D R A F T

FOR DISCUSSION ONLY

PROPOSED REVISIONS TO THE MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 1981

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

First Discussion Draft

For the Meeting of the Committee
November 12-14, 2004

WITH GENERAL INTRODUCTION AND COMMENTS

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MODEL STATE ADMINISTRATIVE PROCEDURE ACT

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MODEL STATE ADMINISTRATIVE PROCEDURE ACT

GENERAL INTRODUCTION

This proposed revision adopts a slightly different approach to the concept of the model act. In order to make decisions for revision of state Administrative Procedure Acts for state legislatures clearer and more easily adaptable to the differing histories, constitutions and political structures in the various states, the Committee has determined to adopt a two part approach to the revision of the Model State Administrative Procedure Act. The first part is a set of "core" provisions. These core provisions resemble the widely adopted 1961 Model State Administrative Procedure Act. They consist of a minimum core of administrative procedure provisions which can be adopted by a state just as they are drafted with only very minor revisions to fit local conditions. They contain sufficient detail to be used effectively as a state's administrative procedure act without any additions. They are presented in a set of separate articles entitled "Core Articles", and each of the sections in these core articles is designated with a "C" followed by the section number. The second part is a set of "optional" provisions. These articles are designated "Optional Articles", and each section of the optional article is preceded by the letter "O" to signify that fact. These optional articles contain more procedural devices and details than the core articles. The Committee is of the opinion that these optional provisions will be useful to states which desire a greater degree of detail, or which need to solve problems that are not covered in the core provisions. This approach is consistent with the concept of a "model" act—as distinguished from a uniform act. A model act is predicated upon the idea that, because differences in state constitutions as well as historical and political differences, in some areas the law cannot become uniform in all of the states. Administrative procedure is one of the leading examples of this phenomenon. This core/optional approach is consistent with that view and represents an attempt to put it into practice in a manner that is of maximum benefit to the states.

MODEL STATE ADMINISTRATIVE PROCEDURE ACT

CORE PROVISIONS

CORE ARTICLE I

GENERAL PROVISIONS

§ C1-101. SHORT TITLE. This Act may be cited as the [state] Administrative Procedure Act.

§ C1-102 DEFINITIONS

(1) ADJUDICATION. Means an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues an order.

(2) AGENCY. Means each statewide board, authority, commission, institution, department, division, or officer, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf of or under the authority of the agency head, or other state government entity (whether or not subject to review by another agency) that is:

(a) authorized or required by law to make rules or to adjudicate; or

(b) created by legislative action.

The term does not include the Governor, the Legislature or the Judiciary. The term does not include any political subdivision of the state or any of the administrative units, boards, authorities commissions or other entities of such political subdivision. An administrative unit otherwise qualifying as an agency shall be treated as an agency even though located within

or subordinate to another agency.

(3) AGENCY ACTION. Means

(a) The whole or part of any agency order or rule; or

(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 placed upon it by law.

(4) AGENCY HEAD. Means an individual or body of individuals in whom the ultimate legal authority of the agency is vested.

(5) INTERPRETIVE STATEMENT. Means a written expression of the opinion of an agency, entitled an interpretive statement by the agency head or its designee, about the meaning of a statute or other provision of law, of a court decision, or of an agency order. An interpretive statement is advisory only, and does not bind any person outside the agency.

(6) LAW. Means the whole or a part of the federal or state Constitution, or of any federal or state (a) statute, (b) case law or common law, (c) rule of court, (d) executive order, or (e) rule or order of an administrative agency.

(7) LICENSE. Includes the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law.

(8) LICENSING. Includes a state agency process relating to the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(9) 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.

(10) 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 or to participate in the agency proceedings.

(11) PERSON. Means an individual, partnership, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character.

(12) POLICY STATEMENT. Means a written description of the current approach of an agency, entitled a policy statement by the agency head or its designee, to implementation of a statute or other provision of law, of a court decision, or of an agency order, including, where appropriate, the agency's current practice, procedure, or method of action based upon that approach. A policy statement is advisory only, and does not bind any person outside the agency.

(13) RULE. Means the whole or a part of an agency statement of general applicability that implements, interprets or prescribes

(a) law or policy or

(b) the organization, procedure or practice requirements of an agency.

The term includes amendment, repeal or suspension of an existing rule.

(14) RULEMAKING. Means the process for adopting, amending, or repealing a rule.

Comment

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. To that end, the language has been extended to include not only those statewide agencies that adjudicate or make rules, but also any agency with statewide jurisdiction created by the legislature. This will include state agencies that affect individuals in ways different from adjudication or rulemaking.

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.

Interpretive Statement. This definition is drawn from WA, Wash.Rev.Code § 34.05.010(8) (1990). It recognizes the need for interpretive statements that an agency will prepare 1) as a guide to its employees and 2) as a guide to the public. An agency interpretive statement must be labeled as such in language similar to the following: This is an interpretive statement that is intended to explain the meaning of [state the language in the statute, court order, or agency order that is being interpreted].

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 § 11405.50.

Person. This broad definition includes agencies other than the one against which rights are asserted. It is based on the Tennesee APA, the California APA and the 1981 MSAPA. This definition means that another agency may petition or take such action as a natural person could take in asserting rights.

Policy Statement. This definition is taken from the Washington Administrative Procedure Act, RCWA 34.05.010(15). See also, Va. Administrative Procedure Act, Va. Code Ann. § 2.2-4001, which is similar to the WA provision, but does not have a provision requiring labelling. A policy statement must be labeled as such in language similar to the following: This is a policy statement intended to explain the agency position on [insert subject and statute, court order, or agency order that is being explained].

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.

§ C1-103. GENERAL PURPOSES

(1) This [state] Administrative Procedure Act shall be broadly construed to achieve its purposes.

(2) The purposes of the [state] Administrative Procedure Act are:

(a) to clarify the existing law of administrative procedure;

(b) to increase public accountability of administrative agencies in carrying out their most important functions;

(c) to increase public access to governmental information;

(d) to assure fairness of agencies in their conduct of adjudication;

(e) to increase public participation in the formulation of administrative rules; and to simplify and restate the law of judicial review of agency action.

(3) In accomplishing its objectives, the intention of this chapter is to strike a fair balance between these purposes and the need for efficient, economical and effective government administration, and one that is consistent with the state and federal constitutions.

Comment

Statements of purpose are often of substantial assistance in interpreting and understanding a statute, especially a complex one.

The following (nonexhaustive) list includes some states that have statements of purpose in their APAs: Alabama, see Ala.Code 1975 § 41-22-2; California, see West's Ann.Cal.Gov.Code § 11340.1; Iowa, see I.C.A. § 17A.1; Maryland, see MD Code, State Government, § 10-201; Michigan, see M.S.A. § 14.001; Minnesota, see M.S.A. § 14.001; Texas, see V.T.C.A., Government Code § 2001.001; Virginia, see Va. Code Ann. § 2.2-4000;

Washington, see West's Revised Code of Washington, 34.05.001.

Subsection B is applicable to all agencies; however, subsection B.2 makes clear that this section does not include all agency action, only important agency action. For example, an adjudicatory procedure is not required for all particular agency action. This is a change from the 81 MSAPA, under which every particular action constituted an adjudication and had to be resolved by use of one of at least three adjudicative procedures.

§ C1-104. APPLICABILITY

(1) The provisions of this Act shall apply to all agencies unless expressly exempted by this chapter or expressly exempted from the provisions of this Act by another statute.

(2) No legislation enacted subsequent to this Act shall supersede or diminish the provisions of this statute unless the subsequent statute expressly so states in language that includes the title of this statute.

(3) This chapter creates procedural rights only and is not intended to affect or change any substantive rights of individuals or agencies; this chapter does not augment or change the authority of an agency to act, except with regard to procedural matters addressed in this statute.

Comment

This section is intended to define which agencies are subject to the procedural provisions of this act. It is largely patterned on the same provision in the 81 MSAPA.

Many states have made use of an applicability provision to define the coverage of their Administrative Procedure Act. See: Iowa, I.C.A. § 17A.23; Kansas, K.S.A. § 77-503; Kentucky, KRS § 13B.020; Maryland, MD Code, State Government, § 10-203; Minnesota, M.S.A. § 14.03; Mississippi, Miss. Code Ann. § 25-43-1.103; Washington, West's RCWA 34.05.020. These states include ones using primarily the 61 Administrative Procedure Act and others using the 81 MSAPA.

§ C1-105. SUSPENSION OF ACT'S PROVISIONS WHEN NECESSARY TO AVOID LOSS OF FEDERAL FUNDS

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

(2) If any provision of this chapter is suspended pursuant to this section, the Governor shall promptly report the suspension to the Legislature. The report may include recommendations concerning desirable legislation that may be necessary to conform this chapter to federal law, including the exemption, if appropriate, of a particular program from the provisions of this chapter.

Comment

Alternate Approach. Washington in its new Administrative Procedure Act has chosen a different method to accomplish this goal which the revision committee may wish to consider. Washington makes suspension of the state administrative act automatic and self executing, if that is possible:

> Title 34. Administrative Law (Refs & Annos)
> Chapter 34.05. Administrative Procedure Act (Refs & Annos)
> Part I. General Provisions
> 34.05.040. Operation of chapter if in conflict with federal law
>
> If any part of this chapter is found to be in conflict with federal requirements which are a condition precedent to the allocation of federal funds to the state, the conflicting part of this chapter is inoperative solely to the extent of the conflict and with respect to the agencies directly affected, and such findings or determination shall not affect the operation of the remainder of this chapter in its application to the agencies concerned.

This approach has the advantage of simplicity and transparency. However, it must be asked whether there may not arise questions regarding the operation of what constiututes "inoperative solely to the extent of the conflict" in the Washington version.

