reconsideration is not a prerequisite for seeking administrative or judicial review. No petition for reconsideration may stay the effectiveness of an order.

(c) If a petition for reconsideration is timely filed, and the petitioner has complied with the agency's procedural rules for reconsideration, if any, the time for filing a petition for judicial review does not commence until the agency disposes of the petition for reconsideration as provided in section 504(d).

(d) If a petition is filed under subsection (a), the presiding officer shall render a written order within [20] days denying the petition, granting the petition and dissolving or modifying the initial or final order, or granting the petition and setting the matter for further proceedings. The petition may be granted only if the presiding officer states findings of facts, conclusions of law, and the reasons for granting the petition.

Comment

This section is taken from the 1981 MSAPA and the Washington APA, West's RCWA 34.05.470. This section creates a general right to seek reconsideration of an initial or final order. Subsection (b) must be read concurrently with section 507(d), which excuses exhaustion to the extent that a provision of this [act] provides for excuse. Subsection (b) provides that excuse from seeking reconsideration.

SECTION 418. STAY. Except as otherwise provided by law other than this [act], a party may request an agency to stay an initial or final order within [five] days after it is rendered.

Comment

The 1961 MSAPA § 15 contained a provision for a stay that was continued in the 1981 Model State Administrative Procedure Act, Section 4-217. Stays are sometimes necessary to preserve the status quo pending agency review or judicial review.

SECTION 419. AVAILABILITY OF ORDERS; INDEX.

(a) Except as otherwise provided in subsection (b), an agency shall index, by caption and subject, all final orders in disputed cases and make the index available for public inspection and copying, at cost.

(b) Final orders privileged by law or order of court and final orders, the disclosure of which would constitute an unwarranted invasion of privacy or release of trade secrets, are not public records and may not be indexed.

(c) In each case in which a final order is excluded under subsection (b), the justification for the exclusion must be explained in writing and attached to the order.

(d) An agency may not rely on a final order as precedent in future adjudications unless the order has been indexed and made available for public inspection.

[(e) An agency may, in its discretion, designate a final order that contains a significant legal or policy determination of general application that is likely to recur as a precedent decision in its caption. The agency decision whether to designate a decision as a precedent decision is not subject to judicial review. Designation of a final order as a precedent decision is not rulemaking and need not be conducted under the provisions of article 3; however, an agency may not change, repeal, alter or modify a rule that the agency has enacted under article 3 through adjudication under this article.]

Comment

This section is entirely new. This section continues the concept, seen earlier in connection with rules, of preventing earlier decisional law known only to agency personnel from constituting the basis for decision in a disputed case. If the agency wishes to use a case as precedent in the future, it must make the order and decision in that case available to the public. The only situations in which an agency may rely on a disputed case as precedent without indexing and making that decision and order available to the public are described in subsection b of this section.

In some states there have been attacks on agency adjudications on the basis that the proceeding should be conducted under the provisions for rulemaking. In the case of SEC v. Chenery Corp., 332 U.S. 194 (1947) the United States Supreme Court held that the choice of whether to proceed by rulemaking or adjudication is left entirely to the discretion of the agency, because not every principle can be immediately promulgated in the form of a rule. In the words of the Supreme Court " Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations." Most states follow Chenery. See Illuminating a Bureaucratic Shadow World: Precedent Decisions under California's Revised Administrative Procedure Act, 21 J. Nat'l A. Admin. L. Judges 247 (2001) at n. 68.

This section makes clear that the choice between rulemaking and adjudication is entirely in the discretion of the agency. However, in order to prevent law that the public does not have access to from constituting the basis for decision, final orders must be indexed and available to the public. In order to promote further publicity in adjudications in which there is a clear legal or policy question involved, the agency is encouraged to designate or identify the decision as a "precedent' decision. Such designation prevents an attack on the adjudication on the basis that it constitutes a rule. See the California administrative procedure act at West's Ann. Cal. Gov. Code, § 11425.60

SECTION 420. AGENCY RECORD IN DISPUTED CASE.

(a) An agency shall maintain an official record of each disputed case.

(b) The agency record consists only of:

(1) notices of all proceedings;

(2) any pre-hearing order;

(3) any motions, pleadings, briefs, petitions, requests, and intermediate rulings;

(4) evidence received or considered;

(5) a statement of matters judicially noticed;

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

(7) proposed findings, requested orders, and exceptions;

(8) the record prepared for the presiding officer at the hearing, and any transcript of all or part of the hearing considered before final disposition of the proceeding;

(9) any final order, initial order, or order on reconsideration;

(10) all memoranda, data or testimony prepared under Section 410; and

(11) matters placed on the record after an ex parte communication.

