D R A F T

FOR DISCUSSION ONLY

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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For June 4, 2008 Conference Call

WITH PREFATORY NOTE AND COMMENTS

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

May 30, 2008

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REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

Prefatory Note

The 1946 Model State Administrative Procedure Act

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

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

The 1961 Model State Administrative Procedure Act

As a result of several studies conducted in the nineteen fifties, the Conference decided to revise the 1946 Act. The basis given for that decision was that a maturing of thought on administrative procedure had occurred since 1946. The drafters of the 1961 Act explained that their goals were fairness to the parties involved and creation of procedure that is effective from the standpoint of government.[4] The resulting 1961 Act also followed the model, not uniform, act approach, because "details must vary from state to state." The 1961 APA purposely included only "basic principles" and "essential major features." Some of those major principles were: requiring agency rulemaking for procedural rules; rulemaking procedure that provided for notice, public input and publication; judicial review of rules; guarantees of fundamental fairness in adjudications; and provision for judicial review of agency adjudication. Over one half of the states adopted the 1961 Act or large parts of it.[5]

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

[2] Id. at 200

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

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

[5] Uniform Laws Annotated at 357 (1980 Master Edition) catalogued numerous states that used the 1961 Model State Administrative Procedure Act. They are: Arizona, Arkansas, Connecticut, District of Columbia, Florida, Georgia,

The 1981 Model State Administrative Procedure Act

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

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

The Present Revision

There are several reasons for revision of the 1981 Act. It has been more than twenty-five years since the Act was last revised. There now exists a substantial body of legislative action, judicial opinion and academic commentary that explain, interpret and critique the 1961 and 1981 Acts and the Federal Administrative Procedure Act. In the past two decades state legislatures, dissatisfied with agency rulemaking and adjudication, have enacted statutes that modify administrative adjudication and rulemaking procedure. At the present time the American Bar Association has undertaken a major study of the Federal Administrative Procedure Act and is recommending revision of that act. Since some sections of the Model State Administrative Procedure Act are similar to the Federal Act, the ABA study furnishes useful comparisons for

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Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

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

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

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

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

the Act. The emergence of the Internet, which did not exist at the time of the last revision of the Act, is another event that the Model Administrative Procedure Act must address. Finally, since the 1981 Act, approximately thirty states have adopted central panel administrative law judge provisions. What has been learned from the experience in those states can be used to improve this Act.

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

[ARTICLE] 1

GENERAL PROVISIONS

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

SECTION 102. DEFINITIONS. In this [act]:

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

(2) "Adoption of a rule" includes amendment or repeal, unless the context clearly indicates otherwise.

(3) "Agency" means a state board, authority, commission, institution, department, division, officer, or other state entity, that is authorized or required by law to make rules or to adjudicate. The term does not include the governor, the legislature, and the judiciary.

(4) "Agency action" means:

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

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

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

(5) "Agency head" means the individual in whom, or one or more members of the body of individuals in which, the ultimate legal authority of an agency is vested.

(6) "Agency record" means the agency rulemaking record in rulemaking governed by

Section 302, the emergency rulemaking record in rulemaking governed by Section 309(a), the expedited rulemaking record in rulemaking governed by Section 309(b), the agency hearing record in an adjudication governed by Section 407, and the agency record in informal and emergency cases governed by Sections 406 and 408 .

(7) "Contested case" means an adjudication in which an opportunity for an evidentiary hearing is required by the federal or state constitution, or a federal or state statute, or a judicial decision.

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

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

(10) "Emergency adjudication" means an adjudication in a contested case in which danger to the public health, safety, or welfare requires immediate action.

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

(12) "Guidance document" means a record developed by an agency that lacks the force of law but states the agency's current approach to, or opinion of law, including interpretations and general statements of policy that describe the agency's exercise of discretionary functions

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

(14) "Internet website" means a centralized Internet website that permits the public to

search a permanent database that archives materials required to be published with the [publisher] under this [act].

(15) "Law" means the federal or state constitution, a federal or state statute, a judicial decision, a rule of court, an executive order that rests on statutory or constitutional authorization, or a rule or order of an agency.

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

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

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

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

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

(21) "Person" means an individual, corporation, business trust, estate, trust, statutory trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(22) "Presiding officer" means an individual who presides over the evidentiary hearing in a contested case.

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

investigation.

(24) "Recommended decision" means a proposed action issued by a presiding officer who is not the agency head which is subject to review by the agency head.

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

(26) "Rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy or the organization, procedure, or practice requirements of an agency.

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

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

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

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

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

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

Comment

Adjudication. This definition gives the general meaning of adjudication that distinguishes it from rulemaking. See California Government Code Section 11405.20. This Act and the definitions in this Section also identify some categories of adjudication that require procedure specified in this Act to be used to reach a decision. For example, the term contested case, defines a subset of adjudications that must be conducted as prescribed in Article 4 of this Act.

Agency. The object of this definition is to subject as many state actors as possible to this definition. See 1981 MSAPA Section 1-102(1). The exception for the governor means the governor personally.

Agency Action. This definition is added for purposes of identifying those matters subject to judicial review. Failure to issue an order or rule is not judicially reviewable except as provided in Section 501(a) of the Act. Failure to issue an order or rule does not include an agency denial of a petition to initiate rulemaking. See Section 317 of the Act. This definition is taken from 1981 MSAPA Section 1-102(2).

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. This definition is taken from 1981 MSAPA Section 1-102(3).

Contested case. This term is similar to the "contested case" definition of the 1961 MSAPA. Like the 1961 MSAPA, this Act looks to external sources such as statutes to describe situations in which a party is entitled to a hearing. However, this term differs from the 1961 MSAPA's term "contested case" because it also includes hearings required by the constitution, federal or state, and makes provision in Article 4 for the type of hearing to be held in a case where a constitution creates the right to a hearing. Including constitutionally created rights to a hearing within the provisions of this Act eliminates the problem of looking outside the Act to determine the type of hearing required in cases where the right to the hearing is created by constitution. Hearing rights created by judicial decisions means constitutional decisions by appellate courts. See Goldberg v. Kelley, 397 U.S. 254 (1970), and Goss v. Lopez 419 U.S. 565 (1975). Contested cases do not include investigatory hearings, pure administrative process proceedings such as tests, elections, or inspections, and situations in which a party has a right to a de novo administrative or judicial hearing. See Section 401 of the Act. An agency may by rule make all or part of article 4 applicable to adjudication that does not fall within the requirements of Section 401, including hearing rights conferred by agency regulations. See California Government Code Section 11410.10. The scope of hearing rights is governed by law other than this act.

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

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

Electronic Record. This definition is identical to § 2(7) of the Uniform Electronic Transactions Act. An "electronic record" is a document that is in an "electronic" form. Documents may be communicated in electronic form; they may be received in electronic form;

they may be recorded and stored in electronic form; and they may be received in paper copies and converted into an electronic record. This Act does not limit the type of electronic documents received by the [publisher]. The purpose of defining and recognizing electronic documents is to facilitate and encourage agency use of electronic communication and maintenance of electronic records.

Emergency Adjudication. This definition is designed to be used with the emergency adjudication procedures provided by Section 408. The danger to the public health, safety, or welfare standard requiring immediate action is a strict standard that is defined by law other than this Act. Federal and state case law have held that in an emergency situation an agency may act rapidly and postpone any formal hearing without violation, respectively, of federal or state constitutional law. FDIC v. Mallen, 486 U.S. 230 (1988); Gilbert v. Homar (1997) 520 U.S. 924; Dep't of Agric. v. Yanes, 755 P.2d 611 (OK. 1987).

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

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

Internet website. This definition is designed to be used by agencies and publishers to comply with the requirements of Sections 201, 316, and 421 of this Act.

Law. Law includes an executive order that rests on statutory or constitutional authorization. See Kevin M. Stack, "The Statutory President," 90 Iowa L. Rev. 539, 550-52 (2005); Jim Rossi, "State Executive Law making in Crisis," 56 Duke L. Rev. 237, 261-64 (2006).

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

Order. Unlike the federal APA which defines rule, but not order, this section provides a positive definition of order based on case law and agency experience. The key concept is that an order includes solely agency legal determinations that are addressed to particular, specific, identified individuals in particular circumstances. An order may be addressed to more than one person. Further, the definition is consistent with modern law in rejecting the right/privilege distinction in constitutional law. The addition of the language "or other interests" is intended to clarify this change and to include entitlements. See also Cal.Gov.Code SECTION 11405.50.

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

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

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

Rule. 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. The exceptions to the definition are widely used in state APAs. Subsection 26(A) is drawn from 1981 Model State APA § 3-116(1). Subsection 26(E) is drawn from 1981 Model State APA § 3-116(9). Subsection 26(F) is drawn from 1981 Model State APA § 3-116(2). Subsection 26(H) is based on 1981 Model State APA § 3-116(7).

Written. This definition relates to the definition of record in Section 102(25) in that written documents are inscribed on a tangible medium. The definition of record in Section 102(25) includes both tangible medium (written) and electronic documents.

SECTION 103. APPLICABILITY. This [act] applies to all agencies unless the agency is expressly exempted by statutory law of this state.

Comment

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

[ARTICLE 2]

PUBLIC ACCESS TO AGENCY LAW AND POLICY

SECTION 201. PUBLICATION, COMPILATION, INDEXING, AND PUBLIC INSPECTION OF RULEMAKING DOCUMENTS.

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

Legislative Note: *throughout this act the drafting committee has used the term [publisher] to describe the official or agency to which substantive publishing functions are assigned. All states have such an official, but their titles vary. Each state using this act should determine what that agency is, then insert its title in place of [publisher] throughout this act.*

(b) The [publisher] shall publish all documents in [electronic] [written] format.The [publisher] shall prescribe a uniform numbering system, form, and style for all proposed and adopted rules.

(c) The [publisher] shall maintain the official record of adoption for adopted rules, including the text of the rule and any supporting documents, filed with the [publisher] by the agency. The agency adopting the rule shall maintain the rulemaking record, as defined in Section 302(b), for that rule.

(d) The [publisher] shall create and maintain an Internet website [or other appropriate technology]. The [administrative bulletin and administrative code] and any guidance document filed with the [publisher] by an agency must be published online on the Internet website [or other appropriate technology].

(e) The [administrative bulletin] shall be published by the [publisher] at least once per [month].

(f) The [administrative bulletin] must be made available in written form upon request, for

which the [publisher] may charge a reasonable fee.

(g) The [administrative bulletin] must contain:

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

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

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

(4) an index .

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

(i) The [publisher] shall also make available for public inspection and copying the [administrative bulletin] and the [administrative code].

(j) The [publisher] may make minor non substantive corrections in spelling, grammar, and format in proposed or adopted rules after notification of the agency. The [publisher] shall make a record of the corrections.

(k) An agency shall make its rules, guidance documents, and orders in contested cases available through electronic distribution unless exempt from disclosure under law other than this act. An agency shall make these materials available through regular mail upon request for which the agency may charge a reasonable fee.

(l) An agency may provide for electronic distribution of notices related to rulemaking or guidance documents to a person who requests it.. If a notice is distributed electronically, the

agency is not required to transmit the actual notice form but must send all the information contained in the notice.

(m) All agencies, through the office of [publisher], shall make available on the Internet website of the [publisher]:

(1) notice of each proposed rule adoption, amendment, or repeal;

(2) the summary of regulatory analysis of each proposed rule;

(3) each adopted rule, rule amendment, or rule repeal;

(4) each guidance document;

(5) each notice;

(6) each order in a contested case ; and

(7) any other notice or matter that an agency is required to publish under this act.

(n) The [publisher] may not charge a fee for public access to the [publisher]'s Internet website [or other appropriate technology].

Comment

This section seeks to assure adequate notice to the public of proposed agency action. It also seeks to assure adequate record keeping and availability of records for the public. Article 2 is intended to provide easy public access to agency law and policy that are relevant to agency process. Article 2 also adds provisions for electronic publication of the administrative bulletin and code. Section 201 does not address the issue related to what languages rules should be published in, nor does it address issues related to translation of information contained in these documents into languages other than English.

The arrival of the Internet and electronic information transfer, which occurred after the last revision of the Model State Administrative Procedure Act, has revolutionized communication. It has made available rapid, efficient and low cost communication and information transfer. Many states as well as the federal agencies have found that it is an ideal medium for communication between agencies and the public, especially in connection with rulemaking. Since the last Model Administrative Procedure Act was written, many states have adopted various types of statutes that permit agencies to use electronic technology to communicate with the public. The agencies have found this technology particularly useful in connection with rulemaking.

Subsection (c) requires that the [publisher] maintain the official record for adopted rules, including the text of the rules and any supporting documents, filed by the agency. Subsection (c) also requires that the agency adopting the rule maintain the rulemaking record for that rule. Section 302(b) provides the requirements for the rulemaking record.

Subsection (d) requires the [publisher] to 1) maintain an Internet website, and 2) publish all matters required to be published under this act on that website. If a state chooses to use subsection (d), they will create a centralized website for use by all agencies. Subsection (d) also requires that the [publisher] publish agency guidance documents filed by the agency with the [publisher]. See section 202(4) and Section 310, below. Subsection (d) does not address issues related to authentication, preservation and archival storage of electronic documents published on an internet website. Subsection (d) does not address the principles for deciding what rules are in effect and enforceable at a specific point in time.

Subsection (f) requires the publisher to make the administrative bulletin available in written form upon request, for which the publisher may charge a reasonable fee. This requirement can be satisfied by states making the administrative bulletin available on the internet, searchable, and printable.