§ C1-106. WAIVER. Except to the extent precluded by another provision of law, a person may waive any right conferred upon that person by this Act.

§ C1-107. INFORMAL SETTLEMENTS. Except to the extent precluded by another provision of law, informal settlement of matters that may make unnecessary more elaborate proceedings under this Act is encouraged. Agencies shall establish by rule specific procedures to facilitate informal settlement of matters. This section does not require any party or other person to settle a matter pursuant to informal procedures, except as provided by law.

Comment

This is the same provision as the 81 MSAPA section for informal settlement. This section expressly encourages informal settlements of controversies that would otherwise end in more formal proceedings. Obviously, economy and efficiency in government commends such a policy except as it is otherwise precluded by law. A requirement that each agency issue rules providing for informal settlement procedures assures that everyone is on notice as to the availability and utility of such procedures. When accepted by an agency an offer of settlement becomes an "order" because it fits the Section 1-102(9) definition of that term. The last clause of the section "except as provided by law" is intended to make clear that other provisions of this act or other statutes may make provisions for informal settlement procedure, and this section and parties are subject to those other provisions.

§ C1-108. EFFECTIVE DATE. This Act takes effect on [date] and does not govern proceedings pending on that date. This Act governs all agency proceedings, and all proceedings for judicial review or civil enforcement of agency action, commenced after that date. This Act also governs agency proceedings conducted on a remand from a court or another agency after the

effective date of this Act.

§ C1-109. SEVERABILITY. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are severable.

Comment

This is the provision from the 81 MSAPA. It is the standard NCCUSL severability provision.

CORE ARTICLE II

PUBLIC ACCESS TO AGENCY LAW AND POLICY

§ C2-101. ADMINISTRATIVE RULES EDITOR; PUBLICATION, COMPILATION, INDEXING, AND PUBLIC INSPECTION OF RULES.

(1) The [administrative rules editor/secretary of state/other] [editor hereafter] shall be responsible for administering the provisions of this section.

(2) Subject to the provisions of this Act, the [editor] shall prescribe a uniform numbering system, form, and style for all proposed and adopted rules caused to be published by that office [, and shall have the same editing authority with respect to the publication of rules as the [reviser of statutes] has with respect to the publication of statutes].

(3) The [administrative bulletin] shall be published in a format and medium as prescribed by the [editor] no less frequently than [once per _] and in writing upon request. 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 that issue or the date of its dissemination via the format and medium as prescribed. The [administrative bulletin] must contain:

(a) 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;

(b) 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;

(c) any other notices and materials designated by [law] [the editor] for publication therein; and

(d) an index to its contents by subject.

(4) The [administrative code] shall be compiled, indexed by subject, and published in a format and medium as prescribed by the [editor]. All of the effective rules of each agency must be published and indexed in that publication.

(5) The [editor] may omit from the [administrative bulletin or code] any proposed or filed adopted rule, or portion thereof, the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if:

(a) knowledge of the rule or portion thereof is likely to be important to only a small class of persons;

(b) on application to the issuing agency, the proposed or adopted rule is made available in a format or medium as prescribed by the [editor] at no cost or if in printed form at no more than its cost of reproduction; and

(c) the [administrative bulletin or code] contains a notice stating in detail the specific subject matter of the omitted proposed or adopted rule and how a copy of the omitted material may be obtained.

(6) 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 [editor] without charge, or in writing upon request without charge and to all subscribers at a cost to be determined by the [editor]. 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 the index to those rules.

(7) Except as otherwise required by a provision of law, subsections (1) through (6) of this section do not apply to rules governed by § C3-114 Special Provisions for Certain Classes of Rule, and the following provisions apply instead:

(a) Each agency shall maintain an official, current, and dated compilation that is indexed by subject, containing all of its rules within the scope of §3-114. Each addition to, change in, or deletion from the official compilation must also be dated, indexed, and a record thereof kept. The compilation must be made available for public inspection and copying and online via the internet. Certified copies of the full compilation must also be furnished to the [secretary of state, the attorney general or made available online via the internet or other appropriate technology], and be kept current by the agency at least every [30] days.

(b) A rule subject to the requirements of this subsection may not be relied on by an agency to the detriment of any person who does not have actual, timely knowledge of the contents of the rule until the requirements of this section are satisfied. The burden of proving that knowledge is on the agency. This provision is also inapplicable to the extent necessary to avoid imminent peril to the public health, safety, or welfare.

Comment

Article II is intended to provide easy public access to agency law and policy that are relevant to agency process. Article II also adds provisions for electronic publication of the administrative bulletin and code. Generally, this section is modeled after the 81 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. Section (7) is important to provide for public access to all rules and notice of applicable rules, even though those rules are exempted or excused from normal rulemaking procedures under section C3-114 *infra*. That section provides for certain specific exemptions from rulemaking for situations in which it is believed that the costs of rulemaking outweigh the benefits, where an area that requires privacy

such as law enforcement is involved, or where a party would have an unfair advantage if normal procedure were followed. For more explanation, see § 3-114 *infra*..

§ C2-102. REQUIRED AGENCY RULEMAKING AND RECORDKEEPING. In addition to the 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 rules descriptions in plain English of the process for application for license, benefits available or other matters for which an application would be appropriate unless such process is prescribed by a statute;

(4) It shall be the duty of the agency to file with the [editor] all rules and all interpretive, policy or other statements formulated, adopted or used by the agency in the discharge of its functions, including an index of those documents.

(5) It shall be the duty of the agency to make available for public inspection and copying, at cost, and index by name and subject all final orders, decisions, and opinions, except

(a) those expressly made confidential; or

(b) those privileged by statute or order of court;

(c) those necessary to prevent a clearly unwarranted invasion of privacy or release of trade secrets.

(d) In each case the justification for the deletion must be explained in writing and attached to the order.

(e) A written final order may not be relied on as precedent by an agency to the detriment of any person until it has been made available for public inspection and indexed in the manner described in subsection (5). This provision is inapplicable to any person who has actual timely knowledge of the order. The burden of proving that knowledge is on the agency.

Comment

Like the 81 MSAPA, the object of this section is to eliminate "secret law." It is modeled on the 61 Model State Administrative Procedure Act, Sections 2(a) (4) & 2(b), the 81 MSAPA, Sections 2-102 & 103, and the Kentucky Administrative Procedure Act, KRS § 13A.100. Persons seeking licenses or benefits should have a readily available and understandable reference source from the agency. The section makes rules and orders available to the public, and forbids use of either as precedent if they are not made available. The section also makes interpretive and policy statements available to the public through the rules editor.

§ C2-103. DECLARATORY RULINGS BY AGENCY

(1) Any interested person may petition an agency for a declaratory statement about the applicability of any statutory provision or of any rule or prior order issued by the agency.

(2) Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition.

(3) Within sixty days after receipt of a petition pursuant to this section, an agency shall either deny the petition in writing or schedule the matter for hearing. If the agency denies the petition, it shall promptly notify the person who filed the petition of its decision, including a brief statement of the reasons therefor. A declaratory order has the same status and binding effect as any other order issued in an agency adjudicative proceeding.

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 81 MSAPA, Section 2-103 and Hawaii Revised Statutes, Section 91-8.

§ C2-104. MODEL RULES

(1) The [Attorney General] shall publish model procedural rules for use by the agencies. The model rules shall include general procedural functions and duties of as many agencies as is practicable.

(2) All agencies, in adopting rules of procedure pursuant to § C2-102 of this subsection, shall adopt those model rules that are practicable. Any agency that adopts a rule of procedure that differs from the model rules shall state the reasons why the particular section of the model rules is impractical for that agency.

Comment

The 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 impractical for that particular agency.

The availability of model rules will be helpful to smaller agencies that lack sufficient resources to draft their own rules effectively.

Like § 2-105 of the 81 MSAPA, this section requires all agencies to use the model rules as the basis for the rules that they are required to adopt under § C2-102. An agency may deviate from the model rules only for impracticability.

States with model rules provisions: Arkansas, A.C.A. § 25-15-215; Montana, MCA 2-4-202; Oregon, O.R.S. § 183.341; New Hampshire, N.H. Rev. Stat. § 541-A:30-a; Nebraska, Neb.Rev.St. § 84-205.

CORE ARTICLE III

RULEMAKING

ADOPTION AND EFFECTIVENESS OF RULES

§ C3-101. RULEMAKING DOCKET. Each agency shall maintain a current, public rulemaking docket. The rulemaking docket must list each pending rulemaking proceeding. The docket shall indicate or contain: the subject matter; notices; where written or electronic comments can be inspected; time within which written or electronic comments may be made; electronic and written requests for public hearing and information about the public hearing, if any, and including the names of the persons making the request; how comments may be made in writing and electronically; and the timetable for action.

Comment

This section is modeled on Minn. M.S.A. § 14.366.

§ C3-102. NOTICE OF PROPOSED RULE ADOPTION.

(1) 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 proposed rule adoption must include:

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

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

(c) subject to [§],

(d) the text of the proposed rule;

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

(f) where, when, and how persons may demand an oral proceeding on the proposed rule if the notice does not already provide for one.

(2) Within [3] days after its publication in the [administrative bulletin], the agency shall cause a copy of the notice of proposed rule adoption to be mailed or sent electronically to each person who has made a timely request to the agency for a mailed or electronic copy of the notice. An agency may charge persons for the actual cost of providing them with written mailed copies where a person has made a request for a written copy.

Comment

This section is taken from the 81 MSAPA, § 3-103.

