CONNECTICUT BAR ASSOCIATION
ADMINISTRATIVE LAW SECTION
WORK GROUP ON REVISIONS TO MODEL STATE AMDINISTRATIVE PROCEDURE ACT
September 28, 2005

RESPONSE TO KEY ISSUES AND OTHER ISSUES

The Administrative Law Section (Section) of the Connecticut Bar Association (CBA) established a Work Group to monitor, to review and to offer guidance to the Committee for Revisions to the Model State Administrative Procedure Act (Revised Act) that has been charged by the National Conference of Commissioners on Uniform State Laws (Conference) to study and to draft revisions to the Model State Administrative Procedure Act (1981 Act).

KEY ISSUES RAISED BY THE COMMITTEE

1. Should the [Revised Act] require interpretive and policy statements to be adopted as rules; and, if not, should there be a requirement that they be published?

DISCUSSION: The overarching public policy is that the standards and criteria used in agency decision making should be transparent.

Revised Act Article 3 cover Rule Making. The Committee is proposing a category defined as "Guidance Record" as the vehicle to give instruction to staff on rendering decisions. To the extent that "Guidance Record" is published and available to all to consider, then the only difference is eliminating the steps involved in "Rule Making." However, the definition is inherently conflicted. Revised Act Section 310(c) proposes that the Guidance records are "advisory only to the public; an agency may not rely on a guidance record, but a guidance record is binding on the agency." This is not the model for clarity. If the agency is bound to them, then the agency's reliance is irrelevant, i.e., there is no discretion. Remembering that the agency issued the Guidance Record, the agency can control its own destiny as to the content of the Guidance. If the Guidance Record covers the topic at issue, then there is no issue. The Rule Making process is subverted by the agency.

Connecticut sets forth a broad definition of regulations and the requirements for adoption through a rule making process that includes public comments, review by the attorney general and a committee of the legislature. Under Conn. Gen. Stat. §4-166(13) "regulation" is defined as "each statement of general applicability," subjected to minor exceptions. It includes, without regard to designation, any and all things used to implement, interpret, or prescribe any standard to be used by the agency. Subsection (14) establishes "regulation-making" as "the process for formulation and adoption of regulation" while subsection (11) defines "proposed regulation" as a regulation being considered by an agency, but not yet finalized, and therefore is one that may not be used by an agency. The adoption process requires publication.

RECOMMENDATION: The Work Group recommends that the Committee adopt a broad definition of the scope of regulations and require that all "interpretive and policy statements" be included in the definition. As to the scope of Rule Making requirements and restriction of Guidance Records, the 1981 Act language should be expanded, not contracted.

2. If interpretive and policy statements are not rules, but are required to be published, should the [Revised Act] address the weight to be given to them on judicial review?

DISCUSSION: See answer to #1 above. If addressed at all, the Revised Act should require that all decisions be handled in accordance with statutory and regulatory standards without regard to any interpretive or policy statements that have not been subjected to Rule Making procedures.

In the alternative, the Revised Act, if it presents options for the various states to consider, should include a strong sunset provision limiting the use and life of any interpretive or policy statement or Guidance Records, i.e., the standard contained in them must be subjected to Rule Making no later than the next following opportunity to amend regulations or a specific period of time, i.e., 120 days.

Again, agency decision making transparency is the key. This means that the person or entity subject to an agency decision should be able to depend on the representations of the agency as to the standards to be applied by the decision-maker. That person should be able to predict, with some degree of accuracy, the outcome, assuming an accurate perception of the facts. Allowing Guidance Records to instantaneously change would be contradictory and counter productive to transparency because no substantive standard would in place.

RECOMMENDATION: See recommendation #1. The Work Group recommends that the Committee adopt provisions restricting agency reliance on "interpretive and policy statements" to the extent that they are not published and transparent.

3. Should the [Revised Act] require prior agency decisions of first impression on legal issues to be adopted as rules: or, if not required to be adopted as rules, should there be a requirement that such decisions be indexed and published?

DISCUSSION: The short answer is yes to both issues raised.

The Revised Act §102(1) defines "Adjudication" as "the process for determination of facts pursuant to which an agency formulates and issues an order." In subsection (6), "Disputed case" is defined as "a proceeding in which an evidentiary hearing is required by [Revised Act] Section 401 to be conducted under the provisions of Article 4 of this [act]. Subsection (11) defines an "Evidentiary hearing" as "a hearing to resolve a disputed issue of fact in which the decision of the hearing officer may be made only on material contained in the record created at the hearing."

Noticeably absent is that the form and function of "disputed case" is designed to be an alternative to the Rule Making process. It is not. For example, the public review and comment period in Rule Making, an integral part of the process, is completely absent during a "disputed case." If the facts found are so unique in a single case, it is not a basis for changing the standard of general applicability. The key issue is that the "disputed case" hearing process at the agency level is not the appropriate way to be challenging the agency decision making standard.

The Revised Act has a mechanism for the challenging of agency rule or standard. See Section 317 on "Petition for Adoption of Rule."