(c) Except to the extent that this [act] or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in a disputed case and for judicial review of the case.

ARTICLE 5

JUDICIAL REVIEW

SECTION 501. RIGHT TO JUDICIAL REVIEW; FINAL AGENCY ACTION REVIEWABLE.

(a) Except as otherwise provided by this article, a person is entitled to judicial review of final agency action affecting that person. Final agency action for purposes of this [article] is agency action that is not intended by the agency, or reasonably perceived to be, indefinite, inconclusive, tentative, provisional, contingent, preparatory, preliminary, intermediate, or procedural.

(b) A person otherwise qualified under this [article] is entitled to judicial review of agency action not subject to review under subsection (a) if postponement of judicial review would result in:

(1) an inadequate remedy or substantial and irreparable harm to that person that outweighs the public benefit derived from postponement; and

(2) it appears likely that the person will prevail in judicial review of the agency action.

Comment

Subsection (a) of this section provides a right of judicial review of final agency action by appropriate parties. Under this section, the person seeking review must meet all of the requirements of this article, which include standing (section 5-106), exhaustion of remedies (section 5-107), and time for filing (section 5-102). The definition of "agency action" is found in Section 1-101. This section draws upon the 1981 MSAPA, and is similar to the judicial review provisions of Florida (West's F.S.A. SECTION 120.68), Iowa (I.C.A. SECTION 17A.19), Virginia (Va. Code Ann. SECTION 2.2-4026) and Wyoming (W.S.1977 SECTION 16-3-114).

Subsection (a) draws on the 1981 MSAPA and defines final and non-final agency action for purposes of this article. Under subsection (a), agency action that is not perceived to be, or is not intended to be, final by meeting the description for indefiniteness, inconclusiveness or indeterminacy in section (a). Agency action that is indefinite, inconclusive, tentative, provisional, contingent, preparatory, intermediate, or procedural is non-final. This definition of non-final as intended to be preliminary or otherwise tentative is widely used by courts. Dep't of Revenue v. Hogan, 198 Wis.2d 792, 543 N.W.2d 825 (1995); Essex Cty v. Zagata, 91 N.Y. 2d 447, 695 N.E. 2d 232 (1998); Union Pacific R.R. Co. v. Tax Comm'n, 2000 UT 40, 999 P.2d 17 (2000).

Subsection (a)deals with a particular problem that has created unfairness for some appellants as recognized in the 1981 MSAPA. If an appellant reasonably believes that agency action is, or is intended to be, preparatory, preliminary, or intermediate, that party often will not appeal that agency action because of that belief. However, if a reviewing court later holds that the agency action was final, the appellant will have failed to meet the time requirement for taking an appeal. Subsection (a) gives guidance to a party in that situation.

Subsection (b)creates a limited right to review of non-final agency action.

SECTION 502. REVIEW OF AGENCY ACTION OTHER THAN ORDER. A person otherwise qualified under this article is entitled to judicial review of agency rules and agency action other than an order if:

(1) the agency action is intended to be final or is the completion of action on that issue;

(2) postponement of judicial review of that issue would subject the person affected to a risk of substantial harm; and

(3) the issue involved is fit and appropriate for judicial resolution; and

(4) the judicial action does not substantially interfere with development of agency policy.

Comment

This section seeks to recognize the prudential exception to finality and ripeness sometimes recognized for rules and other types of agency action by agencies such as advisory letters and guidance documents. It seeks to incorporate the general tests for finality and ripeness taken from the cases of Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); FTC v. Standard Oil Co.,449 U.S. 232, 101 S.Ct. 488 (1980) and Bennett

v. Spear, 520 U.S. 154, 117 S.Ct. 1154 (1997), which have been cited with approval and followed in many states. Under this subsection, some appellant challenges or bases for challenge will be ripe for review, but many will not. The subsection seeks to furnish guidance to state courts attempting to apply the doctrines of finality and ripeness.

SECTION 503. RELATION TO OTHER JUDICIAL REVIEW LAW AND RULES. Unless otherwise provided by a statute of this state other than this [act], judicial review of agency action may be taken only by proceeding as provided by [state] [rules of appellate procedure] [rules of civil procedure]. An appeal from agency action may be taken regardless of the amount involved. An appeal may seek any type of relief available.