§ C3-103. PUBLIC PARTICIPATION

(1) For at least [30] days after publication of the notice of proposed rule adoption, an agency shall afford persons the opportunity to submit electronically or in writing, argument, data, and views on the proposed rule.

(2) An agency may schedule an oral proceeding on a proposed rule if such hearing is not required by law. At that proceeding, persons may present oral argument, data, and views on the proposed rule.

(a) An oral proceeding on a proposed rule may not be held earlier than [20] days after notice of its location and time is published in the [administrative bulletin].

(b) The agency, a member of the agency, or another presiding officer

designated by the agency, shall preside at a required oral proceeding on a proposed rule. If the agency does not preside, the presiding official shall prepare a memorandum for consideration by the agency summarizing the contents of the presentations made at the oral proceeding. Oral proceedings must be open to the public and be recorded by stenographic or other means.

(3) Each agency shall issue rules for the conduct of oral rule-making proceedings. Those rules may include provisions calculated to prevent undue repetition in the oral proceedings.

Comment

This section is substantially similar to § 3-104 of the 81 MSAPA. However, the decision about whether to hold an oral hearing is left to the discretion of the agency in the absence of a statutory or constitutional requirement that an oral hearing be held.

§ C3-104. TIME AND MANNER OF ADOPTION

(1) An agency may not adopt a rule until the period for making electronic or written submissions and oral presentations has expired.

(2) Within two years after the later of (i) the publication of the notice of proposed rule adoption, or (ii) the end of oral proceedings thereon, an agency shall adopt a rule pursuant to the rule-making proceeding or terminate the proceeding by publication of a notice to that effect in the [administrative bulletin].

(3) Before the adoption of a rule, an agency shall consider the written submissions, electronic submissions, oral submissions or any electronic or written memoranda summarizing oral submissions provided for by this Chapter.

(4) Within the scope of its delegated authority, an agency may use its own

experience, technical competence, specialized knowledge, and judgment in the adoption of a rule.

Comment

This section is substantially similar to § 3-106 of the 81 MSAPA. However, in subsection (b) the agency has been given a substantially longer period of time to act.

§ C3-105. VARIANCE BETWEEN NOTICE OF RULE AND RULE ADOPTED

(1) An agency shall not adopt a rule that substantially differs from the rule proposed in the notice of proposed rule adoption on which the rule is based unless all of the following apply:

(a) The differences are within the scope of the matter announced in the notice of proposed rule adoption and are in character with the issues raised in that notice; and

(b) The differences are a logical outgrowth of the contents of that notice of proposed rule adoption and the comments submitted in response thereto; and

(c) The notice of proposed rule adoption provided fair warning that the outcome of that rule-making proceeding could be the rule in question.

Comment

This section is based upon the 81 MSAPA, section 3-107, Mississippi Administrative Procedure Act, Miss. Code Ann. § 25-43-3.107 and the Minn. Administrative Procedure Act, M.S.A. § 14.05. It is an attempt to strike a balance between the need for notice to the public in rulemaking and the need of the agency to make modifications in proposed rules as a result of comments received. It draws on the federal "logical outgrowth" test. See *First Am. Discount Corp. v. Commodity Futures Trading Comm'n,* 222 F.3d 1008, 1015 (D.C.Cir.2000); *Arizona Pub. 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).

§ C3-106. GENERAL EXEMPTION FROM PUBLIC RULEMAKING

PROCEDURES

(1) To the extent an agency for good cause finds that any requirements of Sections 3-102 through 3-105 are unnecessary, impracticable, contrary to the public interest or noncontroversial, those requirements do not apply. The agency shall incorporate the required finding and a brief statement of its supporting reasons in each rule adopted in reliance upon this subsection.

(2) In an action contesting a rule adopted under subsection (a) of this section, the burden is upon the agency to demonstrate that any omitted requirements of Sections 3- 102 through 3-105 were impracticable, unnecessary, or contrary to the public interest in the particular circumstances involved.

(3) The [attorney general/governor/other official] may object in writing or electronically to a rule enacted under subsection (a) of this section. Such objection shall be filed with the agency and with the secretary of state. The objected to rule becomes invalid after 180 days from the time of filing the written objection; however, the agency may reenact the rule by following the procedures of sections 3-102 to 3-105 of this chapter.

(4) In the event the agency finds for good cause that a rule will be noncontroversial or that compliance with sections 3-102 to 3-105 of this chapter is unnecessary, the agency shall publish said rule in the Bulletin 30 days before it becomes effective. Said notice shall state that if any person objects to the rule within the following 30 day period by written, oral or electronic communication to the agency, said rule will be withdrawn. If such notice is received, the agency shall withdraw the objected to rule; however, the agency may enact the statement as a rule by following the provisions of sections 3-102 to 3-105 of this chapter.

Comment

This section is taken from the 81 MSAPA, Section 3-108, and the Iowa Administrative Procedure Act, I.C.A. § 17A.4. The 61 Model State Administrative Procedure Act in section 3(b) provided for exemption, but only in the case of "imminent peril to the public health, safety, or welfare". 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. Recognizing that there may be more justifications than emergency for exemption, this section adopts a broader rule. Thus, a situation where the agency is merely making a correction that the agency believes is noncontroversial may be adopted without formal rulemaking procedures. See the VA Fast-Track Regulation provision at Va. Code Ann. § 2.2-4012.1.

In order to prevent misuse of this procedural device, sections (2) & (3) give two remedies: 1) In an action brought by a member of the public, subsection (b) places the burden of proof on the agency. As explained in the comment to the 81 MSAPA, section 3-108, this is a device with serious consequences for the agency, and should discourage use of the device except in situations where it is clearly justified. Observe that subsection (2) does not contain a burden of proof provision for rules that are objected to because, since an objection has been made, *ipso facto* they are controversial: if a party or official is objecting to the exemption, then that objection without more makes the rule controversial, provided that the objecting party is acting in good faith. 2) In addition, if a designated official, who will differ from state to state, objects at any time, then the rule adopted under subsection (1) becomes invalid in 180 days, but the agency can reenact the identical rule if it follows the normal rulemaking procedure in sections C3-102 to C3-105.

§ C3-107. EXEMPTION FOR CERTAIN STATEMENTS OR RULES. An agency need not follow the procedures of sections 3-102 to 3-105 for interpretive statements and policy statements. Interpretive statements and policy statements must include a statement that it was adopted pursuant to this section when published in the administrative bulletin. Interpretive statements and policy statements are advisory only, and a reviewing court may determine de novo the validity of an interpretive or policy statement adopted under this section.

Comment

This section is modeled largely on the recent revision of the Washington Administrative Procedure Act. See Wash. Wash.Rev.Code § § 34.05.010(8), Wash.Rev.Code § 34.05.010(14) , Wash.Rev.Code § 34.05.230(1) (1990), and on the 81 MSAPA, section 3-109.

For the definition of interpretive statement, see *supra*, definitions section C1-102(5); for the definition of policy statement, see *supra* definitions section C1-102(12).

This section recognizes the need for interpretive statements 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 channelling. The public needs to know the agency opinion about the meaning of the law and regulations that it administers. Increasing public knowledge and understanding is good, because it 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 interpretive and policy statements 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. 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 § 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. §§ 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., § 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 § 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. § 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).

§ C3-108. CONCISE EXPLANATORY STATEMENT

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

statement containing:

(a) its reasons for adopting the rule; and

(b) an indication of any change between the text of the proposed rule contained in the published notice of proposed rule adoption and the text of the rule as finally adopted, with the reasons for any change.

(2) Only the reasons contained in the concise explanatory statement 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 is the same provision as the 81 MSAPA, Section 3-110, for a concise explanatory statement of a rule when it is adopted. Arkansas (A.C.A. § 25-15-204) and Colorado (C.R.S.A. § 24-4-103) have similar provisions. The federal Administrative Procedure Act uses the identical terms in section 553 (c) (5 U.S.C.A. § 553).

§ C3-109. AGENCY RULE-MAKING RECORD.

(1) An agency shall maintain an official rule-making record for each rule it (i) proposes by publication in the [administrative bulletin] of a notice of proposed rule adoption, or (ii) adopts. The record and materials incorporated by reference must be available for public inspection or online via the internet.

(2) The agency rule-making record must contain:

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

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

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

(d) 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 a presiding official summarizing the contents of those presentations;

(e) a copy of the rule and explanatory statement filed in the office of the [secretary of state];

(f) all petitions for exceptions to, amendments of, or repeal or suspension of, the rule;

(7) Upon judicial review, the record required by this section constitutes the official agency rule-making record with respect to a rule. Except as provided in Section C3-108 or otherwise required by a provision of law, the agency rule-making record need not constitute the exclusive basis for agency action on that rule or for judicial review thereof.

Comment

This section is taken from the 81 MSAPA, section 3-112. The following states have similar or identical agency rule-making record provisions: Az., A.R.S. § 41-1029; Colo., C.R.S.A. § 24-4-103; Minn., M.S.A. § 14.365; Miss., Miss. Code Ann. § 25-43-3.110; Mont., MCA 2-4-402; and Okl., 75 Okl.St.Ann. § 302.

§ C3-110. TIME LIMITATION. No rule hereafter adopted is valid unless adopted in substantial compliance with the procedural requirements of this Article. A proceeding to contest

any rule on the ground of non-compliance with the procedural requirements of this Article must be commenced within 2 years from the effective date of the rule.

Comment

This section is a slightly modified form of the 61 Model State Administrative Procedure Act, section (3)(c). As noted in the comment to the 81 MSAPA, section 3-113, there have been no complaints from the states about the two year time limitation on procedural challenges to rules.

§ C3-111. FILING OF RULES. An agency shall file in the office of the [secretary of state] each rule it adopts and all rules existing on the effective date of this Act that have not previously been filed. 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 C3-109. The [secretary of state] 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 [secretary of state].

