PEPPERDINE UNIVERSITY

Journal of the National Association of Administrative Law Judiciary

Volume 8 | Issue 1 Article 2

3-15-1988

Meeting the Challenge: Adjudication Under the 1981 Model State Administrative Procedure Act

Howard J. Swibel

MEETING THE CHALLENGE: ADJUDICATION UNDER THE 1981 MODEL STATE ADMINISTRATIVE PROCEDURE ACT

Howard J. Swibel, Esq. [1]

It was nearly 100 years ago that lawyers uniformly decided to address and remedy the many interstate and national problems stemming from differences in states' laws. In 1889, lawyers at the twelfth annual meeting of the American Bar Association first stated the desire to work for "uniformity of the laws" in the then-existing 44 states.

Until the 1930's, the administrative procedural process in the United States was characterized by minimal constitutional standards for fair procedures and uncoordinated, inconsistent modifications of the statutory schemes guiding agency actions. Many of the administrative procedure statutes then in place represented a compromise between two opposing viewpoints on administrative procedure legislation. One viewpoint, as expressed by the majority of the U.S. Attorney General's Commission on Administrative Procedures in its 1941 report, concluded that the growing mass of federal bureaucracy represented an insurmountable obstacle to any workable uniform code of administrative procedure. [2] The majority considered it useless to create legislation that was "merely hortatory" or could do nothing more than order the obvious. [3]

The opposing view, represented in the minority's report of the Attorney General's Commission, stated that an administrative procedure act should not burden the administrative process with excessive rules. [4] The minority's answer was to develop a legislative statement of principles and standards that would dispel the cloud hovering over the administrative process. Such a system did not have to be a rigid mold, but

---

1/ Arnstein, Gluck, Lehr & Milligan, Esqs., Chicago, IL.

2/ Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, S. Dock. No. 8, 77th Cong., 1st Sess. 191-92 (1941).

3/ Id. at 191.

4/ Id. at 215-16.

could and should be flexible and adaptable. This viewpoint of administrative procedure legislation has, for the most part, been dominant. The fact that most states have now enacted comprehensive administrative procedure codes certainly bears this out.

The Model State Administrative Procedure Act, adopted in August of 1981 by the National Conference of Commissioners on Uniform State Laws, represents an entirely new statute. 5/ The 1981 Model Act is the product of nearly 250 dedicated lawyers, law professors and judges who serve as Commissioners for the Conference. Commissioners are appointed from each of the 50 states, the District of Columbia and Puerto Rico. It is most common for the governor or legislature of each state to appoint representatives to the Conference.

The basic and distinguishing purpose of the Conference is to promote uniformity in state laws with the concomitant effect of improving the quality of state legislation. The Conference, in its continuing pursuit of this goal, drafts Uniform Acts and Model Acts that are designed to help states deal effectively with the ever-increasing complexity and widening scope of governmental concerns.

The Model State Administrative Procedure Act, with its extensive influence among states demonstrates the significant and beneficial impact that the Conference's work can and does have on states' statutory laws. In the face of unprecedented technological and social change, however, laws must be changed and updated in order to maintain their relevance and continuing viability. In the case of the Model State Administrative Procedure Act, this required appointment of an entirely new committee to develop procedural reforms adequate in response to the bureaucratic and due process explosion of the last several decades. The 1981 Model Act supersedes the 1961 Revised Model Act, and more than ever reflects the need for efficiency, economy and effectiveness in the governmental administrative process.

The historical predecessors of the 1981 Model Act date back to the New Deal era when the state and federal bureaucracies dramatically increased in size and scope, and members of the public and the bar foresaw uncontrolled authority by administrative agencies. In 1939, President Franklin D.

5/ Model State Administrative Procedure Act (MSAPA) (1981).

Roosevelt requested the Attorney General to investigate "the need for procedural reform in the field of administrative law". [6] Two years later, the Attorney General's Committee on Administrative Procedure issued its final report. [7] Then, in 1946, Congress passed the Federal Administrative Procedure Act. [8]

In response to the increasing role of administrative agencies in state government, the Section of Judicial Administration of the American Bar Association in 1937 created the Committee on Administrative Agencies and Tribunals. The following year, this Committee issued a report regarding judicial review of state administrative action in state courts. In 1939, the Committee drafted a Model State Administrative Procedure Act, and submitted the proposed statutory framework to the Conference for further study. After several drafts and final passage of the Federal Administrative Procedure Act, the Conference approved the Model State Administrative Procedure Act in 1946. At least 12 states adopted legislation based in whole or in part on the Model Act of 1946. In 1961, the Conference completed and adopted the Revised Model Act. [9] Now, more than half of the states have enacted administrative procedure acts based on either the 1946 Model Act or the 1961 Revised Model Act.

