D R A F T

FOR DISCUSSION ONLY

REVISED MODEL STATE

ADMINISTRATIVE PROCEDURES ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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WITH GENERAL INTRODUCTION AND COMMENTS

DRAFTING COMMITTEE TO REVISE MODEL STATE ADMINISTRATIVE PROCEDURES ACT

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General Introduction

The 1946 Model State Administrative Procedure Act

The Model State Administrative Procedure Act (Act) of the National Conference of Commissioners on Uniform State Laws 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 passed in 1946, and the Conference approved its final draft of the 1946 Act shortly thereafter. The Federal Administrative Procedure Act exerted a substantial influence on the 1946 Act.[1]

The 1946 Act incorporated basic principles with only enough elaboration of detail to support essential features[2]of an administrative procedure act. This is the major characteristic of a model, as distinguished from a uniform, act. The drafters explained that this model act approach was required since the details of administrative procedure must vary from state to state because 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.[3] By about 1960, twelve states had adopted the 1946 Act.[4]

The 1961 Model State Administrative Procedure Act

After 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

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[1] Many of the same persons worked on both the draft of the federal act and the 1946 Model Administrative Procedure Act. The United states Attorney General's Report and federal legislation proposed during the same time period were frequently consulted in drafting the 1946 Model Administrative Procedure Act. The chair of the Conference committee that drafted the 1946 Act stated that the committee frequently consulted the Federal Admiinstrative Procedure Act. Arthur Earl Bonfield, The Federal Administrative Procedure Act and State Administrative Law, 72 Va. L. Rev. 297 (1987) at 300.

[2] 1946 Model State Administrative Procedure Act preface at 200.

[3] Id. at 200

[4]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.

government.[5] The resulting 1961 Act followed the model, not the uniform, act approach. It was drafted in a skeletal[6] fashion, and expressly sought to articulate only major principles.[7] Some of those major principles were: requiring agency rulemaking to adopt procedural rules; rulemaking procedure that provided for notice, public input and publication; judicial review of rules; guarantees of fundamental fairness in adjudications; and provision for judicial review of agency adjudication. Over one half of the states adopted the 1961 Act or large parts of it.[8]

The 1981 Model State Administrative Procedure Act

In the nineteen seventies, the Conference began work to revise the Act again. The preface to the 1981 Act explained that the approach of the drafters had changed from the 1946 and 1961 Acts. According to the drafters, the 1981 Act was entirely new, and contained more detail than earlier versions of the Act. The drafters explained that substantially more elaboration of detail was justifiable in light of changed circumstances and greater experience with administrative procedure since 1961.[9] The 1981 Act, when completed, contained considerably greater detail than the 1961 Act.[10] In the twenty-odd years since promulgation of the 1981 Act, Arizona, New Hampshire, and Washington have substantially adopted most of its provisions, and several other

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

[6] The term skeletal administrative procedure act is taken from an article that expounds the benefits of the Federal Administrative Procedure as a "skeletal" act that has survived as a useful procedural tool because of its focus on only major principles. See William D. Araiza, In Praise of a Skeletal administrative procedure act, 56 Admin. L. Rev. 979 (2004).

[7] Preface, 1961 Model State Administrative Procedure Act.

[8] 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.

[9] 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.

[10] 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.

states have drawn some of their provisions from the Act.[11]

The Present Revision

There are several reasons for revision of the 1981 Act. It has been more than twenty years since the Act was last revised. There now exists a substantial body of legislative action, judicial opinion and academic commentary that explain, interpret and critique the 1961 and 1981 Acts and the Federal Administrative Procedure Act. In the past two decades state legislatures, dissatisfied with agency rulemaking and adjudication, have enacted statutes that modify administrative adjudicative procedure in specific areas and that require additional specific procedures to be followed in agency rulemaking. There has been considerable scholarly examination of scope and standard of judicial review of agency action in the past twenty-five years, as well as extensive judicial examination at the state and federal level about the problems and difficulties of this area. Finally, the ABA has undertaken a major study of the Federal Administrative Procedure Act and is recommending revision. Since some sections of the various revisions of the Act are similar to the Federal Administrative Procedure Act, the ABA study furnishes useful comparisons for the Act.

The wide adoption of the "skeletal" 1946 and 1961 Administrative Procedure Acts has persuaded the Committee to draft in less detailed form.[12] The Committee's objectives are to produce a template consisting of basic principles that draw upon the widely-adopted and successful principles from the states and the best of current thinking on administrative procedure. The committee believes that this approach will preserve the best parts of the 1946, 1961 and 1981 Model State Administrative Procedure Acts and will be widely acceptable to state legislatures.

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

[12] This draft cannot and will not attempt to replicate exactly the brevity of the 1961 Act: too many new problems that the present revision must address have emerged since that act was drafted. But this revision, where possible, will attempt primarily maintain a focus upon essential matters of administrative procedure with only sufficient detail to give effect to those essential features..

REVISED MODEL STATE ADMINISTRATIVE PROCEDURES 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 pursuant to which an agency formulates and issues an order.

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

(3) "Agency action" means:

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

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

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

(4) "Agency head" means the individual or body of individuals in whom the ultimate legal authority of the agency is vested.

(5) "Agency record" means:

(A) in a disputed case proceeding, all oral or written evidence received[, and] any matter officially noticed[, and any record or file of which the agency or a party acquires by discovery].

(B) in an adjudication that is not a disputed case proceeding, the evidence compiled pursuant to statutory or constitutional requirements or statutory provisions for an evidentiary hearing.

(C) in an adjudication not subject to paragraphs (A) or (B), the relevant agency file, minutes and records, and oral or written submissions relating to the agency proceedings.

(D) in a rulemaking proceeding, the record the agency is required to maintain by Section 302.

(6) "Disputed case," unless the procedures for informal adjudication or emergency adjudication are applicable, means a proceeding in which an evidentiary hearing is required by Section 401 to be conducted under the provisions of Article 4 of this [act].

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

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

(9) "Electronic record" means information that is received, recorded or maintained by the agency or other government official in an electronic form.

(10) "Emergency adjudication" means an agency adjudication taken in a situation

in which there is an immediate danger to the public health, safety, or welfare that requires immediate action.

(11) "Evidentiary hearing," except as provided in Section 410, means a hearing for the reception of evidence to resolve a disputed issue of fact in which the decision of the hearing officer may be made only on material contained in the record created at the hearing.

(12) "Filing" of a record means delivery or electronic transmission of a record to a place and in a manner designated by the agency by rule for receipt of official records, or in the absence of such designation, at the office of the agency head.