Comment

This section is based on the 61 Model State Administrative Procedure Act, section 4(a) and its expansion in the 81 MSAPA, section 3-114.

§ C3-112. EFFECTIVE DATE OF RULES

(1) Except to the extent subsection (2) provides otherwise, each rule adopted after the effective date of this Act becomes effective [60] days after the later of (i) its filing in the office of the [secretary of state] or (ii) its publication and indexing in the [administrative bulletin].

(2) A rule becomes effective on a date later than that established by subsection (1) if a later date is required by another statute or specified in the rule.

(3) A rule may become effective immediately upon its filing or on any subsequent date earlier than that established by subsection (1) if the agency establishes such an effective date and finds that:

(a) it is required by constitution, statute, or court order;

(b) the earlier effective date is necessary because of imminent peril to the public health, safety, or welfare.

(c) if a federal statute or regulation requires that a state agency implement a rule by a certain date, the rule is effective on the prescribed date.

(4) An interpretive statement or a policy statement may become effective immediately upon its filing or any subsequent date earlier than that established by subsection (1) if the agency establishes such an effective date.

Comment

This is a substantially revised version of the 61 Model State Administrative Procedure Act, section 4 (b)&(c) and 81 Model State Administrative Procedure Act, section 3-115. Most of the states have adopted provisions similar to both the 61 Model State Administrative Procedure Act and the 81 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 § 2001.036.

§ C3-113. SPECIAL PROVISION FOR CERTAIN CLASSES OF RULES

(1) Except to the extent otherwise provided by any provision of law, Sections C3-102 through C3-115 are inapplicable to:

(a) a rule concerning only the internal management of an agency which

does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public;

(b) a rule that establishes criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections, settling commercial disputes, negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if disclosure of the criteria or guidelines would:

(i) enable law violators to avoid detection;

(ii) facilitate disregard of requirements imposed by law; or

(iii) give a clearly improper advantage to persons who are in an adverse position to the state;

(2) a rule that only establishes specific prices to be charged for particular goods or services sold by an agency;

(3) a rule concerning only the physical servicing, maintenance, or care of agency owned or operated facilities or property;

(4) a rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its subdivisions, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property;

(5) a rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital;

(6) a form whose contents or substantive requirements are prescribed by rule or statute, and instructions for the execution or use of the form;

(7) an agency budget; [or]

(8) an opinion of the attorney general [; or] [.]

(9) [the terms of a collective bargaining agreement.]

Comment

This section is virtually identical to section 3-116 of the 81 Model State Administrative Procedure Act. It continues the effort to strike a fair balance between the need for public participation in, and adequate publicity for, agency policymaking on the one hand, and the sometimes conflicting need for efficient, economical, and effective government on the other hand. See: Ala. § 41-22-3(1)(a); Fla. F.S.A. § 120.52(15)(a); see Ky. KRS § 13A.010(2)(a). And see generally: Az. A.R.S. § 41-1005; Ia. I.C.A. § 17A.2(11); Fla. West's F.S.A. § 120.52(15); Ky. KRS § 13A.010(2); Va. Va. Code Ann. § 2.2-4002(B); Wa. West's RCWA 34.05.010(16); WI, W.S.A. 227.01(13). This section moves the exempt actions out of the definitions section. This section, like the similar provision in section 3-116 of the 81 Model State Administrative Procedure Act, recognizes that matters that fall within the confines of this subsection may be in fact fit the definition of rule, but that nevertheless it is necessary to exempt them from the standard rulemaking procedures because of the balance of costs, benefits and relative advantages described this comment and in the comment to the 81 Model State Administrative Procedure Act, section 3-116.

§ C3-114. PETITION FOR ADOPTION OF RULE. Any person may petition an agency requesting 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 either (i) deny the petition in writing or electronically, stating its reasons therefore, (ii) initiate rule-making proceedings in accordance with this Chapter, or (iii) if otherwise lawful, adopt a rule.

CORE ARTICLE IV

ADJUDICATION

§ C4-101. WHEN EVIDENTIARY HEARING REQUIRED. This chapter applies to an order made by an agency if, under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of the order.

Comment

This section changes the broad definition of sections 1-101(5), 4-101, 4-102 (b) (and the comment to that section) of the 81 Model State Administrative Procedure Act. Under the 81 MSAPA all agency action that is not rulemaking appears to require one of the three types of hearing provided for in that Administrative Procedure Act. There are several problems with that approach. Requiring a hearing for every type of non rule action is expensive. Also, the costs of providing a hearing in every situation that is not rule making outweigh the benefits of limiting hearings to individual rights and interests that are important or significant for the claimant. Drawing on the approach of the states described in the immediately following paragraph, this section of the 2006 Model State Administrative Procedure Act seeks to provide a more formal hearing for situations where a claimant has a more important interest that is created 1) by an statutory provision that she should receive a hearing from a state or federal statute external to the Administrative Procedure Act; and 2) by the constitutional requirements of state or federal due process guarantees. For a state statute to create a right to a hearing, express use of the term "evidentiary hearing" is not necessary in the statute. Statutes often use terms like "appeal" or "proceeding" but in context it is clear that they mean an evidentiary hearing. An evidentiary hearing is one in which the hearing officer is limited to material in the record in making his decision. Category 2), hearings required by procedural due process guarantees, includes life, liberty and property *interests* as described in the *Goldberg*, *Roth* and *Perry* cases, where a statute creates a justified expectation or legitimate entitlement. Thus, this section seeks to include more than what were described as "rights" under pre *Goldberg* case law that employed the now-rejected right/privilege test, but defines interest in a limited manner that does not include every claim that an individual might make in dealings with the state. In cases where the right to an evidentiary hearing is created by due process, attention is directed to section C4-110 vi *infra* which may permit an informal hearing.

However, 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. This section does not apply to a situation where a procedural rule creates a right to an evidentiary hearing.

This section is modeled on the California, (see Cal. Cal.Gov.Code § 11410.10); Minnesota, (see Minnesota Statutes Annotated, § 14.02, subd. 3; Washington (see Revised Code of Washington, 34.05.413(2) and (perhaps) Kansas (see Kansas Stat. Ann., KS ST § 77-502(d) & Kansas Stat. Ann., KS ST § 77-503). Note that Arizona retained the narrower provision of the 61 Model State Administrative Procedure Act even though it revised its Administrative Procedure Act subsequent to the promulgation of the 81 Model State Administrative Procedure Act (see A.R.S. § 41-1001-4).

§ C4-102. PROCEDURAL REQUIREMENTS FOR AGENCY ADJUDICATION

(1) The governing procedure by which an agency conducts an adjudicative proceeding is subject to all of the following requirements:

(a) The agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence.

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

(c) The hearing shall be open to public observation.

(d) Any party may be advised or represented by counsel provided at the party's expense.

(e) The adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency.

(f) The presiding officer is subject to disqualification for bias, prejudice, or interest.

(g) The decision shall be in writing, be based on the record, and include a statement of the factual and legal basis of the decision.

(h) A decision may not be relied on as precedent unless the agency designates and indexes the decision as precedent.

(i) Ex parte communications shall be restricted.

(2) The requirements of this section apply to the governing procedure by which an agency conducts an adjudicative proceeding without further action by the agency, and prevail over a conflicting or inconsistent provision of the agency's governing procedure. The governing procedure by which an agency conducts an adjudicative proceeding 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 agency adjudication under this statute. This section applies to all agencies whether or not an agency provision provides a different procedure; this procedure is excused only if a state or federal statute specifically provides otherwise. This section does not prevent an agency from adopting more stringent procedures than those in this section.

This section is modeled on the Arizona Regulatory Bill of Rights, see A.R.S. § 41-1001.01 and the California Administrative Adjudication Bill of Rights, see West Ann.Cal.Gov.Code § 11425.10. The right to be represented by counsel has been adapted from 81 Model State Administrative Procedure Act section 4-203.

There are two interrelated purposes for this procedural provision: 1) to create statutorily a minimum fair hearing procedure; and 2) to provide that minimum procedure "across the board" so that it is applicable to all agencies. In many states, agencies have petitioned and lobbied the legislature to remove various requirements of the state Administrative Procedure Act from them. The result is a crazy quilt of widely different agency procedures in a single state. This lack of uniformity creates problems for litigants, the bar and the reviewing courts. This section represents an attempt to provide a minimum, bare bones, across the board procedure for all agency adjudications. This should be a goal that resonates with legislatures, since its goal is to protect citizens by a guarantee of minimum procedural protections. On the other hand, the procedures required here are only for actions that fit the definition of adjudication under this Act (which are by definition here required only for more important rights in a formal procedure akin to the 61 Model State Administrative Procedure Act contested case procedure) and are not so

onerous as to create any noticable loss of efficiency or increased cost.

§ C4-103. NOTICE OF HEARING

(1) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. Unless otherwise provided by law, the notice shall be given at least [ ] prior to the date set for the hearing.

(2) the notice shall include:

(a) The names and mailing addresses of all parties and other persons to whom notice is being given by the presiding officer;

(b) the name, official title, mailing address and telephone number of any counsel or employee who has been designated to appear for the state agency;

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

(d) a statement of the time, place and nature of the hearing;

(e) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(f) the name, official title, mailing address and telephone number of the presiding officer;

(g) a short and plain statement of the matters asserted which includes a statement of the issues involved. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement must be furnished;

and

(h) a statement that a party who fails to attend or participate in a hearing or other stage of an adjudicative proceeding may be held in default under this act. A default judgement may be entered only upon making out a prima facie case.