It is interesting to note that, initially, the Conference favored a "uniform" state administrative procedure act as opposed to a "model" act. However, the wide and, possibly, irreconcilable diversities in the existing state statutory schemes lead the Conference away from any attempt to create a uniform system of administrative procedures to be adopted by each state in identical form. The idea that diversity was a stimulus to experimentation in the burgeoning field of administrative procedure statutory law led the Conference to draft a "model act" that would serve as a guide to state

---

6/ Att'y Gen. Order No. 215 (Feb. 23, 1939), reprinted in Attorney General's Comm. on Admin. Procedure, Final Report, S. Dock. No. 8, 77th Cong., 1st Sess. 252-3 (1941).

7/ Id. at 2.

8/ 5 U.S.C. Sections 101-706 (1982).

9/ Revised Model State Administrative Procedure Act (1961).

legislatures dealing with problems and concerns in the area of administrative procedure. The Conference believed that the individual states could adapt the Model Act in accord with each state's specific needs and general concerns.

As noted earlier, the 1981 Model Act is much more than merely a revised version of the 1961 Revised Model Act. As the prefatory note to the 1981 Model Act states, this is an "entirely new" statute. [10/] While the 1981 Model Act retains the basic structural framework of the 1961 Revised Model Act, the updated version makes up for the deficiencies that have arisen in the last 20 years. The 1981 Model Act more accurately reflects the modern experience of state governments in dealing with an ever-expanding range of administrative responsibilities. The extensive network of administrative agencies now in place provides services and monitors issues that only in the last 20 years have become essential or necessary. It seems that once enough people consider an issue important enough, it is only a matter of limited time before a new administrative agency springs up ready to assume responsibility for it. Indeed, the face of state government is lined with old and new administrative institutions whose purpose and function derive from mounting social pressures for change, growth and progress.

The 1981 Model Act is also responsive to recent developments that have occurred in the state court judicial system. During the last 20 years, the judicial trend has been away from insisting that administrative agencies' authority must be based on "clear standards". The modern trend is now for state courts to allow legislative delegations of authority to administrative agencies so long as:

1. the statutory standards for delegated authority are generally discernible; and

2. adequate procedural guidelines and safeguards accompany the delegations of authority.

This, of course, highlights the importance of a responsive and comprehensive administrative procedure act. In light of the many state administrative procedure acts already in place, it is crucial to the viability of the new Model Act that the drafters take into serious consideration existing statutory provisions in various states. The

---

10/ 1981 MSAPA, Prefatory Note, at 5.

experience of many states over the past 20 years with the 1961 Revised Model Act and with newly-developing administrative procedure requirements has signaled the time for review and reform. Judging from the vast amount of state activity in the field of administrative procedure, state legislatures are more willing now to consider and adopt an updated administrative procedure reform measure. And, so long as the states continue to assume further administrative responsibilities from the federal government, the pressures to reform existing administrative procedures and adequately respond to new administrative exigencies will only mount.

The fact is that the drafters of the 1981 Model Act drew heavily on the experience of the states whose administrative procedure acts were based on previous Model Acts. The drafters studied existing and proposed statutory schemes for state administrative procedural reform. The drafters also incorporated the wisdom and advice of a wide range of individuals experienced in the field of administrative procedure -- experts such as practicing attorneys, scholarly law professors and various state government officials. In sum, the drafters of the 1981 Model Act have carefully combined the efforts of many individuals skilled in the techniques of administrative procedure to craft a statutory construct that will facilitate reform of the administrative procedure process in the various states.

Like its 1961 predecessor, the 1981 Model Act addresses four important areas of administrative procedure:

1. public access to agency law and policy (freedom of information);

2. rule-making procedures and review of agency rules;

3. agency adjudication procedures; and

4. judicial review and enforcement of agency actions.

