D R A F T

FOR DISCUSSION ONLY

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

For April 20-22, 2007~~November 17-19, 2006~~ Drafting Committee Meeting

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.

November 7, 2006

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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

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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.

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

The 1981 Model State Administrative Procedure Act

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

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

The Present Revision

There are several reasons for revision of the 1981 Act. It has been more than twenty-five

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

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

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

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

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

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

(3) "Agency action" means:

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

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

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

(4) "Agency head" means the individual or one or more members of the body of

individuals in which the ultimate legal authority of an agency is vested.

(5) "Agency Record" means the agency rulemaking record in rulemaking and means the agency hearing record in adjudication governed by section 403, and the agency record in cases governed by Section 406 (informal adjudication procedure), and by Section 408 (emergency adjudication procedure).

(6)[(5)] "Contested Case" means an adjudication in which an opportunity for an evidentiary hearing is required by the federal or state constitution or by a federal or state statute or by the common law ~~"Disputed case" means an adjudication in which an opportunity for an evidentiary hearing is required by law~~.

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

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

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

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

(11)[(10)] "Guidance document" means a record other than a rule developed by an agency that informs the general public of an agency's current approach to, or opinion of, law, including, interpretive rules, and general statements of policy that describe ~~where appropriate,~~ the agency's

exercise of discretionary functions. Guidance documents do not have the force of law and are not intended to prescribe the rights and duties of persons subject to agency regulation under a delegation of authority to thatagency. ~~current practice, procedure, or method of action based upon that agency's current approach or opinion.~~

(12)[(11)] "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.

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

(14)[(13)] "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] or subscribe to an automated e-mail notification of selected notice types.

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

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

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

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

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

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

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

(22)[(21)] "Presiding officer" means the person who presides over the evidentiary hearing in a contested~~disputed~~ case. ~~A presiding officer may be an [administrative law judge,] agency staff member[,] or one or more members of the agency head~~.

(23)[(22)] "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)[(23)] "Publisher" means the state official or agency to which is assigned the tasks of publishing rules and other substantive functions under this act. [Legislative Note: throughout this act the drafting committee has used the term publisher to describe the official or agency to whom 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.]

(25)[(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.

(26)[(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.

(27)[(26)] "Rule" means the whole or a part of an agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy or the organization, procedure, or practice requirements of an agency. The term ~~includes the amendment, repeal, or suspension of an existing rule, but~~ does not include:

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

(B) agency declaratory orders issued under this [act];

(C) a decision or order in a disputed case;

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

(E) an opinion of the Attorney General;

(F) an executive order of the Governor;

(G) 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 who are in an adverse position to the state;

(H) guidance documents.

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

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

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

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

(30)[(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.

(31)[(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 contesteddisputed 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)

Agency Action. This definition is added for purposes of identifying those matters subject to judicial review. 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~~Disputed 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 constitution, and makes provision in Article 4 for the type of hearing to be held in a case where a constitution creates the right to a hearing. Including constitutionally created rights to a hearing 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. See California Government Code Section 11410.10.

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.

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, publishers and editors about their duties to make records available and easily accessible to the public in the form of an index, as that term is used throughout this act.

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

Order. 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.

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

Comment

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

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

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

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

~~**Comment**~~

~~This approach to the federal funds and federal requirements problem divides the state response between the governor or attorney general and the legislature. Many states use~~

~~provisions of this type. Subsection (b) provides for immediate notification of the legislature in case of suspension of any law under the provisions of this section.~~

[ARTICLE 2]

PUBLIC ACCESS TO AGENCY LAW AND POLICY

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

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

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

(c) The [publisher] shall maintain the official record for adopted rules, including the text of the rules and any supporting documents, filed with the [publisher] by the agency.

~~[~~(d)~~(c)~~ The [publisher] shall create and maintain an Internet website. The [administrative bulletin and administrative code] must be published online via the Internet website [or other appropriate technology]. The publisher may not charge for public access to the Internet website.~~]~~

(e)~~(c)[d]~~ The [administrative bulletin] shall be published by the [publisher] at least once per [_]. ~~[The [administrative bulletin] must also be [published] in written paper form, for which the [publisher] may charge a reasonable fee.]~~ The [administrative bulletin] is deemed published under the requirements of law other than this act.

(f) The [administrative bulletin] must be made available in written ~~paper~~ form upon request, for which the [publisher] may charge a reasonable fee. ~~For purposes of calculating adherence to time requirements imposed by this [act], an issue of the [administrative bulletin] is~~

~~deemed published on the later of the date indicated in the issue or the date of its dissemination via the format and medium as prescribed.~~

(f)~~(d)[c]~~ The [administrative bulletin] must contain:

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

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

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

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

(g)~~(e)[f]~~ 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].

(h)[(f)]~~[g]~~ Each agency shall also make available for public inspection and copying those portions of the [administrative bulletin and administrative code] containing all rules adopted or used by the agency in the discharge of its functions and an index to those rules~~.~~

(i) The [publisher] may correct minor, nonsubstantive errors in spelling and format in proposed or adopted rules provided that the agency is notified.

(j) The [publisher] shall publish online via the internet website [or other appropriate technology] agency guidance documents filed with the publisher by the agency issuing the guidance document.

Comment~~**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.

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.

Bracketed subsection (d)~~(c)~~ requires the publisher to 1) maintain an Internet website, and 2) publish all matters required to be published under this act to be published on that website If a state chooses to use subsection (d)~~(c)~~, they will create a centralized website for use by all agencies.

The bracketed text of subsection (f)(1), and (f) (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 dat~~a~~abase 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 (i) provides for a limited nonsubstantive power to edit agency rules provided that the agency is notified by the rules publisher of the changes. Subsection (g) is based on the Maine Administrative Procedure Act, 5 M.R.S.A. Section 8056(10).