(i) The notice may include any other matters the presiding officer considers desirable to expedite the proceedings.

Comment

This section is taken from: the 61 Model State Administrative Procedure Act, section 9; the 81 Model State Administrative Procedure Act, section 4-206; Oregon, see West's Oregon Revised Statutes Ann 183.415; Kansas, Kansas Statutes Annotated. K.S.A. § 77-518; Iowa, Iowa Code Annotated, I.C.A. § 17A.12; Montana, Montana Code Annotated, MCA 2-4-601; and Michigan, Michigan Compiled Laws Annotated, M.C.L.A. 24.271.

§ C4-104. HEARING PROCEDURE

(1) A hearing officer shall preside over the conduct of an administrative hearing and shall regulate the course of the proceedings in a manner which will promote the orderly and prompt conduct of the hearing. When a prehearing order has been issued, the hearing officer shall regulate the hearing in conformity with the prehearing order.

(2) A hearing may be conducted in an informal manner and without adherence to the rules of evidence required in judicial proceedings. Neither the manner of conducting the hearing nor the failure to adhere to the rules of evidence required in judicial proceedings shall be grounds for reversing any administrative decision or order, provided that the evidence supporting such decision or order is substantial, reliable, and probative. Irrelevant, immaterial or unduly repetitious evidence shall be excluded.

(3) The hearing officer, at appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, motions, objections, and offers of settlement. The hearing officer, at appropriate stages of the proceedings, may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed recommended or final orders. The original of all filings shall be mailed to the agency, and copies of any filed item shall be served on all parties and the hearing officer by mail or any other means permitted by law or prescribed by agency administrative regulation.

(4) To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer permit all parties to be represented by counsel at their expense, and shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the pre-hearing order.

(5) A hearing officer may conduct all or part of an administrative hearing, or a prehearing conference, by telephone, television, or other electronic means, if each party to the hearing has an opportunity to hear, and, if technically feasible, to see the entire proceeding as it occurs.

(6) All testimony of parties and witnesses shall be made under oath or affirmation and the presiding officer shall have the power to administer an oath or affirmation for that purpose.

(7) An agency may issue subpoenas on its own motion.. In addition, an agency or hearing officer may issue subpoenas upon the request of a party upon a showing of general relevance and reasonable scope of the evidence sought. A party entitled to have witnesses on

behalf of the party may have subpoenas issued by an attorney of record of the party, subscribed by the signature of the attorney.

(8) 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 any party. Documentary evidence may be received in the form of a copy or excerpt. Upon request, parties must be given an opportunity to compare the copy with the original if available.

(9) All evidence, including records and documents containing information classified by law as not public, in the possession of the agency of which it desires to avail itself or which is offered into evidence by a party to a contested case proceeding, shall be made a part of the hearing record of the case. No factual information or evidence shall be considered in the determination of the case unless it is part of the record. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. When the hearing record contains information which is not public, the administrative law judge or the agency may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record.

(10) Official notice may be taken of all facts of which judicial notice may be taken and of other scientific and technical facts within the specialized knowledge of the agency. Parties shall 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, and the parties shall be afforded an opportunity to contest such 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. The experience, technical competence, and specialized knowledge of the agency may be utilized in the evaluation of the evidence.

(11) An administrative hearing shall be open to the public unless specifically closed pursuant to a provision of law. If an administrative hearing is conducted by telephone, television, or other electronic means, and is not closed, public access shall be satisfied by giving the public an opportunity, at reasonable times, to hear or inspect the agency's record.

Comment

Section (1) is taken from Kentucky, KRS § 13B.080.

Section (2) is taken from Arizona, A.R.S. § 41-1062.

Section (3) is taken from Arizona, A.R.S. § 41-1062.

Section (4) is taken from 81 Model State Administrative Procedure Act, Section 4-211(2) and from Kentucky, KRS § 13B.080 (4).

Section (5) is taken from from Kentucky, KRS § 13B.080 (7).

Section (6) is taken from Kansas, K.S.A. § 77-524 and 81 Model State Administrative Procedure Act, Section 4-212(b).

Section (7) is taken from Oregon, O.R.S. § 183.440 (1).

Section (8) is taken from 81 Model State Administrative Procedure Act, Section 4-212 (d) and (e). Iowa, I.C.A. § 17A.14(2), Kansas, K.S.A. § 77-524 (d) and (e), and Wisconsin, K.S.A. § 77-524 (5) have similar provision, but limit admission of copies of documentary evidence to situations where the original is not readily available.

Section (9) is taken from Minnesota, M.S.A. § 14.60 subd.2. All government proceedings should be public, except if there is good cause for them not to be.

Section (10) is taken from Alabama, Ala.Code 1975 § 41-22-13 and from the 81 Model State Administrative Procedure Act, section 4-212 (f).

Section (11) is taken from Kentucky, KRS § 13B.080, and from 81 Model State Administrative Procedure Act, section 4-211.

§ C4-105. NO EX PARTE COMMUNICATIONS

(1) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer or agency head from an employee or representative of an agency that is a party or from a party or an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.

(2) communication otherwise prohibited by subparagraph (1) of this section from an employee or representative of an agency that is a party to the presiding officer is permissible in any of the following circumstances:

(a) The communication is for the purpose of assistance and advice to the presiding officer or agency head from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage. An assistant or advisor may evaluate the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the record.

(b) The communication is for the purpose of advising the presiding officer or agency head concerning a settlement proposal advocated by the advisor.

(3) If a presiding officer or agency head receives a communication in violation of this article, the presiding officer shall make a part of the record: i) the written communication, if the communication is written; and/or ii) a memorandum that contains the substance, response of the presiding officer and the identity of the parties who communicated..

(4) The presiding officer or agency head shall notify all parties that a

communication prohibited under this section has been made, and permit parties to respond within ten (10) days in writing, and, when appropriate, by introducing testimony or other evidence relevant to the communication..

(5) There shall be no communication, direct or indirect, while a proceeding is pending 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.

(a) This section does not apply where the agency head or other person or body to which the power to hear or decide in the proceeding is delegated serves as both presiding officer and agency head, or where the presiding officer does not issue a decision in the proceeding.

Comment

This section is taken from the systematic California provisions on ex parte proceedings in West's Ann.Cal.Gov.Code sections 11430.10 to 11430.80. The California sections address most of the problems that arise in this area, and attempt to distinguish technical, advisory contacts from agency staff to presiding officers or agency heads.

§ C4-106. INTERVENTION

(1) The presiding officer shall grant a petition for intervention if:

(a) The petitioner has a statutory right to initiate the proceeding in which he wishes to intervene; or

(b) The petitioner has an interest which is or may be adversely affected by the outcome of the proceeding.

(2) The presiding officer may grant intervention after consideration of the following factors and a determination that intervention is in the interests of justice

(a) The nature of the issues;

(b) The adequacy of representation of the petitioner's interest which is provided by the existing parties to the proceeding;

(c) The ability of the petitioner to present relevant evidence and argument; and

(d) effect of intervention on the agency's ability to implement its statutory mandate.

(3) If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervener's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:

(a) limiting the intervener's participation to designated issues in which the intervener has a particular interest demonstrated by the petition;

(b) limiting the intervener's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

(c) requiring 2 or more interveners to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

(4) 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 may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

Comment

Sections (1) and (2) are taken from the Kentucky provisions on intervention, KRS § 13B.060. They clearly include de jure and de facto injury to the petitioning intervenor as a sufficient conditions for intervention.

Sections (3) and (4) are taken from the 81 Model State Administrative Procedure Act, section 4-209(c)&(d). Section three recognizes the normal judicial practice of limiting the participation of intervenors to their interest and maintaining an orderly and expeditious hearing. Section four simply provides for notice suitable under the circumstances to enable parties to anticipate and prepare for changes that may be caused by the intervention.

§ C4-107. LICENSES

(1) When the grant, denial, or renewal of a license is required by Constitution or statute to be preceded by notice and opportunity for an evidentiary hearing, the provisions of this chapter concerning adjudication apply, except that

(a) When an agency refuses to issue a license required to pursue any commercial activity, trade, occupation or profession, if the refusal is based on grounds other than the results of a test or inspection, that agency shall grant the person requesting the license 60 days from notification of the refusal to request a hearing.

(b) In case of license applications not required to be acted on by adjudication, the agency shall give prompt notice of its action.

(2) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, 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, until the last day for seeking review of the agency decision or a later date fixed by order of the reviewing court.

(3) No revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the action, the agency provides the licensee with notice and an opportunity for an evidentiary hearing in accordance with this chapter. If the agency finds that the public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

Comment

Subsection (1) is modeled on the following Administrative Procedure Acts: 61 Model State Administrative Procedure Act, section 14(c), 81 MSAPA, section 4-501; Arizona, A.R.S. § 41-1065; Iowa, I.C.A. § 17A.18; Wisconsin, W.S.A. 227.51.

Subsection (1) a. is modeled on the Oregon Administrative Procedure Act, O.R.S. § 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 (1) (b). is loosely based on the 81 Model State Administrative Procedure Act, section 4-104 and the Florida Administrative Procedure Act, West's F.S.A. § 120.60. This section does not include as much detail.

Subsection (2) was taken from the 61 Model State Administrative Procedure Act, section 14(b), which has been adopted by many states. See, for example: Alabama, Ala.Code 1975 § 41-22-19; Tennessee, T. C. A. § 4-5-320; Michigan, M.C.L.A. 24.291; and Wisconsin, W.S.A. 227.51.