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

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

(15) "Informal adjudication" means a procedure in a disputed case in the nature of a conference rather than a trial, as provided in Section 412.

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

(17) "Law" means the whole or a part of the federal or state Constitution, or of any federal or state statute, case law, common law, rule of court, executive order, or rule or order of an agency.

(18) "License" means the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law.

(19) "Licensing" means an agency process relating to the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(20) "Mail" for purposes of any notice means 1st class mail of the United States Postal Service, a carrier other than the United States Postal Service, or electronic distribution, where electronic distribution has been designated by agency rule as an acceptable means for transmission or receipt of records.

(21) "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.

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

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

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

(25) "Presiding officer" means the person who presides over the evidentiary hearing in a disputed case. The term includes an agency staff member, [an administrative law

judge as provided in Section ,] or one or more members of the agency head when designated to preside at a hearing.

(26) "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) "Rule" means the whole or a part of an agency statement of general applicability that implements, interprets, or prescribes law or policy or the organization, procedure, or practice requirements of an agency. The term includes the amendment, repeal, or suspension of an existing rule. The term does not include a rule adopted pursuant to section 309(a).

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

(29) "Written" means inscribed on a tangible medium, and retrievable in perceivable form.

Comment

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

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

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

Agency Record. This set of definitions distinguishes between the record compiled by an agency in a proceeding governed by Article 4 of this Act [Subsection (A)]; adjudications for which another statute prescribes hearing procedure [Subsection (B)]; and adjudications not made

on the record in an evidentiary hearing, and rulemaking. This definition of record is not binding on reviewing courts, and the provisions of this Act on scope of review recognize the power of reviewing courts to order augmentation of the record.

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. 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, hard copy, and converted into an electronic record. This Act does not limit the type of electronic documents received by the publisher. The purpose of defining and recognizing electronic documents is to facilitate and encourage agency use of electronic communication and maintenance of records.

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

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

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

Order. This definition is drawn from the 1981 MSAPA. Unlike the federal APA which defines rule, but not order, this section provides a positive definition of order based on case law and agency experience. The key concept is that an order includes solely agency legal determinations that are addressed to particular, specific, identified individuals in particular circumstances. An order may be addressed to more than one person. Further, the definition is consistent with modern law in rejecting the right/privilege distinction in constitutional law. The addition of the language "or other interests" is intended to clarify this change and to include entitlements. See also Cal.Gov.Code SECTION 11405.50.

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

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

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

SECTION 103. APPLICABILITY.

(a) This [act] shall apply to all agencies unless expressly exempted.

(b) This [act] does not require a record to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

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.

Subsection (b) was taken from the Uniform Electronic Transactions Act (UETA). Although many agencies make extensive use of electronic records and this act recognizes and encourages such advances, there remain small agencies in some states that do not have sufficient resources to move to electronic documentation immediately. This subsection makes clear that, although electronic documentation is encouraged and recognized in this [act], it is not mandatory.

SECTION 104. SUSPENSION OF [ACT]'S 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 is no longer 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, if appropriate, of a particular program from this [act].

Comment

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

legislature in case of suspension of any law under the provisions of this section.

SECTION 105. CONVERSION.

(a) At any point in an agency proceeding the presiding officer responsible for the proceeding:

(1) may convert the proceeding to another type of proceeding provided for by statute if the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of a party;

(2) if required by law, shall convert the proceeding to another type of proceeding provided for by this [act].

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

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

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

Comment

This section draws upon the 1981 Model State APA SECTION 1-107, with some modifications. A reference in this section to a "party," in the case of an adjudicative proceeding means "party" as defined in Section 102, and in the case of a rulemaking proceeding means an active participant in the proceeding or one primarily interested in its outcome. Agency proceedings covered by this article include a rulemaking proceeding as well as an adjudicative

proceeding. Subdivision (a) is intended to give agencies flexibility in actions where law does not mandate a particular form of proceeding; in such case the agency is authorized to select the form of action that is most effective and efficient in the particular circumstances.

"Appropriate" as used in section (a)(1) means that the conversion must be to a form that is appropriate for the type of action being taken. Thus, the conversion of a disputed case proceeding to an informal proceeding is proper under this term if the action could have originally been commenced as an informal proceeding.

Conversion must also not substantially prejudice the rights of parties. The courts will have to decide on a case-by-case basis what constitutes substantial prejudice. The concept includes both the right to an appropriate procedure that enables a party to protect its interests, and freedom of the party from great inconvenience caused by the conversion in terms of time, cost, availability of witnesses, necessity of continuances and other delays, and other practical consequences of the conversion. However, even if the rights of a party are substantially prejudiced by a conversion, the party may voluntarily waive them.

The no substantial-prejudice-to-the-rights-of-a-party limitation on discretionary conversion of an agency proceeding from one type to another is not intended to disturb an existing body of law. In certain situations an agency may lawfully deny an individual an adjudicative proceeding to which the individual otherwise would be entitled by conducting a rulemaking proceeding that determines for an entire class an issue that otherwise would be the subject of a necessary adjudicative proceeding. See Note, The Use of Agency Rulemaking To Deny Adjudications Apparently Required by Statute, 54 Iowa L.Rev. 1086 (1969). Similarly, the substantial prejudice limitation is not intended to disturb the existing body of law allowing an agency, in certain situations, to make a determination through an adjudicative proceeding that has the effect of denying a person an opportunity the person might otherwise be afforded if a rulemaking proceeding were used instead.

Under subdivision (a)(2) an agency is required to convert a proceeding of one type to a proceeding of another type when required by rule or statute, even if a party does not consent is prejudiced. Under subdivision (b), however, both a discretionary and a mandatory conversion must be accompanied by notice to all parties to the original proceeding so that they will have a fully adequate opportunity to protect their interests.

ARTICLE 2

PUBLIC ACCESS TO AGENCY LAW AND POLICY

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

(a) The [administrative rules [publisher] shall be responsible for administering the provisions of this section.