Subsection (j) requires that the publisher publish agency guidance documents filed with the publisher. See section 202(4) and Section 310, below.

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

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

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

(3) adopt as a rule a description in plain English of the process for application for 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) file with the [publisher] all rules, including any emergency rule adopted under Section 309(a) and all guidance documents; and

(5) file all current rulemaking dockets, proposed rules, adopted rules including emergency rules, direct final ~~fast- track~~ rules, guidance documents, notices, and orders issued in contested cases with the [publisher] in electronic format acceptable to the [publisher].

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), and the Kentucky Administrative Procedure Act, KRS Section 13A.100. Persons seeking licenses or benefits should have a readily available and understandable reference sources from the agency. A second reason is to eliminate “secret law” by making all guidance documents used by the agency

available from the agency and the administrative publisher.

SECTION 203~~203~~. DECLARATORY ORDER.

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

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

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

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

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

Comment

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

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

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

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

Comment

One purpose of this provision is to provide agencies with a set of procedural rules. This is especially important for smaller agencies. Another purpose of this section is to create as uniform a set of procedures for all agencies as is realistic, but to preserve the power of agencies to deviate from the common model where necessary because the use of the model rules is demonstrated to be impractical for that particular agency. 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 article, "rule" does not include an emergency rule adopted under Section 309(a), a direct final ~~fast-track~~ rule adopted under Section 309(b), or a guidance document.

(b) Each agency shall maintain a current rulemaking docket. [The current rulemaking docket must be published on the [publisher]'s Internet website.

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

(1) the subject matter of the proposed rule;

(2) notices related to the proposed rule;

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

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

(5) ~~electronic and written~~ requests for public hearing;

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

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

(8) the timetable for action.

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

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 available for public inspection in the office and, unless unavailable for display on the internet because proprietary in nature or incapable of being displayed electronically, available for public display on the internet.~~or be available via the Internet.~~

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

(4) any official transcript of oral presentations made in the proceeding upon which the rule is based or, if not transcribed, any tape recording or stenographic record of those

presentations, and any memorandum prepared by the agency official who presided over the hearing, summarizing the contents of those presentations;

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

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

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).

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.

[SECTION 303. ADVICE ON POSSIBILE RULE BEFORE NOTICE OF PROPOSED RULE ADOPTION ~~ADVICE ON POSSIBLE RULE BEFORE NOTICE OF PROPOSED RULE ADOPTION~~: NEGOTIATED RULEMAKING .

(a) An agency, before notice of the proposed adoption of a rule, may solicit comments and recommendations from the public on a subject matter of possible rulemaking under active

consideration within the agency by causing notice of possible rulemaking on the subject matter to be published in the [administrative bulletin] and indicating where, when, and how persons may comment.

(b) Before publication of a notice of the proposed adoption of a rule, each agency may appoint a committee to comment or to make recommendations on the subject matter of a possible rulemaking under active consideration within the agency. In making the appointments, the agency shall seek to establish a balance in representation among 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 section shall be published in the [administrative register] at least 15 days prior to the meeting. Meetings of committees appointed under this section shall be open to the public.

Comment

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.

SECTION 304. NOTICE OF PROPOSED RULE ADOPTION.

(a) At least [30] days before the adoption, amendment, or repeal, of a rule, an agency shall publish notice of the proposed adoption in the [administrative bulletin]. The notice of the

proposed adoption of a rule must include:

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

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

(3) the text of the rule proposed;

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

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

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

(b) Within three days after publication of the notice of the proposed adoption of a rule in the [administrative bulletin], the agency shall cause a copy of the notice to be mailed or sent electronically to the [rules review committee] [speaker of the house of representatives and president of the senate] [governor] [attorney general] and each person that has made a timely request to the agency for a mailed or electronic copy of the notice. An agency may charge a person for the actual cost of providing written mailed copies if the person has made a request for a written paper copy.

Comment

Many states have similar provisions to provide notice of proposed rule adoption to the public and to rule review agencies.

SECTION 305. REGULATORY ANALYSIS.

(a) An agency shall prepare a regulatory analysis for a rule proposed by the agency

having an estimated economic impact of more than [$].

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

(c) A regulatory analysis must contain:

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

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

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

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

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

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

(f) A concise summary of a regulatory analysis required under this section must be published in the [administrative bulletin] at least [20] days before the earliest of:

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

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

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

Comment

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

SECTION 306. PUBLIC PARTICIPATION.

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

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

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

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

(e) An agency official shall preside at a public hearing on a rule proposed to be adopted.

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

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

Comment

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

SECTION 307. TIME OF ADOPTION.

(a) An agency may not adopt a rule until the period for submitting information or comments has expired and notice has been given to the officials under subsection (b).

(b) At the expiration if the period for submitting information or comments on a rule, the agency shall transmit copies of the rule to be adopted to the [Rules Review Committee] [Speaker of the House of Representatives and President of the Senate] [Governor] [Attorney General].

(c) Except as otherwise provided in subsection (d), within [ ] days after the time of transmission of the rule to be adopted under subsection (b), an agency shall adopt the rule pursuant to the rulemaking proceeding or terminate the proceeding by publication of a notice to that effect in the [administrative bulletin].

(d) 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.

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

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

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

(1) any persons affected by the adopted rule should have understood that the published proposed rule would affect their 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; and

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

Comment

This section draws upon 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 RULES; Direct Final Rulemaking~~FAST-TRACK RULES~~.