Subsection (3) was modeled on the 61 Model State Administrative Procedure Act, section 14(c) and the 81 Model State Administrative Procedure Act, section 4-104(b). Many states have adopted similar provisions. E.g. Arizona, A.R.S. § 41-1064 C.; Iowa, I.C.A. § 17A.18 3.; Tennessee, T. C. A. § 4-5-320 (c); and New Hampshire, N.H. Rev. Stat. § 541-A:30, II & III. This section controls proceedings to revoke, suspend, withhold, annul or modify a license whether or not hearing rights are granted by statute or constitution.

§ C4-108. INITIAL ORDER AND FINAL ORDER

(1) If the presiding officer is the agency head, the presiding officer shall render a

final order.

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

(3) A final order or initial order must include, separately stated, findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, must be accompanied by a concise and explicit statement of the underlying facts of record to support the findings. 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.

(4) Findings of fact must be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a civil trial. The presiding officer's experience, technical competence, and specialized knowledge may be utilized in evaluating evidence.

(5) The presiding officer may allow the parties a designated amount of time after

conclusion of the hearing for the submission of proposed findings.

(6) A final order or initial order pursuant to this section must be rendered in writing within [ ] days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) unless this period is waived or extended with the written consent of all parties or for good cause shown.

(7) The presiding officer shall cause copies of the final order or initial order to be delivered to each party and to the agency head.

Comment

This section is closely modeled on the 81 Model State Administrative Procedure Act, Section 4-215. That provision follows includes useful provisions from a substantial number of states. E.g. see: Alabama, Ala.Code 1975 § 41-22-16; Iowa, I.C.A. § 17A.15; Kansas, K.S.A. § 77-526; Michigan, M.C.L.A. 24.281; Montana, MCA 2-4-623; Washington, RCWA 34.05.461.

§ C4-109. STAY. A party may submit to the presiding officer a petition for stay of effectiveness of an initial or final order within [ ] days after its rendition unless otherwise provided by statute or stated in the initial or final order. The presiding officer may take action on the petition for stay, either before or after the effective date of the initial or final order.

Comment

This section is taken verbatim from 81 Model State Administrative Procedure Act, Section 4-217. Stays are needed for judicial review and for agency review.

§ C4-110. INFORMAL PROCEEDINGS

(1) an agency may use an informal hearing procedure in any of the following proceedings, if in the circumstances its use does not violate another statute or the federal or state Constitution:

(a) A proceeding where there is no disputed issue of material fact.

(b) A proceeding where there is a disputed issue of material fact, if the matter is limited to any of the following:

(i) A monetary amount of not more than one thousand dollars ($1,000).

(ii) A disciplinary sanction against a student that does not involve expulsion from an academic institution or suspension for more than 10 days.

(iii) A disciplinary sanction against an employee that does not involve discharge from employment, demotion, or suspension for more than 5 days.

(iv) 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. Nothing in this section precludes an agency from imposing a stayed revocation or a stayed suspension of a license in an informal hearing.

(v) A proceeding where, by regulation, the agency has authorized use of an informal hearing, and there is no violation of statute or constitution.

(vi) A proceeding where an evidentiary hearing for determination of facts is not required by statute but where the agency determines the federal or state Constitution may require a hearing.

Comment

This section builds on the 81 Model State Administrative Procedure Act, Articles 4-401 *et seq.* and 4-501 *et seq*., which provided for two different types of informal hearings, the conference and the summary hearing. This section adopts a single category of informal procedure that an agency may use to perform the same functions as the conference and summary hearings. This section also draws upon the California provision for an informal procedure, see

Ann.Cal.Gov.Code § 11445.20.

There can be no doubt that it is necessary to have an informal type of agency procedure for matters that do not involve factual disputes. See the Iowa Administrative Procedure Act, I.C.A. § 17A.10A and the Virginia Administrative Procedure Act, Va. Code Ann. § 2.2-4019.

§ C4-111. INFORMAL ADJUDICATION PROCEDURE; CONVERSION

(1) Except as provided in this article, the hearing procedures otherwise required by statute for an adjudicative proceeding apply to an informal hearing.

(2) In an informal hearing the presiding officer shall regulate the course of the proceeding. The presiding officer shall permit the parties 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.

Comment

This section is modeled on the 81 Model State Administrative Procedure Act, section 4-402 and California Administrative Procedure Act, West's Ann.Cal.Gov.Code § 11445.40. Under this section, the informal adjudication is a simplified form of an adjudication under the control of the hearing officer.

§ C4-112. CONVERSION

(1) Subject to any applicable regulation adopted under Section C2-202 at any point in an agency proceeding the presiding officer or other agency official responsible for the proceeding:

(a) May convert the proceeding to another type of agency proceeding provided for by statute if the conversion is appropriate, is in the public interest, and does not

substantially prejudice the rights of a party.

(b) Shall convert the proceeding to another type of agency proceeding provided for by statute, if required by regulation or statute.

(2) A proceeding of one type may be converted to a proceeding of another type only on notice to all parties to the original proceeding.

Comment

This section is modeled on 1981 Model State APA § 1-107(a)-(b) and California Section § 11470.10. This section applies to rulemaking proceedings as well as adjudications. For conversion under section (1)(a) the conversion must be to a form that is appropriate for the type of action being taken. Also, it must not substantially prejudice the rights of parties. This may require judicial application to decide what constitutes substantial prejudice, as was noted in the comment to section 1-107 of the 81 Model State Administrative Procedure Act.

MODEL STATE ADMINISTRATIVE PROCEDURE ACT

OPTIONAL PROVISIONS

OPTIONAL ARTICLE I

GENERAL PROVISIONS

§ O1-102. DEFINITIONS

(1) "Code" means the [state] administrative code.

(2) "Electronic distribution" or "electronically" means distribution by electronic mail or facsimile mail.

(3) "Entry" of an order means the signing of the order by all persons who are to sign the order, as an official act indicating that the order is to be effective.

(4) "Fee" means a charge prescribed by an agency for an inspection or for obtaining a license.

(5) "Filing" of a document that is required to be filed with an agency means delivery of the document to a place designated by the agency by rule for receipt of official documents, or in the absence of such designation, at the office of the agency head.

(6) "Mail" or "send," for purposes of any notice relating to rule making or policy or interpretive statements, means regular mail or electronic distribution.

(7) "Party to judicial review or civil enforcement proceedings," or "party" in context so indicating, means:

(a) a person who files a petition for judicial review or civil enforcement

(b) a person named as a party in a proceeding for judicial review or civil enforcement or allowed to participate as a party in the proceeding.

(8) "Presiding officer" means the agency head, member of the agency head, administrative law judge, hearing officer, or other person who presides in an adjudicative proceeding.

(9) "Provision of law" means the whole or a part of the federal or state constitution, or of any federal or state (i) statute, (ii) rule of court, (iii) executive order, or (iv) rule of an administrative agency.

(10) "Register" means the [state] administrative register.

(11) "Service," except as otherwise provided in this chapter, means posting in the United States mail, properly addressed, postage prepaid, or personal service. Service by mail is complete upon deposit in the United States mail. Agencies may, by rule, authorize service by electronic telefacsimile transmission, where copies are mailed simultaneously, or by commercial parcel delivery company.

Comment

Section (1) is modeled on the Arizona Administrative Procedure Act, A.R.S. § 41-1001 2.

Section (3) is modeled on the Washington Administrative Procedure Act, RCWA 34.05.010 (5).

Section (4) is modeled on the Arizona Administrative Procedure Act, A.R.S. § 41-1001 8.

Section (5) is modeled on the Washington Administrative Procedure Act, RCWA 34.05.010 (6).

Section (6) is modeled on the Washington Administrative Procedure Act, RCWA

34.05.010 (10).

Section (7) is modeled on the 81 Model State Administrative Procedure Act, Section 1-102(7).

Section (8) is modeled on the California Administrative Procedure Act, West's Ann.Cal.Gov.Code § 11405.80.

Section (9) is modeled on the 81 Model State Administrative Procedure Act, Section 1-102(9).

Section (10) is modeled on the Arizona Administrative Procedure Act, Arizona, A.R.S. § 41-1001 16.

Section (11) is modeled on the Washington Administrative Procedure Act, West's RCWA 34.05.010(19).

OPTIONAL ARTICLE III

RULEMAKING

OPTIONAL GENERAL PROVISIONS

§ O3-101. ADVICE ON POSSIBLE RULES BEFORE NOTICE OF PROPOSED RULE ADOPTION

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

(2) Each agency may also appoint committees to comment, before publication of a notice of proposed rule adoption, on the subject matter of a possible rule making under active consideration within the agency. The membership of those committees must be published at least [annually] in the [administrative bulletin].

Comment

This section is modeled on the 81 Model State Administrative Procedure Act, section 3-101.

§ O3-102. REGULATORY ANALYSIS

(1) An agency shall issue a regulatory analysis of a proposed rule if, within [20] days after the published notice of proposed rule adoption, a written request for the analysis is filed in the office of the [secretary of state] by [the administrative rules review committee, the

governor, a political subdivision, an agency, or [300] persons signing the request]. The [secretary of state] shall immediately forward to the agency a certified copy of the filed request.

(2) Except to the extent that the written request expressly waives one or more of the following, the regulatory analysis must contain:

(a) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

(b) a description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons;

(c) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

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

(e) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule; and

(f) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

(3) Each regulatory analysis must include quantification of the data to the extent practicable and must take account of both short-term and long-term consequences.

(4) A concise summary of the regulatory analysis must be published in the

[administrative bulletin] at least [10] days before the earliest of:

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

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

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

(5) The published summary of the regulatory analysis must also indicate where persons may obtain copies of the full text of the regulatory analysis and where, when, and how persons may present their views on the proposed rule and demand an oral proceeding thereon if one is not already provided.