Comment

This section places appeals from final agency action within the existing state rules of appellate procedure. Such action may be preferred by some states because of constitutional provisions or because of the existence of rules of appellate procedure that the legislature may not wish to change. This practice was followed under the 1961 MSAPA, and is followed in a number of states today. See e.g.: Alaska (AS 44.62.560), California (West's Ann.Cal.Gov.Code section 11523), Delaware (29 Del.C. section 10143), Florida (West's F.S.A. section 120.68), Iowa (I.C.A. § 17A.20), Michigan (M.C.L.A. 24.302), Minnesota (M.S.A. § 14.63) (Appeal integrated with state appellate rules),Virginia (Va. Code Ann. SECTION 2.2-4026), Wyoming (W.S.1977 § 16-3-114).

SECTION 504. TIME FOR SEEKING JUDICIAL REVIEW OF AGENCY ACTION, LIMITATIONS.

(a) Except as otherwise provided in Section 316, and subject to Section 502, judicial review of a rule may be sought at any time.

(b) Judicial review of an order or other agency action other than a rule must be commenced within 30 days after issuance of the order or other agency action.

(c) A time for seeking judicial review under this section is tolled during any time a party

is pursuing an administrative remedy before the agency which must be exhausted as a condition of judicial review.

(d) A party may not file or petition for judicial review while seeking reconsideration under Section 417. During the time that a petition for reconsideration is pending before an agency, the time for seeking judicial review in subsection (b) is tolled.

Comment

This section follows the earlier MSAPA's in permitting a challenge to a rule at any time, but limiting procedural challenges to two years; and setting a 30 day limit for filing a judicial appeal from an order. Like the 1981 MSAPA, this act permits judicial appeals from agency action other than rulemaking and orders, and it therefore establishes a 30 day limitation for appeals from such action.

SECTION 505. STAYS PENDING APPEAL. The initiation of judicial review does not automatically stay a decision of the agency appealed from. An appellant may petition the reviewing court for a stay upon a showing of immediate, unavoidable, irreparable harm, and a colorable claim of error in the agency proceedings. The reviewing court may grant a stay whether or not the appellant first sought a stay from the agency.

Comment

This provision for stay permits a party appealing agency final action to seek a stay of the agency decision the court. This is similar to the 1961 MSAPA, but it adds standards to help guide appellants. The standards for issuing a stay are taken from the Virginia APA (Va. Code Ann. SECTION 2.2-4028), the Delaware APA (29 Del.C. SECTION 10144), and the Oregon APA (O.R.S. SECTION 183.482).

SECTION 506. STANDING. The following persons have standing to obtain judicial review of an agency action:

(1) a person to which, or against which, the agency action is specifically directed;

(2) a person that was a party to the agency proceedings that led to the agency action;

(3) a person eligible for standing under law of this state other than this [act]; and

(4) a person aggrieved or adversely affected by the agency action, [if the appellant's interests are not marginally related or inconsistent with the underlying statute which the appeal challenges].

Comment

This section adopts an approach to standing that incorporates the injury in fact test for standing. It does not include the "zone of interests" test from federal law. There are several reasons for this difference from federal standing law. First, states have explicitly rejected the federal approach to standing. See: *Rhode Island Opthalmological Soc. v. Director of Health*, 113 R.I. 16, 317 A.2d 124 (1974); *Alliance for Metropolitan Security v. Council*, 671 N.W.2d 905 (Minn. Ct. Apps., 2003); *Snyder's Drug Stores v. Board of Pharmacy*, 301 Minn. 28, 35, 221 N.W.2d 162, 166 (1974); *O'Connell v. Dept. of Community Affairs*, 874 So.2d 673 (Fla. App. 2004); *Greer v. Housing Auth.*, 122 Ill.2d 462, 120 Ill.Dec. 531 (1988); *Iowa Bankers Assn v. Iowa Credit Union Dept.*, 335 N.W.2d 439 (Iowa, 1983); *City of Des Moines v. Public Employment Relations Bd.*, 275 N.W.2d 753 (Iowa, 1979). These states have done so for various reasons. One is the perception that the zone of interests test is drawn from the specific language of the federal APA; the language of many state APAs is different. Another is that states have constitutional requirements that differ from the Article III requirements of the federal constitution. Those states that have rejected the zone of interest test have stated that this simpler test is preferable to searching for legislative intent in the absence of an express term conferring statutory standing. States rejecting the zone test have also done so with the purpose of making judicial review more freely available than in the federal arena. The zone test has been severely limited in the federal arena, as well. See Clarke v. Securities Industry Ass'n, 479 U.S. 388, 107 S.Ct. 750 (1987).