(a) If an agency finds that an imminent peril to the public health, safety, or welfare requires immediate adoption of a rule and states in writing its reasons for that finding, the agency, without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, may adopt an emergency rule. An emergency rule may be effective for not longer than [ ] days [renewable once up to [ ] days]. The adoption of an emergency rule does not preclude adoption of an identical rule under Sections 304 through 308. The agency shall take appropriate measures to make an emergency rule known to the persons who may be affected by it. An emergency rule proceeding can be used to change agency program requirements to avoid the imminent loss of federal funding for agency programs.

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

~~[Legislature] [or the Rules Review Committee],~~ the agency shall file notice of the objection with the [publisher] for publication in the [administrative bulletin] and proceed with the normal rulemaking process set out in this [article], with the initial publication of the fast-track rule serving as the notice of the proposed adoption of a rule.

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

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 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 Adminstrative 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. An agency may not issue a guidance document in place of a rule.

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

(c) A guidance document binds the agency, but is advisory to, and does not bind, any other person.

(d) A reviewing court shall give no deference to agency interpretations in a guidance document and shall~~may~~ determine de novo the validity of a guidance document. A reviewing court may consider whether or not the agency followed the guidance document, and may enforce the provisions of the guidance document against the agency.

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

(f) Each agency shall file all currently operative guidance documents with the [publisher] so that the full text of the guidance document can be published by the [publisher] on the internet or other appropriate electronic technology.

(g) Each agency shall maintain an index of all of its currently operative guidance documents, make the index available for public inspection, and make available for public

inspection the full texts of all guidance documents to the extent inspection is permitted by law; and, upon request, make copies of guidance indexes or guidance documents available without charge, at cost, or on payment of a reasonable fee. In case of failure to index a guidance document, the burden of proof shall be upon the agency in any proceeding to establish that parties were not entitled to rely upon the guidance document.

(h)~~(g)~~ A person may petition an agency for a declaratory order under this [act] that requests conversion of a guidance document into a rule. Upon submission of the petition, the agency shall notify the [Rules Review Committee]. Within [ ] days of submission of the petition, the agency shall either deny the petition and state its reasons in writing for so doing, or shall initiate rulemaking proceedings under this [act]. The agency shall notify the Rules Review Committee of any action taken on the petition.

Comment

This section draws upon the provisions of the Arizona, Michigan, Virginia, and Washington Administrative Procedure Acts. See: A.R.S. § 41-1001 & A.R.S. § 41-1091; M.C.L.A. 24.203 & M.C.L.A. 24.224; Va. Code Ann. Section 2.2–4008; and WA RCWA § 34.05.230.

This section seeks to encourage an agency to advise the public of its current opinions, approaches, and likely courses of action by means of guidance documents. This section also recognizes the need for guidance documents that an agency will prepare 1) as a guide to its employees and 2) as a guide to the public. Agency law often needs interpretation, and agency discretion needs some channeling. The public needs to know the agency opinion about the meaning of the law and rules that it administers. Increasing public knowledge and understanding reduces unintentional violations and lowers transaction costs. See Michael Asimow, *California Underground Regulations*, 44 Admin. L. Rev. 43 (1992); Peter Strauss, *The Rulemaking Continuum*, 44 Duke L. J. 1463 (1992). Excusing the agency from full procedural rulemaking for guidance documents furnishes a powerful economic incentive for agencies to use these devices to inform their employees and the public.

Many states have recognized the need for this type of exemption in their statutes. They are also referred to as interpretive statements or policy statements. These states have defined interpretive and policy statements differently from rules, and also excused agencies creating

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

Four states in particular have adopted detailed provision for guidance documents. They are: Arizona, Michigan, Virginia, and Washington. See: A.R.S. § 41-1001 & A.R.S. § 41-1091; M.C.L.A. 24.203 & M.C.L.A. 24.224; Va. Code Ann. Section 2.2−4008; and WA RCWA § 34.05.230. Their provisions strike a balance between the need of agencies for guidance documents and the need of the public to be protected from "secret" law or law adopted without the procedural protections of rulemaking. This section seeks to strike the same balance.

This section seeks to provide protection from abuse of guidance documents by various definitional and procedural measures. One measure not provided is a requirement of a notice on all guidance documents that informs members of the public of the right to petition the agency to convert the guidance document to a rule. Only one state, Arizona, has adopted this measure. See A.R.S. § 41-1091. Because of the numerous other protections in this section, that measure has not been included.

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

Subsection (d) provides for de novo judicial review of the validity of guidance documents. Under this standard, also known as the independent judgment or the substituted judgment standard, reviewing courts considering the validity of guidance documents will not defer to the agency interpretation contained in the guidance document. Subsection (d) also contains provisions addressing reliance interests of persons who follow the provisions of agency guidance documents. If an agency fails to follow the provisions of the guidance document, the reviewing court may apply principles of equitable estoppel to preclude the agency from a change

in position that causes detrimental reliance to the affected person. Equitable estoppel is generally not recognized in federal administrative law (Office of Personnel Management v. Richmond (1990) 496 U.S. 414) unless a due process of law fair notice standard is violated (General Electric Co., v. EPA, 53 Fed. 3d 1324 (DC Cir.1995). Equitable estoppel is more widely recognized in state administrative law (Footes Dixie Dandy, Inc. v. McHenry, 607 S. W. 2d 323 (Ark. 1980); Lentz v. McMahon, 49 Cal. 3d 393, 406-407, 777 P. 2d 83 (Cal. 1989). There is a balance between encouraging or requiring agencies to issue guidance documents that provide advice to members of the public and holding agencies responsible for mistaken advice that persons reasonable rely upon to their detriment.

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

(1) the date the agency adopted the rule;

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

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

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

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

(6) the effective date of the rule.

SECTION 312. CONCISE EXPLANATORY STATEMENT.