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

(c) The [administrative bulletin] shall be published as a record as prescribed by the [publisher] no less frequently than [once per _]. [The [administrative bulletin] must be made available in written form upon request, for which the publisher may charge a reasonable fee]. For purposes of calculating adherence to time requirements imposed by this [act], an issue of the [administrative bulletin] is deemed published on the later of the date indicated in that issue or the date of its dissemination via the format and medium as prescribed. The [administrative bulletin] must contain:

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

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

(3) any other notices and materials designated by [law] [the publisher] for

publication therein; and

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

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

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

Comment

This section seeks to assure adequate notice to the public of proposed agency action. It also seeks to assure adequate record keeping and availability of records for the public. Article 2 is intended to provide easy public access to agency law and policy that are relevant to agency process. Article 2 also adds provisions for electronic publication of the administrative bulletin and code. Generally, this section is modeled after the 81 Model State Administrative Procedure Act. Most states now have an administrative rules editor or her equivalent and an administrative bulletin published on a regular basis. This Act substitutes the word "publisher" for editor and limits the authority of the publisher to make changes to material submitted to her, except for creating a uniform numbering system, form and style. Subsection (f) is important to provide for public access to all rules and notice of applicable rules, even though those rules are exempted from normal rulemaking procedures under Sections 3-108 and 3-109 *infra*.

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

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

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

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

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

(4) file with the publisher all rules, including an emergency rule adopted under section 309(a) and an index of guidance documents;

(5) file with the publisher for publication in the [administrative bulletin] a list of any guidance records 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.

(6) maintain an index of all of its currently operative guidance records and make the index available for public inspection; and

(7) make available for public inspection the full texts of all guidance records to the extent inspection is permitted by law, and upon request, make copies of such lists or guidance records available without charge, at cost, or on payment of a reasonable fee.

Comment

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

by making all guidance records used by the agency available from the agency and the administrative publisher.

SECTION 203. DECLARATIONS BY AGENCY.

(a) Any interested person may petition an agency for a declaration of the applicability of any rule or prior 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 sixty days after receipt of a petition pursuant to this section, an agency shall either decline to issue a declaration in writing or schedule the matter for hearing.

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

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

Comment

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

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

[SECTION 204. MODEL PROCEDURAL RULES.

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

(b) Except as otherwise provided in section (c), the default procedural rules shall constitute the default procedural rules under subsection (a) shall be used by all agencies.

(c) An agency may adopt a rule of procedure that differs from the default procedural rules adopted under subsection (a) only through rulemaking, and the final rule must state with particularity the need and reasons for the variation from the default procedural rules].

Comment

One purpose of this provision is to provide agencies with a set of procedural rules. This is especially important for smaller agencies. Another purpose of this section is to create as uniform a set of procedures for all agencies as is realistic, but to preserve the power of agencies to deviate from the common model where necessary because the use of the model rules is demonstrated to be impractical for that particular agency. Like Section 2-105 of the 81 MSAPA, this section requires all agencies to use the model rules as the basis for the rules that they are required to adopt under 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, except for agency action taken pursuant to section 309, each agency shall maintain a current rulemaking docket.

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

(1) the subject matter;

(2) notices;

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

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

(5) electronic and written requests for public hearing;

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

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

(8) the timetable for action.

(c) Whether or not an agency maintains a docket electronically, it must also maintain a written, hard copy current docket.

Comment

This section is modeled on Minn. M.S.A. Section 14.366. This section and the following section, Section C3-102 state the minimum docketing and rulemaking record keeping

requirements for all agencies. This section also recognizes that many agencies use electronic recording and maintenance of dockets and records. However, for smaller agencies, the use of electronic recording and maintenance may not be feasible. This section therefore permits the use of exclusively written, hard copy dockets. The current rulemaking docket is a summary list of pending rulemaking proceedings or an agenda referring to pending rulemaking.

SECTION 302. AGENCY RULEMAKING RECORD.

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

(b) The agency rulemaking record must contain:

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

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

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

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

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

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

(c) Upon judicial review, the record required by this section constitutes the official agency rulemaking record. Except as required by a provision of law other than this [act], the agency rulemaking record need not constitute the exclusive basis for agency action on that rule or for judicial review thereof.

Comment

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

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

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

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

wants to impose on itself by rule such a prohibition on *ex parte* oral communications in rulemaking, or a requirement that all such oral communications be reduced to writing and included in the agency rulemaking record, it may do so. Paragraph (9) of subsection (b) is bracketed because this paragraph is wholly dependent on subsequently bracketed Section 3-204(d).

The language of subsection (c) is a modified form of S.1291, the "Administrative Practice and Regulatory Control Act of 1979," title I, Section 102(d), [5 U.S.C. 553(d)], which provides: "The file required by this subsection shall be available to the courts as the agency record in connection with review of the rule, but the file need not constitute the exclusive basis for judicial review or for agency action." See 96 Cong.Rec. S7126 at S7129 (daily ed. Jun. 6, 1979) (Sen. Kennedy). Although this section requires the creation and maintenance of an official agency rulemaking record, subsection (c) makes clear that the requirement of such a record does not mean that the rules made must be based exclusively on the rulemaking record or judicially reviewed exclusively on the basis of that rulemaking record.

Conventional wisdom and substantial experience dictate that neither the making of usual rules by an agency, nor judicial review of their validity, should be *required* to be based wholly on any official agency rulemaking record. See Hamilton, "Procedure for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking," 60 Calif.L.Rev. 1276 (1972); 2 *Recommendations and Reports of the Administrative Conference of the U.S.*, 66 (1970-1972), Recommendation 72-5; Auerbach, "Administrative Rulemaking in Minnesota," 63 Minn.L.Rev. 151 at 218-222 (1979). The burden imposed on agencies by a duty in every case to assemble their entire factual and argumentative justification for a rule prior to its adoption, and to enter that entire justification in the official agency record of the rulemaking proceeding, is far too great to justify such a requirement.

In addition, a requirement that the validity of a rule, on judicial review, be based wholly on an official record made before the agency in the rulemaking proceeding, could be inconsistent with the policy of Section 5-107(1). That provision states that a petitioner for judicial review of a rule "need not have participated in the rulemaking proceeding on which that rule is based." It may be unfair to bind persons with an agency rulemaking record as the only basis for judicial review of a rule if they did not participate in the rulemaking proceeding because of Section 5-107(1), or because they did not know of the existence of that rulemaking proceeding, or because at the time of that proceeding they did not know or could not know that their interests would at a future time be adversely affected by the product of that rulemaking proceeding. See also Auerbach, "Informal Rulemaking: A Proposed Relationship Between Administrative Procedures and Judicial Review," 72 N.W.UnivL.Rev. 15 at 16-17 (1977), stating that an APA should distinguish "between the administrative proceedings on the basis of which an agency promulgates an informal rule and the record on the basis of which the courts determine the rule's validity. The record for judicial review should not be the product of the informal rulemaking proceedings, but a record especially made for the purpose." The reason for this is that the purpose of rulemaking proceedings should be "'not to try a case' but to contribute to the dual objectives of informing the agency and safeguarding private interests." This statute contemplates, therefore,

that in any judicial review proceeding in which the validity of an agency rule is at issue, the agency and the challenging party will have an opportunity, within certain limits, to supplement the official rulemaking record required by this section with whatever materials they deem appropriate. See Sections 5-114 and 5-115. Those supplemental submissions and the official rulemaking record may be considered by the court, however, only as they are relevant to the specific standards specified for judicial review of agency action in Section 5-116. And, as provided in Section 3-110(b), the agency is limited to the particular reasons of fact, law, or policy for its adoption of the rule stated in the concise explanatory statement, but it may supplement the agency rulemaking record on judicial review with further evidence and argument to justify or to demonstrate the propriety of those particular reasons.