Connecticut has a similar construct in place. Connecticut adopted a definition of a "contested case" and "final agency decision" under Conn. Gen. Stat. §4-166(2) and (3), respectively, that encompasses a process for adjudication that is separate and distinct from rule making. A controversy between a party and the agency in an administrative appeal is not a rule making proceeding. The remedy for reversing an agency decision is to reverse an agency decision, not an attack of the rule or standard itself. The remedy may also invalidate a standard or criteria being used by the agency. In that case, the agency must address the change in rule through the rule making process, unless the standard is reviewed by a court and found to be in violation of the law (e.g., unconstitutional or made in excess of delegated powers). A declaratory ruling mechanism is in place to challenge the standards of general applicability in the context of rule making.

As to both the Revised Act and Connecticut's experience, judicial review is the more appropriate point in time to challenge the standards being used by the agency in its decision making process below. The agency should not be using its precedents to repeal, abandon, or reverse its precedents and the underlying standards without employing the Rule Making process or without judicial guidance.

As to the second issue, publication and indexing of all decisions is inherently required under the transparency standard noted above. Connecticut requires that all decisions be indexed and published (to the extent that the Freedom of Information Act (FOIA) requires). Again, transparency in agency decision making is the overriding public policy. Publication is an important element of that assurance of fairness and integrity of the process.

The Work Group finds there are separate tracks for adjudication and rule making that overlap and balance on similar issues. The balance tilts more in favor of allowing precedents to be used the more that the decisions are (1) published and indexed and (2) where the decisions are consistent with the statutory and regulatory standards. The balance disfavors allowing precedents to be used if the precedents are (1) not published and indexed, i.e., not readily available, and (2) to the extent those precedents are used as a substitute for rule making, i.e., changing the standards being used by the agency in its decision making.

RECOMMENDATION: The Work Group recommends that the Committee not adopt language that permits an agency to use individual case and controversy decisions, including issues of first

impression, as its primary process for Rule Making or changing its standards. *See* Recommendation 9 below.

4. Should evidentiary hearings be required only when mandated by statute, constitution or other law, or should the Conference adopt the broader approach of the 1981 Model State Administrative Act that requires and evidentiary hearing in almost all instances where an order is to be issued by the agency?

DISCUSSION: The standard of "statute, constitution or other law" leaves the agency exposure to administrative hearings on a considerable breath. Conn. Gen. Stat. §4-166(2) limits formal hearings "in which the legal rights, duties or privileges of a party are required by state statute or regulation to be determined by an agency after an opportunity for a hearing." This is a narrower definition than in the 1981 Act.

The proposed Revised Act expands the federal government impact on State rights to control judicial review of its decisions by limiting a state's power to limit judicial review. This is a legally significant shift in power under Connecticut law. Currently only state statute and regulations can trigger judicial review.

The Revised Act does not identify or treat the class of agency decisions that are made for which no judicial review is available.

RECOMMENDATION: The Work Group recommends that the Committee adopt a broad approach, but provide an option for a narrower model for consideration by the various States that maintains their control of judicial review. In addition, the Committee should adopt language that clarifies that a class of decisions exists for which no judicial review is available.

5. With respect to post hearing *ex parte* communication between the agency decision maker and agency staff, what, if any, disclosure of the *ex parte* communication should be required to the parties? Also, what, if any, opportunity should be allowed for a party to respond to the disclosed communication?

DISCUSSION: Where a case and controversy exists, post hearing *ex parte* communication is a legal concept that protects the tribunal and the parties form engaging in advocacy or adversarial activities as to the pending decision without disclosure and an opportunity to respond from the excluded party. The prohibition does not extend to persons other than those engaged in the advocacy or adversarial activity.

The prohibited activity does not include seeking advice of counsel on matters already on the record, including pending legal issues, except that advice should be prohibited from any person otherwise involved in the pending case and controversy. Nor should it prohibit a tribunal from interacting with other members of the tribunal or receipt of aid or advice from any, except the parties. The integrity of fundamental fairness of an administrative proceeding must be protected.

"Separation of function" is the guiding principle within an agency staff and any person engaged in attempting to influence the decision-maker should be prohibited from doing so *ex parte*.

Connecticut has expanded the definition of lobbying to cover "administrative actions." Conn. Gen. Stat. §1-91(a). While an advocate in the context of an adjudication of a case and controversy in a pending administrative decision, the restriction on lobbying can impact any person attempting to influence an agency decision-maker, e.g., concurrent rule making activities. Again, while the restriction on administrative lobbying may not stop or restrict *ex parte* communication, the restriction can come into play.

Noting further, that if the decision maker determines that "factual" information outside the record is necessary to render a decision and it is available, then the decision maker must make it a part of the record and provide an opportunity to respond to both sides or, if it is available from one party, then the others must be provided an opportunity to respond.

The Committee should not adopt any language that frustrates the access of a decision maker to legal and technical advice or that encourages or causes such activity to go underground.