The bracketed text of subsection (g)(1), and (g) (2) is included so that agencies may utilize redlining or underlining and striking of the text of the proposed or adopted rules so that changes from the existing text of the rule are clearly delineated. Agencies that are proposing or adopting new rules or that have some other system for showing changes need not use the bracketed text.

It is possible to go much further in providing for use of the Internet that the publication adopted here. For example, a state could choose to permit agencies to operate their own websites, and to accept comments on rules on the website. They could also provide for maintenance of a database of all comments received that the public could access. These provisions are extremely useful, but may be quite expensive. The central system adopted here, means only one Internet website is required. In terms of cost benefit, this is an effective method of providing for electronic communication and agency access.

Subsection (h) requires the publisher to index the administrative code by subject. States can satisfy this requirement by providing an administrative code that is searchable by word on the internet.

Subsection (j) provides for a limited nonsubstantive power to edit agency rules provided that the agency is notified by the rules [publisher] of the changes. Subsection (j) is based on the Maine Administrative Procedure Act, 5 M.R.S.A. Section 8056(10).

Subsections (k) and (l) are drawn from the Washington Administrative Procedure Act. See WA ST 34.05.260.

SECTION 202. REQUIRED AGENCY RULEMAKING AND

RECORDKEEPING. In addition to any other rulemaking requirements imposed by law, each agency shall:

(1) adopt as a rule a description of its organization, stating the general course and method of its operations and the methods by which the public may obtain information or make submissions or requests;

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

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

(4) issue rules for the conduct of public hearings [if the default procedural rules promulgated under Section 204 do not include provisions for the conduct of public hearings] .

(5) file with the publisher in electronic format acceptable to the publisher the agency's proposed rules; adopted rules, including rules adopted using the emergency process under Section 309(a) and rules adopted using the expedited process under Section 309(b); notices; and orders issued in contested cases;

(6) [maintain a separate, official, current, and dated index and compilation of all rules adopted under [Article] 3, make the index and compilation available at agency offices for public inspection and copying [and online on the [publisher]'s Internet website], update the index and compilation at least every [30 days], and file the index and the compilation and all changes to both with the [publisher];] and

(7) maintain [custody of] the agency's current rulemaking docket required by Section 302(b).

Comment

One object of this section is to make available to the public all procedures followed by the agency, including especially how to file for a license or benefit. It is modeled on the 1961 Model State Administrative Procedure Act, Sections 2(a) (4) & 2(b), the 1981 Model State APA Sections 2-104(1),(2), and the Kentucky Administrative Procedure Act, KRS Section 13A.100. Persons seeking licenses or benefits should have a readily available and understandable reference sources from the agency. A second reason is to eliminate "secret law" by making all guidance documents used by the agency available from the agency .

Agencies could use expedited rulemaking procedures under Section 309(b) to adopt some of the rules required by subsections (1), (2), (3), and (4).

SECTION 203. DECLARATORY ORDER.

(a) Any interested person may petition an agency for a declaratory order that states whether or in what manner a rule, guidance document, or order issued by the agency applies or does not apply to the petitioner.

(b) Each agency shall adopt rules prescribing the form of a petition for purposes of subsection (a) and the procedure for its submission, consideration, and prompt disposition. The provisions of this [act] for formal, informal, or other applicable hearing procedure do not apply to an agency proceeding for a declaratory order, except to the extent provided in this [article] or to the extent the agency so provides by rule or order.

(c) Not later than 60 days after receipt of a petition pursuant to subsection (a), an agency shall issue a declaratory order in response to the petition, decline to issue a declaratory order, or schedule the matter for further consideration.

(d) If an agency declines to consider a petition submitted under subsection (a), it shall promptly notify in a record the petitioner of its decision and include a brief statement of the reasons for declining. An agency decision to decline to issue a declaratory order is judicially reviewable in court for abuse of discretion.

(e) If an agency issues a declaratory order, the order must contain the names of all parties to the proceeding, the particular facts on which it is based, and the reasons for the agency's conclusion. A declaratory order has the same status and binding effect as an order issued in an adjudication. Declaratory orders are subject to judicial review under Section 501.

Comment

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

Subsection (d) states two alternatives: 1) agency decisions that decline to issue a declaratory order are not judicially reviewable (See Heckler v. Chaney 470 U.S. 821 (1985) (FDA decision not to undertake enforcement action is not reviewable under federal APA, 5 U.S.C. Section 701(a)(2).); 2) agency decisions that decline to issue a declaratory order are judicially reviewable for abuse of discretion (See Massachusetts v. EPA 127 S. Ct. 1438 (2007) (EPA decision to reject rulemaking petition and therefore not to regulate greenhouse gases associated with global warming was judicially reviewable and decision was arbitrary and capricious.).

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

[SECTION 204. DEFAULT PROCEDURAL RULES.

(a) The [governor] [attorney general] [designated state agency] shall adopt default procedural rules for use by agencies. The default rules must provide for the procedural functions and duties of as many agencies as is practicable.

(b) Except as otherwise provided in subsection (c), an agency shall use the default

procedural rules published under subsection (a).

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

Comment

This Section is based on Section 2-105 of the 1981 MSAPA. See also the provisions of the California Administrative Procedure Act, California Government Code Section 11420.20 (adoption of model alternative dispute resolution regulations by California Office of Administrative Hearings.) One purpose of this provision is to provide agencies with a set of procedural rules. This is especially important for smaller agencies. Another purpose of this section is to create as uniform a set of procedures for all agencies as is realistic, but to preserve the power of agencies to deviate from the common model where necessary because the use of the model rules is demonstrated to be impractical for that particular agency. This section requires all agencies to use the model rules as the basis for the rules that they are required to adopt under Section 202. An agency may deviate from the model rules only for impracticability.

[ARTICLE] 3

RULEMAKING; ADOPTION AND EFFECTIVENESS OF RULES

SECTION 301. CURRENT RULEMAKING DOCKET.

(a) As used in this section, "rule" does not include a rule adopted using the emergency process under Section 309(a) or a rule adopted using the expedited process under Section 309(b).

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

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

(1) the subject matter of the proposed rule;

(2) notices related to the proposed rule;

(3) where comments may be inspected;

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

(5) requests for public hearing;

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

(7) how comments may be made; and

(8) the timetable for action.

(d) Upon request, the agency shall provide a written docket.

Comment

This section is modeled on Minn. M.S.A. Section 14.366. This section and the following section, Section 302 state the minimum docketing and rulemaking record keeping requirements for all agencies. This section also recognizes that many agencies use electronic recording and maintenance of dockets and records. However, for smaller agencies, the use of electronic recording and maintenance may not be feasible. This section therefore permits the use of exclusively written, hard copy dockets. The current rulemaking docket is a summary list of

pending rulemaking proceedings or an agenda referring to pending rulemaking. This section includes expedited rules governed by Section 309.

SECTION 302. AGENCY RECORD IN RULEMAKING PROCEEDING.

(a) An agency shall maintain a rulemaking record for each rule it proposes to adopt. The record and materials incorporated by reference must be readily available for public inspection in the central office of the agency and available for public display on the internet website maintained by the [publisher], unless the record and materials are privileged or exempt from disclosure under state law other than this [act].. Where an agency determines, in its sound discretion, that any portions of the rulemaking record can not practicably be displayed or are inappropriate for public display on the internet, the agency shall describe the documents, and shall note in the public and internet record that these documents are not displayed.

(b) A rulemaking record must contain:

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

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

(3) copies or an index of written factual material, studies, and reports relied on or seriously consulted by agency personnel in formulating the proposed or final rule;

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

(5) a copy of the rule and explanatory statement filed with the [publisher]; and

(6) all petitions for any agency action on the rule except for petitions governed by Section 203.

Comment

Several states have adopted this type of agency rule-making record provisions: Az., A.R.S. Section 41-1029; Colo., C.R.S.A. Section 24-4-103; Minn., M.S.A. Section 14.365; Miss., Miss. Code Ann. Section 25-43-3.110; Mont., MCA 2-4-402; Okl., 75 Okl.St.Ann. Section 302; and Wash., RCWA 34.05.370.

The language of subsection (a) is based on Section 3-112(a) of the 1981 Model Act. Similar language is found in the Washington Administrative Procedures Act, RCWA Section 34.05.370. The requirement of an official agency rulemaking record in subsection (a) should facilitate a more structured and rational agency and public consideration of proposed rules. It will also aid the process of judicial review of the validity of rules. The requirement of an official agency rulemaking record was suggested for the Federal Act in S. 1291, the "Administrative Practice and Regulatory Control Act of 1979," title I, Section 102(d), [5 U.S.C. 553(d)], 96 Cong.Rec. S7126 at S7129 (daily ed. Jun. 6, 1979) (Sen. Kennedy). The second sentence of subsection (a) is intended exclude privileged material from disclosure and display. Privileged materials includes confidential business information and trade secrets, as well as internal advice memoranda. The exemptions in the state open records laws would be examples of records and materials that are exempt from disclosure and display under law other than this act. The third sentence in subsection (a) is intended to enable an agency to decide, for example, that indecent material or copyrighted material should be available for inspection in hard copy but not posted on the internet. It is not intended to authorize exclusion from the internet record of, for example, information that reflects adversely on the government."

Subsection (b) requires *all written* submissions made to an agency and *all written* materials considered by an agency in connection with a rulemaking proceeding to be included in the record. It also requires a copy of any existing record of oral presentations made in the proceeding to be included in the rulemaking record. The language in Subsection (b)(3) is based on language adopted by the ABA. See ABA Section of Administrative Law and Regulatory Practice, "A Blackletter Statement of Federal Administrative Law," 54 Admin. L. Rev. 1, 34 (2002)

SECTION 303. ADVANCED NOTICE OF PROPOSED RULEMAKING; NEGOTIATED RULEMAKING.

(a) An agency may gather information relevant to the subject matter of possible rulemaking and may solicit comments and recommendations from the public about that possibility by publishing an advance notice of proposed rulemaking in the [administrative

bulletin] and indicating where, when, and how persons may comment.

(b) An agency may engage in negotiated rulemaking by appointing a committee to comment or make recommendations on the subject matter of a possible rulemaking under active consideration within the agency. The committee may seek, in consultation with one or more agency representatives, to reach a consensus on the terms or substance of a proposed rule. In making the appointments, the agency shall seek to establish a balance in representation among interested stakeholders and the public. The agency shall publish a list of all committees with their membership at least [annually] in the [administrative bulletin]. Notice of meetings of committees appointed under this subsection shall be published in the [administrative bulletin] at least [15 days] before to the meeting. Meetings of committees appointed under this section must be open to the public.

(c) This section does not prohibit agencies from obtaining information and opinions from members of the public on the subject of the rulemaking by any other method or procedure used in rulemaking.

Comment

This section is based upon the provisions of Section 3-101 of the 1981 MSAPA. Seeking advice before proposing a rule frequently alerts the agency to potential serious problems that will change the notice of proposed rulemaking and the rule ultimately adopted. This section is designed to encourage gathering information. It is not intended to prohibit any type of reasonable agency information gathering activities; however, the section seeks to insure that agencies act in a fashion that will result in a balance among interested groups from whom information is received.

Several states have enacted provisions of this type in their APAs. Some of them merely authorize agencies to seek informal input before proposing a rule; several of them indicate that the purpose of this type of provision is to promote negotiated rulemaking. Those states are Idaho, I.C. § 67-5220; Minnesota, M.S.A. § 14.101; Montana, MCA 2-4-304; and Wisconsin, W.S.A. 227.13. Subsection (b) is intended to authorize negotiated rulemaking.

Subsection (c) authorizes agencies to use other methods to obtain information and opinions. Under subsection (c), agencies may meet informally with specific stakeholders to

discuss issues raised in the negotiated rulemaking process. Negotiated rulemaking under subsection (b) is an option for agency use but is not required to be used prior to starting a rulemaking proceeding. Negotiated rulemaking committees are also used in federal administrative law. See the federal Negotiating Rulemaking Act, 5 U.S.C. Sections 561 to 570.

SECTION 304. NOTICE OF PROPOSED RULEMAKING

(a) At least [30] days before the adoption, amendment, or repeal of a rule, an agency shall file with the [publisher] notice of the proposed action in the [administrative bulletin]. The notice must include:

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

(2) a citation or reference to the specific legal authority authorizing the proposed rule;

(3) the text of the proposed rule;

(4) how copies of the full text of the regulatory analysis of the proposed rule may be obtained; and

(5) where, when, and how a person may present their views on the proposed rule and request a hearing thereon if one is not already provided.

(b) Not later than three days after publication of the notice of the proposed rulemaking in the [administrative bulletin], the agency shall mail or send electronically the notice to each person that has made a timely request to the agency for a mailed or electronic copy of the notice. An agency may charge a reasonable fee for written mailed copies if the person has made a request for a mailed copy.

Comment

Many states have similar provisions to provide notice of proposed rulemaking to the public. This section is based upon the provisions of Section 3-103 of the 1081 MSAPA. Rulemaking is defined in Section 102(28). Adoption of a rule is defined in Section 102(2) to mean that adoption of a rule includes amendment or repeal, unless the context clearly indicates

otherwise..

SECTION 305. REGULATORY ANALYSIS.

(a) An agency shall prepare a regulatory analysis for a proposed rule having an estimated economic impact of: (1) more than [$.]; (2) less than [$.]; if not later than [20] days after the notice of proposed rulemaking is published, a written request for the analysis is filed with the agency by [the governor] [,] [another agency] [,] [or] [a member of the Legislature].].