Of course, to the extent another provision of law expressly requires a particular class of rules to be made by the agency and, therefore, judicially reviewed, wholly on the basis of the official agency rulemaking record, that other provision of law will control. This permits the legislature and the agency to make a determination from time to time, that in light of the particular circumstances, a specified class of rules should be made and judicially reviewed wholly on the basis of that official agency rulemaking record. In this connection see also Section 4-101(b). It provides that another statute may expressly require a particular class of rulemaking to be conducted pursuant to some or all of the adjudication procedures provided in Article 4, including the requirement that the agency determination be made exclusively on the basis of the official agency record.

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

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

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

Comment

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

SECTION 304. NOTICE OF PROPOSED RULE ADOPTION.

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

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

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

(3) the text of the proposed rule;

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

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

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

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

(C) the date of any required oral proceeding on the proposed rule;

(6) where persons may obtain copies of the full text of the regulatory analysis; and

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

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

Comment

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

SECTION 305. REGULATORY ANALYSIS.

(a) For a proposed rule rule adoption which has an estimated economic impact of less than [$], an agency shall issue a regulatory analysis of a proposed rule if, within [20] days after the published notice of proposed rule adoption, a written request for the analysis is filed in the office of the publisher by [the administrative rules review committee] [the governor] [a political subdivision] [an agency] or [[ ] persons signing the request]. The publisher shall immediately forward to the agency proposing the rule adoption a certified copy of the filed request for regulatory analysis. The proposing agency shall then prepare a regulatory analysis.

(b) For a proposed rule adoption which has an estimated impact of more than $[ ], the agency shall prepare a regulatory analysis according to this section.

(c) A regulatory analysis must contain:

(1) a description of any persons or classes of persons who will be affected by the rule and the costs and benefits to those classes of persons;

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

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

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

(d) Each regulatory analysis statement filed under this section shall be filed with the [publisher] in the manner provided in Section 315 [and shall be submitted to the [regulatory review agency] [department of finance and revenue] [other]].

Comment

Regulatory analyses are widely used as part of the rulemaking process in the states. Subsection (4) provides for a summary of the regulatory review analysis to be published in order to give the public notice of the claimed benefits and costs, and an opportunity to challenge them. The subsection also provides for submission to the rules review entity in the state, if the state has one.

SECTION 306. PUBLIC PARTICIPATION.

(a) An agency shall afford persons the opportunity to submit information and comment on the proposed rule electronically or in writing for at least [30] days after publication of the notice of proposed rule adoption.

(b) unless required by law other than this [act], an agency may, but is not required, to hold a public hearing. At a public hearing the agency may allow persons to present oral argument, data, and views on the proposed rule.

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

(d) A presiding officer shall preside at a public hearing on a proposed rule. If the presiding officer is not the agency head, the presiding officer 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 be recorded by stenographic or other means.

(e) 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 making electronic or written submissions has expired.

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

(c) An agency may obtain one extension of [ ] days, with the approval of the governor or the governor by executive order may impose an extension of [ ] in case of a change in the rule.

(d) The time for adoption required by this section shall not include the time during which the rule is before the [legislative] [executive] [regulatory review commission].

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

Comment

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

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

(a) Before adopting a rule, an agency shall consider all information and comments received.

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

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

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

proposed rule; and

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

Comment

This section draws upon the 1981 MSAPA, section 3-107 and similar provisions from a number of states. See Mississippi Administrative Procedure Act, Miss. Code Ann. Section 25-43-3.107 and the Minn. Administrative Procedure Act, M.S.A. Section 14.05. The 1981 MSAPA drew heavily on the federal "logical outgrowth" test. The logical outgrowth test attempts to strike a balance between the need for notice to the public in rulemaking, the need of the agency to make modifications in proposed rules as a result of comments received, and encouragement to agencies to consider the information received in comments from the public in formulating final rules. The following cases discuss and analyze the logical outgrowth test, and this section seeks to incorporate the factors identified in those cases, as did the 1981 MSAPA. These judicial opinions also convey the wide acceptance and use of the logical outgrowth test in the states. *First Am. Discount Corp. v. Commodity Futures Trading Comm'n,* 222 F.3d 1008, 1015 (D.C.Cir.2000); *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1300 (D.C.Cir.2000); *American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C.Cir.1994); *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 Pub. Svc. re Small Power Projects*, 161 Vt. 97, 632 A.2d 13 73 (1993); *Amer. Bankers Life Ins. Co. v. Div. of Consumer Counsel*, 220 Va. 773, 263 S.E.2d 867 (1980).

SECTION 309. EMERGENCY RULES; FAST-TRACK RULES.

(a) If an agency finds that an imminent peril to the public health, safety, or welfare requires immediate adoption of a rule and states in writing its reasons for that finding, the agency may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The emergency rule may be effective for a period of not longer than [ ] days [renewable once for a period not exceeding ( ) days]. The adoption of an identical rule under Sections 304 through 308 is not precluded. The agency shall

take appropriate measures to make emergency rules known to the persons who may be affected by them.

(b) Rules that are 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 [state] legislature, and to the [Commission on Administrative Rules]], the agency may submit a fast-track rule. The fast-track rule shall be subject to the requirements set out in Sections 202 and 304, and shall be published in the [administrative bulletin] along with an agency statement setting out the reasons for using fast-track rulemaking. If an objection to the use of the fast-track process is received within the public comment period from [ ] or more persons, any member of the applicable standing committee of either house of the [General Assembly] or of the [Commission on Administrative Rules], 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 Proposed Rule Adoption.

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

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.

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 RECORDS.

(a) An agency may issue guidance records.

(b) An agency need not follow the procedures of Sections 304 to 308 for guidance records. Each guidance record must include a statement that it was adopted pursuant to this section when published in the [administrative bulletin].