Subsections (a)(1)(2)and (3) confer standing, as of right, to persons within the categories described in those paragraphs. Paragraph (a)(3) incorporates any other provision of law that confers standing. Examples of this type of standing are statutes that expressly confer standing in general language such as, for example, "any person may commence a civil suit in his own behalf... to enjoin... an agency...alleged to be in violation of this chapter. . . . 16 U.S.C.A. § 1540, explained in Bennett v. Spear, 520 U.S. 154, 117 S.Ct. 1154(1997).

Subsection (4) uses the term person aggrieved or affected to describe classes of persons who have been found to have standing in decisional law, even though they do not meet the tests in subsections (1) & (2). An example of a person entitled to standing who is intended to be included under subsection (4) is a competitor. There are many other persons who have been

found to posses standing under this test. This subsection also may provide standing for persons challenging rules.

Part of subsection 4 is bracketed because it is a "weak" version of the zone of interests test employed in Clarke v. Securities Industry Ass'n, 479 U.S. 388, 107 S.Ct. 750 (1987) that defines zone of interest very broadly so that persons in more diverse categories or with more diverse status may be found to have standing.

SECTION 507. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

(a) Except as otherwise provided in subsection (b), a person may file a petition for judicial review under this [act] only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review, except a petition for reconsideration .

(b) A petitioner for judicial review of a rule need not have participated in the rulemaking proceeding upon which that rule is based.

(c) If the issue that a petitioner for judicial review under this subsection challenges was not raised and considered in a rulemaking proceeding:

(1) before bringing a petition for judicial review, the petitioner must petition the agency to initiate rulemaking under section 317 to take action to resolve or cure the issue or issues that the petitioner is challenging; and

(2) in the petition for judicial review the petitioner must disclose the petition to the agency for rulemaking and the agency action on that petition.

(d) A petitioner need not have exhausted his administrative remedies if this [act] or a statute other than this [act] provides that exhaustion is not required.

(e) the court may relieve a petitioner of the requirement to exhaust any or all

administrative remedies to the extent that the administrative remedies are inadequate or would result in irreparable harm.

Comment

This section creates a default requirement of exhaustion, which is generally followed in the states. It draws on provisions of the 1961 & 1981 MSAPAs. However, the section creates several exceptions to the default rule. Subsection (a)(1) seeks to create issue exhaustion in appeals from rulemaking for persons who did not participate in the rulemaking challenged. It excuses persons seeking judicial review of a rule who were not parties before the agency from the exhaustion requirement; but, if the issue that they seek to raise was not raised and considered in the rulemaking proceeding that they challenge, then they must first petition the agency to conduct another rulemaking to consider the issue. If the agency refuses to do so or if the agency conducts a second rulemaking that is adverse to the petitioner on the issue or issues raised in his petition for rulemaking, then the petitioner may seek judicial review. Subsection (a)(3) recognizes the judicially created exception to the exhaustion requirement where agency relief would be inadequate or would result in irreparable harm. In some states courts have held that irreparable harm that is a sufficient condition to excuse exhaustion exists only if it outweighs the public interest in exhaustion. State courts are free under this section to engage in that weighing test.

SECTION 508. AGENCY RECORD ON JUDICIAL REVIEW; EXCEPTION.

Judicial review of adjudication and rulemaking is confined to the agency record except when the petitioner alleges procedural error arising from matters outside the record or matters that are not evident from the record.

Comment

This section establishes a default closed record for judicial review of adjudication and rulemaking. It is well established in most states and in federal administrative procedure that, in case of adjudication, judicial review is based upon that evidence which was before the agency on the record. Otherwise, the standards of judicial review could be subverted by the introduction of additional evidence to the court that was not before the agency. See *Western States Petroleum Ass'n v. Superior Court*, 888 P.2d 1268 (Cal. 1995). For rulemaking, the record for judicial review is defined in Section 3-102 of this Act.

The section contains an exception to the closed record on review where petitioner alleges error, such as ex parte contacts, that does not appear in or is not evident from the record. Other

examples of error that do not appear or are not evident from the record are: improper constitution of the decision making body, grounds for disqualification of a decision maker, or unlawful procedure.

SECTION 509. SCOPE OF REVIEW.

(a) In judicial review of an agency action, the following rules apply:

(1) Except as provided by law of this state other than this [act], the burden of demonstrating the invalidity of agency action is on the party asserting invalidity.