(b) An agency shall prepare a statement of no estimated economic impact for any rule proposed to be adopted, amended, or repealed by the agency the adoption, amendment, or repeal of which has no economic impact.

(c) A regulatory analysis must contain:

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

(2) an estimate of the probable impact of the proposed rule upon affected classes;

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

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

(5) “a citation to and summary of each scientific or statistical study, report, or analysis that served as a basis for the rule, together with an indication of how the full text may be obtained.”

(d) An agency preparing a regulatory analysis under this section shall prepare a concise summary of the regulatory analysis.

(e) An agency preparing a regulatory analysis under this section shall submit the analysis

to the [regulatory review agency] [department of finance and revenue] [other]].

(f) The agency preparing a concise summary of a regulatory analysis required under this section must file the concise summary with the publisher for publication in the [administrative bulletin] at least [20] days before the end of the period during which a person may make written submissions on the proposed rule;

Comment

Regulatory analyses are widely used as part of the rulemaking process in the states. The subsection also provides for submission to the rules review entity in the state, if the state has one. States that already have regulatory analysis laws can utilize the provisions of Section 305 to the extent that this section is not inconsistent with existing law other than this act. Agencies may rely upon agency staff expertise and information provided by interested stakeholders and participants in the rulemaking process. Agencies are not required by this act to hire and pay for private consultants to complete regulatory impact analysis.

Subsection (c)(5) This language is adapted from N.Y. APA § 202-a. This language also codifies requirments used in federal administrative law. In the federal cases, disclosure of technical information underlying a rule has been deemed essential to effective use of the opportunity to comment. See *American Radio Relay League v. FCC*, 2008 WL 1838387 (D.C. Cir. April 25, 2008); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

SECTION 306. PUBLIC PARTICIPATION.

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

(b) The agency shall consider all information and comments submitted respecting a proposed rule

(c) Unless a hearing is required by law other than this [act], an agency is not required to hold a hearing on a proposed rule. If an agency does hold a hearing, the agency may allow a person to make an oral presentation with information and comments about the rule. Hearings must be open to the public and shall be recorded.

(d) A hearing on a proposed rule may not be held earlier than [30] days after notice of its location and time is published in the [administrative bulletin].

(e) An agency representative shall preside at a hearing on a proposed rule. If the presiding agency representative is not the agency head, the representative shall prepare a memorandum for consideration by the agency head summarizing the contents of the presentations made at the hearing.

Comment

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

SECTION 307. FINAL ADOPTION.

(a) An agency may not adopt a rule until the period for submitting information or comments has expired and notice has been given under [Article] 7.

(b) Not later than [180] days after the date of publication of the notice of proposed adoption of the rule, the agency shall adopt the rule pursuant to the rulemaking proceeding or terminate the proceeding by publication of a notice to that effect in the [administrative bulletin]. The agency shall file adopted rules with the [publisher] within [ ] days after the date of adoption of the rule.

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

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

Comment

This section codifies the final adoption and filing for publication requirements for

rulemaking that is subject to the procedures provided in sections 304 to 308 of this Act. Section 702(a) of this act requires that the agency shall file a copy of the adopted amended or repealed rule with the rules review committee at the same time it is filed with the publisher. Subsection (d) provides that a rule that is not properly adopted and filed for publication has no legal effect.

SECTION 308. VARIANCE BETWEEN PROPOSED RULE AND ADOPTED RULE. An agency may not adopt a rule that substantially differs from the rule proposed in the notice of proposed adoption of a rule on which the rule is based unless the rule being adopted is a logical outgrowth of the rule proposed in the notice, as determined from consideration of the extent to which:

(1) any person affected by the adopted rule should have reasonably expected that the published proposed rule would affect the person's interest;

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

(3) the effect of the adopted rule differs from the effect of the rule proposed to be adopted or amended.

Comment

This section draws upon provisions from several states. See Mississippi Administrative Procedure Act, Miss. Code Ann. Section 25-43-3.107 and the Minn. Administrative Procedure Act, M.S.A. Section 14.05. The following cases discuss and analyze the logical outgrowth test, and this section seeks to incorporate the factors identified in those cases. These judicial opinions also convey the wide acceptance and use of the logical outgrowth test in the states. *First Am. Discount Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008, 1015 (D.C.Cir.2000); *Arizona [publisher]. Serv. Co. v. EPA*, 211 F.3d 1280, 1300 (D.C.Cir.2000); *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C.Cir.1994); *Trustees for Alaska v. Dept. Nat. Resources*, ___AK____, 795 P.2d 805 (1990); *Sullivan v. Evergreen Health Care*, 678 N.E.2d 129 (Ind. App. 1997); *Iowa Citizen Energy Coalition v. Iowa St. Commerce Comm*. ___IA___, 335 N.W.2d 178 (1983); *Motor Veh. Mfrs. Ass'n v. Jorling,* 152 Misc.2d 405, 577 N.Y.S.2d 346 (N.Y.Sup.,1991); *Tennessee Envir. Coun. v. Solid Waste Control Bd.*, 852 S.W.2d 893 (Tenn. App. 1992); *Workers' Comp. Comm. v. Patients Advocate,* 47 Tex. 607, 136 S.W.3d 643 (2004); *Dept. Of [publisher]. Svc. re Small Power Projects*, 161 Vt. 97, 632 A.2d 13 73 (1993); *Amer.*

Bankers Life Ins. Co. v. Div. of Consumer Counsel, 220 Va. 773, 263 S.E.2d 867 (1980).

SECTION 309. EMERGENCY RULEMAKING; EXPEDITED RULEMAKING.

(a) When an agency finds for good cause that an imminent peril to the public health, safety, or welfare, including the imminent loss of federal funding for agency programs, requires the immediate adoption of a rule and states in a record its reasons for that finding, the agency, without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, may adopt, a rule without complying with Sections 304 to 308. The adoption may be effective for not longer than [180] days [renewable once up to an additional [180] days]. The adoption does not preclude adoption of an identical rule under Sections 304 through 308. The agency shall file under Section 315 a rule not later than [ ] days of the adoption under the subsection and shall notify persons who have requested notice of rules related to that subject matter.

(b) If an agency proposes to adopt a rule and that action is expected to be noncontroversial, it may use an expedited process in accordance with this subsection. A rule adopted under this subsection must be published in the [administrative bulletin] along with a statement by the agency that it does not expect the rule to be controversial . If an objection to the use of the expedited rulemaking process is received within the public comment period from any person, the agency shall file notice of the objection with the [publisher] for publication in the [administrative bulletin] and may proceed with the normal rulemaking process specified in Sections 304 to 308, with the initial publication of the rule serving as the notice of the proposed adoption of a rule.

Comment

This section is taken from the 1961 MSAPA, Section 3(2)(b), and the Virginia

Administrative Procedure Act, Va. Code Ann. Section 2.2-4012.1. Some state courts have indicated that *any* exemption from rulemaking requirements must be strictly construed to be limited to an emergency or virtual emergency situation.

Subsection (a) can be used to adopt program requirements necessary to comply with federal funding requirements, or to avoid suspension of federal funds for noncompliance with program requirements.

Subsection (b) is based upon a recommendation from the Administrative Conference of the United States. Direct final rulemaking has been recommended by the Administrative Conference of the United States [ACUS Recommendation 95-4, 60 Fed. Reg. 43110 (1995)]. The study that provided the basis for the recommendation was prepared by Professor Ron Levin and has been published [Ronald M. Levin, "Direct Final Rulemaking" 64 George Washington Law Review 1 (1995)]. [However, recognizing that there may be a few other justifications for exemption, this section adopts a broader rule for matters that will be noncontroversial. Thus, a situation where the agency is merely making a stylistic correction or correcting an error that the agency believes is noncontroversial may be adopted without formal rulemaking procedures. See the VA Fast-Track Rule provision at Va. Code Ann. Section 2.2-4012.1.]

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

SECTION 310. GUIDANCE DOCUMENTS.

(a) An agency may issue a guidance document without following the procedures set forth in Sections 304 through 308. Guidance documents do not have the force of law and do not constitute an exercise of an agency's delegated authority, if any, to establish the rights or duties of any person.

(b) An agency that proposes to rely on a guidance document to the detriment of a person in any administrative proceeding must afford that person a fair opportunity to contest the legality or wisdom of positions taken in the document. The agency may not use a guidance document to foreclose consideration of issues raised in the document.

(c) A guidance document may contain binding instructions to agency staff members, provided that the agency's procedures also afford to affected persons, in compliance with

subsection (b), an adequate opportunity to contest positions taken in the document at an appropriate stage in the administrative process.

(d) When an agency proposes to act at variance with a position expressed in a guidance document, it shall provide a reasonable explanation for the departure. If affected persons may have reasonably relied on the agency's position, the explanation shall include a reasonable justification for the agency's conclusion that the need for the departure outweighs such persons' reliance interests.

(e) Each agency shall publish all currently operative guidance documents and may file the guidance document with the [publisher].

(f) Each agency shall maintain an index of all of its currently operative guidance documents, file the index with the [publisher] on or before January 1 of each year, make the index readily available for public inspection, and make available for public inspection the full text of all guidance documents to the extent inspection is permitted by law. Upon request, an agency shall make copies of guidance indexes or guidance documents available without charge; at cost; or, where authorized by law, on payment of a reasonable fee. If any agency does not index a guidance document, the agency may not rely on that guidance document or cite it as precedent against any party to a proceeding, unless that party has actual and timely notice of the guidance document.

(g) A person may petition under section 317 to request an agency to adopt a rule in place of an existing guidance document.

(h) A person may petition an agency to revise or repeal an existing guidance document. Not later than [60] days after submission of such a petition, the agency shall: (1) revise or repeal the guidance document; (2) initiate a proceeding for the purpose of considering such a revision

or repeal; or (3) deny the petition in a record and state its reasons for the denial.

Comment

This section seeks to encourage an agency to advise the public of its current opinions, approaches, and likely courses of action by using guidance documents (also commonly known as interpretive rules and policy statements). The section also recognizes agencies' need to promulgate such documents for the guidance of both its employees and the public. Agency law often needs interpretation, and agency discretion needs some channeling. The public needs to know the agency's opinion about the meaning of the law and rules that it administers. Increasing public knowledge and understanding reduces unintentional violations and lowers transaction costs. See Michael Asimow, "California Underground Regulations," 44 Admin. L. Rev. 43 (1992); Peter L. Strauss, "Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element," 53 Admin. L. Rev. 803 (2001). This section strengthens agencies' ability to fulfill these legitimate objectives by excusing them from having to comply with the full range of rulemaking procedures before they may issue these nonbinding statements. At the same time, the section incorporates safeguards to ensure that agencies will not use guidance documents in a manner that would undermine the public's interest in administrative openness and accountability.

Four states have adopted detailed provisions regulating guidance documents in their administrative procedure acts. See Ariz. Rev. Stat. Ann. §§ 41-1001, 41-1091; Mich. Comp. Laws §§ 24.203, 24.224; Va. Code Ann. § 2.2-4008; Wash. Rev. Code Ann. § 34.05.230. This section draws upon those provisions, and also upon requirements and recommendations issued by federal authorities and the American Bar Association.

Subsection (a) exempts guidance documents from the procedures that are required for issuance of rules. Many states have recognized the need for this type of exemption in their administrative procedure statutes. These states have defined guidance documents—or interpretive rules and policy statements—differently from rules, and have also excused agencies creating them from some or all of the procedural requirements for rulemaking. See Ala. Code § 41-22-3(9)(c) ("memoranda, directives, manuals, or other communications which do not substantially affect the legal rights of, or procedures available to, the public"); 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); 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 [follow notice-and-comment procedure]") (emphasis added); Mich. Comp. Laws § 24.207(h) (defining "rule" to exclude "[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"); Wyo. Stat. Ann. § 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); 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) (estimating that more than thirty states have relaxed rulemaking requirements for agency guidance documents such as

interpretive and policy statements). The federal Administrative Procedure Act draws a similar distinction. See 5 U.S.C. § 553(b)(A) (exempting "interpretative rules [and] general statements of policy" from notice-and-comment procedural requirements).

The second sentence of subsection (a) sets forth the fundamental proposition that a guidance document, in contrast to a rule, lacks the force of law. Many state and federal decisions recognize the distinction. See, e.g., Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533
(D.C. Cir. 1986); District of Columbia v. Craig, 930 A.2d 946, 968-69 (D.C. 2007); Clonlara v. State Bd. of Educ., 501 N.W.2d 88, 94 (Mich. 1993); Penn. Human Relations Comm'n v. Norristown Area School Dist., 374 A.2d 671, 678 (Pa. 1977).

Subsection (b) requires an agency to allow affected persons to challenge the legality or wisdom of guidance documents when it seeks to rely on such documents to their detriment. In effect, this subsection prohibits an agency from treating guidance documents as though they were rules. Because rules have the force of law (i.e., are binding), an agency need not respond to criticisms of their legality or wisdom during an adjudicative proceeding; the agency would be obliged in any event to adhere to them until such time as they have been lawfully rescinded or invalidated. In contrast, a guidance document is not binding. Therefore, when affected persons seek to contest a position expressed in a guidance document, the agency may not treat the document as determinative of the issues raised. See Recommendation 120C of the American Bar Association, 118-2 A.B.A. Rep. 57, 380 (August 1993) ("When an agency proposes to apply a nonlegislative rule . . . , it [should] provide affected private parties an opportunity to challenge the wisdom or legality of the rule [and] not allow the fact that a rule has already been made available to the public to foreclose consideration of [their] positions").