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

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

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

(b) Only the reasons contained in the concise explanatory statement required by subsection (a) may be used by a party as justifications for the adoption of the rule in any proceeding in which its validity 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.** An agency may adopt a rule that incorporates by reference all or any part of a code, standard, or rule that has been adopted by an agency of the United States, this state, another state, or by a nationally recognized organization or association, if:

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

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

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

(4) the rule states where copies of the code, standard, or rule are available at cost from

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

(5) the rule is of limited public interest.

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

Comment

This section is a slightly modified form of the 1961 Model State Administrative Procedure Act, section (3)(c).

SECTION 315. FILING OF RULES. An agency shall file with the [publisher] each rule it adopts and all rules existing on [the effective date of this [act]] that have not previously been filed. The agency shall also file a rule under this section as an electronic record. The filing must be done as soon after adoption of the rule as is practicable. At the time of filing, each rule

adopted after [the effective date of this [act]] must have attached to it the explanatory statement required by Section 312. The [publisher] shall affix to each rule and statement a certification of the time and date of filing and keep a permanent register open to public inspection of all filed rules and attached explanatory statements. In filing a rule, each agency shall use a standard form prescribed by the [publisher].

Comment

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

SECTION 316. EFFECTIVE DATE OF RULES.

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

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

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

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

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

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

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

Comment

This is a substantially revised version of the 1961 Model State Administrative Procedure Act, Section 4 (b)&(c) and 1981 Model State Administrative Procedure Act, Section 3-115. Most of the states have adopted provisions similar to both the 1961 Model State Administrative Procedure Act and the 1981 Model State Administrative Procedure Act, although they may differ on specific time periods.

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

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

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

(3) if otherwise lawful, adopt the rule.

Comment

This section is substantially similar to the 1961 MSAPA.

[ARTICLE 4]

ADJUDICATION

SECTION 401. WHEN ARTICLE APPLIES. CONTESTEDDISPUTED CASES.

This [article] applies to an adjudication made by an agency in a contesteddisputed case. If the requirements for informal adjudication under Sections 405 and 406 or an emergency adjudication under Section 408 are met, a hearing in a contesteddisputed case may be conducted following the procedures in those sections.

Comment

Article 4 of this Act does not apply to all adjudications but only to those adjudications, defined in Section 102 as a "contesteddisputed case." ContesteddDisputed 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. All contesteddisputed 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.

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

This section draws upon the California, (see Cal. Cal.Gov.Code Section 11410.10);

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

SECTION 402. PRESIDING OFFICERS.

(a) In a disputed case, the presiding officer shall regulate the hearing in a manner that will promote an 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, or in the discretion of the agency head, ~~The agency head, or [one or more members of the agency head,]~~ [one or more administrative law judges assigned by the office in accordance with Section 602] [or, unless prohibited by law, one or more persons designated by the agency head], ~~in the discretion of the agency head,~~ may serve as the presiding officer.

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

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

(e) A presiding officer is subject to disqualification for bias, prejudice, financial interest, or any other cause for which a judge is or may be disqualified. A presiding officer, after making a reasonable inquiry, shall disclose to all parties any known facts that a reasonable person would consider likely to affect the impartiality of the presiding officer in the contested case proceeding, including:

(1) a financial or personal interest in the outcome of the contested case proceeding; and

(2) an existing or past relationship with any of the parties to the contested case proceeding, their counsel or representatives, or a witness.

(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 ~~Before the taking of evidence at an evidentiary hearing, a party may request~~ the disqualification of the presiding officer must~~by~~ file~~ing~~ 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~~ [or the appointing authority, or the Chief Administrative Law Judge] determine whether to grant the petition and state facts and reasons for the determination in writing, except as otherwise provided by law, or by determination of the appointing authority if provided by rule. Determinations to disqualify or to not disqualify a presiding officer are 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 the 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) Agency heads may continue to participate in the hearing or decision of a contested case notwithstanding grounds for disqualification if required by law

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~~DISPUTED~~ CASE PROCEDURE.

(a) Except for emergency adjudications and except as otherwise provided in Section 406, this section applies to contested~~disputed~~ 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~~governing procedure~~.

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

(1) Upon proper objection, the presiding officer must [or may]exclude evidence that is immaterial, irrelevant, unduly repetitious, or excludable on constitutional, or ~~or~~ statutory grounds or on the basis of an evidentiary privilege recognized in the courts of this state. ~~In the absence of proper objection,~~ T~~t~~he presiding officer may exclude evidence that is objectionable under the applicable rules of evidence. Evidence may not be excluded solely because it is hearsay. ~~[~~Hearsay evidence may be used for the purpose of supplementing or explaining other evidence except that on timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.~~]~~ Or [Hearsay evidence can be sufficient to support fact findings if that evidence constitutes reliable probative and substantial

evidence].

(2) An objection is ~~timely if~~ made at the time the evidence is offered~~before conclusion of the hearing~~. In the absence of objection, the presiding officer may exclude evidence at the time it is offered.

(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 including, if the agency desires to avail itself of information or if it is offered into evidence by a party, records in the possession of the agency which contain information that is not a public record~~classified by law as not public~~. No factual information or evidence may be considered in the determination of the case unless it is part of the agency 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 ~~judicially~~ noticed facts before the decision is announced~~, unless the presiding officer determines as part of the record or decision~~

~~that fairness to the parties does not require an opportunity to contest such facts~~.

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

(e) Except for informal hearings under Sections 405 and 406 and emergency hearings under Section 408, in a disputed case, the presiding officer, at appropriate stages of the proceedings, shall give all parties the opportunity to file pleadings, motions, and objections~~, and offers of settlement~~ in a timely manner. The presiding officer, at appropriate stages of the proceeding, may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed, recommended, or final orders. If written records are submitted, the original record ~~available, the original of all records~~ must be filed with the agency and copies of all filings shall be sent to all parties.