(6) If the agency has made a good faith effort to comply with the requirements of subsections (a) through (c), the rule may not be invalidated on the ground that the contents of the regulatory analysis are insufficient or inaccurate.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 3-105.

§ O3-103. CONTENTS, STYLE, AND FORM OF RULE.

(1) Each rule adopted by an agency must contain the text of the rule and:

(a) the date the agency adopted the rule;

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

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

(d) a reference to the specific statutory or other authority authorizing

adoption of the rule;

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

(f) the effective date of the rule.

(2) To the extent feasible, each rule should be written in clear and concise language understandable to persons who may be affected by it.

(3) An agency may incorporate, by reference in its rules and without publishing the incorporated matter in full, all or any part of a code, standard, rule, or regulation that has been adopted by an agency of the United States or of this state, another state, or by a nationally recognized organization or association, if incorporation of its text in agency rules would be unduly cumbersome, expensive, or otherwise inexpedient. The reference in the agency rules must fully identify the incorporated matter by location, date, and otherwise, [and must state that the rule does not include any later amendments or editions of the incorporated matter]. An agency may incorporate by reference such matter in its rules only if the agency, organization, or association originally issuing that matter makes copies of it readily available to the public. The rules must state where copies of the incorporated matter 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 that matter.

(4) In preparing its rules pursuant to this Chapter, each agency shall follow the uniform numbering system, form, and style prescribed by the [administrative rules editor].

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 3-111.

§ O3-104. INVALIDITY OF RULES NOT ADOPTED ACCORDING TO CHAPTER. A rule adopted after [date] is invalid unless adopted in substantial compliance with the provisions of [Sections]through [ ] and [ ] through [ ]. However, inadvertent failure to mail a notice of proposed rule adoption to any person as required by [ ] does not invalidate a rule.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 3-113(a).

OPTIONAL AGENCY REVIEW PROVISIONS

§ O3-105. REVIEW BY AGENCY.

(1) At least [annually], each agency shall review all of its rules to determine whether any new rule should be adopted. In conducting that review, each agency shall prepare a written report summarizing its findings, its supporting reasons, and any proposed course of action.

(2) For each rule, the [annual] report must include, at least once every [7] years, a concise statement of:

(a) the rule's effectiveness in achieving its objectives, including a summary of any available data supporting the conclusions reached;

(b) criticisms of the rule received during the previous [7] years, including a summary of any petitions for waiver of the rule tendered to the agency or granted by it; and

(c) alternative solutions to the criticisms and the reasons they were rejected or the changes made in the rule in response to those criticisms and the reasons for the changes.

(3) A copy of the [annual] report must be sent to the [administrative rules review committee and the administrative rules counsel] and be available for public inspection.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 3-201.

§ O3-106. REVIEW BY GOVERNOR; ADMINISTRATIVE RULES COUNSEL.

(1) To the extent the agency itself would have authority, the governor may rescind or suspend all or a severable portion of a rule of an agency. In exercising this authority, the governor shall act by an executive order that is subject to the provisions of this Act applicable to the adoption and effectiveness of a rule.

(2) The governor may summarily terminate any pending rule-making proceeding by an executive order to that effect, stating therein the reasons for the action. The executive order must be filed in the office of the [secretary of state], which shall promptly forward a certified copy to the agency and the [administrative rules editor]. An executive order terminating a rule-making proceeding becomes effective on [the date it is filed] and must be published in the next issue of the [administrative bulletin]

(3) There is created, within the office of the governor, an [administrative rules counsel] to advise the governor in the execution of the authority vested under this Article. The governor shall appoint the [administrative rules counsel] who shall serve at the pleasure of the governor.]

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 3-202.

§ O3-107. ADMINISTRATIVE RULES REVIEW COMMITTEE. There is created the ["administrative rules review committee"] of the [legislature]. The committee must be [bipartisan] and composed of [3] senators appointed by the [president of the senate] and [3] representatives appointed by the [speaker of the house]. Committee members must be appointed within [30] days after the convening of a regular legislative session. The term of office is [2] years while a member of the [legislature] and begins on the date of appointment to the committee. While a member of the [legislature], a member of the committee whose term has expired shall serve until a successor is appointed. A vacancy on the committee may be filled at any time by the original appointing authority for the remainder of the term. The committee shall choose a chairman from its membership for a [2]-year term and may employ staff it considers advisable.]

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 3-203.

§ O3-108. REVIEW BY ADMINISTRATIVE RULES REVIEW COMMITTEE.

(1) The [administrative rules review committee] shall selectively review possible, proposed, or adopted rules and prescribe appropriate committee procedures for that purpose. The committee may receive and investigate complaints from members of the public with respect to possible, proposed, or adopted rules and hold public proceedings on those complaints.

(2) Committee meetings must be open to the public. Subject to procedures

established by the committee, persons may present oral argument, data, or views at those meetings. The committee may require a representative of an agency whose possible, proposed, or adopted rule is under examination to attend a committee meeting and answer relevant questions. The committee may also communicate to the agency its comments on any possible, proposed, or adopted rule and require the agency to respond to them in writing. Unless impracticable, in advance of each committee meeting notice of the time and place of the meeting and the specific subject matter to be considered must be published in the [administrative bulletin].

(3) The committee may recommend enactment of a statute to improve the operation of an agency. The committee may also recommend that a particular rule be superseded in whole or in part by statute. The [speaker of the house and the president of the senate] shall refer those recommendations to the appropriate standing committees. This subsection does not preclude any committee of the legislature from reviewing a rule on its own motion or recommending that it be superseded in whole or in part by statute.

(a) If the committee objects to all or some portion of a rule because the committee considers it to be beyond the procedural or substantive authority delegated to the adopting agency, the committee may file that objection in the office of the [secretary of state]. The filed objection must contain a concise statement of the committee's reasons for its action.]

(b) The [secretary of state] shall affix to each objection a certification of the date and time of its filing and as soon thereafter as practicable shall transmit a certified copy thereof to the agency issuing the rule in question, the [administrative rules editor, and the administrative rules counsel]. The [secretary of state] shall also maintain a permanent register open to public inspection of all objections by the committee.

(c) The [administrative rules editor] shall publish and index an objection filed pursuant to this subsection in the next issue of the [administrative bulletin] and indicate its existence adjacent to the rule in question when that rule is published in the [administrative code]. In case of a filed objection by the committee to a rule that is subject to the requirements of Section [ ], the agency shall indicate the existence of that objection adjacent to the rule in the official compilation referred to in that subsection. (4) Within [14] days after the filing of an objection by the committee to a rule, the issuing agency shall respond in writing to the committee. After receipt of the response, the committee may withdraw or modify its objection.

(d) After the filing of an objection by the committee that is not subsequently withdrawn, the burden is upon the agency in any proceeding for judicial review or for enforcement of the rule to establish that the whole or portion of the rule objected to is within the procedural and substantive authority delegated to the agency.]

(e) The failure of the [administrative rules review committee] to object to a rule is not an implied legislative authorization of its procedural or substantive validity.]

(4) The committee may recommend to an agency that it adopt a rule. [The committee may also require an agency to publish notice of the committee's recommendation as a proposed rule of the agency and to allow public participation thereon, according to the provisions of Sections [ ] through [ ]. An agency is not required to adopt the proposed rule.]

(5) The committee shall file an annual report with the [presiding officer] of each house and the governor.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 3-204.

OPTIONAL ARTICLE IV

ADJUDICATIVE PROCEEDINGS

OPTIONAL PROVISIONS ON AVAILABILITY

§ O4-101. ADJUDICATIVE PROCEEDINGS; COMMENCEMENT.

(1) An agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction for which an evidentiary hearing is required.

(2) An adjudicative proceeding commences when the agency or a presiding officer:

(a) notifies a party that a pre-hearing conference, hearing, or other stage of an adjudicative proceeding will be conducted; or

(b) begins to take action on a matter that appropriately may be determined by an adjudicative proceeding, unless this action is:

(i) an investigation for the purpose of determining whether an adjudicative proceeding should be conducted; or

(ii) a decision which the agency may make without conducting an adjudicative proceeding.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-102. It removes the presumption that all matters that are not rule making are some form of adjudication covered by one of the specific forms in this Administrative Procedure Act.

§ O4-102. DECISION NOT TO CONDUCT ADJUDICATIVE PROCEEDING. If

an agency decides not to conduct an adjudicative proceeding in response to an application, the agency shall furnish the applicant a copy of its decision in writing, with a brief statement of the agency's reasons and of any administrative review available to the applicant.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-103.

OPTIONAL PROVISIONS ON FORMAL ADJUDICATION

§ O4-103. PRESIDING OFFICER, DISQUALIFICATION, SUBSTITUTION.

(1) The agency head, one or more members of the agency head, one or more administrative law judges assigned by the office of administrative hearings in accordance with Section [ ] [, or, unless prohibited by law, one or more other persons designated by the agency head], in the discretion of the agency head, may be the presiding officer.

(2) Any person serving or designated to serve alone or with others as presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this Act or for which a judge is or may be disqualified.

(3) Any party may petition for the disqualification of a person promptly after receipt of notice indicating that the person will preside or promptly upon discovering facts establishing grounds for disqualification, whichever is later.

(4) A person whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.(e) If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, the substitute must be appointed by:

(a) the governor, if the disqualified or unavailable person is an elected official; or

(b) the appointing authority, if the disqualified or unavailable person is an appointed official.

(5) Any action taken by a duly-appointed substitute for a disqualified or unavailable person is as effective as if taken by the latter.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-202.

§ O4-104. REPRESENTATION.

(1) Any party may participate in the hearing in person or, if the party is a corporation or other artificial person, by a duly authorized representative.