An integral aspect of a fair opportunity to challenge a guidance document is the agency's responsibility to respond reasonably to arguments made against the document. Thus, when affected persons take issue with propositions expressed in a guidance document, the agency "must be prepared to support the policy just as if the [guidance document] had never been issued." Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974); see Center for Auto Safety v. NHTSA, 452 F.3d 798, 807 (D.C. Cir. 2006); Professionals and Patients for Customized Care v. Shalala, 56 F.3d 592, 596 (5th Cir. 1995); American Mining Cong. v. MSHA, 995 F.2d 1106, 1111 (D.C. Cir. 1993).

An agency may not, therefore, treat its prior promulgation of a guidance document as a justification for not responding to arguments against the legality or wisdom of the positions expressed in such a document. Flagstaff Broadcasting Found. v. FCC, 979 F.2d 1566 (D.C. Cir. 1992); Bechtel v. FCC, 957 F.2d 873 (D.C. Cir. 1992); Giant Food Stores, Inc. v. Commonwealth, 713 A.2d 177, 180 (Pa. Cmwlth. 1998); Agency Policy Statements, Recommendation 92-2 of the Admin. Conf. of the U.S. (ACUS), 57 Fed. Reg. 30,103 (1992), ¶ II.B. An agency may, however, refer to a guidance document during a subsequent administrative proceeding and rely on its reasoning, if it also recognizes that it has leeway to depart from the positions expressed in the document. See, e.g., Steeltech, Ltd. v. USEPA, 273 F.3d 652, 655-56 (6th Cir. 2001) (upholding decision of ALJ who "expressly stated that the [guidance document] was not a rule and that she had the discretion to depart from [it], if appropriate," but who adhered

to the document upon determining "that the present case does not present circumstances that raise policy issues not accounted for in the [document]"); Panhandle Producers & Royalty Owners Ass'n v. Econ. Reg. Admin., 847 F.2d 1168, 1175 (5th Cir. 1988) (agency "responded fully to each argument made by opponents of the order, without merely relying on the force of the policy statement," but was not "bound to ignore [it] altogether"); American Cyanamid Co. v. State Dep't of Envir. Protection, 555 A.2d 684, 693 (N.J. Super. 1989) (rejecting contention that agency had treated a computer model as a rule, because agency afforded opposing party a meaningful opportunity to challenge the model's basis and did not apply the model uniformly in every case). See generally John F. Manning, "Nonlegislative Rules," 72 Geo. Wash. L. Rev. 893, 933-34 (2004); Ronald M. Levin, "Nonlegislative Rules and the Administrative Open Mind," 41 Duke L.J. 1497 (1992). The relevance of a guidance document to subsequent administrative proceedings has been compared with that of the agency's adjudicative procedents. See subsection (d) infra.

What constitutes a fair opportunity to contest a policy statement within an agency will depend on the circumstances. See ACUS Recommendation 92-2, supra, ¶ II.B. ("[A]ffected persons should be afforded a fair opportunity to challenge the legality or wisdom of [a policy statement] and suggest alternative choices in an agency forum that assures adequate consideration by responsible agency officials," preferably "at or before the time the policy statement is applied to [them]"). Affected persons' right to a meaningful opportunity to be heard on the issues addressed in guidance documents must be reconciled with the agency's interest in being able to set forth its interpretations and policies for the guidance of agency personnel and the public without undue impediment. An agency may use its rulemaking authority to set forth procedures that it believes will provide affected persons with the requisite opportunity to be heard. To the extent that these procedures survive judicial scrutiny for compliance with the purposes of this subsection (b), the agency will thereafter be able to rely on established practice and precedent in determining what hearing rights to afford to persons who may be affected by its guidance documents. As new fact situations arise, however, courts should be prepared to entertain contentions that procedures that have been upheld in past cases did not, or will not, afford a meaningful opportunity to be heard to some persons who may wish to challenge the legality or wisdom of a particular guidance document.

Subsection (c) permits an agency to issue mandatory instructions to agency staff members, typically those who deal with members of the public at an early stage of the administrative process, provided that affected persons will have a fair opportunity to contest the positions taken in the guidance document at a later stage. See Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (2007), § II(2)(h) (significant guidance documents shall not "contain mandatory language . . . unless . . . the language is addressed to agency staff and will not foreclose agency consideration of positions advanced by affected private parties"); ACUS Recommendation 92-2, supra, ¶ III (an agency should be able to "mak[e] a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence"). For example, an agency manual might prescribe requirements that are mandatory for low-level staff, leaving to higher-ranking officials the discretion to depart from the interpretation or policy stated in the manual. The question of what constitutes an adequate opportunity to be heard may vary among agencies or programs. In some programs, centralization of discretionary authority may be a necessary

concession to "administrative uniformity or policy coherence"; in other programs, the obligation to proceed through multiple stages of review might be considered so burdensome as to deprive members of the public of a meaningful opportunity to obtain agency consideration of whether the guidance document should apply to their particular situations. The touchstone in every case is whether the opportunity to be heard prescribed by subsection (b) remains realistically available to affected persons.

Subsection (d) is based on a similar provision in ABA Recommendation No. 120C, supra. It is in accord with general principles of administrative law, under which an agency's failure to reasonably explain its departure from established policies or interpretations renders its action arbitrary and capricious on judicial review. See § 509(a)(3)(H) [Alternative 2] (court may grant relief against agency action other than a rule if it is "inconsistent with the agency's prior practice or precedent, unless the agency has stated credible reasons sufficient to indicate a fair and rational basis for the inconsistency"); 1981 MSAPA § 5-116(c)(8)(iii) (equivalent provision); Yale-New Haven Hospital v. Leavitt, 470 F.3d 71, 79-80 (2d Cir. 2006). It has been said that a guidance document should constrain subsequent agency action in the same manner that the agency's adjudicative precedents do. See Peter L. Strauss, "The Rulemaking Continuum," 41 Duke L.J. 1463, 1472-73, 1486 (1992) (cited with approval on this point in United States v. Mead Corp., 533 U.S. 218, 232 (2001)); see also Manning, supra, at 934-37.

One purpose of this subsection is to protect the interests of persons who may have reasonably relied on a guidance document. An agency that acts at variance with its past practices may be held to have acted in an arbitrary and capricious manner if the unfairness to regulated persons outweighs the government's interest in applying its new view to those persons. Heckler v. Community Health Servs., 467 U.S. 51, 61 (1984) ("an administrative agency may not apply a new [case law] rule retroactively when to do so would unduly intrude upon reasonable reliance interests"); Miguel-Miguel v. Gonzales, 500 F.3d 941, 951 (9th Cir. 2007); Epilepsy Found. v. NLRB, 268 F.3d 1095, 1102 (D.C. Cir. 2001); Microcomputer Tech. Inst. v. Riley, 139 F.3d 1044, 1050 (5th Cir. 1998). Accordingly, where persons may have justifiably relied on a guidance document, the agency's explanation for departing from the position taken in that document should ordinarily include a reasonable justification for the decision to override their reliance interests.

The first two sentences of subsection (f) are based directly on Va. Code Ann. § 2.2-4008. Similar provisions have been adopted in Arizona and Washington. See Ariz. Rev. Stat. Ann. § 41-1091; Wash. Rev. Code Ann. § 34.05.230(3)-(4).

The last sentence of the subsection is based on the federal APA. See 5 U.S.C. § 552(a)(2); Smith v. NTSB, 981 F.2d 1326 (D.C. Cir. 1993). Subject to harmless error principles, see § 509(b), a court may invoke the sanction prescribed in this section without necessarily concluding that the party against whom the document is cited has valid objections to the substance of the document.

Subsection (g) is based on Wash. Rev. Code Ann. § 34.05.230(2), which provides for petitions "requesting the conversion of interpretive and policy statements into rules." However, it is phrased more generally than the Washington provision, because an agency that receives a

rulemaking petition will not necessarily wish to "convert" the existing guidance document into a rule without any revision. Knowing that it will now be speaking with the force of law, in a format that would be more difficult to alter than a guidance document is, the agency might prefer to adopt a rule that is narrower than, or otherwise differently phrased than, the guidance document that it would replace. In any event, the agency will, as provided in section 317, need to explain any rejection of the petition, whether in whole or in part, and such a rejection will be judicially reviewable to the same extent as other actions taken under that section.

Subsection (h) extends the principles of section 317 by allowing interested persons to petition an agency to revise or repeal an existing guidance document. Thus, while this Act does not require an agency to obtain the views of the public before issuing a guidance document, this subsection provides a procedure by which members of the public may bring their views regarding an existing guidance document to the agency's attention and request that the agency take account of those views. This process may be of particular importance to persons who are indirectly affected by a guidance document (such as persons who stand to benefit from the underlying regulatory program) but are unlikely to be the targets of an enforcement action in which they could challenge the legality or wisdom of the document under subsection (b). See Nina A. Mendelson, "Regulatory Beneficiaries and Informal Agency Policymaking," 92 Cornell L. Rev. 397, 438-44 (2007); see also ACUS Recommendation No. 76-5, 41 Fed. Reg. 56,769 (1976) (noting that section 553(e) of the federal APA "allow[s] any person to petition at any time for the amendment or repeal of . . . an interpretive rule or statement of general policy").

The subsection requires an agency to respond to the petition in [sixty] or fewer days. An agency that is not prepared to revise or repeal the guidance document within that time period may initiate a proceeding for the purpose of giving the matter further consideration. This proceeding can be informal; the notice and comment requirements of Sections 304 through 308 are inapplicable to it, because those sections deal with rules rather than guidance documents. The agency may, however, voluntarily solicit public comments on issues raised by the petition. Cf. ACUS Recommendation 76-5, supra, ¶ 2. This section does not prescribe a time period within which the agency must complete the proceeding, but judicial intervention to compel agency action "unlawfully withheld or unreasonably delayed" may be sought in an appropriate case. § 501(a). If the agency declines to revise or repeal the guidance document, within the [sixty] day period or otherwise, it must explain its decision. Denials of petitions under this subsection, like denials of petitions for rulemaking under section 317, are reviewable for abuse of discretion, and the agency's explanation will provide a basis for any judicial review of the denial.

SECTION 311. CONTENTS OF RULE. Each rule filed by the agency with the [publisher] under Section 315 must contain the text of the rule and be accompanied by a record containing:

(1) the date the agency adopted the rule;

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

(3) a reference to the specific statutory or other authority authorizing the action;

(4) any findings required by any provision of law as a prerequisite to adoption or effectiveness of the action;

(5) the effective date of the action;

(6) the concise explanatory statement required by Section 312; and

(7) any final regulatory analysis statement required by Section 305.

SECTION 312. CONCISE EXPLANATORY STATEMENT.

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

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

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

(b) An agency may use the reasons contained in the concise explanatory statement required by subsection (a) as justification for the adoption, of the rule in any proceeding in which the validity of the action is at issue.

Comment

Many states have adopted the requirement of a concise explanatory statement. Arkansas (A.C.A. Section 25-15-204) and Colorado (C.R.S.A. Section 24-4-103) have similar provisions. The federal Administrative Procedure Act uses the identical terms in Section 553 (c) (5 U.S.C.A. Section 553). This provision also requires the agency to explain why it rejected substantial

arguments made in comments. Such explanation helps to encourage agency consideration of all substantial arguments and fosters perception of agency action as not arbitrary.

SECTION 313. INCORPORATION BY REFERENCE. A rule may incorporate by reference all or any part of a code, standard, or rule that has been adopted by an agency of the United States, this state, another state, or by a nationally recognized organization or association, if:

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

(2) the reference in the rule fully identifies the incorporated code, standard, or rule by citation, location, and date, and states whether the rule includes any later amendments or editions of the incorporated code, standard, or rule;

(3) the code, standard, or rule is readily available to the public in written or electronic format;

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

(5) The agency maintains a copy of the code, standard, or rule readily available for public inspection at the agency office.

Comment

Several states have provisions that require the agencies to retain the voluminous technical codes. See, Alabama, Ala.Code 1975 Section 41-22-9; Michigan, M.C.L.A. 24.232; and North Carolina, N.C.G.S.A. § 150B-21.6. To avoid the problems created by those retention provisions, but to assure that these technical codes are available to the public, this section adopts several specific procedures. One protection is to permit incorporating by reference only codes that are readily available from the outside promulgator, and that are of limited public interest as

determined by a source outside the agency. See Wisconsin, W.S.A. 227.21. These provisions will guarantee that important material drawn from other sources is available to the public, but that less important material that is freely available elsewhere does not have to be retained.

SECTION 314. COMPLIANCE; EXEMPT RULES .

(a) An action taken under this [article] including a rule adopted using the emergency process under Section 309(a), or the expedited process under Section 309(b) is not valid unless taken in substantial compliance with the procedural requirements of this [article].

(b) Except as otherwise provided by law other than this act, this article does not apply to

(1) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public;

(2) an intergovernmental or interagency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public;

(3) an opinion of the attorney general;

(4) a statement 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 enable law violators to avoid detection, facilitate disregard of requirements imposed by law, or give a clearly improper advantage to persons that are in an adverse position to the state; or

(5) forms developed by an agency to implement or interpret agency law or policy.