(2) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

(3) The court may grant relief only if it determines that a person seeking judicial review has been prejudiced by one or more of the following:

(A) the agency erroneously interpreted or applied the law;

(B) the agency committed an error of procedure;

(C) the agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(D) an agency determination of fact is not supported by substantial evidence; or

(E) to the extent that the facts are subject to trial de novo by the reviewing court, the action was unwarranted by the facts.

(b) In making the determinations under this section, the court shall review the whole record or those parts of it cited by the parties, and shall take due account of the rule of prejudicial error.

Comment

Scope of review is notoriously difficult to capture in verbal formulas, and its application varies depending on context. For that reason, the drafters have chosen to return to shorter, skeletal formulations of the scope of review, similar to the 1961 MSAPA. See Ronald M. Levin, Scope of Review Legislation, 31 Wake Forest L. Rev. 647 (1996)at 664-66. William D. Araiza, In Praise of a Skeletal APA, 56 Admin. L. Rev. 979 (2004). (Judiciary, not legislature, appropriate body to evolve specific standards for review, because of great variety of agency action and contexts, and inability to describe how general standards of review should apply to many of them).

Subsections (a) (1) & (2) are taken from the 1961 and 1981 MSAPA. They describe the general burdens on the appellant and the approach under this Act. They are substantially similar to the general scope of review provisions of the Federal APA, 5 U.S.C. SECTION 706.

Subsection (a)(3)(A) & (B) identify the courts' power to decide questions of law and procedure. 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) of the 1961 MSAPA, and includes subsections (c) (1), (2) and (4) of the 1981 MSAPA. The section thus 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. Subsection (c) (2) is part of the 1961 MSAPA (section 15(g) and the 1981 MSAPA (section 5-116 (c) (1)-(6). This section is not intended to preclude courts from according deference to agency interpretations of law, where such deference is appropriate.

Subsection (c) defines the courts' power to review the exercise of agency discretion, and includes review of rules. Such review may include: agency reliance on factors that may not be taken into account under, or ignored factors that must be taken into account under, law; agency action does not bear a reasonable relationship to statutory purposes or requirements; necessary factual premises of the action do not withstand scrutiny under the relevant standard of review; agency action is unsupported by any explanation or rests upon reasoning that is seriously flawed; the agency failed, without adequate justification, to give reasonable consideration to an important aspect of the problems presented by the action; the agency action is, without legitimate reason and adequate explanation, inconsistent with prior agency policies or precedents; without an adequate justification, to consider or adopt an important alternative solution to the problem addressed in the action; The agency failed to consider substantial arguments, or respond to relevant and significant comments, made by the participants in the proceeding that gave rise to the agency action; the agency has imposed a sanction that is greatly out of proportion to the magnitude of the violation; or the action fails in other respects to rest upon reasoned decision making. These factors are taken from: Ronald L. Levin and William E. Murano, Scope-of-Review Doctrine: Restatement and Commentary, 38 Admin. L. Rev. 233(1986) and Blackletter Statement of Administrative Law, 54 Admin. Law Rev. 17 (2002)(Section on Administrative and Regulatory Law, American Bar Association).

ARTICLE 6

OFFICE OF ADMINISTRATIVE HEARINGS

SECTION 601. CREATION OF OFFICE OF ADMINISTRATIVE HEARINGS.

(a) As used in this [article], office means the [Office of Administrative Hearings].

(b) The Office of Administrative Hearings is created as an independent agency for the purpose of separating the adjudicatory function from the investigatory, prosecutorial and policy-making functions of agencies.

(c) Administrative law judges shall be selected and appointed to the Office [by the Governor upon screening and recommendation of a judicial nominating commission] [through competitive examination in the classified service of state employment] [by the chief administrative law judge].

(d) The hearing officers and administrative law judges of the agencies to which this [act] applies shall become employees of the Office.

SECTION 602. DUTIES OF OFFICE. [Except as provided in this [article], the office shall administer the resolution of all disputed cases [unless the agency head hears the case without delegation or assignment to presiding officer]]. [The office shall employ administrative law judges as necessary to conduct proceedings required by this [act] or provisions of law other than this [act].

SECTION 603. APPOINTMENT AND DUTIES OF CHIEF ADMINISTRATIVE LAW JUDGE.

(a) The office is headed by a chief administrative law judge [appointed by the Governor

with advice and consent of the Senate for a term of [6] years], and until a successor is appointed. A chief administrative law judge may be removed only for good cause following notice and an opportunity for a disputed case hearing.