Compared to the previous version, the provisions of the 1981 Model Act are much more detailed and comprehensive. Recent experiences in the field of administrative procedure prompted the drafters of the new Act to include this added detail. Essentially, the 1961 Revised Model Act has become inadequate in light of recent developments in government and society. This is evidenced by the fact that many of the statutory schemes governing administrative procedures of various states exceed the scope and detail of the 1961 Revised Model Act upon which they are based. It is now well

recognized that the states are in need of and receptive to a more detailed and responsive administrative procedure act.

It is also important to note that the states' experiences with administrative procedure in the modern era indicate that extra detail is workable and, most likely, necessary. Fears of excessive detail may be quelled by recalling that this is a Model Act as opposed to a Uniform Act. Therefore, a state need only adopt those provisions of the Act that are suitable for its particular system of governmental processes.

While the 1981 Model Act deals extensively with the major principles of the administrative procedure process, the drafters did not concern themselves with minor details. The important point to remember is that detail is only added where detail is specifically needed. This infusion of detail will increase the efficiency and effectiveness of state governmental bureaucracies, and, at the same time, serve to protect the rights and interests of those individuals subject to a state's administrative process.

Like the 1961 Revised Model Act, the 1981 Model Act establishes only procedural rights and imposes only procedural duties. Prior model acts, however, treated the procedures for adjudication of individual cases and controversies in a limited and summary fashion. The 1961 Revised Model Act, for instance, makes provisions for only one basic type of agency adjudication. That, of course, is the formal, trial-type adjudicatory hearing. Most state administrative procedure acts follow the pattern set by the 1961 Revised Model Act in that the respective statutory frameworks provide only for formal hearing procedures. The statutes recognize the right to a formal hearing in every contested case that an agency is involved in. The 1981 Model Act, together with the administrative procedure acts in five states, go beyond these earlier approaches, and provide for informal adjudicatory procedures in addition to formal hearing proceedings. The informal procedures are primarily designed to take the place of formal hearings where, in light of the facts and circumstances, a particular case does not warrant formal proceedings.

For both formal and informal adjudications of cases and controversies, the due process rights of individuals must be adequately protected. The 1981 Model Act, therefore, adds greater detail than prior acts to provisions setting forth the standards for proper notice, hearing and legal

representation. The scope of the 1981 Model Act in adjudicatory proceedings is determined by two significant variables:

1. the Act's definition of agency; and

2. the Act's definition of adjudicatory proceedings.

As defined in the 1981 Model Act, "agency" means "a board, commission, department, officer, or other administrative unit of the state, including agency head, and one or more members of the agency or agency employees or other persons directly or indirectly purporting to act on behalf or under the authority of the agency head". [11/] By this provision, the drafters of the Act intended to subject as many state governmental units as possible to the provisions of the administrative procedure act. In order to effect the broadest coverage possible, the drafters explicitly included the agency head as well as any persons who act for the agency. This definition of agency also explicitly codifies every inclusion and specifically states those institutions that are excluded -- such as the legislature and the courts. While the 1981 Model Act's definition of agency is significantly more detailed than that in the 1961 Revised Model Act, the added detail extends the scope of the Act's coverage to a wider range of specific administrative units.

The scope of the 1981 Model Act depends also on the type of adjudication subject to the Act. While the 1961 Revised Model Act defines "adjudications" broadly, the 1981 version defines "adjudications" as "the process for formulating and issuing an order". [12/] "Order," in turn, means "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons". [13/] Like the Federal Administrative Procedure Act, the 1981 Model Act defines adjudication in the functional terms of a process.

11/ 1981 MSAPA Section 1-102(1).

12/ 1981 MSAPA Section 4-101(a).

13/ 1981 MSAPA Section 1-102(5).

Additionally, the drafters of the 1981 Model Act list three specific exceptions to this definition of adjudication. Excluded are:

1. orders to issue or not issue a complaint; [14]

2. orders to initiate or not initiate proceedings; [15] and

3. orders not to conduct an adjudicatory proceeding. [16]

The drafters intended that this definition describe only those situations in which an adjudicative proceeding is required. Successive provisions of the Act determine the particular type of adjudicative proceeding that will be used.