(2) Whether or not participating in person, any party may be advised and represented at the party's own expense by counsel or, if permitted by law, other representative.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-203.

§ O4-105. PRE-HEARING CONFERENCE--AVAILABILITY, NOTICE.

(1) The presiding officer designated to conduct the hearing may determine, subject to the agency's rules, whether a pre-hearing conference will be conducted. If the conference is conducted:

(a) The presiding officer shall promptly notify the agency of the determination that a pre-hearing conference will be conducted. The agency shall assign or request

the office of administrative hearings to assign a presiding officer for the pre-hearing conference, exercising the same discretion as is provided by Section [ ] concerning the selection of a presiding officer for a hearing.

(b) The presiding officer for the pre-hearing conference shall set the time and place of the conference and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The agency shall give notice to other persons entitled to notice under any provision of law.

(2) The notice must include:

(a) the names and mailing addresses of all parties and other persons to whom notice is being given by the presiding officer;

(b) the name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the agency;

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

(d) a statement of the time, place, and nature of the pre-hearing conference;

(e) a statement of the legal authority and jurisdiction under which the pre-hearing conference and the hearing are to be held;

(f) the name, official title, mailing address and telephone number of the presiding officer for the pre-hearing conference;

(g) a statement that at the pre-hearing conference the proceeding, without further notice, may be converted into a conference adjudicative hearing or a summary

adjudicative proceeding for disposition of the matter as provided by this Act; and

(h) a statement that a party who fails to attend or participate in a pre-hearing conference, hearing, or other state of an adjudicative proceeding may be held in default under this Act.

(3) The notice may include any other matter that the presiding officer considers desirable to expedite the proceedings.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-204.

§ O4-106. PRE-HEARING CONFERENCE--PROCEDURE AND PRE-HEARING ORDER.

(1) The presiding officer may conduct all or part of the pre-hearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

(2) The presiding officer shall conduct the pre-hearing conference, as may be appropriate, to deal with such matters as conversion of the proceeding to another type, exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form, and the extent to which telephone, television, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence

and cross-examination, rulings regarding issuance of subpoenas, discovery orders and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. The presiding officer shall issue a pre-hearing order incorporating the matters determined at the pre-hearing conference.

(3) If a pre-hearing conference is not held, the presiding officer for the hearing may issue a pre-hearing order, based on the pleadings, to regulate the conduct of the proceedings.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-205.

§ O4-107. DEFAULT.

(1) If a party fails to attend or participate in a pre-hearing conference, hearing, or other stage of an adjudicative proceeding, the presiding officer may serve upon all parties written notice of a proposed default order, including a statement of the grounds.

(2) Within [7] days after service of a proposed default order, the party against whom it was issued may file a written motion requesting that the proposed default order be vacated and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the presiding officer may adjourn the proceedings or conduct them without the participation of the party against whom a proposed default order was issued, having due regard for the interests of justice and the orderly and prompt conduct of the proceedings.

(3) The presiding officer shall either issue or vacate the default order promptly after expiration of the time within which the party may file a written motion under subsection (2).

(4) After issuing a default order, the presiding officer shall conduct any further proceedings necessary to complete the adjudication without the participation of the party in default and shall determine all issues in the adjudication, including those affecting the defaulting party.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-208.

§ O4-108. SEPARATION OF FUNCTIONS.

(1) A person who has served as investigator, prosecutor or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise a presiding officer in the same proceeding.

(2) A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in an adjudicative proceeding or in its pre-adjudicative stage may not serve as presiding officer or assist or advise a presiding officer in the same proceeding.

(3) A person who has participated in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or assist or advise a presiding officer in the same proceeding, unless a party demonstrates grounds for disqualification in accordance with Section [ ].

(4) A person may serve as presiding officer at successive stages of the same adjudicative proceeding, unless a party demonstrates grounds for disqualification in accordance with Section [ ].

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-214.

§ O4-109. REVIEW OF INITIAL ORDER; EXCEPTIONS TO REVIEWABILITY.

(1) The agency head, upon its own motion may, and upon appeal by any party shall, review an initial order, except to the extent that:

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

(b) the agency head, in the exercise of discretion conferred by a provision of law,

(i) determines to review some but not all issues, or not to exercise any review,

(ii) delegates its authority to review the initial order to one or more persons, or

(iii) authorizes one or more persons to review the initial order, subject to further review by the agency head.

(2) A petition for 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 rendition of the initial order. 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 its rendition. The [10]-day period for a party to file a petition for appeal or for the agency head to give notice of its intention to review an initial order on the agency head's own

motion is tolled by the submission of a timely petition for reconsideration of the initial order pursuant to Section [ ], and 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.

(3) The petition for appeal must state its basis. If the agency head on its own motion gives notice of its intent to review an initial order, the agency head shall identity the issues that it intends to review.

(4) The presiding officer for the review of an initial order shall exercise all the decision-making power that the presiding officer would have had to render a final order had the presiding officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the presiding officer upon notice to all parties.

(5) The presiding officer shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

(6) Before rendering a final order, the presiding officer may cause a transcript to be prepared, at the agency's expense, of such portions of the proceeding under review as the presiding officer considers necessary.

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

(8) A final order or an order remanding the matter for further proceedings must be rendered in writing within [60] days after receipt of briefs and oral argument unless that period is waived or extended with the written consent of all parties or for good cause shown.

(9) 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 must include, or incorporate by express reference to the initial order, all the matters required by Section [ ].

(10) The presiding officer shall cause copies of the final order or order remanding the matter for further proceedings to be delivered to each party and to the agency head.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-216.

§ O4-110. RECONSIDERATION. Unless otherwise provided by statute or rule:

(1) Any party, within [10] days after rendition of an initial or final order, may file a petition for reconsideration, stating the specific grounds upon which relief is requested. The filing of the petition is not a prerequisite for seeking administrative or judicial review.

(2) The petition must be disposed of by the same person or persons who rendered the initial or final order, if available.

(3) The presiding officer shall render a written order 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, in whole or in part, only if the presiding officer states, in the written order, findings of fact, conclusions of law, and policy

reasons for the decision if it is an exercise of the agency's discretion, to justify the order. The petition is deemed to have been denied if the presiding officer does not dispose of it within [20] days after the filing of the petition.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-218.

§ O4-111. REVIEW BY SUPERIOR AGENCY. If, pursuant to statute, an agency may review the final order of another agency, the review is deemed to be a continuous proceeding as if before a single agency. The final order of the first agency is treated as an initial order and the second agency functions as though it were reviewing an initial order in accordance with Section [ ].

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-219.

§ O4-112. EFFECTIVENESS OF ORDERS.

(1) Unless a later date is stated in a final order or a stay is granted, a final order is effective [10] days after rendition, but:

(a) a party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the final order;

(b) a nonparty may not be required to comply with a final order unless the agency has made the final order available for public inspection and copying or the nonparty has actual knowledge of the final order.

(2) Unless a later date is stated in an initial order or a stay is granted, the time

when an initial order becomes a final order in accordance with Section [ ] is determined as follows:

(a) when the initial order is rendered, if administrative review is unavailable;

(b) when the agency head renders an order stating, after a petition for appeal has been filed, that review will not be exercised, if discretion is available to make a determination to this effect; or

(c) [10] days after rendition of the initial order, if no party has filed a petition for appeal and the agency head has not given written notice of its intention to exercise review.

(3) Unless a later date is stated in an initial order or a stay is granted, an initial order that becomes a final order in accordance with subsection (b) and Section [ ] is effective [10] days after becoming a final order, but:

(a) a party may not be required to comply with the final order unless the party has been served with or has actual knowledge of the initial order or of an order stating that review will not be exercised; and

(b) a nonparty may not be required to comply with the final order unless the agency has made the initial order available for public inspection and copying or

(c) the nonparty has actual knowledge of the initial order or of an order stating that review will not be exercised.

(4) This section does not preclude an agency from taking immediate action to protect the public interest in accordance with Section [ ].

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-220.

OFFICE OF ADMINISTRATIVE HEARINGS

§ O4-113. OFFICE OF ADMINISTRATIVE HEARINGS--CREATION, POWERS, DUTIES.

(1) There is created the office of administrative hearings within the [Department of _____], to be headed by a director appointed by the governor [and confirmed by the senate].

(2) The office shall employ administrative law judges as necessary to conduct proceedings required by this Act or other provision of law. [Only a person admitted to practice law in [this State] [a jurisdiction in the United States] may be employed as an administrative law judge.]

(3) If the office cannot furnish one of its administrative law judges in response to an agency request, the director shall designate in writing a full- time employee of an agency other than the requesting agency to serve as administrative law judge for the proceeding, but only with the consent of the employing agency. The designee must possess the same qualifications required of administrative law judges employed by the office.

(4) The director may furnish administrative law judges on a contract basis to any governmental entity to conduct any proceeding not subject to this Act.

(5) The office may adopt rules:

(a) to establish further qualifications for administrative law judges, procedures by which candidates will be considered for employment, and the manner in which

public notice of vacancies in the staff of the office will be given;

(b) to establish procedures for agencies to request and for the director to assign administrative law judges; however, an agency may neither select nor reject any individual administrative law judge for any proceeding except in accordance with this Act;

(c) to establish procedures and adopt forms, consistent with this Act, the model rules of procedure, and other provisions of law, to govern administrative law judges;

(d) to establish standards and procedures for the evaluation, training, promotion, and discipline of administrative law judges; and

(e) to facilitate the performance of the responsibilities conferred upon the office by this Act.

(6) The director may:

(a) maintain a staff of reporters and other personnel; and

(b) implement the provisions of this section and rules adopted under its authority.

Comment

This section is modeled on 81 Model State Administrative Procedure Act, Section 4-301.