Comment

This section is a slightly modified form of the 1961 Model State Administrative

Procedure Act, section (3)(c). See also section 3-113(a) and section 3-116 of the 1981 Model State Administrative Procedures Act. Section 504(a) governs the timing of judicial review proceedings to contest any rule on the ground of noncompliance with the procedural requirements of this [act]. The scope of challenges permitted under Section 504(a) includes all applicable requirements of article 3 for the type of rule being challenged.

SECTION 315. FILING OF RULES. An agency shall file in written and electronic format with the [publisher] each rule it adopts, including a rule adopted under Section 309(a) or under Section 309(b), 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 practical. The [publisher] shall affix to each rule and statement a certification of the time and date of filing and keep a permanent register open to public inspection of all filed rules and attached concise explanatory statements. In filing a rule, each agency shall use a standard form prescribed by the [publisher].

Comment

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

SECTION 316. EFFECTIVE DATE OF RULES.

(a) Except as otherwise provided in subsection (b), (c), or (d), [unless disapproved by the [rules review committee] or [withdrawn by the agency under Section 703] after [the effective date of this [act] each rule adopted, and the repeal of a rule, becomes effective [60] days after publication of the rule in the [administrative bulletin] [on the [publisher]'s Internet website.]

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

(c) The adoption of a rule becomes effective immediately upon its filing with the [publisher] or on any subsequent date earlier than that established by subsection (a) if it is

required to be implemented by a certain date by the federal or [state] constitution, a statute, or court order.

(d) A rule adopted using the emergency process under Section 309(a) becomes effective immediately upon filing with the [publisher].

(e) A rule adopted using the expedited process under Section 309(b) to which no objection is made becomes effective [30] days after the close of the comment period, unless the rulemaking proceeding is terminated or a later effective date is specified by the agency.

Comment

This is a substantially revised version of the 1961 Model State Administrative Procedure Act, Section 4 (b)&(c) and 1981 Model State Administrative Procedure Act, Section 3-115. Most of the states have adopted provisions similar to both the 1961 Model State Administrative Procedure Act and the 1981 Model State Administrative Procedure Act, although they may differ on specific time periods. Some rules may have retroactive application or effect provided that there is express statutory authority for the agency to adopt retroactive rules. See Bowen v. Georgetown University Hospital 488 U.S. 204 (1988).

SECTION 317. PETITION FOR ADOPTION OF RULE. Any person may petition an agency to request the adoption of a rule. Each agency shall prescribe by rule the form of the petition and the procedure for its submission, consideration, and disposition. Not later than [60] days after submission of a petition, the agency shall:

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

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

Comment

This section is substantially similar to the 1961 MSAPA. See also section 3-117 of the 1981 MSAPA. Agency decisions that decline to adopt a rule are judicially reviewable for abuse of discretion (See Massachusetts v. EPA 127 S. Ct. 1438 (2007) (EPA decision to reject rulemaking petition and therefore not to regulate greenhouse gases associated with global warming was judicially reviewable and decision was arbitrary and capricious.).

[ARTICLE] 4

ADJUDICATION IN A CONTESTED CASE

SECTION 401. WHEN ARTICLE APPLIES; CONTESTED CASES. This [article] applies to an adjudication made by an agency in a contested case.

Comment

Article 4 of this Act does not apply to all adjudications but only to those adjudications, defined in Section 102 as a "contested case." Contested case is the definition of the subset of adjudications that fall within this section because law as defined in Section 102(14) requires an evidentiary hearing to resolve particular facts or the application of law to facts. This section is subject to the exceptions in Sections 405 and 406 for informal hearing and Section 408 for emergency hearing if the requirements for those exceptions under this Article apply. If the requirements for informal adjudication under Sections 405 and 406 or an emergency adjudication under Section 408 are met, a hearing in a contested case may be conducted following the procedures in those sections. All contested cases are also subject to Section 402 of this article.

For a statute to create a right to an evidentiary hearing, express use of the term "evidentiary hearing" is not necessary in the statute. Statutes often use terms like "appeal" or "proceeding" or "hearing", but in context it is clear that they mean an evidentiary hearing. An evidentiary hearing is one in which the resolution of the dispute involves particular facts and the presiding officer is limited to material in the record in making his decision.

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

Section 401, governing contested case hearings, does not apply to investigatory hearings, a hearing that merely seeks public input or comment, pure administrative process proceedings such as tests, elections, or inspections, and situations in which a party has a right to a de novo administrative or judicial hearing. An agency may by rule make all or part of article 4 applicable to adjudication that does not fall within the requirements of Section 401, including hearing rights conferred by agency regulations, or on the record appeals.

This section draws upon the California, (see Cal. Cal.Gov.Code Section 11410.10); Minnesota, (see Minnesota Statutes Annotated, Section 14.02, subd. 3; Washington (see Revised Code of Washington, 34.05.413(2) and Kansas (see Kansas Stat. Ann., KS ST Section 77-502(d) & Kansas Stat. Ann., KS ST Section 77-503).

SECTION 402. PRESIDING OFFICERS.

(a) In a contested case, the presiding officer shall manage the proceeding in a manner that will promote a fair, just, orderly and prompt resolution.

(b) The presiding officer shall be the agency head, one or more members of the agency head that is a body of individuals [, in the discretion of the agency head, one or more administrative law judges assigned by the office in accordance with Section 602,] or, unless prohibited by law, one or more persons designated by the agency head .

(c) An individual who has served as investigator, prosecutor, or advocate at any stage in a contested case may not serve as a presiding officer or assist or advise any presiding officer in the same proceeding.

(d) An individual who is subject to the authority, direction, or discretion of an individual who has served as [investigator,] prosecutor [,] or advocate at any stage in a disputed case, including investigation, may not serve as presiding officer or assist or advise a presiding officer in the same proceeding.

(e) A presiding officer is subject to disqualification for bias, prejudice, financial interest, or any other factor that would provide reasonable doubts about the impartiality of the presiding officer]. A presiding officer, after making a reasonable inquiry, shall disclose to all parties any known facts related to grounds for disqualification that would be material to the impartiality of the presiding officer in the contested case proceeding.

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

disqualification of the presiding officer must file a petition that states with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded, or the applicable rule or canon of practice or ethics that requires disqualification. If grounds for disqualification are discovered at a time later than the beginning of the taking of evidence, a party must request disqualification promptly after discovery. The petition may be denied if the party fails to exercise due diligence in requesting disqualification after discovering grounds for disqualification.

(g) A presiding officer whose disqualification is requested [] shall determine whether to grant the petition and state facts and reasons for the determination in writing. A presiding officer's decision to deny disqualification is not immediately subject to judicial review.

(h) If a substitute presiding officer is required, the substitute must be appointed [as required by law, or if no law governs then] by:

(1) the Governor, if the original presiding officer is an elected official; or

(2) the appointing authority, if the original presiding officer is an appointed official.

(i) The provisions of this section governing disqualification of a presiding officer also govern disqualification of the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(j) If participation of the agency head is necessary to enable the agency to take legally effective action, an agency head may continue to participate notwithstanding grounds for disqualification.

Comment

Subsection (b) governs who may be appointed to serve as a presiding officer in a disputed case. If the case is heard by more than one presiding officer, as when the agency head

hears a disputed case en banc, one member of the agency head may serve as chair, but all of the persons sitting as judge in the case are collectively the presiding officer.

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

Subsection (e) is based upon 1981 MSAPA Section 4-202(b). See also California Government Code Section 11425.40(a). Disclosure duties under subsection (e) are based on state ethics codes governing ethical standards for judges in the judicial branch of the government, Section 12 of the 2000 Uniform Arbitration Act, and on state law governing the ethical responsibilities of government officials and employees. See Section 410.

Subsection (f) is based on 1981 MSAPA Section 4-202(c).

Subsection (i) is based on California Government Code Section 11425.40(c).

Subsection (j) adopts the rule of necessity for decision makers. See California Government Code Section 11512(c) (agency member not disqualified if loss of a quorum would result); United States v. Will (1980) 449 U.S. 200 (common law rule of necessity applied to U.S. Supreme Court to decide issues before the court relating to compensation all Article III judges.

SECTION 403. CONTESTED CASE PROCEDURE.

(a) Except for emergency adjudications , this section applies to contested cases.

(b) Except as otherwise provided in Section 408(c), an agency shall give to the person to which an agency action is directed notice that is consistent with Section 404.

(c) An agency shall make available to the person to which an agency action is directed a copy of the agency procedures governing the case.

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

(1) Upon proper objection, the presiding officer [must] [may] exclude evidence that is immaterial, irrelevant, unduly repetitious, or excludable on constitutional, or statutory grounds or on the basis of an evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is objectionable under the applicable rules of evidence. Evidence may not be excluded solely because it is hearsay.

Alternative A

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

Alternative B

Hearsay evidence may be sufficient to support fact findings if that evidence constitutes reliable, probative, and substantial evidence.

(2) An objection must be made at the time the evidence is offered. In the absence of an objection, the presiding officer may exclude evidence at the time it is offered. A party may make an offer of proof when evidence is objected to, or prior to the presiding officer's decision to exclude evidence."

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

(4) All evidence must be made part of the hearing record of the case . No

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

(5) The presiding officer may take official notice of all facts of which judicial notice may be taken and of other scientific and technical facts within the specialized knowledge of the agency. Parties must be notified at the earliest practicable time, either before or during the hearing, or by reference in preliminary reports, preliminary decisions or otherwise, of the facts proposed to be noticed and their source, including any staff memoranda or data. The parties must be afforded an opportunity to contest any officially noticed facts before the decision is announced.

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

(e) Except for emergency hearings under Section 408, in a contested case, the presiding officer, at appropriate stages of the proceedings, shall give all parties the opportunity to file pleadings, motions, and objections in a timely manner. The presiding officer, at appropriate stages of the proceeding, may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed, recommended, or final orders. . The presiding officer may, with the consent of all parties, refer the parties in a contested case proceeding to mediation or other dispute resolution procedure.

(f) Except for emergency hearings under Section 408, in a contested, to the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-

examination, and submit rebuttal evidence.

(g) Except as otherwise provided by law other than this act, the presiding officer may conduct all, or part of, an evidentiary hearing, or a prehearing conference, by telephone, television, video conference, or other electronic means, if each party to a hearing has an opportunity to hear, speak, and be heard in the proceeding as it occurs.

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

(i) A hearing in a contested case is open to the public, except for a hearing or part of a hearing that the presiding officer closes on the same basis and for the same reasons that a court of this state may close a hearing or closes pursuant to a statutory provision other than this [act] that authorizes closure. To the extent that a hearing is conducted by telephone, television, video conference, or other electronic means, and is not closed, a hearing is open if members of the public have an opportunity, at reasonable times, to hear or inspect the agency's record, and to inspect any transcript obtained by the agency.

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

(k) a party may exercise the right to self representation in a contested case, and the presiding officer may explain contested case procedures to the self represented party to the extent consistent with fair hearing requirements

(l) The decision in a contested case must be written, based on the agency hearing record, and include a statement of the factual and legal bases of the decision.

(m) Subject to Section 204, the rules by which an agency conducts a contested case may

include provisions more protective of the rights of the person to which the agency action is directed than the requirements of this section.

Comment

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

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

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

Under subsection (c), agency procedures governing the case refers to rules of practice adopted under Section 202, or default procedural rules adopted under Section 204, or procedures required under the agency governing statute.

Under subsection (d)(1) evidence is unduly repetitious if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. In most states a presiding officer's determination that evidence is unduly repetitious may be overturned only for abuse of discretion. Under subsection (d)(1), the legal residuum rule is not adopted and hearsay evidence can be sufficient to support fact findings if the hearsay evidence is sufficiently reliable. This provision is based on the federal A.P.A. provision, 5 U.S.C. Section 556 (d), Richardson v. Perales, (1971) 402 U.S. 389 and the 1981 MSAPA Section 4-215(d). (reasonably prudent person standard for reliability).

Subsection (d)(4) information that is not a public record means information not subject to disclosure under the applicable public records act in the jurisdiction.

Subsection (d)(5) is based on 1981 MSAPA Section 4-212(f). See also California

Government Code Section 11515, and 1961 MSAPA Section 10(4).

Subsection (d)(6) is based on 1981 MSAPA Section 4-215(d). See also California Government Code Section 11425.50(c) which contains the same language.

Under subsection (g) hearings in contested cases can be conducted using the telephone, television, video conferences, or other electronic means. Subsection (g) is based in part on California Government Code Section 11440.30. Due process of law may require live in person hearings. See Whiteside v. State, (2001) 20 P. 3d 1130 (Supreme Court of Alaska) (due process of law violated with telephone hearing in driver's license revocation hearing when driver's credibility was material to the hearing, and the driver was not offered an in person hearing); But see Bancock v. Employment Division (1985) 72 Or. App. 486, 696 P. 2d 19, 21 (telephone hearings do not violate due process of law in hearings in which the credibility of a party is at issue because audible indicia of a witness's demeanor are sufficient for credibility).

Subsection (k) provides for a right of self representation for parties in contested case proceedings. Subsection (k) also allows presiding officers to accommodate pro se litigant's unfamiliarity with agency procedures in contested cases by explaining those procedures to the pro se litigant to the extent consistent with fair hearing and impartial decision maker requirements. Goldberg v. Kelley (1970) 397 U.S. 254 (impartial decision-making is essential to due process of law). The fair hearing limits would be exceeded if the presiding officer violated impartial decision maker requirements by improperly assisting one party in presenting that parties case at the hearing.