Under the 1981 Model Act, four types of adjudicatory proceedings are available: formal adjudicative hearings, [17] conference adjudicative hearings, [18] emergency adjudicative proceedings, [19] and summary adjudicative proceedings. [20] The 1961 Revised Model Act, and many of the state acts, provide only for a formal, trial-like adjudicatory proceeding in cases where a hearing is required by law -- or by the due process clause of the fourteenth amendment. The Revised Act mandates that parties to contested cases receive certain procedural protections. These basic procedural safeguards include:

1. notice; [21]

14/ 1981 MSAPA Section 4-101(a)(1).

15/ 1981 MSAPA Section 4-101(a)(2).

16/ 1981 MSAPA Section 4-101(a)(3).

17/ 1981 MSAPA Section 4-201.

18/ 1981 MSAPA Section 4-403.

19/ 1981 MSAPA Section 4-501.

20/ 1981 MSAPA Section 4-502.

21/ Revised Model State Administrative Procedure Act (RMSAPA) (1961) Section 9(a).

2. the opportunity to present evidence and argument; [22]

3. a full record upon which findings of fact are exclusively based; [23]

4. the opportunity for cross-examination under the applicable civil rules of evidence; [24] and

5. a prohibition against ex parte communications between agency decisionmakers and involved parties. [25]

While the formal adjudicative proceeding under the 1981 Model Act certainly resembles its 1961 predecessor, the updated version adds significant detail to the formal hearing process. Indeed, the drafters intended to establish an elaborate adjudicative procedural framework in line with the changing realities and needs of the modern administrative procedure experience. This required that the drafters of the updated Act include more detailed provisions that would promote effectiveness and efficiency in the adjudicatory process -- a reflection of the heightened awareness of due process interests under the fourteenth amendment.

Article IV of the 1981 Model Act governs the applicability of proceedings. The Act mandates a formal adjudicative hearing for all adjudicatory proceedings unless the Act or other laws provide to the contrary. [26] At the same time, however, the Act provides that parties involved in a particular case may also waive any procedures or settle the case in the absence of available proceedings. The Act details when an agency may and when an agency shall conduct an adjudicative proceeding. An agency may commence an adjudicative proceeding on its own motion, at any time, regarding a matter within the agency's jurisdiction. [27]

22/ 1961 RMSAPA Section 9(c).

23/ 1961 RMSAPA Section 9(e).

24/ 1961 RMSAPA Section 10(3).

25/ 1961 RMSAPA Section 13.

26/ 1981 MSAPA Section 4-102.

27/ 1981 MSAPA Section 4-102(a).

Once a person makes application, however, an agency must commence an adjudicative proceeding. [28] There are several exceptions to this provision. These include:

1. an agency's lack of jurisdiction of the subject matter; [29]

2. other applicable law gives the agency discretion not to conduct an adjudicatory proceeding -- and it so chooses; [30] and

3. the applicant fails to demonstrate that the adjudicative proceeding would finally determine the applicant's legal rights, duties and other legal interests. [31]

Once a person applies for an agency to issue an order, the agency may automatically conduct the appropriate adjudicative proceedings -- even if the applicant does not request such proceedings. [32] The adjudicative proceeding, itself, begins once the agency or presiding officer

1. provides notification to a party that proceedings will be conducted; [33] or

2. takes action on a matter that may be appropriately determined by an adjudicative proceeding. [34]

Should an agency deny an application and decide not to conduct an adjudicative proceeding, the agency must provide

---

28/ 1981 MSAPA Section 4-102(b).

29/ 1981 MSAPA Section 4-102(b)(1).

30/ 1981 MSAPA Section 4-102(b)(3).

31/ 1981 MSAPA(b)(4).

32/ 1981 MSAPA Section 4-102(b)(4).

33/ 1981 MSAPA Section 4-102(d)(1).

34/ 1981 MSAPA Section 4-102(d)(2).

in writing to the applicant a brief explanation, and mention whether or not administrative review is available. [35]

The 1981 Model Act goes beyond its 1961 cousin by expanding the scope of representation. Once an agency commences an adjudicative hearing, any involved party has the right to appear in person. [36] This appearance may be an actual physical appearance or can be accomplished by electronic means. If the party happens to be a corporation, it may also participate in the hearing through a duly authorized representative. In the absence of a personal appearance, a party is still guaranteed the right to be advised and represented at the party's own expense. [37] The representation may be through private counsel or, depending on the relevant state laws, other allowable representatives.