(f) Except for informal hearings under Sections 405 and 406 and emergency hearings under Section 408, in a disputed case, to the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence.

(g) [If no party objects or if all parties consent] or Unless prohibited by law, if each party to a hearing has an opportunity to~~o~~ hear, speak, and be heard in the proceeding as it occurs, the presiding officer may conduct all, or part of, an evidentiary hearing, or a prehearing conference, by telephone, television, video conference, or other electronic means;

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

(i) A hearing in a contested~~disputed~~ 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, 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) Any party may represent themselves in a contested case, and the presiding officer may accommodate pro se parties unfamiliarity with agency contested case procedures by explaining those procedures to the pro se party to the extent consistent with fair hearing [impartial decision maker] requirements

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

(m)~~(l)~~ This section applies to agency procedure in contested~~disputed~~ cases without further action by the agency, and prevails over a conflicting or inconsistent provision of the agency's rules.

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

(o) Agencies must train new presiding officers [including non lawyer presiding officers]

in contested case procedures and in the rules of evidence applicable to contested case proceedings.

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 basedon 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 accomdate 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 deisionmake 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~~disputed~~ case.

(b) In case of applications or petitions submitted by persons other than the agency,

within a reasonable time after filing, the agency shall give 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 case of actions initiated by the agency that may or will result in an order, the agency shall give an initial notice to the party or parties against which the action is brought by personal service in a manner appropriate under the rules of civil procedure for the service of process in a civil action in this state which includes:

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

(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 any subsequent proceeding in a contested~~disputed~~ case may be held in default;

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

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

(d) When a prehearing 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. INFORMAL ADJUDICATION IN CONTESTED~~DISPUTED~~

CC~~C~~ASES. Unless prohibited by law other than this [act], an agency may use an informal hearing procedure in a contested~~disputed~~ case if:

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

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

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

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

(C) a disciplinary sanction against a licensee that does not involve an actual revocation of a license or an actual suspension of a license for more than five days;

(D) a proceeding where the federal or state constitution requires an evidentiary hearing, but the federal or state constitution does not require an agency to follow the adjudication procedures of Section 403; or

(E) the parties by written agreement consent to an informal hearing.

Comment

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

This section adopts a single category of informal procedure that an agency may use to perform the same functions, and the following section leaves to the discretion of the presiding officer the exact hearing procedure to be followed. This section also draws upon the California provision for an informal procedure, see Ann.Cal.Gov.Code SECTION 11445.20.

Subsection 2(D) is intended to deal with the situation that arises in federal constitutional law where the constitution protects a life, liberty or property interest, but, under the holding of Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976) do not require all the protections of a formal hearing. See Goss v. Lopez, (1975) 419 U.S. 565, 581-582 (informal due process hearing for school suspension of ten days or less), and Cleveland Board of Education v. Loudermill (1985) 472 U.S. 532.

SECTION 406. INFORMAL ADJUDICATION PROCEDURE.

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

(b) In an informal adjudication, the presiding officer shall regulate the course of the proceeding consistent with the due process requirement of meaningful opportunity to be heard. The presiding officer shall permit the parties and their representatives, and may permit others, to offer written or oral comments on the issues. The presiding officer may limit the use of witnesses, testimony, evidence, cross-examination, and argument and may limit or eliminate the use of pleadings, intervention, discovery, prehearing conferences, and rebuttal. Where appropriate in the discretion of the presiding officer, an informal adjudication may be in the nature of a conference.

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

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

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

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

(4) to have notice of any contrary factual material in the possession of the agency

that can be relied on as the basis for adverse decision; and

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

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

Comment

This section draws on the informal adjudication provisions of several state Administrative Procedure Acts. See: California Administrative Procedure Act, West's Ann.Cal.Gov.Code SECTION 11445.40; Va. Administrative Procedure Act, Section 2.2-4019, Va. Code Ann. § 2.2-4019; and Washington Administrative Procedure Act, Section 34.05.485, West's RCWA § 34.05.485. Under this section, the informal adjudication procedure is a simplified form of an adjudication under the control of the presiding officer. The informal hearing may be in the nature of a conference at the discretion of the presiding officer. Although the hearing is streamlined and informal, the hearing officer must observe basic protections of fairness spelled out in subsection (c) and protections described in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976). . See Goss v. Lopez, (1975) 419 U.S. 565, 581-582 (informal due process hearing for school suspension of ten days or less), and Cleveland Board of Education v. Loudermill (1985) 472 U.S. 532.

SECTION 407. AGENCY HEARING RECORD IN CONTESTED~~DISPUTED~~ CASE.

(a) An agency shall maintain an official hearing record in~~of~~ each contested~~disputed~~ 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 received or considered;

(5) a statement of matters judicially noticed;

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

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

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

(9) any final order, 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) Except to the extent that law other than this [act] provides otherwise, the agency hearing record constitutes the exclusive basis for agency action in a disputed case and for judicial review of the case.

SECTION 408. EMERGENCY ADJUDICATION PROCEDURE.

(a) Unless prohibited by law other than this [act], an agency may conduct an emergency adjudication in a contesteddisputed 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 interim relief.

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

electronic means. The hearing may be conducted in the same manner as an informal hearing under this [article].

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

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

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

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

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

Comment

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

Federal and state case law have held that in an emergency situation an agency may act rapidly and postpone any formal hearing without violation, respectively, of federal or state

constitutional law. FDIC v. Mallen, 486 U.S. 230 (1988); 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 409. EX PARTE COMMUNICATIONS.