The subsection (l) written decision requirement is based in part on 1961 MSAPA Section 12, and on1981 MSAPA Section 4-215(g). See also California Government Code Section 11425.50. See also sections 801, and 802, electronic publication of written decisions, and the provisions of 15 U.S.C. Section 7004.

Section 10 of the 1961 MSAPA contained many similar provisions.

SECTION 404. NOTICE.

(a) Except for an emergency adjudication under Section 408, an agency shall give reasonable notice of the right to an evidentiary hearing in a contested case.

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

(1) the official file or other reference number, the name of the proceeding, and a

general description of the subject matter;

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

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

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

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

(c) In an action initiated by the agency , the agency shall give an initial notice to the party or parties against which the action is brought as provided by law. The notice shall include:

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

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

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

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

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

(6) a statement that a party who fails to attend or participate in any subsequent proceeding in a contested case may be held in default;

(7) a statement that the party served may request a hearing and instructions in plain language about how to request a hearing; and

(8) the names and last known addresses of all parties and other persons to which notice is being given by the agency.

(d) When a prehearing meeting or conference is scheduled, the agency shall give parties notice at least 14 days before the hearing that contains the information contained in subsection (c).

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

Comment

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

SECTION 405. AGENCY HEARING RECORD IN CONTESTED CASE.

(a) An agency shall maintain an official hearing record in each contested case.

(b) The agency hearing record consists of:

(1) notices of all proceedings;

(2) any pre-hearing order;

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

(4) evidence admitted, received, or considered;

(5) a statement of matters officially noticed;

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

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

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

(9) any final order, recommended decision, or order on reconsideration;

(10) all memoranda, data, or testimony prepared under Section 409; and

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

(c) The agency hearing record constitutes the exclusive basis for agency action in a contested case and for judicial review of the case.

SECTION 406. EMERGENCY ADJUDICATION PROCEDURE.

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

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

(c) Before issuing an order under this section, the agency, if practicable, shall give notice and an opportunity to be heard to the person to which the agency action is directed. The notice and hearing may be oral or written and may be communicated by telephone, facsimile, or other electronic means.

(d) Any order issued under this section must contain an explanation that briefly explains the factual and legal reasons for making the decision using the procedures provided by this Section of the Act.

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

(f) After issuing an order pursuant to this section, an agency shall proceed as soon as practicable to provides an opportunity for a hearing following contested case procedure under Section 403 in order to resolve the issues underlying the temporary relief.

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

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

Comment

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

Federal and state case law have held that in an emergency situation an agency may act rapidly and postpone any formal hearing without violation, respectively, of federal or state constitutional law. FDIC v. Mallen, 486 U.S. 230 (1988); Gilbert v. Homar (1997) 520 U.S. 924; Dep't of Agric. v. Yanes, 755 P.2d 611 (OK. 1987).

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

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

outside of this act.

SECTION 407. EX PARTE COMMUNICATIONS.

(a) Except as otherwise provided in subsections (b) and (c), while a contested case is pending, the presiding officer may not make to or receive from any person any communication regarding any issue in the proceeding without notice and opportunity for all parties to participate in the communication. For the purpose of this section, a proceeding is pending from the issuance of the agency's pleading, or from an application for an agency decision, whichever is earlier.

(b) The presiding officer may make communications to or receive communications from a law clerk or may communicate on ministerial matters with a person who serves on the personal staff of the presiding officer if the person providing legal advice or ministerial information has not served as investigator, prosecutor, or advocate at any stage of the proceeding. When acting as the decision maker, the agency head may make communications to or receive communications from a person authorized by law to provide legal advice to the agency if the person providing legal advice has not served as investigator, prosecutor, or advocate at any stage of the proceeding.

(c) An employee or representative may make communications to or receive communications from an agency head sitting as presiding officer if:

(1) the communications consist of an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence in the agency hearing record; and

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

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

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

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

(e) If a presiding officer makes or receives a communication in violation of this section, if the communication is:

(1) written, the presiding officer shall make the communication a part of the hearing record and prepare and make part of the record a memorandum that contains the response of the presiding officer to the communication and the identity of the parties who communicated; or

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

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

(g) When the presiding officer is a member of an agency head that is a body of persons, the presiding officer may communicate with the other members of the agency head. Otherwise, While a proceeding is pending, there may be no communication, direct or indirect, regarding the

merits of any issue in the proceeding between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated. (h) If necessary to eliminate the effect of a communication received in violation of this section, a presiding officer may be disqualified, the portions of the record pertaining to the communication may be sealed by protective order, or other appropriate relief may be granted including dismissal of the application or other adverse ruling on the merits as a sanction.

Comment

This section is not intended to be applied to communications made by or to a presiding officer or personal staff assistant regarding noncontroversial practice and procedure matters such as number of pleadings, number of copies or type of service. Communications related to contested procedural issues or motions are covered by Section 409(a). Other communications not on the merits but related to security or to the credibility of a party or witness are covered by Section 409(a). See Matthew Zaheri Corp., Inc. v. New Motor Vehicle Board (1997) 55 Cal. App. 4th 1305. However, this section goes further in permitting advice to the presiding officer from staff members on complex technical and scientific matters, but permits parties to reply to those staff communications.

This section also provides another remedy besides disclosure and party reply. In a case where disclosure and reply are inadequate to cure or eliminate the effect of the ex parte contact, a protective order may be issued. The intent of authorizing the protective order is to keep the ex parte material from the successor presiding officer.

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

SECTION 408. ADMINISTRATIVE ADJUDICATION CODE OF ETHICS.

(a) Except as otherwise provided in subsection (b), the administrative law judge code of ethics adopted in the state governs the hearing and other conduct of a a full time administrative law judge or other presiding officer adjudicating a contested case.]

(b) Section 407 governs the standards for ex parte communication. Section 402 governs

disqualification of presiding officers. Restrictions on financial interests, political activity or on accepting honoraria, gifts, or travel are governed by state law other than this act.

Comment

Section 408 is based on the provisions of the California A.P.A. California Government Code Sections 11475 to 11475.70 (Administrative Adjudication Code of Ethics). This section applies to administrative law judges the provisions of the Code of Judicial Ethics applicable to judges in the judicial branch in the state, with exceptions as noted. Some of the exceptions are based on provisions of this act. Other exceptions are based on state statutes governing the ethical responsibilities of government officials and employees. Section 408 provides applicable law to govern disqualification of presiding officers under Section 402(e).

SECTION 409. INTERVENTION.

(a) A presiding officer shall grant a timely petition for intervention in a contested case if:

(1) the petitioner has a statutory right to initiate, or to intervene in, the proceeding in which intervention is sought.

(2) the petitioner has an interest that will or may be adversely affected by the outcome of the proceeding and that interest is not adequately represented by existing parties.

(b) A presiding office may grant a timely petition for intervention when the petitioner has a conditional statutory right to intervene, or when the petitioner's claim or defense is based on the same transaction or occurrence as the contested case.

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

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

(e) Upon request by the interveners or existing parties, the presiding officer may hold a hearing on the intervention petition. .

(f) The presiding officer, at least [24 hours] before the hearing, shall issue an order

granting or denying each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer shall promptly give notice to the petitioner for intervention and to all parties of an order granting, denying, or modifying intervention.

Comment

Section 411 is based in part of 1981 MSAPA Section 4-209. See also Federal Rule of Civil Procedure Rule 24 (intervention of right under Rule 24(a), and permissive intervention under Rule 24(b)).

Subsection (c) recognizes the normal judicial practice of limiting the participation of intervenors, especially on cross examination, to their particular interest and taking any other procedural steps or limitations in order to maintaining an orderly and expeditious hearing. Mandatory intervention is provided for in subsections (a)(1), and (2). Permissive intervention is provided for in subsection (b). Subsection (d) recognizes the power of the presiding officer to dismiss a party who has intervened at any time after intervention has occurred when it appears that the conditions of this section or the requirements for the intervening party's standing have not been satisfied. Subsection (f) provides for notice suitable under the circumstances to enable parties to anticipate and prepare for changes that may be caused by the intervention.

SECTION 412. SUBPOENAS.

(a) In a contested case, upon tender of the proper fees for witnesses calculated in the same manner as under the rules of civil procedure by the party applying for the subpoena, the presiding officer or any other officer to whom the power is delegated may issue subpoenas for the attendance of witnesses and the production of books, records and other evidence for use at the hearing.

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

(c) Subpoenas, protective orders, and other orders issued under this section may be enforced pursuant to the rules of civil procedure.

Comment

Section 412 is based in part on 1981 MSAPA Section 4-210. See also California Government Code sections 11450.05 to 11450.50 (subpoenas in administrative adjudication).

SECTION 413. DISCOVERY.

(a) As used in this section, "statement" includes records signed by a person of his or her oral statements and records that summarize these oral utterances.

(b) Except in an emergency hearing under Section 408, a party, upon written notice to another party at least [ ] days before an evidentiary hearing, is entitled to:

(1) obtain the names and addresses of witnesses that the disclosing party will present at the contested case hearing to the extent known to the other party; and

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

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

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

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

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

(E) investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the adjudication, to the extent that these reports contain

the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions, or events that are the basis for the adjudication or reflect matters perceived by the investigator in the course of the investigation, or contain or include by attachment any statement or writing described in this section;

(F) any exculpatory material in the possession of the agency; or

(G) any other material for good cause shown.

(3) Parties to contested case proceedings have a duty to supplement responses provided under subsection (b) to include information thereafter acquired to the extent that information will be relied upon in the contested case hearing.

(c) Upon petition, a presiding officer may issue a protective order for any material for which discovery is sought under this section that is exempt, privileged, or otherwise made confidential or protected from disclosure by law.

(d) Upon petition, the presiding officer may issue an order compelling discovery for refusal to comply with a discovery request unless good cause exists for refusal. Failure to comply with the discovery order shall be enforced according to the rules of civil procedure.

Comment

Discovery in administrative adjudication is more limited than in civil court proceedings. Nevertheless discovery is available for the items listed in subsection (b). See California Government Code Section 11507.6 to 11507.7 (discovery in administrative adjudication).

SECTION 414. CONVERSION.

(a) An adjudication in a contested case of one type may be converted to an adjudication of another type under this [article] if:

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

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

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

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

Comment

Section 414 is based in part on 1981 MSAPA Section 1-107. See also California Government Code Sections 11470.10 to 11470.50. Under this section the presiding officer is empowered to convert from one type of disputed case adjudication to another in appropriate circumstances. Conversion may only occur if two requirements are satisfied: the situation that met the requirements under this article for the original proceeding must no longer exist, and the requirements for the new type of proceeding under this article are now satisfied. Meeting both requirements is mandatory in order to prevent a presiding officer from converting an adjudication under Section 402 to an informal adjudication in a situation where the procedural protections of Section 402 are still justified under this article.

SECTION 415. DEFAULT.

(a) Unless displaced or modified by law other than this [act], if a party without good cause fails to attend or participate in a pre-hearing conference, hearing, or other stage of a disputed case, the presiding officer may issue a default order or proceed with a hearing in the absence of the party.

(b) Under subsection (a), a default judgment must be based on the absent party's admissions or other evidence and affidavits, which can be used without notice to the absent party. This subsection does not apply where the burden is on the absent party to establish that he

or she is entitled to the agency action sought.

(c) Within [ ] days after a decision is rendered against a party who failed to appear, that party may petition the presiding officer to vacate the recommended or final order. If adequate reasons are provided showing good cause for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If adequate reasons are not provided showing good cause for the party's failure to appear, the presiding officer shall deny the motion to vacate.

Comment

Under this section the presiding officer the power to impose a default judgment. However, the default decision must be based upon prima facie evidence. Among the other laws that modify the presiding officer's discretion are the [state] rules of civil procedure. The section thus authorizes a presiding officer to issue a default judgment for the same reasons as contained in the state rules of civil procedure.

Subsection (b) is adapted from the Alaska Administrative Procedure Act, AS 44.62.530 and the California Administrative Procedure Act, West's Ann.Cal.Gov.Code § 11520.

SECTION 416. LICENSES.

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

(b) When a licensee has made timely and sufficient application for the renewal of a license, the existing license does not expire until the application has been finally acted upon by the agency and, if the application is denied or the terms of the new license are limited, the last day for seeking review of the agency decision is 45 days from the date of the agency decision denying the application or limiting the terms of the new license or a later date fixed by order of

the reviewing court.

(c) If the agency finds that emergency action against a license is required, the action shall be conducted under Section 408.

Comment

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

SECTION 417. ORDERS: FINAL AND RECOMMENDED.

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

(b) If the presiding officer is not the agency head, the presiding officer shall render a recommended decision [proposed decision], when the presiding officer has not been delegated final decisional authority. When the presiding officer has been delegated final decisional authority, the presiding officer shall render a decision which shall become a final order in [30] days, unless reviewed by the agency head on its own motion or on petition of a party.

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

(d) A recommended or final order must include separately stated findings of fact and conclusions of law on all material issues of fact, law, or discretion, the remedy prescribed, and, if applicable, the action taken on a petition for stay. A party may submit proposed findings of fact. 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, and a statement of the time limits for seeking judicial review of the agency order. A recommended decision must include a statement of any circumstances under which the recommended decision, without further notice, may become a final order.

(e) Findings of fact must be based exclusively upon the evidence of the agency hearing record in the contested case and on matters officially noticed.

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

Comment

See section 102(24) of this act for the definition of "recommended decision". This section draws upon useful provisions from several states. E.g. see: Alabama, Ala.Code 1975 Section 41-22-16; Iowa, I.C.A. Section 17A.15; Kansas, K.S.A. Section 77-526; Michigan, M.C.L.A. 24.281; Montana, MCA 2-4-623; Washington, RCWA 34.05.461.