(c) Guidance records are advisory only to the public; an agency may not rely on a guidance record, but a guidance record is binding on the agency.

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

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

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

Comment

This section is modeled largely on the provision in the Va. APA. See Va. Code Ann. Section 2.2–4008.

This section recognizes the need for guidance records 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 records 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 records such as interpretive and policy statements).

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

SECTION 311. CONTENTS OF RULE. Each rule adopted by an agency must contain the text of the rule and:

(1) the date the agency adopted the rule;

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

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

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

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

(6) the effective date of the rule.

SECTION 312. CONCISE EXPLANATORY STATEMENT.

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

(1) its reasons for adopting the rule, which shall include an explanation of the principal reasons for and against its adoption, and its reasons for overruling substantial arguments and considerations made in oral testimony and comments; and

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

(b) Only the reasons contained in the concise explanatory statement required by

subsection (a) may be used by any party as justifications for the adoption of the rule in any proceeding in which its validity is at issue.

Comment

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

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

(a) An agency may incorporate, by reference in its rules and without publishing the incorporated matter in full, all or any part of a code, standard, or rule that has been adopted by an agency of the United States, this state, or another state, or by a nationally recognized organization or association, if:

(1) incorporation of its text in agency rules would be unduly cumbersome, expensive, or otherwise inexpedient; and

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

(3) the agency, organization, or association originally issuing that matter makes copies of it readily available to the public. The rules must state where copies of the incorporated matter are available at cost from the agency issuing the rule, and where copies are available from the agency of the United States, this State, another state, or the organization or association originally issuing that matter; and

(4) the rule is of limited public interest, as determined by the [governor][attorney general].]

Comment

This section is drawn in part from the 1981 MSAPA, section 3-111(c) . Several states have provisions that require the agencies to retain the voluminous technical codes. See, Alabama, Ala.Code 1975 section 41-22-9; Michigan, M.C.L.A. 24.232; and North Carolina, N.C.G.S.A. § 150B-21.6. Wisconsin permits only incorporating by reference codes that are readily available from the outside promulgator, and that are of limited public interest as determined by a source outside the agency. Wisconsin, W.S.A. 227.21. These provisions will guarantee that important material drawn from other sources is available to the public, but that less important material that is freely available elsewhere does not have to be retained.

SECTION 314. COMPLIANCE AND TIME LIMITATION.

(a) Unless a fast-track rule is objected to as provided in section 309(b), the rule becomes effective 15 days after the close of the comment period, unless the rule is withdrawn or a later effective date is specified by the agency.

(b) Except for fast-track rules as provided in section (a), no rule hereafter adopted 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 2 years from the effective date of the rule.

Comment

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

SECTION 315. FILING OF RULES. An agency shall file in the office of the publisher each rule it adopts, including rules it adopts pursuant to section 309, and all rules

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

Comment

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

SECTION 316. EFFECTIVE DATE OF RULES.

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

(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 by federal or [state] constitution, statute, court order or rule to be implemented by a certain date;

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

(d) An unobjected to fast-track rule adopted under the provisions of Section 309(b) shall become effective 15 days after the close of the comment period unless the rule is withdrawn or a later effective date is specified by the agency.

(e) A guidance record may become effective immediately upon its filing or any subsequent date earlier than that established by subsection (a) if the agency establishes a later effective date.

Comment

This is a substantially revised version of the 1961 Model State Administrative Procedure Act, section 4 (b)&(c) and 1981 Model State Administrative Procedure Act, section 3-115. Most of the states have adopted provisions similar to both the 1961 Model State Administrative Procedure Act and the 1981 Model State Administrative Procedure Act, although they may differ on specific time periods. Subsection (c)(3) has been adopted from TX, V.T.C.A., Government Code Section 2001.036.

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

(1) deny the petition in a record, stating its reasons therefore;

(2) initiate rule-making proceedings in accordance with this [act]; or

(3) if otherwise lawful, adopt a rule.

Comment

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

ARTICLE 4

ADJUDICATION

SECTION 401. WHEN ARTICLE 4 APPLIES. Subject to Sections 411 and 412, this Article applies to an adjudication made by an agency if, under the federal or state Constitution or a federal or state statute, an evidentiary hearing is required for formulation and issuance of the order. When this section is applicable, parties have a right to an evidentiary hearing.

Comment

Article 4 of this Act does not apply to all adjudications but only to those adjudications, defined in Article 1-102(6) as a "disputed case." This section connects the definitions of Adjudication in Article 1, section 102(1), "disputed case" in Article 1, section 102(6), and order, [section 102(18)]. The definition of adjudication in section 102(1) is general and intended to distinguish adjudication from rulemaking. On the other hand, disputed case is the definition of the subset of adjudications that fall within this section because a federal or state statute or constitution requires an evidentiary hearing to resolve particular facts. This section is subject to the exceptions in section 411 for informal hearing and section 414 for emergency hearing if the requirements for those exceptions under this Article apply. All disputed cases are also subject to the adjudication bill of rights of section 4-102 of this article.

This type of hearing is made by a neutral decision maker, and must be based exclusively on evidence contained in a record made at the hearing. This type of hearing requires at a minimum that a party be permitted to introduce evidence, argue to the presiding officer, and rebut opposing evidence. The hearing must also be conducted on the record.

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

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

Hearings that are required by procedural due process guarantees include life, liberty and property *interests*, where a statute creates a justified expectation or legitimate entitlement. This section includes more than what were described as "rights" under older common law. In cases where the right to an evidentiary hearing is created by due process, attention is directed to section 4-110 (1) F *infra* which may permit an informal hearing.

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

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

SECTION 402. MANDATORY PROCEDURE FOR DISPUTED CASES.

(a) In an evidentiary hearing, the following rules apply::

(1) The agency shall give the person to whom the agency action is directed notice consistent with the Section 403, and an opportunity to be heard, including the opportunity to present and rebut evidence.

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

(3) The hearing shall be open to the public.

(4) Any party at the party's expense may be advised or represented by counsel or by another person who is authorized by law to represent parties in disputed cases of

that type.

(5) The agency shall separate the adjudicative function from the [investigative], [advisory], prosecutorial and advocacy functions within the agency.

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

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

(8) A presiding officer must withdraw from any case in which the presiding officer cannot accord a fair and impartial hearing or consideration, or when required by the applicable rules governing the practice of law. A party may request the disqualification of the presiding officer by filing an affidavit, prior to the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded, or the applicable rule of practice requiring disqualification, or at a later time when information about grounds for disqualification is acquired.