A major innovation contained in the 1981 Model Act is the availability of a pre-hearing conference. [38] This pre-hearing conference resembles the pre-trial conferences provided in most modern civil procedure acts. Generally, the pre-hearing conference may be used to define relevant issues, iron out procedural difficulties and determine the scope and nature of evidence that will be presented at the hearing. Designed by the drafters to promote efficiency in the adjudicatory process, the pre-hearing conference is available once the presiding officer of the hearing determines that such a pre-hearing proceeding is warranted.

The drafters of the 1981 Model Act established an elaborate notice provision for the pre-hearing conference. [39] The Act states numerous specific items that such notice must contain. The notice, for instance, must include a statement that a party's failure to attend or participate in a pre-hearing conference may result in a default. [40] The notice provision is also designed to help the presiding officer and the

---

35/ 1981 MSAPA Section 4-103.

36/ 1981 MSAPA Section 4-203(a).

37/ 1981 MSAPA Section 4-203(b).

38/ 1981 MSAPA Section 4-204.

39/ 1981 MSAPA Section 4-204(2).

40/ 1981 MSAPA Section 4-204(3)(VIII).

parties determine if the case can be settled or be converted from a formal adjudicative hearing to a conference adjudicative proceeding or a summary adjudicative proceeding. [41] Significantly, a case beginning with a pre-hearing conference may be converted into another proceeding and disposed of at that point.

Another important procedural innovation highlighted in the 1981 Model Act allows the presiding officer to conduct all or part of the pre-hearing conference by telephone, television, or other reasonable electronic means -- so long as each party has the opportunity to participate in, hear and, if possible, see the entire proceeding. [42] Following the pre-hearing conference, the presiding officer must incorporate all matters resolved at the proceeding in a pre-hearing order. [43] In the absence of a pre-hearing conference, the presiding officer may still issue a pre-hearing order based on the pleadings. [44] The Act also mandates that parties to an adjudicative proceeding receive reasonable written notice that includes a copy of any pre-hearing order issued. [45] The notice provision then goes on to detail specific items the notice must include.

In the interest of assuring greater participation and access to the adjudicative hearing process, the drafters of the 1981 Model Act included a detailed provision setting the guidelines for intervention. [46] Under certain conditions -- that is, where the petitioner's legal interests will be substantially affected, the petition is timely filed and the interests of justice will not be impaired -- the petition for intervention must be granted as a right. [47] Otherwise, the presiding officer has discretionary authority to grant a petition, and may do so if there will be no adverse effect

---

41/ 1981 MSAPA Section 4-204(3)(VII).

42/ 1981 MSAPA Section 4-205(a).

43/ 1981 MSAPA Section 4-205(b).

44/ 1981 MSAPA Section 4-205(c).

45/ 1981 MSAPA Section 4-206.

46/ 1981 MSAPA Section 4-209.

47/ 1981 MSAPA Section 4-209(a).

on the proceedings. Once such a petition is granted, the presiding officer may impose certain efficiency-promoting conditions on the petitioner such as:

1. restricting the petitioner to specific designated issues; [48]

2. limiting the extent of procedures available to the petitioner; [49] and

3. requiring multiple intervenors to merge their presentations. [50]

Taken together, these measures are designed to enable the presiding officer to gather sufficient input from intervenors while not overburdening the proceedings with an unnecessary deluge of such information. The drafters also provided that the presiding officer must give reasonable advance notice of the decision to grant or deny the petition for intervention. [51] This will give parties some valuable time to ready themselves for the hearing or, alternatively, seek expedited judicial review.

Addressing another area not covered in the 1961 Revised Model Act, the new version provides the presiding officer with subpoena powers for every proceeding. [52] Additionally, the presiding officer may compel discovery and issue protective orders -- all in accord with the rules of civil procedure. The Act provides two alternative versions of this provision. In one case, the presiding officer may or may not issue orders -- according to his or her discretion. The alternative version requires the presiding officer to issue orders if any party so requests. The enforcement mechanism for this provision lies in the Act's later provisions dealing with civil enforcement of agency actions.

48/ 1981 MSAPA Section 4-209(c)(1).

49/ 1981 MSAPA Section 4-209(c)(2).

50/ 1981 MSAPA Section 4-209(c)(3).

51/ 1981 MSAPA Section 4-209(d).

52/ 1981 MSAPA Section 4-210.