The third sentence of subsection (d) is taken from the 1961 MSAPA.

SECTION 418. AGENCY REVIEW OF RECOMMENDED DECISIONS.

(a) An agency head may review a recommended decision on its own motion.

(b) A party may petition the agency head to review a recommended decision. Upon petition by any party, the agency head shall review an agency order, except to the extent that:

(1) a provision of law precludes or limits agency review of the recommended decision; or

(2) the agency head, in the exercise of discretion conferred by law other than this [act], declines to review the recommended decision.

(c) A petition for review of a recommended decision must be filed with the agency head, or with any person designated for this purpose by rule of the agency, within [10] days after the

recommended decision is rendered. If the agency head decides to review a recommended decision on its own motion, the agency head shall give written notice of its intention to review the recommended decision within [10] days after it is rendered.

(d) The [10]-day period for a party to file a petition, or for the agency head to give notice of its intention to review a recommended decision in subsection (b), is tolled by the submission of a timely petition for reconsideration of the recommended decision pursuant to this section. A new [10]-day period starts to run upon disposition of any petition for reconsideration or agency head review under subsection (b). If a recommended decision 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.

(e) An agency head that reviews a recommended decision shall exercise all the decision-making power that the agency head would have had if the agency head had conducted the hearing that produced the recommended decision, except to the extent that the issues subject to review are limited by a provision of law other than this [act] or by order of the agency head upon notice to all the parties. In reviewing findings of fact in recommended decisions by presiding officers, the agency head shall give due regard to the presiding officer's opportunity to observe the witnesses. The agency head shall consider the agency record or such portions of it as have been designated by the parties.

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

(g) A final order or an order remanding the matter for further proceedings under this section must identify any difference between the order and the recommended decision and shall state the facts of record which support any difference in findings of fact, state the source of law which supports any difference in legal conclusions, and state the policy reasons which support any difference in the exercise of discretion. A final order under this section must include, or incorporate by express reference to the recommended decision, all the matters required by Section 416(d). The agency head shall cause an order issued under this section to be delivered to the presiding officer and to all parties.

Comment

This section draws upon 1981 MSAPA, which reflects current practice in regard to recommended decisions, final orders and review of final orders more accurately than the 1961 MSAPA. Subsections (b) and (e) draw upon the Washington APA, West's RCWA 34.05.464, and the Kansas APA, K.S.A. § 77-527. The object of subsection (e) is to assure agency head consideration of the issues tendered in the case.

SECTION 419. RECONSIDERATION.

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

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

(c) If a petition is filed under subsection (a), the presiding officer shall render a written order within [20] days denying the petition, granting the petition and dissolving or modifying the recommended or final order, or granting the petition and setting the matter for further

proceedings. The petition may be granted only if the presiding officer states findings of facts, conclusions of law, and the reasons for granting the petition.

Comment

This section is based in part on the Washington APA, West's RCWA 34.05.470. This section creates a general right to seek reconsideration of a recommended or final order. Subsection (b) must be read concurrently with Section 507(d), which excuses exhaustion to the extent that a provision of this [act] provides for excuse.

SECTION 420. STAY. Except as otherwise provided by law other than this [act], a party may request an agency to stay a recommended or final order within [five] days after it is rendered.

Comment

The 1961 MSAPA § 15 contained a provision for a stay. Stays are sometimes necessary to preserve the status quo pending agency review or judicial review.

SECTION 421. AVAILABILITY OF ORDERS; INDEX.

(a) Except as otherwise provided in subsections (b), (c), and (d), an agency shall index, by caption and subject, all final orders and final written decisions in contested cases and make the index and all final orders and decisions available for public inspection and copying, at cost in its principal offices. The agency must also furnish the index and all final orders and decisions in contested cases online through the [publisher] via the [publisher's] Internet website without charge, or in writing upon request at a cost to be determined by the agency.

(b) Final orders or decisions that are exempt, privileged, or otherwise made confidential or protected from disclosure by law, [the disclosure of which would constitute an unwarranted invasion of privacy or release of trade secrets], are not public records and may not be indexed.

(c) A final order or decision under this subsection may be excluded from disclosure only

by order of the presiding officer. The justification for the exclusion must be explained in writing and attached to the order.

(d) If, in the judgment of the presiding officer, it is possible to redact [or to prepare a generic version of] a final order or decision that is exempt, privileged or otherwise made confidential or protected from disclosure by law so that it complies with the requirements of law, the redacted [or the generic version of the] document may be indexed and published.

(e) An agency may not rely on a final order or a written final decision as precedent in future adjudications unless the order or decision has been designated as a precedent by the agency, and the order or decision has been published, indexed, and made available for public inspection.

Comment

This section is entirely new. This section continues the concept, seen earlier in connection with rules, of preventing earlier decisional law known only to agency personnel from constituting the basis for decision in a disputed case. Subsection (c) is based in part on the provisions of California Government Code Section 11425.60. If the agency wishes to use a case as precedent in the future, it must make the order and decision in that case available to the public. The only situations in which an agency may rely on a contested case as precedent without indexing and making that decision and order available to the public are described in subsection (b) of this section.

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

This section makes clear that the choice between rulemaking and adjudication is entirely in the discretion of the agency. However, in order to prevent law to which the public does not have access from constituting the basis for decision, final orders must be indexed and available to the public. See also the California administrative procedure act at West's Ann. Cal. Gov. Code, § 11425.60

[ARTICLE 5]

JUDICIAL REVIEW

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

(a) As used in this [article], final agency action means agency action that imposes an obligation, denies a right, or fixes some legal relationship as a result of an administrative process. Agency action that is a failure to act is not judicially reviewable except that a reviewing court shall compel agency action that is unlawfully withheld or unreasonably delayed.

(b) A person otherwise qualified under this [article] is entitled to judicial review of a final agency action.

(c) A person is entitled to judicial review of agency action not subject to review under subsection (a) if postponement of judicial review would result in an inadequate remedy or irreparable harm that outweighs the public benefit derived from postponement.

Comment

Subsection (a) of this section provides a right of judicial review of final agency action by appropriate parties. Under this section, the person seeking review must meet all of the requirements of this article, which include standing, exhaustion of remedies, and time for filing. The definition of "agency action" is found in Section 102. This section is similar to the judicial review provisions of Florida (West's F.S.A. Section 120.68), Iowa (I.C.A. Section17A.19), Virginia (Va. Code Ann. Section 2.2-4026) and Wyoming (W.S.1977 Section 16-3-114). Agency failure to act is not judicially reviewable unless agency action is unlawfully withheld or unreasonably delayed. This provisions is based on the federal A.P.A., 5 U.S.C. Section 706(1).

Subsection (a) also defines final agency action. The definition used here is found in state and federal cases. See State Bd. Of Tax Comm'rs v. Ispat Inland, 784 N.E.2D 477 (Ind., 2003); District Intown Properties v. D.C. Dept. Consumer and Regulatory Affairs, 680 A.2d 1373 (Ct. Apps. D.C. 1996); Texas Utilities Co. v. Public Citizen, Inc, 897 S.W.2d 443 (Tex. App. 1995); Bennet v. Spear, 520 U.S. 154, 117 S.Ct. 1154 (1997); Mobil Exploration and Producing Inc. v. Dept. Interior, 180 F.3d 1192, 1197 (10th Cir. 1999).

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

SECTION 502. REVIEW OF AGENCY ACTION OTHER THAN ORDER. A person otherwise qualified under this [article] is entitled to judicial review of agency rules and final agency action other than an order if the action is ripe. Factors to be considered in making the determination are whether the agency has taken final action that involves a concrete, specific legal issue and whether postponement of judicial review will subject the person to irreparable harm.

Comment

This section seeks to recognize the prudential exception to finality and ripeness sometimes recognized for rules and other types of agency action by agencies such as rules, advisory letters and guidance documents. It seeks to incorporate the general tests for finality and ripeness taken from the cases of Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); FTC v. Standard Oil Co.,449 U.S. 232, 101 S.Ct. 488 (1980) and Bennett v. Spear, 520 U.S. 154, 117 S.Ct. 1154 (1997), which have been cited with approval and followed in many states. Under this subsection, some appellant challenges or bases for challenge will be ripe for review, but many will not. The subsection seeks to furnish guidance to state courts attempting to apply the doctrines of finality and ripeness. Under this section, the person seeking review must meet all of the requirements of this article, which include standing, exhaustion of remedies, and time for filing.

The finality determination is to be made case by case in a pragmatic, flexible fashion. Fitness for review is present where issues to be considered are purely legal ones, so that further factual development of the issues is not necessary. Hardship involves imposition of significant practical harm. Some cases have equated that harm with impact that would justify equitable intervention. The harm element has also been approached by asking the question: does the agency action pose a difficult dilemma for the party, so that he or she must immediately take action that will be very expensive and cannot be recovered or face expensive prosecution in the future.

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

regardless of the amount involved. The court may grant any type of relief that is available and appropriate.

Comment

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

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

(a) A proceeding to contest any rule on the ground of noncompliance with the procedural requirements of this [act] must be commenced within two years from the effective date of the rule. Otherwise subject to Section 502, judicial review of a rule may be sought at any time.

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

(c) A time for seeking judicial review under this section is tolled during any time a party is pursuing an administrative remedy before the agency which must be exhausted as a condition of judicial review.

(d) A party may not file or petition for judicial review while seeking reconsideration under Section 418. During the time that a petition for reconsideration is pending before an agency, the time for seeking judicial review in subsection (b) is tolled.

Comment

The first sentence of subsection (a) is based on 1961 Model State Administrative

Procedure Act, section (3)(c)., and on Section 3-113(b) of the 1981 Model State Administrative Procedures Act. The scope of challenges permitted for noncompliance with procedural requirements under Section 314 includes all applicable requirements of article 3 for the type of rule being challenged.

SECTION 505. STAYS PENDING APPEAL. The initiation of judicial review does not automatically stay an agency decision. An appellant may petition the reviewing court for a stay upon the same basis as stays are granted under the [state] rules of [appellate] [civil] procedure, and the reviewing court may grant a stay whether or not the appellant first sought a stay from the agency.

Comment

This provision for stay permits a party appealing agency final action to seek a stay of the agency decision the court. This is similar to the 1961 MSAPA.

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

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

(2) a person otherwise aggrieved or adversely affected by the agency action.

Comment

Subsection (1) confers standing that arises under any other provision of law. Examples of this type of standing are statutes that expressly confer standing in general language such as, for example, "any person may commence a civil suit in his own behalf... to enjoin... an agency... alleged to be in violation of this chapter. . . . 16 U.S.C.A. § 1540, explained in Bennett v. Spear, 520 U.S. 154, 117 S.Ct. 1154(1997). Another example is standing recognized in judicial decision or common law.

Subsection (2) uses the term person "aggrieved or adversely affected". This term is based in part on the provisions of the federal A.P.A., 5 U.S.C. Section 702. These words have become terms of art used to describe types of injury that were not recognized at common law. An example of a person entitled to standing who is intended to be included under subsection (2) is a competitor. These terms have also been used to recognize standing based on non-economic values, such as aesthetic or environmental injuries.

SECTION 507. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

(a) Subject to subsection (e) or a statute other than this [act] that provides that a person need not exhaust their administrative remedies, a person may file a petition for judicial review under this [act] only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review.

(b) Filing a petition for reconsideration or a stay of proceedings is not a prerequisite for seeking administrative or judicial review.

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

(d) If the issue that a petitioner for judicial review of a rule under this section raises was not raised and considered in a rulemaking proceeding, before bringing a petition for judicial review, the petitioner must petition the agency to initiate rulemaking under Section 317 to take action to resolve or cure the issue or issues that the petitioner is challenging. In the petition for judicial review, the petitioner must disclose to the court the petition for rulemaking and the agency action on that petition.

(e) The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies to the extent that the administrative remedies are inadequate or would result in irreparable harm.

Comment

This section creates a default requirement of exhaustion, which is generally followed in the states. However, the section creates several exceptions to the default rule. Subsection (b) requires issue exhaustion in appeals from rulemaking for persons who did not participate in the challenged rulemaking. It excuses persons seeking judicial review of a rule who were not parties before the agency from the exhaustion requirement; but, if the issue that they seek to raise was not raised and considered in the rulemaking proceeding that they challenge, then they must first

petition the agency to conduct another rulemaking to consider the issue. If the agency refuses to do so or if the agency conducts a second rulemaking that is adverse to the petitioner on the issue or issues raised in his petition for rulemaking, then the petitioner may seek judicial review. Subsection (d) recognizes the judicially created exception to the exhaustion requirement where agency relief would be inadequate or would result in irreparable harm. In some states courts have held that irreparable harm that is a sufficient condition to excuse exhaustion exists only if it outweighs the public interest in exhaustion. State courts are free under this section to engage in that weighing test.

SECTION 508. AGENCY RECORD ON JUDICIAL REVIEW; EXCEPTION.

Judicial review of adjudication and rulemaking is confined to the agency record or arising from the record except when the petitioner alleges procedural error arising from matters outside the agency record or alleges matters that are not evident from the record that involve new evidence or changed circumstances. The record may be opened only to avoid manifest injustice.