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

(10) Subject to Section 405, the presiding officer may not have any ex parte communications.

(b) This section applies to agency procedure in disputed cases without further

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

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

Comment

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

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

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

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

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

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

SECTION 403. NOTICE OF HEARING.

(a) In a disputed case, an agency may not conduct an evidentiary hearing without reasonable notice. Notice shall be given at least [ ] days prior to the date of the hearing.

(b) The notice required by subsection (a) shall include:

(1) the names and last known mailing addresses of all parties and other persons to whom notice is being given by the agency;

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

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

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

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

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

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

(8) a statement that a party who fails to attend or participate in the evidentiary hearing in a disputed case or other stage of a disputed case may be held in default under this [act]. A default judgement may be entered only upon making out a prima facie case.

(c) The notice may include any other matters 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 404. DISPUTED CASE PROCEDURE.

(a) A presiding officer shall preside over the conduct of an evidentiary hearing in a disputed case and shall regulate the course of the proceedings in a manner that will promote the orderly and prompt conduct of the hearing.

(b) In an evidentiary hearing, adherence to the rules of evidence required in judicial proceedings is not required. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded.

(c) A presiding officer, at appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, motions, objections, and offers of settlement. The presiding officer, at appropriate stages of the proceedings, may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed, recommended or final orders. The original of all records shall be filed with the agency, and copies of all filed records shall be served on all parties and the presiding officer by any means permitted by law or prescribed by rule as soon as reasonably possible.

(d) In an evidentiary hearing, 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.

(e) If an electronic hearing is not unreasonable or in violation of law, and if each party to the hearing has an opportunity to hear, and, if technically feasible, to see the entire proceeding as it occurs, the presiding officer may conduct all, or part of, an evidentiary hearing, or a prehearing conference, by telephone, television, or other electronic means as it occurs;

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

(g) For the purpose of this section, "statements" include records signed or otherwise authenticated by a person of his oral statements, and records that summarize these oral statements.

(h) An agency may issue subpoenas for the attendance of witnesses and the production of books, records and other evidence.

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

(j) Subpoenas and orders issued under Subsections (g) and (h) may be enforced pursuant to the rules of civil procedure.

[(k) A party, upon written notice to another party at least [ ] days prior to the 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 when it is claimed that that respondent's act or omission as to that person is the basis for the administrative proceeding; and

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

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

(D) all writings, including, but not limited to, reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence;

(E) any other writing or thing which is relevant and which would be admissible in evidence;

(F) investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, 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 proceeding 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 (A) through (E).

(l) Any part of the evidence may be received in written form if doing so will expedite the hearing without substantial prejudice to the interests of any party. All evidence, including records and records containing information classified by law as not public, in the possession of the agency of which it desires to avail itself or which is offered into evidence by a

party to a disputed case proceeding, may be made a part of the hearing record of the case. No factual information or evidence may be considered in the determination of the case unless it is part of the agency record. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. When the agency record contains information that is not public, the presiding officer may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record.

(m) In an evidentiary hearing official notice may be taken of all facts of which judicial notice may be taken and of other scientific and technical facts within the specialized knowledge of the agency. Parties shall be notified at the earliest practicable time, either before or during the hearing, or by reference in preliminary reports, preliminary decisions or otherwise, of the facts proposed to be noticed and their source, including any staff memoranda or data, and the parties shall be afforded an opportunity to contest such facts before the decision is announced unless the agency determines as part of the record or decision that fairness to the parties does not require an opportunity to contest such facts. The experience, technical competence, and specialized knowledge of the presiding officer or agency head may be utilized in the evaluation of the evidence.

Comment

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

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

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

SECTION 405. EX PARTE COMMUNICATIONS.

(a) Except as otherwise provided in subsection (b), while a disputed case is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from a party or an interested person outside the agency who has a direct or indirect interest in the outcome of the case, without notice and opportunity for all parties to participate in the communication.

(b) Communication to the presiding officer otherwise prohibited by subsection (a) from an employee or representative of an agency that is a party is permissible in the following circumstances:

(1) The communication is for the purpose of technical assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage and who does not receive communications that the presiding officer is prohibited from receiving; and

(2) the communication is from an agency assistant or advisor and consists of an explanation of the technical basis of, or technical terms in, the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the hearing record; and

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

(c) If the presiding officer receives advice subject to Section (b), the advice, if written, must be part of the hearing record; or, if verbal, a memorandum containing the substance of the advice must be made part of the record and notify the parties of the communication. The

parties may respond to the staff contact in a record that is made part of the hearing record.

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

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

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

(e) If a communication prohibited by this section is made, the presiding officer shall notify all parties of the prohibited communication and permit parties to respond within fifteen (15) days in a record and, when appropriate, by introducing testimony or other evidence relevant to the communication.

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

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

Comment

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

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

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

SECTION 406. LICENSES.

(a) Except when the federal or state Constitution or a federal or state statute requires an evidentiary hearing for determination of facts on an application for a license, and when an emergency adjudication under section 414 of this article is appropriate, adjudication of the grant, denial, refusal, renewal, revocation, suspension, annulment or withdrawal of a license is governed by this section.

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

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

application under this section, the agency must include a brief explanation of the reasons for denial.

(d) 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, until the last day for seeking review of the agency decision or a later date fixed by order of the reviewing court.

Comment

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

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

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

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

SECTION 407. ORDERS: INITIAL AND FINAL.

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

(b) If the presiding officer is not the agency head, the presiding officer shall

render an initial order, which becomes a final order unless reviewed by the agency head on its own motion or on petition of a party.

(c) Unless the time is extended by stipulation, waived, or extended for good cause shown, an initial or final order shall be served in writing within ninety days after conclusion of the hearing or after submission of memos, briefs, or proposed findings, whichever is later.

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

(e) Findings of fact must be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.

(f) The presiding officer may allow the parties a designated amount of time after conclusion of the hearing for the submission of proposed findings.

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

Comment

See section 102(23) of this act for the definition of "initial order". This section draws upon the 1981 Model State Administrative Procedure Act, Section 4-215. This section also draws upon useful provisions from several states. E.g. see: Alabama, Ala.Code 1975 Section 41-22-16; Iowa, I.C.A. Section 17A.15; Kansas, K.S.A. SECTION 77-526; Michigan, M.C.L.A. 24.281;

Montana, MCA 2-4-623; Washington, RCWA 34.05.461.

SECTION 408. STAY. Except as otherwise provided by law other than this [act], a party may request a stay of an initial or final order within [5] days after its rendition.