RECOMMENDATION: The Work Group recommends that the Committee take the strongest possible position prohibiting *ex parte* communication, directly or indirectly, by any person when said communication is intended or even gives the appearance to advocate a position or when said person was representing an adversarial position within any pending case and controversy. The Work Group strongly opposes any language that would hinder or inhibit the current existing practice of a decision maker being able to seek and secure advice and assistance of any staff member, including legal counsel, who is not otherwise prohibited from communicating with the decision maker by the *ex parte* rule.

The Committee should consider a State option to regulate and restrict administrative lobbying as one way to control inappropriate *ex parte* communication.

OTHER ISSUES RAISED BY THE COMMITTEE

6. Should cost-benefit analysis be required for all rules; or be limited to certain situations; and, if limited, under what criteria?

DISCUSSION: The short answer is no. Cost-benefit does not address the fundamental fairness required in agency decision making. The principles of justice are not susceptible to cost driven models.

RECOMMENDATION: The Work Group recommends that the Committee not adopt a cost-benefit analysis in the Revised Act.

7 Should the [Revised] Act provide for an administrative rules editor, with the power to edit, for publication, compilation, indexing, and public inspection of rules or should the [Revised] Act provide for a publisher with limited power to edit?

DISCUSSION: Except as may be required to comply with laws pertaining to confidentiality of the identity of the person, e.g., protection of the victims of sexual abuse or educational records, the power to edit agency decisions should be restricted. Any rule should address the issue of consent and enable an agency to seek a judicial order prohibiting the release of highly offensive elements of a hearing or memorandum of decision.

RECOMMENDATION: The Work Group recommends that the Committee propose a very restrictive power to edit and require that an agency adopt a rule which sets forth clear the standards against editing, except as may be required for confidentiality.

8. Should the [Revised] Act contain a legislative power for agency rules?

DISCUSSION: The short answer is no. The Work Group understands that the various States use different models as to the details contained in their statutes and regulations and varying degrees of legislative oversight, including variations of the level of approval. If the Committee's charge is to adopt a revised model act with various options for the States to consider, this is not one that needs to be included. Whether a regulation has been approved or disapproved by the legislature is not an element that requires uniformity, the regulation is either effective or not.

Ultimately, if an agency adopts (or proposes) a regulation that the legislative branch determines is not within the legislative intent, the legislature has the power to amend the enabling statute with clarity that forces the agency to use the standard sought by it.

RECOMMENDATION: The Work Group recommends that the Committee not adopt any provision related to this issue.

9. Should the [Revised] Act provide that, before a person who was not a party in an agency rulemaking proceeding seeks judicial review of a rule produced in that proceeding, that person must first petition the agency for rulemaking on the subject for which she seeks judicial review?

DISCUSSION: The short answer is no. A person who was not a party to an agency adjudication lacks standing to challenge the agency decision by way of judicial review, save a procedural error excluding that person who otherwise has a right to participate. The concept of "finality" is important to persons being regulated in that business and personal decisions need to be made and the party affected needs to consider the decision to appeal or not based on their own circumstances.

Having a stranger step forward and take control away from a party is not consistent with the principles of justice, especially when the stranger has available other mechanisms, i.e.,

intervening and/or Rule Making, to attempt to impact the regulations affecting their interests. Any potential party who sits on the sidelines during a hearing waiting to see the outcome should not be rewarded with the opportunity for judicial review.

However, the Work Group recognizes the need for a person or entity to seek guidance or a binding interpretation as to his or her circumstances vis-à-vis the agency standards, including as to a new decision where that person is a third party, i.e., a total stranger to the proceeding below. Conn. Gen. Stat. §4-176 provides that a person may seek an administrative declaratory ruling to challenge "the validity of any regulation, or the applicability to specific circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency." The administrative declaratory ruling is not a full rule making proceeding. *Compare* Conn. Gen. Stat. §§4-168 to 4-174. This is not an appeal in the allegedly offense agency decision.

Adjudication of a single contested case and controversy is a different conceptual procedure than a rule making proceeding. They serve different functions. Most notably in adjudication there is an absence of an opportunity for "public notice" and "public comment" that is essential to the formulation of a standard of "general" applicability because the adjudication is a fact driven process related to the adversarial parties involved. Rule making, as an extension of the legislative process, has a broader focal point and is not driven by just the party petitioning for a certain result and the party to be affected by the decision then pending.

While the short answer is no, the complete answer does not mean that the third party should be left without a means to determine whether the decision rendered as to others will impact their circumstance or the applicability of the standard articulated in the new decision, albeit a matter of first impression or not. But, the third party should not be permitted to upset, delay, or otherwise hinder the decision rendered as to the original parties. *See* Discussion 3 above.

RECOMMENDATION: The Work Group recommends that the Committee adopt language that would prohibit a person who was not a party at the agency level from seeking judicial review of that decision. The Work Group recommends that the Committee adopt language that allows the third party to initiate a separate administrative declaratory ruling to handle emerging legal issues and to do so without engaging in a full Rule Making proceeding, at least until the standards need to significantly changed in accordance with new standards. *See* Recommendation 3 above.

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