(a) Except as provided in subsections (b) and (c), while a contesteddisputed case is pending, the presiding officer may not make or receive any communication from any person regarding any issue in the proceeding [or relevant to the merits of 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 or receive communicationse fromwith a law clerk or a person authorized by law to provide legal advice to the agency, or, on ministerial matters, communicate 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;

(c) An employee or representative may make or receive communications from e with an agency head sitting as presiding officer if the communication consists of an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence in the agency

hearing record, and if:

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

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

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

(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 verbal, a memorandum containing the substance of the advice must be made part of the record and the parties must be notified of the communication. The parties may respond to the advice of an employee or representative of the agency in a record that is made part of the hearing record.

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

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

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

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

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

Comment

This section is 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 rely 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 410 Administrative Adjudication Code of Ethics

(a) Except as otherwise provided in subsection (b), the Code of Judicial Ethics applicable to the conduct of judges in the judicial branch in this state governs the hearing and non hearing conduct of an administrative law judge or other presiding officer adjudicating contested cases.

(b) Section 409 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 the judicial code of ethics.

Comment

Section 410 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. law Section 410 provides applicable law to govern disqualification of presiding officers under Section 402(e).

SECTION 411 [410]. INTERVENTION.

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

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

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

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

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

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

Comment

Section 411 is based in part of 1981 MSAPA Section 4-209. See also Fedreal Rule of civil Procedure Rule 24 (permissive intervention under Rule 24(b)).

Subsection (dc) 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), and (b). Permissive intervention is provided for in subsection (c). Subsection (b) intervention will also be granted when the presiding officer determines that a petitioning intervenor has a substantial interest created by a statute or determines that as a practical matter the effect on the petitioner justifies petitioner's

~~presence as a party~~. Subsection (e~~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~~e~~) provides for notice suitable under the circumstances to enable parties to anticipate and prepare for changes that may be caused by the intervention.

SECTION 412 [411]. SUBPOENAS.

(a) In a contested~~disputed~~ 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~~disputed~~ 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 [412]. 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 407, a party, upon written notice to

another party at least [ ] days before an evidentiary hearing, is entitled to:

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

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

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

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

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

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

(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) 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.

(4) 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.

~~(4) For refusal to comply with discovery requests, a presiding officer may issue a discovery order.~~ 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 [413]. CONVERSION.

(a) An adjudication in a disputed 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 [~~414~~]. 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 at his discretion may issue a default order or proceed with a hearing in the absence of the party.

(b) Under subsection (a), a default judg~~e~~ment 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 of 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 judgement. 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 judgement 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 [415]. 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 an explanation of 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 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 [416]. ORDERS: RECOMMENDED AND FINAL.

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

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

(c) Unless the time is extended by stipulation, waiver, or upon a showing of good cause, 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. 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 contesteddisputed case and on matters officially matters judicially 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 [417]. AGENCY REVIEW OF RECOMMENDED DECISIONS..

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

(b) A party may petition for agency 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 an 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 Section 418. 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 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 [418]. RECONSIDERATION.

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

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

(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 [419]. 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 [420]. AVAILABILITY OF ORDERS; INDEX.

(a) Except as otherwise provided in subsection (b), an agency shall index, by caption and subject, all final orders and final written decisions in contested ~~disputed~~ 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 ~~disputed~~ 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 and 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.

(A) A final order and 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.

(B) Where, in the judgement of the presiding officer, it is possible to redact a final order and 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 document may be indexed and published.

(c) An agency may not rely on a final order and a written final decision as precedent in future adjudications unless the order and decisions have has been designated as a precedent by the agency, and the order and decision have 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 contesteddisputed 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 consummation to the administrative process. Agency 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 substantial and 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 (b)creates a limited right to review of non-final agency action.

SECTION 502. REVIEW OF AGENCY ACTION OTHER THAN ORDER. A person otherwise qualified under this [article] is entitled to judicial review of agency rules and 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 immediate, substantial 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.

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) Except as otherwise provided in Section 314, and 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.

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 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 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; and in the petition for judicial review the petitioner must disclose the petition for rulemaking and the agency action on that petition to the court.

(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 matters that are not evident from the record that involve new evidence or wholly 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 considered in light of the entire record; 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 by one or more of the following:

(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 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. For purposes of this subparagraph, the following terms have the following meanings:

(i) "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.

(ii) "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 precedents, unless the agency has justified that inconsistency by stating 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 agency for the purpose of separating the adjudicatory function from the investigatory, prosecutorial, and policy-making functions of agencies.

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

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

SECTION 602. DUTIES OF OFFICE.

(a) The office shall employ administrative law judges as necessary to conduct 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 without delegation or assignment to presiding officer.

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

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

(b) The chief administrative law judge:

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

(2) must have substantial experience in administrative law;

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

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

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

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

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

(1) supervise the office;

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

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

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

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

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

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

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

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

SECTION 605. ADMINISTRATIVE LAW JUDGES.

(a) An administrative law judge:

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

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

(3) is subject to the requirements and protections of [classified service of state

employment and the state ethics code];

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

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

(6) receive compensation provided by law;

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

(8) [must devote full time to the duties of the position] [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.

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

SECTION 606. COOPERATION OF STATE AGENCIES.

(a) All agencies must cooperate with the chief administrative law judge in the discharge of the duties of the office, 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 607. POWERS OF ADMINISTRATIVE LAW JUDGES. An administrative law judge shall exercise all the powers of a presiding officer under this [act].

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 412(a), in a disputed case, an administrative law judge shall be assigned to serve as the presiding officer. The administrative law judge shall render the recommended decision of the agency in all adjudications in a disputed case except for disputed cases involving the following agencies:

(1) [List name of agency].

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

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

[ARTICLE 7]

RULE REVIEW

NOTE: A state may choose one, two or all of the alternative forms of rule review in this article.