(b) The chief administrative law judge:

(1) must take an oath of office as required by law prior to the commencement of duties;

(2) shall have substantial experience in administrative law;

(3) shall devote full time to the duties of the office and shall not engage in the practice of law;

(4) shall be eligible for reappointment;

(5) receive the salary provided by law;

(6) must be licensed to practice law in the state and admitted to practice for a minimum of five years;

(7) has the powers and duties specified in this [article]; and

(8) is subject to the code of conduct for administrative law judges.

(c) The chief administrative law judge may employ a staff in accordance with law.

SECTION 604. POWERS OF CHIEF ADMINISTRATIVE LAW JUDGE. The chief administrative law judge shall:

(1) supervise the office;

(2) appoint and remove administrative law judges in accordance with this [article];

(3) assign administrative law judges in any case referred to the office;

(4) protect and ensure the decisional independence of each administrative law judge;

(5) establish and implement standards and provide equipment, supplies and technology for administrative law judges;

(6) provide and coordinate continuing education programs and services for administrative law judges, including research, technical assistance, technical and professional publications, compile and disseminate information, and advise administrative law judges of changes in the law relative to their duties;

(7) adopt rules to implement this [article] through rulemaking proceedings in accordance with this [act];

(8) adopt a code of conduct for administrative law judges; and

(9) monitor the quality of adjudications in disputed cases through training, observation, feedback and, when necessary, discipline of administrative law judges who do not meet appropriate standards of conduct and competence.

SECTION 605. ADMINISTRATIVE LAW JUDGES.

(a) An administrative law judge:

(1) must take an oath of office as required by law prior to the commencement of duties;

(2) must be admitted to practice law [in the state];

(3) is subject to the requirements and protections of [classified service of state employment and the state ethics code];

(4) is subject to the code of conduct for administrative law judges;

(5) may be removed, suspended, demoted, or subject to disciplinary or adverse actions only for good cause, after notice and an opportunity to be heard and a finding of good

cause by an impartial presiding officer;

(6) receive compensation provided by law;

(7) be subject to a reduction in force only in accordance with established [civil service][merit system] procedure;

(8) [must devote full time to the duties of the position] [shall not engage in the practice of law unless serving as a part-time administrative law judge];

(9) may not perform duties inconsistent with the duties and responsibilities of an administrative law judge; and

(10) is subject to administrative supervision by the chief administrative law judge.

(b) An administrative law judge is not responsible to or subject to the supervision, direction or direct or indirect influence of an officer, employee, or agent engaged in the performance of investigatory, prosecutorial, or advisory functions for an agency.

SECTION 606. COOPERATION OF STATE AGENCIES.

(a) All agencies must cooperate with the chief administrative law judge in the discharge of the duties of the office.

(b) An agency may not select or reject a particular administrative law judge for a particular proceeding.

SECTION 607. POWERS OF ADMINISTRATIVE LAW JUDGES. An administrative law judge may:

(1) issue subpoenas;

(2) administer oaths;

(3) control the course of the proceedings;

(4) engage in or encourage the use of alternative dispute resolution methodologies as appropriate;

(5) order a party, a party's attorney, or other authorized representative, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay; and

(6) perform other necessary and appropriate acts in the performance of the judge's duties.

SECTION 608. DECISION-MAKING AUTHORITY OF ADMINISTRATIVE LAW JUDGES.

(a) Unless the agency head elects to conduct the initial hearing in a disputed case, in which case the agency head shall render a final decision under Section 412(a), an administrative law judge assigned to a proceeding shall render the initial decision of the agency in all adjudications in a disputed case except for disputed cases involving the following agencies:

(1) [List name of agency].

(b) Except as otherwise provided by law, an administrative law judge shall issue an initial decision unless the agency authorizes the issuance of a final decision.

(c) If a matter is referred to the office by an agency, the agency may take no further adjudicatory action with respect to the proceeding, except as a party litigant, as long as the office has jurisdiction over the proceeding. [This subsection may not be construed to prevent an appropriate interlocutory review by the agency or an appropriate termination or modification of the proceeding by the agency.]

ARTICLE 7

SECTION 701. EFFECTIVE DATE. This [act] takes effect on [date] and governs all agency proceedings, and all proceedings for judicial review or civil enforcement of agency action, commenced after that date. The [act] does not govern adjudications for which notice was given prior to that date under Section 403 and all rulemaking proceedings for which notice was given or a petition filed before that date.