In order to clarify similar provisions in the 1961 Revised Model Act and the administrative procedure acts of most states, the drafters of the 1981 Model Act added significant details to the ex parte communication provision. [53] The result is that the Act greatly expands the scope of the prohibition against ex parte communications. More specifically, the Act forbids the presiding officer from communicating, regarding any issue in the pending proceeding, with

1. any party;

2. any person with an interest in the proceeding's outcome; or

3. any person who [54] presided at some earlier stage of the proceeding.

This prohibition, of course, does not extend to discussions back and forth among panel members or between a presiding officer and members of his or her staff -- provided the staff members do not receive ex parte communications. [55] In the event a presiding officer receives oral or written ex parte communications, he or she has an affirmative obligation to place them on the record, and advise all parties of this fact and of their right to rebuttal. [56] As an added measure of fairness, if the prejudicial effect of the ex parte communication is significant enough, the presiding officer aware of the information may be removed from the case -- with any mention of the communication being sealed by protective order. [57] Under the new Act, each agency must report any known violation of this provision to the appropriate authorities. Agencies may adopt individual sanction procedures -- default being one of the most drastic. [58]

53/ 1981 MSAPA Section 4-213.

54/ 1981 MSAPA Section 4-213(a).

55/ 1981 MSAPA Section 4-213(b).

56/ 1981 MSAPA Section 4-213(e).

57/ 1981 MSAPA Section 4-213(f).

58/ 1981 MSAPA Section 4-213(g).

The 1981 Model Act provides a further innovation in the formal hearing process in terms of the separation of functions provision. [59] The Act requires separation of functions among those agency officials involved in a proceeding. This prohibits any person who at one time served -- that is, played a personal role -- as an investigator, advocate or prosecutor in an adjudicative proceeding from ever becoming the presiding officer in the same matter. [60] This prohibition applies also to any person subject to the general authority of one who served as an investigator, prosecutor or advocate in the adjudicative proceeding. However, the fact that a person participated in a probable cause determination does not necessarily disqualify the person as a presiding officer. Additionally, the Act recognizes that the same official may act as presiding officer at successive stages of the same adjudicative proceeding.

As noted earlier, the 1961 Revised Model Act provides for formal adjudicative proceedings with only passing reference being made to other less formal types of adjudication. The 1981 Model Act, however, establishes three additional procedural models for adjudication in descending order of formality:

1. the conference adjudicative hearing; [61]
2. the summary adjudicative hearing; [62] and, when necessary,
3. the emergency adjudicative hearing. [63]

The inclusion of similar types of informal procedures can be found in several recent state administrative procedure acts. The Conference and its drafters were influenced by a variety of reasons in their decision to include informal adjudication provisions in the 1981 final draft. Of particular importance

---

59/ 1981 MSAPA Section 4-214.

60/ 1981 MSAPA Section 4-214(a).

61/ 1981 MSAPA Section 4-401.

62/ 1981 MSAPA Section 4-502.

63/ 1981 MSAPA Section 4-501.

is the current need for procedural uniformity in informal agency actions. While over 90 percent of agency action is informal, most state administrative procedure acts fail to provide any guidelines, rules or even minimum procedures for informal adjudications. Despite the fact that informal agency actions are at the core of the administrative process, a significant number of agency decisions are non-reviewable, while most of what is reviewable never, in fact, is reviewed. In the absence of a prescribed procedure, there is very little check over agency discretion in informal matters. Thus, the issue becomes one of basic fairness and justice.

The 1981 Model Act is designed as a proposed middle ground between the narrow formal hearing approach of the 1961 Revised Model Act and proposals that would establish a wide variety of hearing models. The drafters have established four adjudicative hearing models flexible enough for agencies to implement as is -- with no special procedures required for each individual agency. With these procedures in place, agencies will no longer need to act with informal procedures not authorized by any statute. By extending some measure of uniformity to the informal adjudicative process, the results should be a less complex and more reasonable administrative process.