Comment

This section is largely based upon the 1981 Model State Administrative Procedure Act, Section 4-217. Stays are sometimes necessary to preserve the status quo pending judicial review or agency review.

SECTION 409. AVAILABILITY OF ORDERS; INDEX.

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

(b) Subsection (a) does not apply to:

(1) final orders privileged by law or order of court; and

(2) final orders, the disclosure of which would constitute an unwarranted invasion of privacy or release of trade secrets.

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

(d) A final order in a disputed case adjudication may not be relied on as precedent by an agency until it has been made available for public inspection and indexed in the manner described in this section.

Comment

This section continues the concept, seen earlier in connection with rules, of preventing law known only to agency personnel from constituting the basis for decision in a disputed case.

If the agency wishes to use a case a precedent in the future, it must make the order and decision in that case available to the public. The only situations in which an agency may rely on a disputed case as precedent without indexing and making that decision and order available to the public are described in subsection b of this section.

SECTION 410. INFORMAL ADJUDICATION IN DISPUTED CASES.

(a) Unless prohibited by law other than this [act], an agency may use an informal hearing procedure under this section in a disputed case:

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

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

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

(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 5 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, by rule, the agency has authorized use of an informal hearing, and there is no violation of law;

(E) a proceeding where an evidentiary hearing for determination of facts is not required by statute, but the federal or state Constitution require an informal evidentiary hearing; or

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

Comment

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

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

SECTION 411. INFORMAL ADJUDICATION PROCEDURE.

(a) Except as otherwise provided in subsection (b), the hearing procedures required by law for an evidentiary hearing in a disputed case apply to an informal adjudication.

(b) In an informal adjudication, the presiding officer shall regulate the course of the proceeding. The presiding officer shall permit the parties and their representatives, and may permit others, to offer written or oral comments on the issues. The presiding officer may limit the use of witnesses, testimony, evidence, and argument, and may limit or eliminate the use of pleadings, intervention, discovery, prehearing conferences, and rebuttal.

(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 appear in person or by a representative;

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

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

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

Comment

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

SECTION 412. EMERGENCY ADJUDICATION.

(a) An agency may conduct an emergency adjudication under the procedure provided in this section.

(b) An agency may only issue an order under this section in a situation involving an immediate danger to the public health, safety, or welfare that requires immediate agency action. The agency may only take action under this section that is necessary to deal with the immediate danger requiring immediate action. The emergency action shall be limited to

temporary, interim relief.

(c) Before issuing an order under this section, the agency, if practicable, shall give notice and an opportunity to be heard to the person to whom the agency action is directed. The notice and hearing may be oral or written, and may be conducted by telephone, fax or other electronic means. The hearing may be conducted in ths same manner as an informal hearing under this article.

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

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

(f) After issuing an order pursuant to this section, an agency shall proceed as soon as feasible to conduct a formal, informal, or other applicable adjudication in order to resolve the issues underlying the temporary, interim relief.

(g) The agency record in an emergency adjudication consists of any 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 whom the agency action is directed may obtain judicial review without exhausting administrative remedies.

Comment

The procedure of this section is intended permit immediate agency emergency adjudication, but also to provide minimal protections to parties against whom such action is taken. Emergencies regularly occur that immediately threaten public health, safety or welfare: licensed health professionals may endanger the public; developers may act rapidly in violation of law; or restaurants may create a public health hazard. In such cases the agencies must possess the power to act rapidly to curb the threat to the public. On the other hand, when the agency acts

in such a situation, there should be some modicum of fairness, and the standards for invoking such remedy must be clear, so that the emergency label may be used only in situations where it fairly can be asserted that rapid action is necessary to protect the public.

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

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

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

SECTION 413. INTERVENTION.

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

(1) The petitioner has a statutory right to initiate the proceeding in which intervention is sought; or

(2) The petitioner has an interest which is or may be adversely affected by the outcome of the proceeding, and that interest is not adequately represented in the proceedings.

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

(c) 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 of an

order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

Comment

Subsection b recognizes the normal judicial practice of limiting the participation of intervenors to their interest and maintaining an orderly and expeditious hearing. Section four simply provides for notice suitable under the circumstances to enable parties to anticipate and prepare for changes that may be caused by the intervention.

ARTICLE 5

JUDICIAL REVIEW

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

(a) For purposes of this article, nonfinal agency action consists of all or part of agency action that is intended by the agency or reasonably perceived to be indefinite, tentative, provisional, contingent, preparatory, intermediate, or procedural.

(b) For purposes of this article, final agency action means agency action other than nonfinal agency action as defined in subsection (a) of this section.

(c) Except as otherwise provided by law other than this [act], a person affected by final agency action who qualifies under this article is entitled to judicial review.

Comment

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

Subsections (b) and (c) are drawn from the 1981 MSAPA and define final and non-final agency action for purposes of this article. Section 5-103 grants a limited right to review of non-final agency action. The definition of non-final as intended to be preliminary or otherwise tentative is widely used by courts. Dep't of Revenue v. Hogan, 198 Wis.2d 792, 543 N.W.2d 825 (1995); Essex Cty v. Zagata, 91 N.Y. 2d 447, 695 N.E. 2d 232 (1998); Union Pacific R.R. Co. v. Tax Comm'n, 2000 UT 40, 999 P.2d 17 (2000).

Subsection (a) is drawn directly from the 1981 MSAPA. It deals with a particular problem that has created unfairness for some appellants. If an appellant reasonably believes that

agency action is, or is intended to be, preparatory, preliminary, or intermediate, that party often will not appeal that agency action because of that belief. However, if a reviewing court later holds that the agency action was final, the appellant will have failed to meet the time requirement for taking an appeal.

SECTION 502. NON-FINAL AGENCY ACTION REVIEWABLE.

(a) In judicial appeals from agency orders, a person otherwise qualified under this article is entitled to judicial review of non-final orders only if postponement of judicial review would result in:

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

(2) It appears likely that the person will qualify for judicial review of the final agency action under section 501 of this article.

(b) In judicial appeals from agency rules and agency action other than orders a person otherwise qualified under this article is entitled to judicial review of action if:

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

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

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

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

Comment

This section sets out the basic concept followed in the United States that petitions to review non-final agency action are rarely granted. There are, however, some exceptions.