Comment

This section establishes a default closed record for judicial review of adjudication and rulemaking. It is well established in most states and in federal administrative procedure that, in case of adjudication, judicial review is based upon that evidence which was before the agency on the record. Otherwise, the standards of judicial review could be subverted by the introduction of additional evidence to the court that was not before the agency. See *Western States Petroleum Ass'n v. Superior Court*, 888 P.2d 1268 (Cal. 1995). For rulemaking, the record for judicial review is defined in Section 302 of this Act.

The section contains an exception to the closed record on review where petitioner alleges error, such as ex parte contacts, that does not appear in or is not evident from the record. Other examples of error that do not appear or are not evident from the record are: improper constitution of the decision making body, grounds for disqualification of a decision maker, or unlawful procedure. However, the standard for opening the record on appeal is high.

SECTION 509. SCOPE OF REVIEW.

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

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

(2) The court shall make a separate and distinct ruling on each material issue on

which the court's decision is based.

ALTERNATIVE 1

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

(A) the agency erroneously interpreted or applied the law, or acted in excess of its authority under the law;

(B) the agency committed an error of procedure;

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

(D) an agency determination of fact is not supported by substantial evidence in the record as a whole; or

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

ALTERNATIVE 2

(3) The court may grant relief only if it determines that a person seeking judicial review has been prejudiced and the agency action is :

(A) unconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied;

(B) beyond the authority delegated to the agency by any provision of law or is in violation of any provision of law;

(C) based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency;

(D) based upon a procedure or decision-making process prohibited by law

or was taken without following the prescribed procedure or decision-making process;

(E) the product of decision-making undertaken by persons who were improperly constituted as a decision-making body, were motivated by an improper purpose, or were subject to disqualification;

(F) based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the agency record before the court when that record is viewed as a whole. “Substantial evidence” means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

“When that record is viewed as a whole” means that the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency’s explanation of why the relevant evidence in the record supports its material findings of fact.

(G) action other than a rule that is inconsistent with a rule of the agency;

(H) action other than a rule that is inconsistent with the agency’s prior practice or precedent, unless the agency has stated credible reasons sufficient to indicate a fair and rational basis for the inconsistency;

(I) the product of reasoning that is so illogical as to render it wholly irrational;

(J) the product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action;

(K) not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy;

(L) based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency;

(M) based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency; or

(N) otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.

END OF ALTERNATIVES

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

NOTE: The drafting committee is divided on the scope of review provisions and seeks guidance from the committee of the whole. There are two schools of thought on the drafting committee.

One view is that scope of review is notoriously difficult to capture in verbal formulas, and its application varies depending on context. For that reason, some members urge return to shorter, skeletal formulations of the scope of review, similar to the 1961 MSAPA. See Ronald M. Levin, Scope of Review Legislation, 31 Wake Forest L. Rev. 647 (1996) at 664-66. William

D. Araiza, In Praise of a Skeletal APA, 56 Admin. L. Rev. 979 (2004). (Judiciary, not legislature, appropriate body to evolve specific standards for review, because of great variety of agency action and contexts, and inability to describe how general standards of review should apply to many of them). Alternative 1 reflects this view.

The other view is that judicial review is sometimes almost perfunctory, and more detailed standards will result in closer judicial scrutiny. A related view strongly argued in drafting committee meetings was that scope of review is a device by which the judiciary assists the legislature to keep the agencies within the bounds set by the legislature, helps to assure agency action consistent with the intent of the legislature, and protects citizens from agency error. More detailed scope of review provisions also make the task of the judiciary easier because they provide clearer instructions from the legislature about how to review agency decisions. More detailed scope of review provisions lead to more intense judicial review, and that is an approach that legislatures welcome for the same reason that they have embraced regulatory review: it controls agency action. Alternative 2, which draws heavily on the Iowa provisions on scope of review (I.C.A. 17. A.19(10)), represents this position.

Comment

Judicial review is essential and exists in all states. Subsections (a) (1) & (2) describe the general burdens on the appellant and the approach under this Act. They are substantially similar to the general scope of review provisions of the Federal APA, 5 U.S.C. Section 706.

Subsections (a)[(3) alternative 1](A) & (B) identify the courts' power to decide questions of law and procedure. Subsection (a)[(3) alternative 1](A) includes, but is not limited to, violations of constitutional or statutory provisions and actions that are in excess of statutory authority from Section 15(g) of the 1961 MSAPA, and includes subsections (c) (1), (2) and (4) of the 1981 MSAPA. The section thus includes challenges to the facial or applied constitutionality of a statute, challenges to the jurisdiction of the agency, erroneous interpretation of the law, and may include erroneous application of the law. This section is not intended to preclude courts from according deference to agency interpretations of law, where such deference is appropriate.

[ARTICLE] 6

OFFICE OF ADMINISTRATIVE HEARINGS

SECTION 601. CREATION OF OFFICE OF ADMINISTRATIVE HEARINGS.

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

(b) The [Office of Administrative Hearings] is created as an independent nonpartisan agency to perform adjudicatory function and not perform the investigatory, prosecutorial, and policy-making functions of agencies.

(c) Administrative law judges shall be selected and appointed to the office through state employment selection processes used in the [civil service of state employment] or [by the chief administrative law judge].

(d) The administrative law judges of the agencies to which this [article] applies are employees of the office.

SECTION 602. DUTIES OF OFFICE.

(a) The office shall employ administrative law judges as necessary to conduct adjudicative proceedings required by this [act] or provisions of law other than this [act].

(b) Except as provided in this [article], the office shall provide an administrative law judge to serve as presiding officer unless the agency head hears the case.

SECTION 603. APPOINTMENT OF CHIEF ADMINISTRATIVE LAW JUDGE.

(a) The office is headed by a chief administrative law judge [appointed by the Governor with advice and consent of the [Senate] [House of Representatives] for a term of [6] years], and until a successor is appointed and qualifies for office. A chief administrative law judge may be removed only for good cause following notice and an opportunity for a contested case hearing.

(b) The chief administrative law judge:

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

(2) shall have substantial experience in administrative law;

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

(4) is eligible for reappointment;

(5) shall receive the salary provided by law;

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

(7) is subject to the code of conduct for administrative law judges pursuant to Section 410.

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

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

(1) supervise and manage the office;

(2) assign randomly administrative law judges in any case referred to the office, taking into account administrative law judge expertise;

(3) protect and attempt to ensure the decisional independence of each administrative law judge;

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

(5) provide and coordinate continuing education programs and services for

administrative law judges and advise them of changes in the law relative to their duties;

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

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

[(8)] monitor the quality of adjudications in contested cases through training, observation, feedback and evaluation for professional development; and

[(9)] when necessary, discipline administrative law judges who do not meet appropriate standards of conduct and competence.

SECTION 605. APPOINTMENT OF ADMINISTRATIVE LAW JUDGES.

(a) An administrative law judge:

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

(2) shall be admitted to practice law for at least [3] years [in the state];

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

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

(5) may be removed, suspended, demoted, or subject to disciplinary or adverse action only for good cause, after notice and an opportunity to be heard and a finding of good cause by an impartial presiding officer [or other appropriate state agency [civil service] [merit system];

(6) receive compensation provided by law;

(7) be subject to a reduction in force only in accordance with established [civil

service][merit system] procedure;

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

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

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

SECTION 606. POWERS OF ADMINISTRATIVE LAW JUDGES. An administrative law judge shall exercise all the powers of a presiding officer under this [act].

Comment

The powers and duties of presiding officers are contained in Sections 403 (contested case procedures, and Section 406 (informal adjudication procedures).

SECTION 607. COOPERATION OF STATE AGENCIES.

(a) All agencies must cooperate with the chief administrative law judge in the discharge of the duties of the office, including, but not limited to, provision of information and coordination of schedules.

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

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

(a) Unless the agency head elects to conduct the hearing, in which case the agency head shall render a final decision under Section 417(a), in a contested case, an administrative law judge shall be assigned to serve as the presiding officer. The administrative law judge shall

render the recommended [or final] decision of the agency in all adjudications in a contested case except for contested cases involving the following agencies:

(1) [List name of agency] or [list subject matter of proceeding].

(b) Except as otherwise provided by law, an administrative law judge shall issue a recommended decision unless the agency head authorizes the issuance of a final decision. A recommended decision of an administrative law judge is a final agency decision unless the agency decides to review the decision. This section does not prevent an administrative law judge from issuing an order as a result of an emergency adjudication under Section 408.

(c) Except as provided by law other than this act, if a matter is referred to the [office] by an agency, the agency may take no further adjudicatory action with respect to the proceeding, except as a party litigant, as long as the [office] has jurisdiction over the proceeding. [This subsection does not prevent an appropriate interlocutory review by the agency or an appropriate termination or modification of the proceeding by the agency when authorized by law other than this act.]

[ARTICLE] 7

RULES REVIEW

[**NOTE:** A state may choose the legislative rule review process stated in this article.]

SECTION 701. [LEGISLATIVE RULES REVIEW COMMITTEE].

(a) There is created a joint standing [rules review committee] of the legislature designated the [rules review committee].

Legislative note: *States that have existing rules review committees can incorporate the provisions of Sections 701, and 702, using the existing number of members of their current rules review committee. Because state practice varies as to how these committees are structured, and how many members of the legislative body serve on this committee, as well as how they are selected, the act does not specify the details of the legislative review committee selection process. Details of the committee staff and adoption of rules to govern the rules review committee staff and organization are governed by law other than this act including the existing law in each state.*

SECTION 702. [RULES REVIEW COMMITTEE] DUTIES.

(a) An agency shall file a copy of an adopted, amended, or repealed rule with the [rules review committee] at the same time it is filed with [the [publisher]].

(b) The [rules review committee] shall examine currently effective final agency rules and shall review newly adopted, amended, or repealed rules on an ongoing basis to determine whether the:

(1) rule is a valid exercise of delegated legislative authority;

(2) statutory authority for the rule has expired or been repealed;

(3) rule is necessary to accomplish the apparent or expressed intent of the specific statute that the rule implements;

(4) rule is a reasonable implementation of the law as it affects persons particularly affected by the rule;

(5) The rule complies with the regulatory analysis requirements of Section 305, and properly determines the factors under Section 305(c).

(c) The [rules review committee] may request from an agency such information as is necessary to carry out the duties of subsection (a). The [rules review committee] shall consult with standing committees of the legislature with subject matter jurisdiction over the subjects of the rule under examination.]

(d) The [rules review committee]:

(1) shall maintain oversight over agency rulemaking; and

(2) shall exercise other duties assigned to it under this [article].

Comment

This section adopts a rules review committee process that is widely followed in state administrative law as a method for legislative review of agency rules. Subsection (b) requires the legislative rules review committee to review all final agency rules as well as newly adopted rules. The rules review committee may establish priorities for rules review including review of newly adopted or amended rules, and may manage the rules review process consistent with committee staff and budgetary resources.

SECTION 703. [RULES REVIEW COMMITTEE] PROCEDURE AND POWERS.

(a) Not later than [60] days after receiving the notice of an adopted, amended, or repealed rule from an agency under Section 307, the [Rules Review Committee] may

(1) approve the adopted, amended, or repealed rule;

(2) propose an amendment to the adopted or amended rule; or

(3) disapprove the adopted, amended, or repealed rule.

(b) If the [rules review committee] approves the adopted, amended or repealed rule, or does not propose an amendment under subsection (a)(2) or disapprove under subsection (a)(3), the adopted, amended, or repealed rule becomes effective as provided under Section 316.

(c) If the [rules review committee] proposes an amendment to the adopted or amended rule under subsection (a)(2), the agency may make the amendment, and resubmit the rule, as amended, to the [rules review committee]. An agency is not required to hold a hearing on an amendment made under this subsection. If the agency makes the amendment, it shall also give notice to the [publisher] for publication of the rule, as so amended, in the [administrative bulletin]. The notice shall include the text of the rule as amended. If the [rules review committee] does not disapprove of the rule, as amended, or propose a further amendment, the rule becomes effective on the date specified for the original rule under Section 314.

(d) If the [rules review committee] disapproves the adoption, amendment, or repeal of a rule under subsection (a)(3), the adopted, amended, or repealed rule becomes effective upon adjournment of the next regular session of the legislature unless prior to that adjournment the legislature adopts a joint resolution sustaining the action of the committee.

(e) An agency may withdraw the adoption, amendment, or repeal of a rule by giving notice of the withdrawal to the [rules review committee] and to the [publisher] for publication in the [administrative bulletin]. A withdrawal under this subsection terminates the rulemaking proceeding with respect to the adoption, amendment, or repeal, but does not prevent the agency from initiating a new rulemaking proceeding for the same or substantially similar adoption, amendment, or repeal.

Comment

This is a type of veto that provides for cooperation between the Legislature and the Governor, and attempts to avoid the Chadha v. I.NS problem of unconstitutionality by delaying the effective date of the rule until the legislature has the opportunity to enact legislation to annul or modify it. The governor may veto the act by which the legislature seeks to annul or modify the rule. This type of veto provision is widely used in the states.

[ARTICLE 8]

SECTION 801. EFFECTIVE DATE. This [act] takes effect on [date] and governs all agency proceedings, and all proceedings for judicial review or civil enforcement of agency action, commenced after that date. The [act] does not govern adjudications for which notice was given prior to that date under Section 403 and all rulemaking proceedings for which notice was given or a petition filed before that date.

Comment

Section 801 is based on Section 1-108 of the 1981 MSAPA. See Also California Government Code Sections 11400.10, and 11400.20 (operative date of California APA revisions). Agency proceedings on remand following judicial review after the act takes effect are governed by the prior law.