The fact that the 1981 Model Act includes uniform informal procedures is also in response to the recent expansion of due process rights and interests. Beginning with the Supreme Court's decision in Goldberg v. Kelly [64/] -- requiring a state to hold a hearing before it can terminate welfare benefits -- courts have invoked due process notions to require hearings before the government can deprive persons of some basic interest. While the Supreme Court has established that the fourteenth amendment's guarantee of due process is broad-based, the Court has also allowed for flexible due process procedural requirements. Supreme Court decisions in cases such as Goss v. Lopez [65/] and Mathews v. Eldridge [66/] demonstrate the Court's favor with the variable due process concept. This, in turn, has led to an increasing variety of hearing rights. The drafters of the 1981 Model Act were not inattentive to the fact that the Supreme Court

---

64/ 397 U.S. 254 (1970).

65/ 419 U.S. 565 (1975).

66/ 424 U.S. 319 (1976).

has determined that a formal hearing is not necessary for an expanding range of interests. The informal adjudicative hearing procedures provided in the Act are a direct response to those cases and controversies that can be fairly decided in the absence of formal hearing requirements.

Efficiency and practicality are two of the greatest motivating factors underlying inclusion of informal hearing procedures in the 1981 Model Act. As a practical matter, some cases are small enough not to warrant an expensive formal hearing. Then again, if a formal hearing is the only option available, a person with a minor problem may lose out entirely and receive inadequate adjudicative procedures. This procedural vacuum can be filled by the effective use of the informal adjudicatory procedures featured in the 1981 Act.

Recognizing the public's interest in and right to efficiency in the administrative hearing process, the drafters of the 1981 Model Act have provided reasonable and feasible alternatives to the formal hearing. The Act's informal hearing provisions strike a balance between inadequate procedural protections and excessive procedural safeguards. At the same time, the Act seeks to promote efficiency in agency actions while protecting the due process rights of all parties.

In the interests of efficiency and effectiveness, the 1981 Model Act features a detailed scheme to determine if informal or formal procedures are most appropriate for a particular controversy. As noted earlier, the Act requires formal hearing procedures unless the statute or rule provides otherwise. Thus, if the legislature fails to require formal procedures for a particular type of case, an agency may promulgate a rule that provides for informal procedures in such case. In no case, however, may a conference adjudicative hearing be used if to do so would violate any provision of law. [67/] The Act provides an exclusive list of categories of cases for which an agency may appropriately use a

---

67/ 1981 MSAPA Section 4-401.

conference adjudicative hearing. The specific instances in which such a hearing may occur involve

1. matters in which there is no disputed issue of material fact; [68] or

2. cases in which there are disputed issues of fact, but that involve modest monetary amounts, minor disciplinary sanctions against students, prisoners [69] public employees or similar types of proceedings.

The drafters of the 1981 Model Act designed these categories with a view toward controlling agency discretion while still expanding the scope of cases amenable to informal hearing procedures.

By its procedures, the conference adjudicative hearing is recognized as a "peeled down" version of the formal adjudicative hearing. The conference adjudicative hearing, however, is distinguished by its lack of a pre-hearing conference, discovery, issuance of subpoenas or testimony by persons who are not parties. The parties, however, must be allowed to testify, present evidence and offer pertinent comments. [70] The presiding officer of such a hearing is authorized to issue protective orders, and may require the parties to describe their available proof as if the proceeding were to be converted into a formal hearing. Otherwise, the two hearing procedures are virtually identical.

Under the tiered system of agency adjudication set up in the 1981 Model Act, the summary adjudicative proceeding is available under certain specified conditions. [71] Under the first of two versions of this provision, the summary adjudicative hearing is the appropriate procedure if it does not violate any provision of law or rule, and the public interest does not require the agency to give non-parties both notice and opportunity to respond. The alternative version provides an exclusive list of categories for which an agency may, by rule, implement the summary adjudicative

---

68/ 1981 MSAPA Section 4-401(1).

69/ 1981 MSAPA Section 4-401(2).

70/ 1981 MSAPA Section 4-402.

71/ 1981 MSAPA Section 4-502.

hearing procedure. This informal proceeding may be used in controversies involving

1. monetary disputes of less than $100.00;

2. purely verbal sanctions against a prisoner, student, public employee or licensee;

3. the denial of various applications; or

4. any matter that has only a trivial impact on the complaining parties. [72]

The summary hearing has been described as a "bare-bones procedure" since it provides only for notice and an opportunity to respond. [73] Again, the drafters intended that this provision kick in under the appropriate circumstances where a case does not merit a full-blown formal proceeding. The provision first states the various individuals who may have the capacity to serve as the presiding officer. If the summary proceeding concerns a monetary dispute or any of several sanctions, the presiding officer, before taking any action, need only notify each party of the agency's view of the matter, and then allow each party to explain his or her position. Should the agency decide against the party, the presiding officer must provide findings of fact, conclusions of law and policy reasons that justify the action. The availability of administrative review must also be noted. The decision in all monetary disputes must be in writing; in all other matters, such orders may be oral or written.