[**SECTION 701. GOVERNOR'S VETO.**

(a) Upon receiving notice from the agency under Section 304(c), the Governor shall review a rule proposed to be adopted by an agency. The Governor shall inform the agency of his or her intention to veto the proposed rule within [ ] days after receiving notice, and shall concisely state the grounds for the veto. If the agency does not remedy the Governor's grounds for veto by changes to the rule and give notice to the Governor of the remedial action taken within [ ] days after receiving notice from the Governor, the Governor by executive order may veto the rule.

(b) Upon issuance of the executive veto order, the Governor shall transmit copies to the agency [Rules Review Committee] [Attorney General] [Speaker of the House of Representatives and President of the Se] and the [publisher], which shall publish the veto in the [administrative bulletin].

(c) A rule vetoed by the Governor is void and may not be published in the [administrative bulletin]

[SECTION 702. GOVERNOR'S OBJECTION.

(a) Upon receiving notice from the agency under Section 304(c), the Governor shall review a rule proposed to be adopted by an agency. The Governor shall inform the agency of his or her intention to object to the proposed rule within [ ] days after receiving notice, and shall

concisely state the grounds for the objection. If the agency does not remedy the Governor's grounds for objection by changes to the rule and give notice to the Governor of the remedial action taken within [ ] days after receiving notice of objection from the Governor, the Governor by executive order may object to the rule.

(b) Upon issuance of the executive order of objection, the Governor shall transmit copies to the agency [Rules Review Committee] [Attorney General] Speaker of the House of Representatives and President of the Senate] and the [publisher], which shall publish the objection in the [administrative bulletin] together with the rule to which it pertains.

(c) If the Governor publishes objection to a rule or any part of a rule under this section, then the agency bears the burden of proving, in any action challenging the legality of the rule or portion of a rule objected to by the Governor, that the rule or portion of the rule objected to was not unreasonable, arbitrary, capricious, not adopted in compliance with Article [3], or otherwise beyond the authority delegated to the agency.]

Comment

An agency may adopt Section 701 or 702, which provide for two different types of gubernatorial checks on agency rulemaking. Section 701creates a pure gubernatorial veto that invalidates a rule in the same fashion as a gubernatorial veto invalidates bills enacted by the legislature. Section 702 creates a gubernatorial "objection" to a rule, which shifts the burden of proof to the agency to demonstrate that the rule meets the procedural and substantive requirements of Article 3 in subsequent litigation involving the rule. This is a device that is used in several states, and may avoid the problems of unconstitutionality of the pure gubernatorial veto. The highest court of Alaska has held that the pure executive veto is unconstitutional. State v. A.L.I.V.E., 606 P.2d 769~~679~~ (Alaska, 1980) and the supreme courts of several other states, in the course of deciding that legislative vetoes are unconstitutional, have indicated in dicta their belief that executive vetoes are unconstitutional.

The gubernatorial veto is an important potential check on agency rulemaking.. Several states have adopted the gubernatorial veto in order to exercise a check on agency action by a single elected official. A gubernatorial veto creates a potentially efficient, unitary executive who is politically accountable. That executive check on agency action is likely to reflect the wishes

of the electorate.

Section 701 creates an executive veto in its purest form. It is drawn from the Hawaii APA, HRS § 91-3 and the Louisiana APA, LSA–RS 49:970. In Louisiana, the legislature also has the power to veto agency rules that can be exercised independently of the executive by concurrent resolution. Indiana's APA has a provision that permits the governor to veto an agency rule "with or without" cause. See IN ST 4-22-2-34. Nebraska also has created a provision requiring the governor's approval before a rule can become effective. See Neb. Rev. St. § 84-908. Arizona has created a useful variation on the executive veto. See A.R.S. § 41-1051. It consists of a commission known as the governor's regulatory review council, to which the governor appoints 6 members who serve at the governor's pleasure. The members of the governor's council represent different interests, including the public interest, business, the Arizona House of Representatives and the Arizona Senate. An agency may not file a rule without the approval of the governor's council. The standards for approval are stated in the Arizona APA. See A.R.S. § 41-1052.

[SECTION 703. LEGISLATIVE [RULES REVIEW COMMITTEE.]

(a) There is created a joint standing [Rules Review Committee] of the Legislature designated the [Rules Review Committee].

(b) The [Rules Review Committee] shall consist of six members, appointed as follows: Three members of the House of Representatives, at least one of whom shall be a member of the minority party appointed by the Speaker of the House; and three members of the Senate, at least one of whom shall be a member of the minority party, appointed by the President of the Senate. The [Rules Review Committee] shall elect a chair and vice chair from among its members.

(c) Members shall serve for [ ] year terms or until their successor is appointed. A vacancy shall occur when a member of the [Rules Review Committee] ceases to be a member of the Legislature or when a member resigns from the committee. Vacancies shall be filled by the appointing authority and the replacement shall fill out the unexpired term.

(d) The [Rules Review Committee]:

(1) Shall maintain continuous oversight over agency rulemaking; and

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

(e) The [Rules Review Committee] may hire staff to carry out the duties and powers assigned to it.

(f) The [Rules Review Committee] shall have the power to adopt rules necessary for its organization and that of its staff, consistent with general law and the rules of the Legislature.

[SECTION 704. [RULES REVIEW COMMITTEE] DUTIES.

(a) The [Rules Review Committee] shall examine proposed agency rules and shall review existing rules on an ongoing basis to determine whether:

(1) The rule is an invalid exercise of delegated legislative authority.

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

(3) The rule is in proper form.

(4) The notice given prior to adoption was adequate.

(5) The rule is necessary to accomplish the apparent or expressed intent of the specific statute that the rule implements.