In the case of judicial review of agency orders, this section provides a limited right to review of non-final action, and to interlocutory review during the pendency of judicial review. This section draws upon the 1961 MSAPA provision regarding inadequacy of remedy, but adds the requirement from the 1981 MSAPA that the harm to the individual by denying immediate review must outweigh or be found disproportionate to the public benefit that results from waiting until the agency action is final. This is a factor that agencies frequently raise in response to petitions for non-final review, and is justified by the delegation by the legislature to the agency to defend the public interest.

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

SECTION 503. RELATION TO OTHER APPEAL LAW AND RULES. Appeals from agency action shall be taken by proceeding as provided by [state] [rules of appellate procedure] or as otherwise provided by law. Appeals from agency action may be taken regardless of the amount involved. A [petition] may seek any type of relief available.

Comment

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

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

(a) Except as provided in Section 314, judicial review of a rule may be sought at any time.

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

(c) A time period required by this section is tolled during any time a party is required to exhaust administrative remedies before the agency with regard to the matter sought to be reviewed.

Comment

This section follows the 1961 and 1981 MSAPA's in permitting a challenge to a rule at any time, but limiting procedural challenges to two years; and setting a 30 day limit for filing a judicial appeal from an order. Like the 1981 MSAPA, this act permits judicial appeals from agency action other than rulemaking and orders, and it therefore establishes a 30 day limitation for appeals from such action.

SECTION 505. STAYS PENDING APPEAL. The initiation of judicial review does not automatically stay the decision of the agency appealed from. An appellant may petition the agency or the reviewing court for a stay upon a showing of immediate, unavoidable, irreparable harm and a colorable claim of error in the agency proceedings. It shall not be a condition of seeking a stay from the reviewing court that the appellant first seek a stay from the agency. The court may act even though the appellant has 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 from the agency and the court. This is similar to the 1961 MSAPA, but it adds standards to help guide appellants. The standards for issuing a stay are taken from the Virginia APA (Va. Code Ann. SECTION 2.2-4028), the Delaware APA (29 Del.C. SECTION 10144), and the Oregon APA (O.R.S. SECTION 183.482).

SECTION 506. STANDING.

(a) The following persons have standing to obtain judicial review of final or nonfinal agency action:

(1) a person to whom the agency action is specifically directed;

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

(3) if the challenged agency action is a rule, a person subject to that rule; and

(4) a person eligible for standing under another provision of law other than this [act]; and

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

Comment

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

judicial review more freely available than in the federal arena. The zone test has been severely limited in the federal arena, as well. See Clarke v. Securities Industry Ass'n, 479 U.S. 388, 107 S.Ct. 750 (1987).

Paragraphs (a)(1)(2)and (3) confer standing, as of right, to persons within the categories described in those paragraphs. Paragraph (a)(4) incorporates any other provision of law that confers standing. Examples of this type of standing are statutes that expressly confer standing in general language such as, for example, "any person may commence a civil suit in his own behalf... to enjoin... an agency...alleged to be in violation of this chapter. . . . 16 U.S.C.A. § 1540, explained in Bennett v. Spear, 520 U.S. 154, 117 S.Ct. 1154(1997).

Subsection 5 is bracketed because it is a "weak" version of the zone of interests test employed in Clarke v. Securities Industry Ass'n, 479 U.S. 388, 107 S.Ct. 750 (1987) that defines zone of interest very broadly. Some states may wish to retain the zone requirement if it defines the zone of interests broadly.

SECTION 507. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

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

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

(c) If the issue that petitioner for judicial review challenges was not raised and considered in the rulemaking proceeding, then:

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

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

(d) 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 requiring their exhaustion would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion].

Comment

This section creates a default requirement of exhaustion, which is generally followed in the states. It draws on provisions of the 1961 & 1981 MSAPAs. However, the section creates several exceptions to the default rule. Subsection (a)(1) seeks to create issue exhaustion in appeals from rulemaking for persons who did not participate in the rulemaking challenged. It excuses persons seeking judicial review of a rule who were not parties before the agency from the exhaustion requirement; but, if the issue that they seek to raise was not raised and considered in the rulemaking proceeding that they challenge, then they must first petition the agency to conduct another rulemaking to consider the issue. If the agency refuses to do so or if the agency conducts a second rulemaking that is adverse to the petitioner on the issue or issues raised in his petition for rulemaking, then the petitioner may seek judicial review. Subsection (a)(3) recognizes the judicially created exception to the exhaustion requirement where agency relief would be inadequate. The material in brackets in subsection (a)(3) was placed there because, although that is the language used in some states' APAs, the drafters consider it to be a subset of the inadequacy addressed in the non bracketed sections of subsection (a)(3).

SECTION 508. AGENCY RECORD ON JUDICIAL REVIEW; EXCEPTION.

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

Comment

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

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

SECTION 509. SCOPE OF REVIEW.

(a) Except as provided by law other than this [act] the burden of demonstrating the invalidity of agency action is on the party asserting invalidity; and

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

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

(1) the action exceeds the authority granted or violates limitations imposed by law;

(2) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(3) the agency action is arbitrary, capricious or an abuse of discretion;

(4) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the whole record before the court.

Comment

Scope of review is notoriously difficult to capture in verbal formulas, and its application varies depending on context. For that reason, the drafters have chosen to return to shorter formulations of the scope of review, similar to the 1961 MSAPA. See Ronald M. Levin, Scope of Review Legislation, 31 Wake Forest L. Rev. 647 (1996)at 664-66. William D. Araiza, In Praise of a Skeletal APA, 56 Admin. L. Rev. 979 (2004). (Judiciary, not legislature, appropriate

body to evolve specific standards for review, because of great variety of agency action and contexts, and inability to describe how general standards of review should apply to many of them).

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

Subsection (c)(1) & (2) identify the courts' power to decide questions of law and procedure. Subsection (c)(1) includes, but is not limited to, violations of constitutional or statutory provisions and actions that are in excess of statutory authority from SECTION 15(g) of the 1961 MSAPA, and includes subsections (c) (1), (2) and (4) of the 1981 MSAPA. The section thus includes challenges to the facial or applied constitutionality of a statute, challenges to the jurisdiction of the agency, erroneous interpretation of the law, and may include erroneous application of the law. Subsection (c) (2) is part of the 1961 MSAPA (section 15(g) and the 1981 MSAPA (section 5-116 (c) (1)-(6). This section is not intended to preclude courts from according deference to agency interpretations of law, where such deference is appropriate.

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

SECTION 510. EFFECTIVE DATE. This [act] takes effect on [date] and does not govern proceedings pending on that date. This [act] governs all agency proceedings, and all proceedings for judicial review or civil enforcement of agency action, commenced after that date.

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