In 1981 Model Act also authorizes summary-type procedures for emergency situations involving an immediate danger to the public health, safety or welfare. [74] An agency may take whatever immediate action is necessary in response to the emergency. Once the action is taken, the agency must then issue an order justifying its actions, and provide whatever notice is practicable to those parties affected by the order. In the post-order phase of the emergency situation, the agency must quickly conduct and conclude any remaining proceedings that it would have to commence if there were no

---

72/ 1981 MSAPA Section 4-502(3).

73/ 1981 MSAPA Section 4-503.

74/ 1981 MSAPA Section 4-501.

emergency. The inclusion of three alternative informal hearing procedures in the 1981 Act represents the drafters' attempt to improve the quality of adjudicative hearings where individual rights and duties are at stake. The 1981 Model Act, as well as the administrative procedure acts in at least eight states, have further addressed this issue by providing for an independent administrative office whose function is to administer adjudicative hearing procedures.

The new Act creates the Office of Administrative Hearings as an independent agency with a mandate to conduct adjudicative proceedings. [75/] The Act proposes that this office be a separate division located within some other state administrative agency. The drafters' intent is to place the office in a neutral organizational position in order to maintain its independence and impartiality. The governor of the state is directed to appoint a director of the office -- subject to legislative confirmation. The Act also creates a central panel of administrative law judges who are responsible for conducting any adjudicative proceedings. Under this scheme, the director of the office assigns administrative law judges from the central panel at the agency's request. The Act provides a choice as to whether the use of administrative law judges from the central panel is permissive or mandatory. In actual practice, a majority of the eight states that have created an independent office to conduct administrative hearings uses the mandatory language. The Act also provides alternative provisions regarding the qualifications of persons who will serve as administrative law judges. This comes down to a choice as to whether a person must be admitted to the bar in a particular state or in any state.

In addition, the office may adopt its own rules establishing the qualifications, training, promotion and disciplinary standards for its administrative law judges. [76/] In the interests of fairness and propriety, an administrative law judge -- or any person serving as presiding officer -- may be disqualified on the basis of demonstrated bias, prejudice, interest or other appropriate causes.

The adjudicative framework established under the newly created Office of Administrative Hearings reflects the twin

---

75/ 1981 MSAPA Section 4-301.

76/ 1981 MSAPA Section 4-301(e).

policy concerns of expanded due process and administrative efficiency that underlie the 1981 Model Act. There is no better guarantee of procedural due process in an adjudicative proceeding than a truly impartial and independent tribunal. Likewise, savings in both time and costs result when properly-trained, professional judges conduct the various administrative hearings.

As stated in the Commissioners' Prefatory Note to the 1981 Model Act, "The case for a complete revision of the Conference's 1961 Model Act is very strong". [77/] The dramatic rise in state and federal administrative activities during the last 20 years has ushered in a new era of administrative law. Supreme Court decisions expanding the reach of individual due process rights, scholarly attempts to structure codes of fair procedure and the states' experiences with the performance of expanding administrative functions have spawned a breadth of popular desire for a responsive, efficient and cost-effective process of administrative procedure.

The prototypical 1981 Model Act exceeds present adjudicatory frameworks in terms of the elaborate procedural safeguards it provides for both formal and informal adjudications. The drafters of the Act had the delicate task of striking a fair balance between individual rights and agency efficiency. While extending the scope of procedural rights and duties in formal adjudicative hearings, the drafters created new provisions detailing and defining the procedural elements of informal adjudicative hearings. The detailed procedural requirements established for both formal and informal agency proceedings assure fairness and justice for each case or controversy that an administrative agency is called upon to decide. The innovative procedural frameworks for both formal and informal agency adjudications place the 1981 Model Act in the forefront of recent developments in administrative law. The Conference is very confident that the 1981 draft represents a complete and comprehensive model administrative procedure act that will be as useful to the states as its predecessors.

77/ 1981 MSAPA, Prefatory Note, at 2.