(6) The rule is a reasonable implementation of the law as it affects persons particularly affected by the rule.

(7) The rule does not impose cost on the regulated person which could be reduced by the adoption of less costly methods that substantially accomplish the statutory objective.

(b) 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.]

[SECTION 705. [RULES REVIEW COMMITTEE] PROCEDURE AND POWERS.

(a) Within [ ] days of receiving notice of a proposed rule from an agency under Section 304(c), the [Rules Review Committee] may object to a rule by giving notice of objection in writing to the agency with a concise statement of the reasons for the objection. The [Rules Review Committee] shall also send notice of objection and reasons for the objection to the [Speaker of the House of Representatives and President of the Senate] [Governor] [Attorney General][standing committees of the legislature with subject matter jurisdiction] and publisher.

(b) In case of receipt of notice of objection from the [Rules Review Committee], an agency within [ ] days in writing shall notify the [Rules Review Committee] and publisher that the agency:

(1) withdraws the rule;

(2) amends the rule; or

(3) refuses to amend or withdraw the rule.

(c) If the agency withdraws the rule, it shall give notice of withdrawal to the publisher for publication in the [administrative bulletin] and shall notify the [Rules Review Committee] of withdrawal in writing at the same time. The rule shall be withdrawn without public hearing. Withdrawal is effective on the date of publication of the notice of withdrawal in the [administrative bulletin].

(d) If the agency amends the rule to comply with the [Rules Review Committee] objections, it shall make only the changes necessary to meet the objections, and shall resubmit

the rule, as amended, to the [Rules Review Committee]. The agency shall also give notice to the publisher for publication in the [administrative bulletin] of the change made to comply with the [Rules Review Committee] objection that shall include the text of the rule as changed and the objection to which it is directed. The agency is not required to hold a public hearing on an amendment made under this subsection.

(e) If the agency refuses to withdraw or amend the rule in response to the objection of the [Rules Review Committee], the agency shall give notice of the refusal to the [Rules Review Committee] and the publisher within [ ] days of receiving the [Rules Review Committee] objection. If the agency fails to respond to the objection within [ ] days, or if an amendment that an agency makes in response to [Rules Review Committee] objections in the opinion of the [Rules Review Committee] does not correct the objection, the [Rules Review Committee]:

(1) may post notice of the detailed objections of the [Rules Review Committee] to the rule in the [administrative bulletin] together with a reference to the location in the [administrative bulletin] where the full text of the rule can be found. Posting notice of the detailed objections shall place upon the agency the burden of proving, in any later action challenging the legality of the rule or portion of the rule objected to by the [Rules Review Committee], that the rule or portion of the rule objected to was not unreasonable, arbitrary, capricious, not adopted in compliance with [Article] 3, or otherwise beyond the authority delegated to the agency; and

(2) may submit a recommendation to the Speaker of the House of Representatives and the President of the Senate that legislation be enacted to annul or modify the rule together with proposed legislation to accomplish it.

(3) Within [ ] days of recommending annulling or modifying legislation under this subsection the [Rules Review Committee] shall notify the agency of the recommendation and request that the agency temporarily suspend the operation of the rule.

(f) Within [ ] days of receiving request for temporary suspension, the agency shall reply in writing to the [Rules Review Committee] either agreeing to temporarily suspend the rule or refusing to do so.

(1) If the agency agrees to temporarily suspend the rule, then it shall cause notice of the suspension to be published in the [administrative bulletin].

(2) If the agency refuses to temporarily suspend the rule, then the [Rules Review Committee] shall cause notice of the refusal to suspend operation of the rule in the [administrative bulletin]. Posting notice under this subparagraph shall suspend the operation of the rule for [[ ] days] [until the end of the next regular session of the Legislature].

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.

[SECTION 706. ATTORNEY GENERAL REVIEW.

(a) Upon receiving notice from the agency under Section 304(c), the Attorney General shall review a rule proposed to be adopted by an agency.

(b) The Attorney General may not approve any rule as to legality when the rule exceeds the statutory authority of the agency, or when the procedural requirements for adoption of the rule in this [act] are not substantially met.

(c) The Attorney General shall advise an agency of any revision or rewording of a rule necessary to correct objections as to legality.]

[ARTICLE 8]

[ELECTRONIC PUBLICATION AND NOTICE]

[SECTION 801. ELECTRONIC PUBLICATION.

(a) In order to provide the greatest possible access to agency documents to the largest number of citizens, agencies are encouraged to make their rules, guidance documents, and orders in disputed cases available through electronic distribution as well as through the regular mail. Agencies that have the capacity to transmit electronically may ask persons who are on mailing lists or rosters for copies of proposed rulemaking, rules, guidance documents and other similar notices whether they would like to receive the notices electronically.

(b) Electronic distribution to persons who request it may substitute for mailed copies related to rulemaking or guidance documents. 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.

(c) Agencies which maintain mailing lists or rosters for any notices relating to rule making or guidance documents may establish different rosters or lists by general subject area.]

Comment

This section encourages, but does not require operation of a website. It can be used as a more limited substitute for the centralized website of Section 201 [(c)] and the publication requirement of Section 802. It is drawn from the Washington Administrative Procedure Act. See WA ST 34.05.260

[SECTION 802. PUBLICATION IN ELECTRONIC FORMAT.

(a) All state 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; and

(6) each order in a disputed case.

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

(b) No fee shall be charged for public access to the [publisher]'s Internet website.

(c) No information concerning a person who accesses the information identified in subsection (a) of this section may be used or released for any purpose.]

[ARTICLE 9]

SECTION 901. 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. This [act] also governs agency proceedings conducted on a remand from a court or another agency after the effective date of the [act] . 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 901 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).